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The Ramapo Journal of Law and Society is an interdisciplinary, online journal devoted to the publication of undergraduate scholarship in Law and Society. The Journal’s mission is to provide a platform to undergraduate students from across disciplines to engage with socio-legal issues in the context of the liberal arts. We understand law and society broadly to include discussions of law in society not just as rigid bodies of rules, but as dynamic institutions shaped by historical forces and social imperatives. The journal will include submissions from varied fields of the social sciences and humanities, and hopes to build conversations across disciplines on the topical socio-legal issues of our times.

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Paradise Not Lost: 
Community Recovery in the Wake of the 2014 Isla Vista Massacre
CAITLIN MARIE NELSON

*Caitlin Marie Nelson graduated from the University of California, Berkeley. This paper was her Senior Honors Thesis in the Legal Studies Department.
For Isla Vista
In a place where there is seemingly eternal sunshine, it is especially fitting that those who inhabit it are able to find light in the darkest of times.

In Memory:
George Chen
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On May 23, 2014, a small college town in Southern California was rocked by what the Sherriff’s Department described as “one of the most horrific crimes ever to occur in Santa Barbara County” (Santa Barbara County Sherriff’s Office, 2015, p.1). After years of planning, Elliot Rodger, a 22-year-old student who had recently been enrolled at Santa Barbara City College, finally carried out what he called “the day of retribution” (Santa Barbara County Sherriff’s Office, 2015, p.44). The massacre begun when he attacked three young men inside his apartment, using large hunting knives to stab each one to death as they entered the building. Then, armed with three semi-automatic pistols and over 500 rounds of ammunition, Rodger embarked on a killing spree, firing shots at the many people (mostly students) walking about the streets of Isla Vista as they were out enjoying their Friday night. Those who he could not hit by gunfire, he tried to mow down with his black BMW. By the end of the night, six UCSB students, as well as Rodger himself, had been killed. Fourteen more were injured, and countless others were traumatized after having borne witness to the rampage (Santa Barbara County Sherriff’s Office, 2015).

I left UCSB less than one year before this incident took place, having begun as a transfer student at Berkeley the previous fall. Thanks to social media, I watched from afar as friends, peers and a place I once called home tried to bounce back from this calamitous tragedy. In doing so, I noticed an interesting trend: despite the opportunity for negativity the situation presented (not only was Rodger a murderer, but also an outspoken racist and misogynist), the reaction of the UCSB and Isla Vista communities seemed to be largely positive. In fact, it appeared that in the days, weeks and months following the event, many of the “problems” that the school and its neighboring town had long been grappling with began to fade. As UCSB alumni turned author Eleanor Goldfield wrote in a piece published the day after the massacre, Isla Vista is now “a paradise not lost, but changed” (Goldfield, 2014). This paper seeks to understand the phenomenon I observed emanating from Isla Vista and at UCSB in the wake of the May 23 tragedy. It asks: How do college communities respond to mass violence? How does social, organizational, and temporal context affect the ways in which individuals
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perceive the effectiveness of different types of recovery efforts put forth in the aftermath of a crisis? This project aims to understand social processes and the significance behind them, investigating questions that arise such as how individuals and communities heal, recover, and redefine social meanings in the wake of violent tragedy. Using a case study of the Isla Vista massacre, this paper seeks to answer those questions in order to better understand what we can expect to come out of these events that occur much too often.

**Rampage school shootings and their aftermath: thinking about crises and responses**

“School shootings” have gripped public fear and fascination in the United States for many years now, and rightfully so. One study describes school shootings and campus violence as especially upsetting because they shatter the myth of the academy as a kind of safe haven (Hempmill and LaBanc, 2010, p.1). In September 2014, prompted by a string of highly publicized shootings (including the Sandy Hook Elementary massacre, the movie theater shooting in Aurora, Colorado, and the rampage that took place in Isla Vista), the Federal Bureau of Investigation (FBI) released a report based on a comprehensive study of what they termed “active shootings”: shootings committed by an individual actively engaged in killing or attempting to kill people in a confined and populated area. The report’s conclusion confirmed public concern that not only are mass shootings in the United States relatively frequent, but also that their rate of occurrence has increased significantly in the last six years: compared with an average of 6.4 active shootings per year from 2000 to 2006, there were 16.4 active shootings per year from 2007 to 2013. Such statistics are indeed chilling, but reports like this contribute to a problem that author Rebecca Solnit notes in her study of communities recovering from disasters: in the event of a massive crisis, public attention tends to focus on the “bigger issue” (such as, for example, the War on Terror in response to the 9/11 terrorist attacks) and thus moves away from the actual city in crisis (Solnit, 2009, p.184). Here Solnit illuminates an important point: tragedies like these often move us to seek out causes and push for prevention, and for this reason it is rare that we stop to look at how they affect the communities they occur in. Nevertheless, doing so is important—we should know what happens, what to expect, and how to best prepare for the unfortunate reality that it will happen again.

Katherine Newman, a leading scholar in the field of school shootings, stated that despite our obsession with such events, “virtually nothing in the media or scholarly literature examines what happens to the towns they devastate” (Newman, 2004, p.21). The literature review that I conducted in the early stages of developing this project played a crucial role in determining the direction of my research. Upon looking into the pre-existing literature base surrounding school shootings and other incidents of mass violence on or nearby college campuses, I found that the majority of this research tends to ask questions about what causes these types of events. While these studies are indeed important for the purposes of developing effective methods of prevention, they do not tell us what to do or expect when such tragedies do occur. For this reason, I hope that my own research will fill a gap in the existing literature by explaining the social processes and meanings that arise in the aftermath of this particular type of community trauma: how individuals make sense of responses in the aftermath of a crisis, what types of recovery efforts they find to effectively facilitate healing, and ultimately how they perceive their community’s capacity for resilience. Within the scope of this project, I define a crisis as any event resulting in social loss that risks harming the fabric of social
life, and recovery efforts as collective or individual action that arises to begin individual and community healing from the effects of the crisis. This literature review will explain both how a number of important past studies in the field of crises and crisis response informed my own project and how my research aims to build upon them by answering new questions.

What causes school shootings?

In 2004, Newman authored a ground-breaking book about school shootings. The text was the result of research for a congressionally mandated study born out of a wave of mass shootings in the 1990s. This allowed Newman to get extraordinary access to residents in communities affected by shootings, which may have been financially or ethically difficult otherwise. Consequently, the depth of Newman’s research and analysis was unprecedented, and was commended in a book review for being the first work to research shootings “not with a raft of numbers... but a set of in-depth community studies” (Suttles, 2006, p.1220). Newman’s research focused on two shootings that predated the notorious Columbine massacre. Her team interviewed 163 community members who were affected by the shootings at either Westside Middle School in Arkansas or Heath High School in Kentucky to explore the answers to questions about how such seemingly normal communities could have produced such violent killers. Newman studies the relationship between causal factors such as bullying, media images of masculinity, teenage depression, access to guns, and a propensity for violence. Though Newman’s interviews were conducted with people from a variety of community groups, including friends and families of the victims and shooters, students, teachers, lawyers, reporters and psychologists, they were aimed mainly at determining more about the shooters and their environments, instead of focusing on how the different individuals reacted and responded to the event. Despite its unparalleled depth of research within affected communities, the study was clearly cause-based, and did not look specifically at the shooting’s aftermath.

There are a number of other influential works in the field of school shootings that, like Newman’s, seek to pinpoint causal factors in order to advocate for targeted solutions. Notable amongst them are Craig Anderson and Brad A. Bushman’s 2001 study, Michael Kimmel and Matthew Mahler’s 2003 study, and Leary, Kowalski, Smith and Phillips’ 2003 study. These three articles explore the effects of influences such as video games, male gender roles, bullying and isolation in light of their potential correlation with violent tendencies in youths. Anderson and Bushman’s study is the most commonly cited article related to the phrase “school shootings” on Google Scholar, with a total of 1,560 works listing it as a source. The other two studies are also highly regarded and frequently cited in other scholarly research, as each contributes a wealth of certifiable information and empirical research to many of the public’s theories about risk factors that contribute to a propensity to become a “school shooter.” Though these works are important for their contribution to scholarship that aims to understand why school shootings happen, they too neglect to investigate the ways in which communities respond to shootings after the fact, instead focusing on the psyche of and influencing factors upon the shooter.

What happens after school shootings?

Though not many, there are a few studies that look specifically at community response to school shootings. A 2010 study of community reactions to school shootings
in Finland most closely aligns with my own project. The research team conducted in-depth interviews with a variety of community members in two cities, Joekla and Kauhajoki, after they were affected by school shootings. However, the main research question posed by the study was what implications incidents such as these have for Finland as a Nordic welfare society, seeking to understand if the incidents were isolated and could have been prevented. Though this is a study of community response, it does not look at community healing processes, and instead aims to understand how school shootings can give rise to new questions and concerns within a community. For this reason, the study still falls short in its exploration of the responses that arise from both institutions and individuals in the wake of such crises. However, this study did give rise to another, in which one of its authors looked specifically at how the reactions of the affected individuals in Joekla and Kauhajoki were patterned by gender, in which she found that females responded in emotionally affected ways and males responded in emotionally detached ways. Nurmi’s study of gender patterns somewhat relates to my study of patterns of social distance, in which I analyze how one’s physical or emotional proximity to the trauma in Isla Vista affected their differing needs in the healing process. While they do leave room to understand institutionally and grassroots orchestrated responses, instead focusing on the individual level, these studies were important in shaping my understandings of emotional reactions to tragedy and informing my methodology surrounding how to conduct research in a recently traumatized community.

Most other literature that focuses exclusively on the aftermath of school shootings is limited to looking at responses from a student affairs perspective, recording administrative best practices. However, as a 2010 study explains, even this literature base is lacking: “There is a paucity of empirical evidence to guide school administrators in developing emergency preparedness and crisis response plans for school shootings. School personnel presently must rely on insights from emergency management strategies used in workplace settings and lessons learned in the aftermath of other traumatic events” (Borum et al., 2010, p.34). While useful for schools looking to inform their administrative response to such events, these student affairs based texts still largely neglect to cover another important piece of community response, the “informal” grassroots events and processes that arise in tandem with those officially endorsed by the school. Two other drawbacks to these works are that they focus on outlining short-term tangible events and services to be offered instead of looking at larger social processes and trends in healing, and tend to have preventative, instead of reactive tones.

A comprehensive 2010 study offers an overview of what schools need to address following crises, including academic disruption, media presence, healing processes, communication, and immediate needs. It extensively covers the importance of mental health promotion as both a preventative and reactive measure, and also includes recommendations on how to transition from a mourning period to a healing period (Hempmill and LaBanc, 2010, p.122). It concludes that for such campus traumas, there can be no set “one size fits all” best practices protocol, but instead a general model that is adaptive to unique situations (Hempmill and LaBanc, 2010, p.xv). This work is significant not only because of its usefulness to universities, but also because of its inclusion of a population exposure model which I draw upon in a later section regarding social distance. While the book briefly covers the importance of allowing for what it terms “campus gatherings,” or informal events, it does not detail what forms they take, how they come about, and why they are important (Hempmill and LaBanc, 2010, p.91).
Another work with a centralized student affairs focus includes Dorothy Siegel’s 1994 study, which discusses difficulties that a researcher faces when outreaching to institutional actors, explaining some participants’ reluctance to participate in research for fear of reopening wounds or damaging the university’s image (Siegel, 1994, p.xi). It also detailed how administrators serving as liaisons for student activities and groups, and collaboration between administration and student government leaders played crucial roles in bringing student and administrative response efforts together, a phenomenon that inspired my section on the importance of “bridging” factors (Siegel, 1994, pp.24, 148). The study includes a number of typical university responses to campus tragedies that informed my own expectations about UCSB’s efforts (Siegel, 1994, p.105). Again, while the study was useful in gauging how academic institutions typically recover from crises, it neglected to look into explanations and descriptions of student-orchestrated response efforts.

What happens after disasters?
There may not be a wealth of literature about the aftermath of school shootings, but there is a substantial literature base surrounding the aftermath of other “disasters.” In sociology, a disaster is defined as a “physical, cultural, and emotional event incurring social loss, often possessing a dramatic quality that damages the fabric of social life” (Vaughan, 1999, p.292). Under this definition, the Isla Vista massacre can be considered a human-made disaster. Disaster studies informed my expectations surrounding the implications of conducting research in a recently traumatized community and a number of my conceptual frameworks, including social distance, the importance of agency, and the balance between institutional and grassroots responses. A significant difference between disaster research and my own, however, is that these studies tend to focus on how to rebuild a community that has experienced both physical and social destruction. College communities in the wake of mass violence, however, face a slightly different challenge in that they usually need only focus on how to restore the intangible: social, mental and emotional damage. Communities that have experienced extensive damage to their physical infrastructure, on the other hand, have to focus much of their recovery process on how to rebuild. Another important difference between crises such as natural disasters and the Isla Vista massacre is that while natural disasters are viewed as “an act of God”, the Isla Vista tragedy was an act of deliberate violence carried out by a community member. As can be expected, the two require very different mental health responses for those affected.

While there are competing theories about how disasters can affect the communities they occur in, that which aligns most closely with my observations is outlined in Rebecca Solnit’s 2009 book, which the New York Times called “a landmark work that gives an impassioned challenge to the social meaning of disasters” (Vanderbilt, 2009). In her book, Solnit uses case studies of a number of disasters to answer the central question: “What is this feeling that crops up after disasters?” (Solnit, 2009, p.5). By “this feeling” she refers to the often largely positive community sentiments of hope, optimism, and solidarity that survivors describe feeling in the immediate aftermath of a disaster. As book reviewer Tom Vanderbilt notes, “Disasters, for Solnit, do not merely put us in view of apocalypse, but provide glimpses of utopia. They do not merely destroy, but create” (Vanderbilt, 2009). The most relevant example Solnit uses for the purposes of this project is the community response that arose in the wake of the September 11 terrorist attacks, because of their status as man-made
intentional acts of violence. Solnit documents the feelings of altruism, generosity, and calm exhibited by the majority of New Yorkers in the immediate aftermath of the attacks. Her study also discusses a clash between bottom-up and top-down responses to crisis, which I analyze in my own study as grassroots (“informal”) and institutional (“formal”) recovery efforts. As Solnit explains, though we might expect disasters to breed a climate of disorder, panic, and pessimism, they tend to do the opposite. My project draws upon many concepts introduced by Solnit and seeks to explain what conditions permit the type of largely positive response that her research describes, despite the terrible circumstances that prompted it.

How do communities collectively heal?

Finally, this paper draws upon studies surrounding collective trauma and collective mourning processes that arise out of such trauma. Peter Homans’ 2000 study of such processes is helpful in its definitions: though the terms grief and mourning are often used interchangeably, grief refers to “feelings of sorrow, anger, guilt and confusion which occur when one experiences the loss of an attachment figure,” while mourning refers to “the culturally constructed social response to the loss of an individual.” Grief is a painful emotion that is “looking for a cure,” while mourning is a ritual that “heals” the pain of grief (Homans, 2000, p.2). Homans argues that “mourning today is no longer a concern of society as a whole but has become a personal and family affair” (Homans, 2000, p.1). I disagree with Homans, arguing that though intensive personal healing is necessary for those who are closely affected by trauma, for others group healing within communities is also a necessary process. This is reflected in my findings regarding social distance.

Kai Erikson, who studies non-naturally occurring disasters, defines collective trauma as “a blow to the basic tissues of social life that damages the bonds attaching people together and impairs the prevailing sense of communality” (Erikson, 1994, p.233). If the disaster people experience was caused by another human and is motivated and mean-minded, Erikson warns that collective trauma can easily become irreversible. People begin to think that the world is ruled by “a natural kind of malice that lurks everywhere” (Erikson, 1994, pp.237-41). Using Erikson’s descriptions, I argue that the Isla Vista massacre, though traumatic, did not cause irreparable damage to the social fabric of the community, instead providing an opportunity to strengthen bonds and improve previously existing problems.

The final piece of literature that I relied upon heavily in my understanding of collective trauma, resilience and recovery was Jack Saul’s 2014 text. Though it is technically intended to serve as a guide for mental health professionals working in response to large scale political violence or natural disaster, Saul’s thesis is that “recognizing and strengthening the adaptive capacities and ‘resilience’ in communities promotes collective recovery after mass trauma... adaptation following massive traumatic events requires both flexibly responding to changing circumstances over time and at the same developing a positive vision of recovery” (Saul, 2014, p.2). For this reason, his work influenced the structure of my own in looking at the conditions that support community recovery and those that weaken the community’s progress forward from the trauma. Saul defines community resilience as “a community’s capacity, hope and faith to withstand major trauma and loss, overcome adversity and to prevail, usually with increased resources, competence and connectedness.” Because he sees belief systems, organizational patterns and communication/problem solving as key to
achieving resilience, I then sought to understand if the responses to the Isla Vista massacre met these needs (Saul, 2014, p.8).

Filling the gap

Glenn Muschert authored an article in 2007 detailing the research that has been done to date surrounding school shootings. He concludes by encouraging continued research into both the causes and the effects of school shootings, stating that “...there has been little research examining the proximate and longer-term effects of such incidents on the communities in which they occur. In this regard, community impact studies might be warranted to uncover the effect of school shootings in a variety of settings, including urban, suburban and rural communities.” My research project will investigate this direction described by Muschert, the specific setting explored being a college community. My project aims to build upon all of these works through the in-depth study of a single campus massacre in order to analyze patterns, processes and meanings of what Saul refers to as “post traumatic growth” (positive changes resulting from struggling with adversity) on both individual and institutional levels (Saul, 2014, p.9).

The overarching research question within this paper asks: How does context affect the ways in which individuals perceive the effectiveness of recovery efforts in the aftermath of rampage school violence? Within my findings, I have produced three sub-questions that look at social, organizational, and temporal context, respectively. First, how does an individual’s socio-emotional proximity to a crisis affect their perceptions of recovery efforts’ effectiveness? Second, how do formal and informal recovery efforts complement (or fail to complement) one another in order to meet the perceived needs of affected individuals? Finally, how does the accumulation of crises within a community over time affect perceptions of recovery effort effectiveness?

Methodology

This study uses a qualitative approach that includes an online survey and in-depth interviews within the context of a single case study of the Isla Vista community in the wake of the massacre that took place there this past May. Because my project focuses on an underexplored and highly emotionally sensitive topic in an attempt to understand social meaning, qualitative methods such as in-depth interviewing offered the best means to understand how people perceived events and experiences. This section explains the specific methods I chose to conduct my research, and details the way in which I carried out implementation of the survey and interviews. Included is a section on methodological drawbacks, the main focus of which is to outline my efforts to conduct the study ethically in light of its heavy reliance on human subjects. I chose my methods of inquiry based on what would allow me to collect data by the most unbiased, representative and accurate means possible, given the time constraints of the project.

The area of study

Located within Santa Barbara County and directly adjacent to the University of California at Santa Barbara (UCSB)’s campus, Isla Vista (“IV”) is an unincorporated community with a population of 23,096 but a total land area of only 1.85 square miles (Census, 2014). In fact, at 62.5 people per acre, Isla Vista has one of the highest concentrations of residents in California (Rosenfeld, 2011). The literally and figuratively tight-knit beachside community consists of 60% UCSB students (Santa Barbara County
Sherriff’s Office, 2013). A significant portion of the remaining population is made up of Santa Barbara City College (SBCC) students, with at least 1,200 but potentially as many as 5,000 living there (Brugger, 2014). The total estimated number of students living in Isla Vista in 2011 was as high as 13,000, and it has likely increased since (Rosenfeld, 2011).

From my own personal experience as a resident there, I can confirm Isla Vista to be where almost all UCSB students live. In Isla Vista, aside from the odd professor or two, it is genuinely rare to come across anyone over the age of 25. The four block by four block town is almost entirely student-run, and because of that, the young people living there maintain a real sense of ownership over it. Because it only takes about fifteen steps to cross from the border of campus into IV, the town is just as much, if not more so, the area of study relevant to my project as UCSB. Not only were the murders committed on May 23 all carried out in Isla Vista, it is also the place where all of my subjects, and most of the affected population I am studying, live and identify as their home. However, as my project emphasizes, UCSB and Isla Vista are indeed two separate places and communities, and will be noted as such throughout this paper.

UCSB is part of the ten-campus University of California system, located near the city of Goleta within the larger Santa Barbara County. The campus is known for having its own beach, and thus has a predominant surf culture that many of its students identify with strongly. The undergraduate student population is predominantly white (41-percent), with another 25-percent identifying as Asian/Pacific Islander and 25-percent as Chicano/Latino (University of California, Santa Barbara, 2014). The larger Santa Barbara County demographic is also generally known to be populated by mainly white, middle-class residents. It is notable that for such individuals, rampage shootings and other mass violence may seem like an unlikely event, but, nevertheless, white middle-class youths are the most likely population both to commit and experience school shootings.

The overarching method that I used to gather research for my project was a singular case study of the rampage that resulted in the deaths of six UCSB students in Isla Vista this past spring. Isla Vista will provide a more comprehensive study context than the just the UCSB campus because the massacre did not affect UCSB students alone, but also Santa Barbara City College (SBCC) students (one of whom was the shooter himself). Isla Vista residents, not UCSB students, were clearly Rodger’s target. He did not discriminate between students from the two colleges, but instead aimed to harm anyone who was young, attractive, and happier than he was. This case was also chosen because of my own personal connection to the school. As a transfer student from UCSB, I am still connected to many members and groups in the community, and thus was able to access individuals and resources there more easily than I would have been able to at another school. I am also able to add to the accounts of what Isla Vista felt like to a UCSB student before the events occurred, and to more clearly recognize changes in the community environment. The UCSB case study is somewhat different from typical school rampage shootings in that it: a) affected a college community, which is more “open” in terms of security than a high school or middle school; b) involved young adults, rather than high school or middle school aged youth; and c) unfolded off campus, but in a community that is contiguous with the campus, raising questions about how to organize responses in light of the unique geographic implications. This combination of factors creates some complexities that other rampage shooting cases may not have, raising questions about the transferability of my findings to other cases.
However, the unique case of the UCSB shootings may provide a vantage point and perspective that other, more typical cases may not, thus offering the opportunity for generating new knowledge about responses in the aftermath of rampage shootings and social crises, more generally. Due to feasibility concerns and issues of access to community members willing to discuss a sensitive subject with an “outsider,” I did not conduct multiple case studies, which may have made my findings more robust in their validity. A second drawback to this approach is that my personal connection to the community and its members may have resulted in bias to portray positively my alma mater and its students as I analyze and interpret the data I collect. To try to avoid this, I employed methods as I carried out my case study that were as accurate, representative, and neutral as possible, allowing little room for discretion or influence from my own beliefs and opinions.

The survey and interviews

The first qualitative method I employed to gather data for the project was an online survey created using the web tool SurveyMonkey, an online survey generator that meets the American Association for Public Opinion Research’s recommendations for secure transmission, informed consent, and database and server security. The introductory page of the survey included an outline of its objective and other considerations for participants. The purpose of the survey was mainly to help myself gauge community climate and student sentiment about the event in order to appropriately adjust my interview protocol. As a result, I was less concerned about the potential for bias that was posed by using Facebook as a platform to get respondents. Though it was only accessible by my Facebook friends and their respective networks, it was still a helpful tool for me as a researcher, and offered a number of other advantages. One such benefit was the true anonymity it offered: without it, I would have only been able to interact with participants who were comfortable doing in-person interviews. Remaining nameless to the researcher allowed people to share things they might not have been comfortable saying otherwise. Another benefit was that the survey was how I began my snowball sample for the interviews: respondents who were interested had the option of leaving their contact information at the end of the survey so that I could follow up with them for an interview (4 of the 24 total chose to do so).

The second method of inquiry I used accounts for the bulk of my findings, because I made a more concerted effort to control methodological drawbacks for the interviews than I did for the online survey. Conducting in-depth interviews was also the best way to gain a full understanding of community members’ experiences because of the opportunity it lent for participants to talk freely in response to open-ended questions. Using 4 respondents from the survey and others from snowball canvassing that I conducted via social media requests and personal connections, I conducted a total of 22 in-depth interviews: 14 with undergraduate students, 2 with graduate students instructors (GSI’s) employed by UCSB to aid professors in teaching undergraduate courses, and 6 UCSB employees from 4 different administrative units. The sample was not random, but instead purposive, as I intentionally sought out individuals that differed by age, gender, race, major, year in school, extracurricular involvement, community role, and social distance in relation to the May tragedy. The purposive sample is important because of my interest in people who may have experienced or perceived the aftermath of the crisis differently due to relative social distance and community role. All interview subjects orally consented to the project after being
informed of its objective and other relevant considerations. The questions asked of each participant differed slightly according to their experience of the event and their role in the community, but generally aimed to gain an understanding of student and school responses to the tragedy, as well as individual perceptions of those responses.

A number of research issues arose from my choice to use interviews as my primary method of inquiry. The first problem I came across was how to reach out to UCSB employees. A number of researchers who have studied communities affected by school shootings have noted that institutional actors tend to be hesitant to comment on such events for fear of reopening old wounds or somehow tarnishing the school's reputation. One study explains that though the school systems were likely to decline to comment, staff members were more willing to speak to researchers on their own (Newman, 2004, p.320). This guided me to seek out interview participants who were willing to share their experience as individuals, instead of speaking officially on behalf of an institution, organization or department. I was also careful in my outreach process to mitigate staff concerns by explaining the objective of my project fully in all e-mails requesting interviews.

The biggest issue in conducting interviews was an ethical one: when asking participants to recount memories of such an emotionally traumatizing event, it is the responsibility of the researcher to be prepared in case the experience is a triggering one. I circumvented this problem as best I could not only by remaining emotionally sensitive and supportive throughout the interviews, but also by distributing contact information for professional counseling services to all of my interview subjects at the end of our meetings. Another issue was confidentiality: a number of participants (particularly staff members) expressed concern about being identifiable in the larger context of this paper. Consequently, all subjects will remain anonymous, and instead be referred to as “Student Interview 1,” “Staff Interview 1,” and so on. However, I was required to name assailants, victims, and the university because the specificity of the circumstances make them easily identifiable even without names.

Other methodological considerations

As mentioned in my literature review, past studies of communities affected by school shootings and other similar crises significantly informed my methodology. For example, I kept in mind Nurmi’s observation that “while some [people] wanted to process emotions and experiences related to the shootings, others wanted to give their opinions about why the shootings happened or the way in which the incidents were managed by the authorities... Many stated that they wanted to be of help in the research on school shootings” (Nurmi, 2014, p.450). Newman’s comprehensive study was especially useful. She notes certain drawbacks to be aware of, such as inadequate or inconsistent memory by interviewees (potentially heightened by the traumatic circumstances), vested interests (such as the institutional concern for public reputation or pending lawsuits), and the purpose of research influencing answers. Newman highlights these issues and solves them by contextualizing all answers (how they know what), triangulating among various respondents (weighing evidence based on relative bias), and allowing for interpretative analysis (subjects can project their interpretation on the event, doesn’t have to be “truth”) (Newman, 2004, p.326). This is an important point: there are competing sets of social meanings held by subjects. While one person found an event to be effective, another may have found it to be ineffective—neither is
necessarily incorrect. In my project, I am careful to keep this in mind, instead looking at perceptions as they vary across individuals and groups.

Finally, my personal connection to the school and experience with the massacre is a small but important factor in my project. Again, though I was not there at the time of the murders, I still felt strongly affected by them as I watched my friends and a place I had once called home grieve collectively in response to such a gruesomely tragic event. My personal connection to the case study does lend itself to opportunities for bias, but it also gave me as a researcher the ability to further hone my expectations and my understanding. When studying a community, it is crucial for a researcher to have some understanding of the place and the people they are focusing on. I already had that sense of familiarity with this community, and therefore was able to access and relate to my subjects more easily than another researcher might have been able to within the parameters of this project. It should also be noted that in carrying out this research, I facilitated a kind of healing process for myself: observing how my peers came together in a time of need to create positive change and social solidarity amongst one another was cathartic for myself as I too recovered from and looked for light within this unfortunate and unnecessary tragedy.

Findings

The three sub-questions that my findings aim to answer developed inductively. After collecting and analyzing my field data, I found that my research subjects’ perceptions of recovery efforts were patterned by social, organizational, and temporal context. The following sections are broken up by those three contextual features, presenting how individuals’ subjective perception of recovery effort effectiveness is a reflection of them, ultimately concluding that context and meaning matter significantly within crisis response. My findings show that there is no “one size fits all” template for community recovery, but instead that meeting individual and community needs can only be only accomplished through targeted, narrowly tailored recovery efforts.

A note on discourse

My very first interview subject significantly altered the way I viewed my project. A close friend of one of Rodgers’ roommates who was stabbed to death, he aptly noted that the rampage should not be referred to simply as a school shooting. In response to a question asking how he was personally affected by the event, he explained:

“I think there was a lot of inappropriateness in the way people responded. Some people were saying, ‘Oh it’s an against women issue’ or ‘It’s a gun issue’ but my friend was killed with a knife, and he’s not a woman either. He got killed just because he was rooming with a guy who was completely insane. ... I don’t think it had anything to do with a bunch of the issues that people brought up afterwards, including that one guy who was the father of one of the kids who got shot. And he was talking about like, ‘This has to do with politicians blah blah blah’ and talking about guns and stuff but I don’t really think that was the issue at hand, because half the people died with guns and half didn’t die with guns. The first three people didn’t die with guns.”

–Student #1

After speaking with Student #1, I was careful to shift the discourse I used in both my writing and my interactions with community members away from one of “school
shootings,” instead using more general terms to refer to the May 23 tragedy. All six administrators and both of the graduate student instructors I spoke with used similarly broad terms, but twelve of the fourteen the students I spoke with referred to the event as a shooting, with the exception of those two who were close to the students who were killed by knife. Because the drive-by shootings and vehicular assaults were committed in public and directly affected a larger population, many community members associated more with this piece of the murders, as is reflected in the following sections detailing my findings.

Community resilience

A 2009 study describes community resilience in response to disasters as encompassing three capacities: resistance, recovery, and creativity. In the first capacity, communities may resist change, counteracting the impact of challenges by adjustments and adaptations, withstanding disruption before undergoing significant lasting change. In the second, a community may change for a period in response to challenges but return to its previous state when the challenges have been resolved. In the third, a community may be transformed by adversity, developing new ways of functioning and new directions by creating new institutions and practices that carry its values forward (Kirmeyer et al., 2009, p.72). My findings reflect that context affects the ways in which individuals perceived the community’s capacity for resilience in the wake of the crisis, resulting in a multitude of opinions about and understandings of the recovery efforts.

Like Solnit, I found that when interviewing crisis survivors, I observed a significant amount of positive reminiscing about how people came together to support one another while the social walls that ordinarily separate us in daily life broke down (Solnit, 2009, pp.4-5). One 9/11 survivor told Solnit, “If you want to make us stronger, attack and we will unite” (Solnit, 2009, p.189). I found similar sentiments being expressed among Isla Vistans:

“As a freshman ..., seeing how everyone came together was really awesome. And it kind of solidified that I was supposed to be at UCSB, even though all this stuff was happening. I was having a hard time adjusting here but then seeing how much support everyone was giving everybody was amazing. It sounds cliché but it’s true; everyone was coming together and really standing by the community so that made me feel really good about UCSB and being here. This year’s been awesome. I’ve loved every second of it.”
–Student #12

“In the immediate aftermath, I really felt a sea change in people’s attitudes, in the level of kindness, and forgiveness, and patience, and you know, people were looking each other in the eye, even just passing on the sidewalk, you could go out into IV and... there was a gentleness that came out of it.”
–Administrator #5

“It won’t be forgotten but it won’t define the campus, it’s not who we are. It’s just going to bring us closer together and help us in the end.”
–Student #4
“I remember when the shooting happened, my dad asked me, ‘Are you going to go back?’ And I’m like, ‘Of course.’ I love UCSB and that hasn’t changed. If anything it’s stronger.”
–Student #8

Where did this strength, community solidarity, respectfulness, and kindness come from? In the aftermath of a crisis, we might expect individuals to express sentiments of pessimism, anxiety or even anger. However, I argue that the Isla Vista and UCSB communities put forth a collective response that aimed to meet the various individual and community needs that arose from the violence in order to dispel most opportunities for negativity, instead providing a multitude of opportunities for social healing that ultimately enabled the community to recover and even prosper despite the circumstances.

Within this project, I refer to the many events, movements, services, memorials and other processes that arose in direct response to the Isla Vista massacre as “recovery efforts.” Such efforts can and did have a variety of aims, including but not limited to: addressing psychological trauma, memorializing the victims whose lives were lost, building community solidarity, minimizing disruption in daily life, and preventing and preparing for potential future crises. In general, however, a recovery effort is any individual or collective action with the intention to begin individual and community healing from the effects of the violence. The Isla Vista tragedy was extraordinarily generative on individual, local and national levels, but my project aims to specifically record and understand those recovery efforts that came directly out of the Isla Vista and UCSB communities. While it would be impossible to record even just those responses entirely because of the sheer quantity of literature, projects, videos, memorials and so on that were created by individuals affected by the crisis in the period following May 23, I have provided an inventory of all those recovery efforts that I was able to record within my research investigation (Appendix A). Due to their high rates of visibility, attendance, and/or publicity, some recovery efforts were discussed more often by interview subjects than others. These include social media movements and memorial services that were offered in the immediate aftermath of the crisis, such as the institutionally endorsed UCSB Memorial Service at Harder Stadium, the grassroots-organized Memorial Paddle Out, and the student government-organized Candlelight Vigil.

**Social distance**

A number of researchers studying school shootings and other incidents of college violence recognize that responses to such crises are not the same across the board, but instead are tied to one’s relative social distance to the trauma. Hempmill and LaBanc’s 2010 text offers a “population exposure model” with the underlying principle that those most greatly affected by a crisis are those who were most directly exposed to the trauma. It discusses how “multiple constituencies may require intervention beyond those directly affected by a traumatic event, and considering the collective needs of the campus community will be important as plans for intervention emerge” (Hempmill and LaBanc, 2010, p.85). Social distance became an important piece of my project when I realized that meanings and perceptions in the wake of a crisis might be patterned by someone’s physical or emotional proximity to the trauma. An example of an interview participant that I identify as socially close might be an individual who sustained an injury in the violence that night, someone who had a close social relationship with a
victim who may have passed away or someone who bore first hand witness to the trauma. Conversely, an example of a participant that I identify as socially distant could be a student who was out of town for the weekend and didn’t know anyone who was directly involved in the events of the night or the response efforts afterward.

This section asks: how does an individual’s socio-emotional proximity to a crisis affect their perceptions of recovery effort effectiveness? In order to answer this question, I asked each interview participant questions about how they were affected by the event, if they knew anyone who was directly affected and what recovery efforts they found to be most helpful to them personally in terms of promoting healing. My findings reflect that the ways in which people make sense of their social, psychological and emotional needs in the wake of the tragedy and the relative meanings they draw from different types of recovery efforts was indeed influenced by their social distance. The socially close and the socially distant have unique needs that arise following such crises, and recovery efforts need to be targeted to meet both types.

I identify those recovery efforts aiming to offer individualized healing as necessary for the socially close. For individuals who have been significantly affected by the trauma in some way, large-scale events intended for the entire community might be too emotionally difficult to aid in the recovery process alone. Instead, these recovery efforts need to be used in combination with more intensive, focused recovery efforts like grief counseling, other forms of individualized treatment, and memorializing opportunities with others affected by the same loss. This is not to say that for the socially close, recovery efforts intended for a broad audience are not helpful and important, but instead that they must be used in tandem with more personalized responses. For the socially distant, what a crisis like the Isla Vista massacre puts most at risk are sentiments about community safety, solidarity, strength and security. Thus, the most important recovery efforts for this population, which included the majority of UCSB and Isla Vista community members, are those community building efforts which aim to restore confidence and optimism about the community’s capacity for resilience. When a community faces a crisis, it is imperative that the recovery efforts that are put forth in response aim to meet the needs of both these groups.

I interviewed five student subjects that I categorized as socially close to the May 23 tragedy, including one victim of an injury sustained in the violence, one witness who used his EMT skills to act as a first responder for a gunshot victim, and three individuals who were very close friends with victims who lost their lives. In speaking with them, I found that each had unique perspectives on the aftermath of the crisis as a result of their especially close proximity to the trauma. Student #7, who survived a series of gunshot wounds inflicted during the massacre, was the most socially close individual in my sample. For him, the most prominent aspect of the aftermath was a practical one. In response to a question asking to describe his experience of that night, he discussed how the financial implications of the violence weighed on him.

“They did leave me with a $250,000 bill, which isn’t funny, because I don’t have the money to cover that. I’m working with the Isla Vista Victims Unit to try to cover that, and I think a lot of people chipped in money to help support us, so they gave me about three grand. It’s not amazing but it’s whatever, it’s something. That’s probably the worst side effect of whatever happened, is I’m stuck with the bill and no one’s really liable because he’s dead and he’s an adult, so I can’t sue his parents, I can’t sue
anything. That’s the hardest part. The community’s there for the immediate thing, but the residual effects of what happened, that’s on me.”

–Student #7

For those who were directly affected by the violence, factors like physical incapacitation during the community’s prime recovery period and financial struggles and lawsuits in the months following make it difficult to actively take part in the collective healing process. Though he mentioned trying to attend the Memorial Paddle Out and his gratitude for the community’s support, Student #7 was most concerned about the actual event and the obstacles that remained for him personally in its aftermath. It wasn’t until speaking with him that I realized that those who were actually injured are unlikely to be able to attend memorial services and other events immediately after the event, implying that they are intended more so for those community members who are left behind.

Student #4, the EMT who witnessed the rampage and responded to a gunshot victim, was the only individual who shared with me that he took advantage of the university’s grief counseling services. Interestingly, however, he responded to a question about what recovery efforts he found to be most helpful by explaining a method he came up with on his own.

“So I actually typed up my story because that was my way of recovering. I just wanted to record everything that happened, because I was so upset that I felt I could do so much more, and once I wrote it out I realized that I did what I could, what I had the means of doing.”

–Student #4

Writing as an emotional outlet also became an important means of healing for Student #14, who lost two of her sorority sisters and close friends in the violence. A team of administrators, graduate students and undergraduate interns are currently working to put together a collection that archives all of the physical memorials given to the school and scattered around Isla Vista in the aftermath of the tragedy. Student #14 decided to get involved in the archival process and to write her capstone paper about the event, her unique place within it, and the collection’s important role in the community’s healing process.

Student #1 and Student #9 were both close friends with and had once been roommates of one of the young men who was stabbed to death inside Rodger’s apartment. When prompted to share what was most helpful to them in the recovery process, they explained that though they attended large-scale memorials in the days following, remembering their friend with others who had experienced the same loss was most powerful to them.

“After [the UCSB Campus-Wide Memorial], me and [a friend] and two others went to speak with his parents and ... that ... I’m glad I did that. I don’t know how to explain it, but I’m really glad I did that. That was probably the best thing I did in terms of the way it made me feel a little bit better about the situation.”

–Student #1
“We went to the beach one day and we just said some nice things. There were maybe 30-50 of us, and we threw some flowers in the ocean and lit some candles. His parents found out about that and invited us all to where we used to live freshman year and we gathered in the cafeteria and we all just talked about our friend and his life... that was the most poignant and visceral thing that we did. ... I think... I think for trauma like this, people need to do it on their own, grieve in their own way. That's what you would do for a family member.”
–Student #9

Finally, it is important to note that for the socially close, focusing on the aftermath of the crisis was difficult—they tended to want to talk about what went wrong and how the event could have been avoided. When asked if they had any final comments they wished to share with me, each of the five individuals made statements about prevention.

“Just that it would never happen again. Take information from my lesson... just maybe a higher consciousness and higher gun control. I'm for guns but I agree with cracking down on how many are out there and who can have them. I know it's not your project, but that's all I can see when I look at this.”
–Student #7

I interviewed nine student subjects that I categorized as socially distant from the May 23 tragedy. These individuals ranged from those who were out of town for the weekend of the tragedy to those who were in Isla Vista but didn’t personally know anyone who was directly affected by the violence. While there was variation amongst these individuals in what recovery efforts they took part in, the general trend was that they made use of large-scale events and processes such as the UCSB Campus-Wide Memorial, the Candlelight Vigil, the Memorial Paddle Out, and the message boards and physical vigils created to memorialize lost victims. As Student #14, who also conducted research surrounding the aftermath of the Isla Vista massacre, noted, events like the vigil that were attended by thousands gave the socially distant an opportunity to process and understand the recently incurred losses.

“A lot of people who weren’t directly affected were able to understand what was going on and participate and just mourn collectively. That was necessary and good that we did that.”
–Student #14

Phrases like “coming together” and comments about seeing the sheer number of people who attended and participated in the recovery efforts in the days and weeks following the crisis reaffirming feelings of community strength and solidarity arose in every interview. Recovery efforts aimed at a broad audience were recognized as being “necessary” by both students and administrators.

“It’s not like everybody wants to see a counselor. People do things in a different way.”
–Administrator #5
Katherine Newman’s 2004 study of communities affected by school shootings offers an analogy comparing the aftermath of shootings to an earthquake, with many concentric circles around the epicenter representing the different rates at which people heal. She explores how social distance and the different emotional needs that arise from it sometimes put those at the epicenter of the trauma in direct tension with groups who were only peripherally affected, explaining that questions about who “had the right to claim true victim status” arose (Newman, 2004, p.207). In response to a question asking in what ways the May 23 tragedy was continually invoked by the school and the students, one interview participant, a transfer student who arrived at UCSB the fall after the event occurred, explained her own experience of this phenomenon:

“It’s kind of weird to have not been here. Because I feel like it’s slightly a respect thing. Like if you weren’t here, you don’t know what it was like. I think that that creates a huge issue in that there’s a huge turnaround time here, students come in and out, so you lose the grieving process and you lose the overall spirit of coming together because people who weren’t here wanted to be respectful of those who were, and not ‘pretend’ they had some sort of role in it, even though we actually do.”

–Student #6

Student #6’s recognition of how those who were especially socially distant from the event might feel excluded from the recovery process is an important one. It suggests that social distance has the potential to alienate certain groups, ultimately hindering collective healing within the community. One normative implication of this phenomenon might be that communities facing crises need to ensure that they offer recovery efforts that are clearly intended to address a broad audience, even those who might not have been closely affected by the event.

When recovery efforts fail to recognize the importance of and address needs according to social distance, they risk being perceived as less effective by individuals. An example of this failure has already been shown in the portion of this section addressing the importance of discourse: Student #1, who was very socially close with one of the young men who was stabbed and killed inside Rodger’s apartment, discussed his discomfort by the larger response effort’s tendency to label the event “a shooting.” For him, the university’s decision to allow Richard Martinez, the father of victim Christopher Martinez, to speak at the UCSB Campus-Wide Memorial about the importance of gun control was offensive to the memory of his lost friend.

Another example of how social distance influences perceptions of recovery effort effectiveness comes from Student #12, who was out of town the weekend of May 23 and didn’t personally know any of the victims. Her only involvement in the response was attending the UCSB Campus-Wide Memorial. She explains her decision not to take part in other recovery efforts:

“I know that a lot of the Housing and Residential staff events that week, they programmed just to kind of talk it out, and there was another candlelight thing, and I think we had chalk boards and stuff... but I didn’t really go to those. It just... having to talk about it over and over again and having all these people from outside of UCSB contacting me, making sure I was okay, constantly having to tell the story over and over again, it was just kind of overwhelming and I didn’t want it to bring me down.”

–Student #12
Student #12 exemplifies the socially distant, for whom constant reminders of the event were upsetting and undesired. It is important for the university and the community to be aware of social distance within the larger response period, trying to meet the varying needs that arise and striking an appropriate balance between remembrance and moving forward.

A number of UCSB staff members spoke about the administrative efforts to accomplish this. The I <3 UCSB Campaign and Pledge that the school put forth in the fall of 2014 is one such example of a recovery effort aimed at a broad audience.

“This year, we were very deliberate with new students and families. We said ‘You’re coming to a place that’s not the same as when you applied’, and I think we’ve done a good job of acculturating them. I don’t know how long we’ll be able to do that, but right now it’s something people can relate to. So I hope we can preserve that.”
–Administrator #1

“We did the I heart UCSB pins, and this pledge we developed, and the GauchoStrong wristbands that everyone got at Orientation, so that students coming in would really understand. Because there was a big fear that new students would have this huge disconnect with the rest of the student body.”
–Administrator #4

Due to concerns about the high turnover rate of students at UCSB and residents in Isla Vista as classes graduate and move away resulting in a loss of the community solidarity that arose in the wake of the tragedy, the administration actively tried to acclimate new students to the still-recovering community. The I <3 UCSB Campaign played an important role in orientations over the summer, with the aim of explaining what it means to be a Gaucho and why students should be proud of their identity as such.

In conclusion, all of these examples reflect the way in which social context plays a critical role in understanding how individuals make meaning of and perceive the social processes that arise in the wake of crises. Social distance is directly related to the unique needs that arise for affected populations, and recovery efforts must be tailored to the audience they are intended to serve. In the following section, I will explore two contrasting channels of recovery efforts, moving from a micro level to a meso level in looking at how organizational context affects perceptions of recovery effort effectiveness.

Formal and informal recovery efforts

The second sub-question that arose as I carried out my fieldwork was one about organizational context: how do formal and informal recovery efforts complement (or fail to complement) one another in order to meet the perceived needs of affected individuals? I found that perceptions of recovery efforts were also patterned by the way in which they were organized: events, processes, services and movements put forth officially by UCSB as an institution were understood differently than those that came about in a spontaneous, grassroots way as unaffiliated individuals created them in an effort to promote collective healing. As university-endorsed “formal” efforts like the UCSB Campus-Wide Memorial, the I <3 UCSB Campaign, grief counseling, and other
administrative efforts were enacted in response to the tragedy, a number of “informal” recovery efforts arose alongside them. These are far too numerous to outline here, but a few notable examples include entirely student-run and organized efforts like the Memorial Paddle Out, protests against the media presence in Isla Vista, the Isla Vista Self Governance Initiative, the #GauchoStrong social media campaign and countless other projects, memorials, videos and movements.

In speaking with administrators, I learned that the university actually has a philosophy of intentionally leaving room for such informal efforts, silently encouraging students to take an active role in the response process.

“Our philosophy in this situation is one where we really believe that in situations like this, where there’s a high degree of emotion around a loss, that it’s important to let the students have input... not just have input, but really take the lead in some ways. Obviously this was of such a magnitude that the university needed to do something, but we felt it was really important that if the students wanted to do a paddle out, or wanted to do a candlelight vigil, that they really do that and organize it and that that is the way that people heal, is to do something, to make something happen.”
—Administrator #5

“There were all the informal sidewalk memorials for instance. And those, you know, they probably don’t meet all the codes, but it was kind of like, let’s be flexible. Those were really productive for people. And I think they helped us communicate outward, too. It was about flexibility.”
—Administrator #1

In creating an inventory of recovery efforts, I found that not all responses could be clearly labeled as formal or informal. There were a number of ways in which the gap between the two channels was bridged, and recovery efforts all along the spectrum from completely formal to completely informal. Administrators approached events differently, according to their place along this spectrum. As one explained, at the UCSB Campus-Wide Memorial (officially endorsed), university counselors took an active presence, wearing orange vests that read “COUNSELOR” on the back. At the Candlelight Vigil (semi-formal, organized by student government), counselors blended into the crowd subtly. Finally, because of its status as a “student thing,” counselors did not attend the Memorial Paddle Out at all.

The gap between the administration and the students was not the only room for disconnect in the response efforts. There also existed a more literal, geographic gap between Isla Vista and UCSB’s campus. A number of interview subjects touched on this “disconnect” between the affected population as both students and residents, and the campus as having a purely academic and institutional feel to it.

“It was for some of my students a real disconnect, where in IV there were all these flowers and memorials and chalk writing, but when they walked on campus they didn’t see any physical signs of what had happened so it ended up feeling like they alone were struggling with some bad dream, some bad personal thing. There was this stark contrast where campus didn’t reflect what was going on in the community of IV.”
—Administrator #8
In response to her perception of this disconnect, Administrator #8, a graduate student instructor, took the initiative to construct an on-campus memorial. The message board at the Arbor, within the heart of campus, is still in place today to memorialize the students who were lost and to commemorate the “Gaucho Pride” that emerged from the event’s aftermath.

The best example of a recovery effort that served as a bridge not only between the formal and the informal, but also between campus and Isla Vista, is the student government-organized Candlelight Vigil, which was held the evening of May 24, only 24 short hours after the violence struck. The group of individuals who planned the vigil consisted mainly of those individuals who were active in student government, but also included administrators and unaffiliated students and community members who simply wished to help. The event not only bridged the gap between the students and the administration because of its status as an Associated Student Body (ASB) event (since one of the central purposes of the student governing body is to facilitate the relationship between the students and the administration), but also literally bridged another important gap: the physical one between campus and Isla Vista. Starting with a gathering in the heart of campus, the vigil included a procession into Isla Vista and concluded in a local park, with hours of testimonials and memories shared of the fallen Gauchos. Within a larger anecdote about her experience of that weekend, one administrator who had close relationships with many students involved in ASB explained the process of how the vigil came to be:

“We processed and planned and fought—and I say fought because they said ‘This isn’t about administration and they shouldn’t have any part in this.’ I said, ‘I’m in administration. I’m an Alum. Don’t shut me out. And I’m the one who can make sure you can do this.’ The other thing is that they wanted to not be on campus, and I said ‘I think we should start on campus.’ So I was able to influence them starting on Storke Tower Plaza, and it ended up being really simple and very powerful.”
—Administrator #3

Despite its difficult planning process, the vigil was universally perceived as a huge success, with not one of my interview subjects having negative comments to share about it, and all who attended it agreeing that it was the most helpful event for the community. Comments about it include “phenomenal,” “most respectful crowd I’ve ever seen,” “absolutely amazing,” “never experienced anything that powerful,” “the most powerful thing,” “most helpful by far,” and “it brought us all together.”

There were other important factors that bridged the gap between the two channels. For example, graduate student instructors (GSI’s) who are both students and administrators served as a significant piece in the aftermath because of their role that Administrator #7, a GSI, described as “the first line of defense” between the students and the administration. Because of this, she took an active role in ensuring that graduate student instructors were properly trained by counselors in how to communicate and interact with students in the immediate aftermath of the crisis. On this note, individual administrators became an important bridging factor between students and the larger administration. While they might be tied by protocol against acting in an official capacity without university approval, they could nonetheless offer support to students with whom they had relationships with as individuals. One student fondly remembered that though the university didn’t have enough jurisdiction over Isla Vista to support
students who were fighting off unwanted attention from news crews, an administrator whom he had worked with previously stopped by and offered his support for the cause and a hand to lend if it was needed. Finally, social media acted as a significant bridge between the formal and informal channels, as it broke down barriers between the administration, students, and the outside world, enabling people to communicate quickly in a universally owned virtual space.

Solnit observes that following disasters, there tends to be a negative view of institutional responses because they signal the end of grassroots responses (Solnit, 2009, p.8). She also cites the appearance of spontaneously organized groups of responders as a suggestion that the official response efforts were inadequate (Solnit, 2009, p.200). Though there were some negative perceptions of UCSB’s institutional response, it was not due to its overshadowing of the “informal” responses. There was also no mention among my subjects of needing to orchestrate informal responses to “make up for” something lacking in the institutional response. Instead, I argue that the two channels of responses offered different modes of healing to students, both of which were necessary to promote a full sense of community recovery. UCSB-endorsed events did not stamp out, but instead co-existed alongside unendorsed events. The biggest problem that institutional responses faced was the perception of them as being more symbolic than substantive, existing only to communicate legitimacy outward instead of to actually accomplish anything. In response to a question about the event’s presence in her own experience at UCSB, one student who transferred in the fall of 2014 explained that the sheer number of times the tragedy was invoked began to make her perceive the school’s stance as symbolic.

“I had to go through a lot of orientations and stuff like that and it was brought up in every single one, to the point that it almost became overkill. I learned about it at original orientation and there’s been 3 different occasions, like the Gaucho FYI’s, which was completely revamped after it happened to make it more informational. I think that that’s kind of been the school’s thought on going into it and moving forward, but like I said I do feel like it’s almost just catch up, and in a way trying to just show students like ‘No, we are here!’ and I don’t know. It feels a little inauthentic. Almost something they have to do.”

–Student #6

When asked about the responses they took part in, a number of students criticized the UCSB Campus-Wide Memorial, arguably the school’s most prominent recovery effort simply because of its 20,000 attendees. Three explicitly said that the event hadn’t been helpful to them, feeling that it was too “political” or side-stepped the underlying issues that caused the massacre.

“The memorial was so political, to say the least. Everyone had their agenda. It was just very—it didn’t feel genuine. All the speakers got up there and it felt like they were kind of reciting the things you would say at any sort of tribute or ceremony or funeral or whatever. That really threw me off. ... But you got to do it. The college has to respond somehow.”

–Student #11
“I did go to the big memorial. I didn’t find it to be helpful, no. … No one took the opportunity to say something meaningful.”
–Student #10

“It just seemed like UCSB … they did promote an atmosphere of healing in the community, I definitely think they did that, but I don’t think they were outspoken enough about how deeply psychotic this person was. They didn’t really take a strong stance against that.”
–Student #1

Despite these negative perceptions, there is a clear benefit that arose from the fact that the school either had to or chose to limit its recovery efforts: it gave students the opportunity to fill the gaps they perceived in the aftermath of the crisis themselves. Informal responses were not only a powerful way to heal for those who create them, but were also generally perceived as especially meaningful. As one student who created a video that he sent in solidarity to another university recently affected by a school shooting explained:

“I think it’s interesting to see how far the school gets involved. ... The things the students can do are so different. That was a point that [my advisor] made too, was that if it was coming from me or the community, it wasn’t for anything. If you’re doing it from the school people might think they told me to do it or it was an assignment, but if you’re doing it yourself or you’re doing it for free, it means a lot more.”
–Student #5

In this way, students are able to do what the school can’t, filling yet another possible gap that might have otherwise hindered the community’s recovery. For example, when asked what (if anything) might have been done differently by either the students or the school in the period following the massacre, five students cited the overwhelming media presence in Isla Vista as TV crews tried to capture crime scenes, victim sites and the heartbroken community. Comments about the media presence include “it’s not what we needed” and frustration that it “diverted attention away from the actual loss.” A recent graduate living in Isla Vista who was actively involved in protests against the media explained what motivated him:

“I had just kind of accepted, like, ‘This is what the news is supposed to do’, but then I was like, ‘No, this isn’t HOW they’re supposed to do it.’”
–Student #13

He continued, discussing the question of whether the university had the power to push back against the media alongside the sixty students involved in the protests. The quotes below, by him and another student, show how this particular recovery effort was again a way for students to do what the school couldn’t (or wouldn’t):

“I think that the greater administration … they might have been able to do a lot more to help us, but we just made up our own way to deal with them.”
–Student #13
“The media was an issue. I wish the campus had jumped in on that. What jurisdiction do they have in Isla Vista though? Students reacted to that instead though, definitely, and that was good.”
–Student #14

While students and others may have perceived either entire recovery efforts or pieces within them to be politically motivated, without concern for students or otherwise “symbolic,” what I found in speaking with individual administrators and UCSB employees was that extremely high levels of emotion and care had been put into the formal response channel. When recovery measures can be easily lumped into a single channel emanating from an institution, they become much easier to criticize as politically motivated. One interview subject, a UC employee who acted as a first responder the night of the tragedy, shared with me a sentiment that not only will I never forget, but also one that all administrators likely shared that night. With tears silently running down his face as he recounted for me his genuine feelings of heartbreak, he said:

“It was just such an emotional and difficult night for us. I was just thinking about my son at home, and couldn’t get the parents of the victims out of my head. People sometimes don’t realize how hard it was; we felt like we watched our own children die. We’re here to protect the students, the kids, the community, and to have a death... it was just so shattering.”
–Administrator #6

Had students been able to see reactions like this one, it is likely they would have felt more compassion emanating from the institution in its response efforts. One implication my findings have about organizational context is that institutions can resolve some of the “disconnect” that might be perceived by increasing transparency about the school’s response process. For example, three of the students complained that the university “didn’t do anything” to combat the disturbing media presence in the days following the violence. However, in speaking with one administrator, I was told that part of her role in all of the events that came about in those initial days after the tragedy was to intercept TV crews who might be harassing students—they just didn’t know it. Administrator #8 also discussed this problem:

“There were administrators working really, really hard behind the scenes, all in their own nighttime and weekends and free time, trying to respond and do amazing work around the tragedy, but it was kind of invisible to all the undergraduate students, because we’re supposed to keep a strong face and carry on and let the students feel like a source of normalcy is returning.” –Administrator #8

Similarly to social context, organizational context influences perceptions of recovery effort effectiveness in the wake of a crisis. I conclude that UCSB could have been more transparent about the care, concern and tireless effort that its employees put into the administrative response process, striking a better balance between “keeping a strong face” and exposing the emotional and practical realities of coping with a crisis. Nevertheless, the university’s decision to leave room for student-driven activity in the aftermath of the tragedy was ultimately positive, resulting in a vast number of recovery
efforts that wouldn’t have been possible as officially endorsed measures and were incredibly powerful and appreciated by those who needed them.

The accumulation of crises

The final piece of my findings focuses on temporal context at the macro level: how does the accumulation of crises within a community over time affect perceptions of recovery effort effectiveness? Like my other threads, this sub-question arose inductively, as I found that none of my interview subjects were able to talk about Isla Vista after the May 23 massacre without citing one or more of the other three major crises that preceded it during the 2013-2014 school year. The first crisis at UCSB was a meningitis outbreak in late fall that landed a small number of students either in the hospital or under quarantine. A few months later, a series of brutally violent sexual assaults were committed in Isla Vista, leaving students on edge and causing an increase in surveillance around the community. Shortly after the attacks, the third crisis hit: UCSB’s annual spring break-style day party called “Deltopia” concluded with a full-fledged riot that resulted in a vast amount of property damage, a record-breaking number of citations, and serious injuries sustained by police officers and students alike. Following the Deltopia unrest, tensions between students, police, the administration, and the media were at an all-time high for the year. Though one might assume that the continued occurrence of crises like these would break community solidarity as they accumulate over time, I found that the three crises which struck the UCSB community before the May 23 tragedy ultimately strengthened the community’s capacity for resilience and ability to respond in a swift, effective, and positively perceived manner. This section focuses on how individuals and organizations used the knowledge and experience of previous crises to reflect on, make sense of, or inform their response to the May 23 massacre.

As crisis after crisis forced Isla Vista into the harsh light of the public eye, UCSB faced increasing scrutiny for its party-school reputation. Instead of resulting in a backlash, negative perceptions of the community from outsiders inspired students to outwardly display shows of love and pride for their school and the town they call home. In response to a question about how the four crises as a whole affected the community, students discussed how they strengthened feelings of community solidarity and broke down previously existing barriers between individuals.

“Last year in general was chaos, the whole school was reeling, and it was all a learning experience that we need to unite and be one not only as UCSB Students but also as Isla Vistans.” –Student #14

“By the end of the year, I remember I would sit down at lunch and someone would see me and come up to me and say ‘Hey how are you doing?’ The most genuine thing in the world. The support... everyone knew you were going through something in life. Because everyone was going through the same thing.”

–Student #10

The series of crises was also beneficial in strengthening community resilience on a formal level, as the university’s response efforts to differing crises were perceived as having improved over time. Administrators explained responding to the first crisis, meningitis, as “exhausting,” activating an emergency response protocol that hadn’t been
used in years. One student I interviewed was directly affected by the meningitis outbreak, having to be temporarily quarantined after being in close physical contact with the first infected individual, a close friend of hers. The two quotes below juxtapose the university’s perception of the response to meningitis with a socially close individual’s perception of it, respectively.

“I think we did a good job of making [meningitis] fun and lighthearted because we didn’t want students to freak out. The biggest response we saw was people saying, ‘Oh I don’t want to get it because it hurts, it’s a painful vaccine.’ There was definitely people who were impacted, their circle was more impacted, but since it was a small group of students, it didn’t affect the whole community. I think that one was pretty contained.”
–Administrator #4

“I think they should have taken [meningitis] more seriously. They did have kids get vaccines, but everyone thought it was a joke. … I just wish they treated it differently. If you look at it now, no one talks about it. Everyone’s just moved on. I don’t know how they could change individuals to take it more seriously but that’s what needed to happen. … The shooting was this huge response. The school went into recovery mode, but that didn’t happen for us. Meningitis was this small casual thing. I wish somehow the school had found out that people were suffering and reached out. I would have wanted to talk to someone during that. Getting calls from national news and being quarantined, I didn’t know how to cope with that. But nobody asked me. The shooting though, people were being reached out to left and right.”
–Student #8

These differing perceptions of the institutional response to the first crisis shed light on how the school was only just beginning to learn to cope with an emergency when the meningitis outbreak occurred. They also show how perceptions of the school’s response to the first crisis differed strongly from those of the response to the final crisis (the May 23 tragedy). When asked about whether there was a relationship between responses to the four crises that occurred during the 2013-2014 school year, multiple administrators commented on how what they learned from earlier crises informed their response to the next.

“The meningitis clinic, having to set up that entire thing and having to educate our students and deal with the panic and parents and all that, we actually activated our emergency operation team … and we worked really closely with colleagues in Administrative Services to make that clinic happen. … So we came right off of that and right into the sexual assaults, and then Deltopia which was a really difficult thing for the campus, and then we moved right into the May tragedy, but I think part of our ability to do what we did in May on such a short time frame and in such tragic circumstances really was because we had been very successful in a longer period of time building trust among these administrative colleagues … we developed this level of trust that we didn’t not have before, but we hadn’t worked that closely before. … I think our response in May was more successful because of the way that we worked together in really, from November through April. … I tie them together in a positive way; I
think we were in some ways fortunate that we had had these things happen that brought us all together. It served us really well.”
—Administrator #5

Though each of the four crises that occurred at UCSB during the 2013-2014 school year were individually devastating events, they offered the university the valuable opportunity to become familiar with, improve, and perfect their ability to respond to emergencies so that when the final and most traumatic crisis occurred, the school was as best prepared as it had been all year to respond quickly and effectively. However, some problems did arise as a result of the administration’s tendency to group the events together as somehow being caused by the “party-happy” climate in Isla Vista. Though students and individual administrators alike expressed recognition that such crises, especially the May 23 tragedy, could have occurred anywhere, there were a number of communications between the administration and the students that seemed to imply otherwise. In response to a question about what either the school or the students could have done differently in the aftermath of the massacre, a student and a graduate student instructor both commented on this phenomenon.

“Other higher up people... I wish in their letters it wasn’t so much blaming IV but understanding. I think a lot of their speeches and letters were like, ‘After last year, you guys need to make the change.’ And it was like, ‘You can make an effort to fix this relationship too. Not just blame it on the community.’”
—Student #14

“Some of the higher level administrators felt really concerned about the whole perception nationally that UCSB and Isla Vista were getting, and there was a lot of pressure to kind of control this unruly area of Isla Vista. ... There were some correspondences between administration that were sent out to all students, undergrad and grad students that really suggested the students were at fault. ... Some [students] purposefully invited friends and planned bigger parties and intended to be incredibly unruly as kind of a ‘F*** you, we’re going to show you we can do whatever we want.’ There were those large towers put up with cameras videotaping people in the wake of the sexual assaults, and people felt like the campus was just using the sexual assaults as a way to kind of do this ‘big brother is watching you’ thing to videotape everyone for Deltopia, but pretending it was because of this other thing.”
—Administrator #8

As more crises arose, so did pressure for the university to increase the formal response efforts to quell public relations concerns, as well as those for the safety of students and Isla Vista residents. Consequently, the administration began to tie together crises that weren’t technically related, using reprimanding tones and seemingly punishment-oriented practices and ultimately offending students who felt unjustly blamed. In this way, despite its overall beneficial effect, the accumulation of crises did provide an opportunity for tension between students and the school that may have hindered the community’s ability to recover from the tumultuous year.

Again, though most stated their understanding of the May 23 tragedy as a random act of violence that in no way was related to or caused by Isla Vista’s culture, it was still looked at by students and administrators alike as a much-needed turning point.
for the community. Interview subjects explained a number of both tangible and intangible changes that were spurred in the wake of the tragedy, citing both general changes in attitude as well as concrete actions and projects that aimed to produce positive change. Below, a student and an administrator comment on this in response to a question about how the crises affected the community:

“It’s good that people finally had the wake up call that something needs to change. On different levels. Behaviorally and structurally and government-wise, on all the different facets people finally are understanding that we can’t continue going the way we’re going. It really got people united to fix it. It’s sustained now. Obviously it’s falling apart a little bit. Every week a couple people peel off, but it’s still going.”
–Student #2

“It has renewed or invigorated the attention of the Chancellor and the trustees of the campus and the faculty of the campus to tend to life in Isla Vista and student life in Isla Vista in a way that, with a tenacity that hadn’t necessarily been there as broadly. There’s a lot more attention focused on Isla Vista, which almost is a little counter-intuitive because this tragedy didn’t arise, Isla Vista didn’t create the tragedy. But people became acutely aware of the concentration of students in Isla Vista and the potential of our community and the quality of our community and why to a) protect students as much as we can and b) strive toward that really positive level of community without tragedy. There’s a lot of ongoing work from virtually all constituents.”
–Administrator #1

As these individuals note, much has changed in Isla Vista since the tragedy (and the three preceding crises) struck. First, a number of interview subjects commented on how things simply felt different in the aftermath of the difficult year, discussing how “conversations that were difficult to have are easier to have now,” “the community has really pulled together, really connected,” “people look out for one another now,” and “people perceive Isla Vista and UCSB as friendlier places.” However, the changes that came about in response to these crises went farther than just improving the kindness and care in daily interactions. One such example is the Isla Vista Self Governance Initiative. The project began when a number of students active in the community decided to advocate for Isla Vista to have its own self-governance and self-determination. One student involved in the creation of the campaign discussed how it arose in response to the crises the community faced in the 2013-2013 school year:

“It was the riot a little bit, the riot had created some need. But the shooting is really what solidified it. A lot of people really care more now about improving IV, and the partying image is in question a lot, and people are looking at things differently. They’re not sticking to the ingrained things they like about IV; they want to actually move forward and start adjusting it to be better in the future. I had never seen people actually caring about IV ... but after the shooting, everybody cared about how everybody else was doing and how the whole town was thriving, so that was the biggest change after the shooting which was that it got people to care a lot. Which sucks, that it took the shooting to happen, but people really started to have a strong opinion about what was going on in IV and wanted to be directly involved in fixing it.
So many people are so interested in moving IV forward so that we don’t have another shooting and we don’t have another riot and it’s a safe place to live and we don’t have to worry about getting shot.”
–Student #2

Another of the most significant recovery efforts that came about in response to the crises was the school’s decision to expand policing measures. As one UCSB employee explained, because of the crises (the riots in particular), the UC recognized a need to increase police presence in Isla Vista from having an average of two officers out in the field on a weekend night to an average of about fifteen to twenty. He noted that there has been a significant decrease in crime, citations, and arrests since the change. A number of students responded to a question about how the massacre changed Isla Vista by discussing the increase in policing.

“I actually enjoy it. It makes me feel more safe having more cops around. … They started putting up surveillance cameras and stuff. I have no problem with that, because it makes me feel more safe. But at the same time I don’t want to feel like I’m in a police state on lockdown. There’s a happy medium there. … Police presence is more accepted now than it was previously, but … they’re trying to crack down on the party scene here, but it wasn’t necessarily the partying that caused it.”
–Student #4

“On the weekends it’s usually a big party environment, so policing has been more strict. But not negatively, not like the Deltopia riots backlash, more just for safety reasons.”
–Student #9

As reflected here, students maintain some serious concerns about safety. Four students commented on the university’s increased use of its emergency electronic communications system, which sends students texts about possibly dangerous situations either in Isla Vista or on campus. An administrator confirmed that the service had been used much more since the crisis in May in an effort to open the lines of communication between the school, the police, and the students. However, this increased transparency may have a negative effect: now that students are more aware of potential threats (even though crime is actually lower), they are more concerned for their safety.

“A lot of people are afraid now. I talked to a person who got shot too, and she doesn’t want to go out anymore. People are really scared, people are… girls especially don’t walk home alone, so it definitely shocked everybody and made everybody… things are different. There is a higher regard for caution, safety. That’s embedded in their brains now. You can’t unlive this.”
–Student #7

“I’ll be honest though, I don’t feel as safe anymore. I get really freaked out sometimes. I walk past the crime scenes and it’s like, ‘Am I going to get attacked?’ A car passes by and I freak out. I guess that’ll go away with time.”
–Student #8
Because all fourteen students that I spoke with commented in some way about how the events negatively affected their perceptions of their personal safety in Isla Vista, I find safety to be the factor which has the most potential to weaken a community’s ability to recover from violent crime. A normative implication of this finding is that communities who face such crimes should channel more effort into addressing these specific concerns. Overall, I argue that communities facing crises are best able to combat their negative effects if they rely on practices and lessons learned from past incidents they may have faced.

_Weaving the three threads together: social, organizational, and temporal context_

Together, my findings about social distance, the interplay between formal and informal responses, and the accumulation of crises implicate the importance of context in understanding perceptions of recovery effort effectiveness in the wake of college crises. While they are important to understand individually, social, organizational, and temporal context also relate to one another in important ways. The best example of a recovery effort in which these three threads intertwine to affect perceptions of its effectiveness is the UCSB Come Together Concert, which featured a free performance by UCSB Alumni-turned musician Jack Johnson in the fall of 2014. The event tried to meet the needs of both the socially close and the socially distant, bridge the gap between formal and informal, and address all four crises at once. Though well-intentioned, the result was ultimately a confusion in tone that rendered the event generally unsuccessful in promoting collective recovery.

When one recovery process tries to meet the needs of both the socially close and the socially distant, it can send mixed messages that renders it ineffective for one or both groups. The Come Together concert was supposed to kick off the new year on a positive note, while also acclimating new students to the idea of continued memorialization of those Gauchos lost the previous spring. For the socially distant, and for students new to UCSB in particular, the concert was received positively, praised as a fun, light-hearted, feel-good introduction to the school. But as some students and administrators explained, the concert was borderline offensive for the socially close due to its uneven balance between memorialization, moving forward, and celebrating the new year.

The concert was also an attempt to bridge the formal and informal channels of response. The event was organized mainly by students within ASB, but had input from many of the institutional actors involved in previous recovery efforts that had taken place the previous spring. While it was technically student-run, administrators had a strong place in the program, with a speech delivered by the Vice Chancellor of Student Affairs as the introduction to the evening. The speech had an institutional tone, discussing the larger reputation of UCSB and Isla Vista in the public eye, which many took to be distastefully politically motivated. In this way, the attempt to include administrative involvement in an otherwise informal event brought in the problems associated with the formal response channel, including room for speculation of ulterior motives.

Finally, the concert tried to include previous crises in the event’s purpose, declaring it an opportunity to “come together” after an especially difficult year. While the other events were important in creating community solidarity, the way in which they were addressed at the concert implied that they were important because they had been
preventable, not because they had supported the community’s ability to come together. Again, the speech was the most problematic factor. A graduate student who is conducting research about how the community responded in the aftermath of the May tragedy and who has spoken with a number of undergraduates about their perceptions of the recovery efforts explains why the event was, overall, not successful in promoting recovery for all sectors of the affected population:

“I was offended that at this event, it’s called ‘Come Together’ and they had just read the names of the six victims and were supposedly memorializing and paying a tribute to them and their lives ... a lot of people felt like it was just this weird mixture of memorializing those who were killed and injured, and then the Vice Chancellor giving this speech that’s kind of reprimanding, and then suddenly the concert with Jack Johnson that’s super celebratory, and... I’m not trying to criticize ASB in doing this, I’m just trying to say that perhaps so many people had different ideas about what they’d like to see that the compromise became cut into three pieces and do them all at once. A lot of people who were close to the victims didn’t feel like it was really well thought out or really a proper memorialization type of event. ... The Tri Delta sorority where they’re really close to the victims—two of their own were killed and [another] was injured and survived— they really want it to be about their sisters and have it be a much more somber memorial type of event. But other people who were coming in as freshmen and weren’t even there in May or didn’t really have that much of a connection and hadn’t been around, they’re like, ‘Cool! Free concert with Jack Johnson! Let’s celebrate how much we like Isla Vista!’ That automatically is going to create a tension between how much is it on memorialization and how much is it on celebrating the whole community coming together. And that’s a thread throughout all of the different memorial events that have occurred actually.”
–Administrator #8

This recovery effort serves as an example of how social, organizational, and temporal context all need to be taken carefully into account when organizing a response that aims to address the needs of all individuals and groups as they try to cope with a crisis. Together, these three threads highlight the importance of attention being paid to the specific circumstances and needs of individual communities as they attempt to maintain resilience in the face of adversity.

Conclusion

In short, there is no “one size fits all” solution for responding to communal crises. Instead, recovery efforts must be narrowly tailored to fit the specific needs of individuals and groups according to social, organizational, and temporal context. When communities face a crisis, they must be aware of social distance, try to bridge the gap between formal and informal response channels, and use knowledge from past crises to build, not break, community solidarity. Recovery efforts that effectively account for these important factors meet the needs that arise within various affected populations as they attempt to bounce back from the trauma, ultimately promoting collective healing.

This paper aims to fill a gap in literature in the field of research school shootings and also the larger topic of disaster studies to explain how perceptions are strongly influenced by context. It shows what communities facing trauma might expect to arise in their aftermath, as well as what works and what doesn’t in terms of recovery efforts.
The Isla Vista massacre, though a unique case, could relate to other theories of collective healing in explaining the importance of looking at multiple levels (micro, meso, and macro) in order to understand the meanings and perceptions that people attach to different responses. However, this study had its limitations, and could still be built upon to further understand perceptions in the aftermath of crises. For example, future research might look into the question of the role of law in the wake of trauma. Though a civil lawsuit against the Sheriff’s department was recently filed by the families of some of the victims killed or injured in the Isla Vista massacre, it was not within the scope of this project’s parameters to be able to investigate such a legally sensitive subject. Nevertheless, the legal route of response is an important one, and research should aim to understand how it works with (or against) the social processes that this paper seeks to understand.

Additionally, it is my hope that the findings of this project might inform future policy regarding crisis response, both in schools and other communities facing disasters. Again, recovery efforts put forth by both formal and informal channels must be aware of the context in which they are taking place if they are to effectively meet the needs of the affected community; monolithic responses risk being perceived negatively and possibly creating resistance among those who experience them. One administrator that I spoke with made a comment that aptly summarizes the purpose of projects like my own, saying, “We realize we can’t prevent random acts of violence, but we know that they’re occurring, so we can and should have meaningful conversations about similar patterns of response that are necessary in the wake of these tragedies.” Finally, a number of other interview subjects mentioned more specific measures that, in retrospect, might have been taken to better promote collective healing in Isla Vista. These included more transparency about and better communication from the formal channel of response, as well as the creation of a specific department within the administration that deals exclusively with matters related to crisis response.

It is my hope that this paper has effectively shed light on one of the darkest subjects that society is currently being forced to grapple with. In the unfortunate reality that another community must someday cope with a situation like that which was presented in Isla Vista last spring, may this study serve as a roadmap towards understanding how it might cope, recover, and heal.

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Appendix A: Recovery Effort Inventory

**Events**
- Memorial Paddle Out
- UCSB Memorial Service
- Candlelight Vigil
- Greek-Only Memorial Service
- Dog Therapy Days
- Open Forum at Anisq’oyo Park
- UCSB Come Together Concert
- Not One More Rally
- GauchoStrong Pride Day
- Community Potluck
- Open Public Safety Meeting
- Community Healing Gathering
- 1000 Cranes of Love for IV Deli
- Quiet Evening Out for First Responders
- Santa Barbara Gun Buyback
- Alumni Events
- Other UC Campus Memorials
- Event in Solidarity with Seattle Pacific
- Goleta Community Dialogue and Reflection in Response

**Projects**
- IVStrong Anthology
- Boys and Guns
- IV Love Fundraiser
- Victims of Isla Vista Fund
- IV MAD (Moms and Dads)
- Isla Vista Self Governance

**Memorial Sites**
- Victim Sites
- Arbor Message Board
- Pardall Message Boards

**CAPS**
- Grief Counseling

**Administrative**
- Increased policing and surveillance
- Financial Aid Advising
- Academic Advising
- Academic Adjustments
- I <3 UCSB Pledge
- I <3 UCSB Campaign
- Love Letter to Students
- “Cheat Sheets” for staff in contact with public
- Graduation Adjustments
  - Remembrance focus (Joe Biden Video)
  - Increased safety precautions
  - Blue and gold ribbons
  - Moment of silence
  - Memorial scholarships
  - Posthumous degrees

**Social Media**
- #NotOneMore
- #IVStrong
- #GauchoStrong
- #YesAllWomen
- UCSB Confession Posts
- Personal Statuses
- Profile Photo Changes
- Humans of UCSB
- Isla Vista: A Week of Solidarity and Healing

**Media Submissions**
- “Still Working on That”
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“In the time of universal deceit – telling the truth is a revolutionary act.”
-George Orwell

In the last few years, the criminal justice system in the United States, or as some would say the criminal (in)justice system, has come under immense scrutiny. The United States has one of the highest prison populations in the entire world. According to the International Center for Prison Studies, prison population in the country at 2,217,000, clocks in over one million more incarcerated individuals than China (International Centre for Prison Studies, 2015). Prison population nationwide has also grown substantially over the past 50 years. In Florida, for instance, the incarcerated population increased from 21,243 in 1978, to 63,866 in 1995 and to 103,028 in 2013 (Mitchell, 2014). This surge in prison population is worrisome; research by think tanks, scholars and media attribute the escalation to mass incarceration and recidivism, further compounded by the War on Drugs and privatization of prisons.

The prison population is not the only problem. Research shows that the War on Drugs and the privatization of prisons resulted in increased incarceration rate, high recidivism and unfairly targeted lower income and African American communities (Bureau of Justice Statistics, 2015; Vera Institute of Justice Report, 2015). The War on Drugs policy, enacted by President Nixon in 1971 and implemented during the Reagan era, spiked up arrests. Data provided by PPI shows an estimated fifty percent of the federal prison population and seventeen percent of the state prison population included arrests for drug related offenses (Wagner and Sakala, 2014). The Bureau of Justice Statistics 2015 reports, as per a study in thirty states, three in four former prisoners are arrested within five years of their initial release from prison. Additionally, 67.8-percent of the former inmates tracked by Bureau of Justice were arrested for a new crime within three years, and 76.6-percent were arrested within five years (Bureau of Justice Statistics, 2015). New York Times reporter Timothy Williams claims that “jails across the country have become vast warehouses made up primarily of people too poor to post bail or too ill with mental health or drug problems to adequately care for themselves” (Williams, 2015). Additionally, the system is heavily focused on punishment and more prison time than rehabilitation. For instance, punishment for post-release drug related offenders, in states that require parole and probation, is more prison time even for minor parole violations (Wagner and Sakala, 2014). Consequently, the disadvantaged end up imprisoned instead of

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receiving the resources they need to overcome poverty, mental illness, or addiction.

Second, according to Michelle Alexander the enforcement of War on Drugs has resulted in systemic control of African American and Latino communities, similar to slavery and Jim Crow era, to maintain a capitalist driven system of power structure with whites at the top of the hierarchy (Alexander, 2011). In 2015, the Vera Institute of Justice, a nonprofit center for social justice policy and research, issued a report on incarceration that states that African Americans are incarcerated at four times the rate of white Americans and mental illness affects the prison population four to six times more than the general population (Vera Institute for Justice, 2015). Although ethnic minorities make up approximately 30-percent of the general population, they constitute 60-percent of the 2.4 million incarcerated individuals in the United States (The Sentencing Project, 2014). According to a 2003 Bureau of Justice Statistics study entitled “Prevalence of Imprisonment in the US Population, 1974-2001,” one in three black men are in prison at any given time compared to one in seventeen white men and one in six Latino men. One in eighteen black women are in prison compared to one in forty-five Latina women and one in one hundred and eleven white women.

Third, concurrent with the War on Drugs policy, a renewed effort to privatize prisons, initiated in the 1980’s, contributed to high recidivism rates (Pelaez, 2014). Private prison agencies made contracts with government agencies to take over entire prisons to expand and profit from mass incarceration (Gottschalk, 2014; Whitlock, 2014; Issacs, 2014). This process focused on making a profit from prisons through a third party hired by a government organization (Palaez, 2014; Gottchak, 2014). Rules such as mandatory minimum laws, which contractually required ninety percent of beds filled in the private prisons, resulted in a profit oriented punishment system rather than rehabilitation. Since the first contract the government made with Corrections Corporations of America (CCA) in 1984, recidivism and mass incarceration have risen by more than five hundred percent (Issacs, 2014). A 2010 ACLU study noted the two largest prison corporations in the country- Corrections Corporations of America (CCA) and GEO group Inc. received nearly three billion years in revenue, and their top executives received annual compensation packages worth over three million dollars (ACLU, 2010).

Fourth, as prison populations grow per state, so does state spending on incarceration, which in turn reduces spending on other areas, including education and healthcare (Mitchell, 2014). Increased spending on prisons continues to be a burden to taxpayers and communities across states. The transfer of funds out of education and healthcare, the system intended to empower and heal us, and into incarceration is counterproductive to the cultivation of a healthy, high functioning society (Williams, 2015). This
reallocation of funds from education and healthcare into incarceration is a clear sign that something is amiss within our nation’s justice system. It is an indication that our states are more interested in policing us than educating us and caring for our wellbeing.

The rise in incarceration and recidivism, fueled by the War on Drugs policy and privatization of prisons suggests what Johan Galtung defines as structural violence perpetrated by the state. Structural violence, unlike direct, physical violence, is the denial of opportunities and freedom through unequal power structures. Violence in this context is indirect and perpetrated through repression and denial of access to basic securities of life. Galtung claims “unequal life chances are the result of violence that is built into the structure and shows up as unequal distribution of power and unequal distribution of resources” (Galtung, 1969, p.171). Structural violence, like physical violence, hurts individuals physically, psychologically, and emotionally, and denies them the tools or capability to enjoy basic freedoms (Sen, 1993; Also, Robyns, 2005). Theories of structural violence and capability approach apply well to the War on Drugs and the privatization of the prison system, as these policies have resulted in mass incarceration of poor communities and high recidivism. They augmented a process of systematic victimization of disadvantaged individuals- deprived them of basic human rights, and then, punished and imprisoned them for failing where they were strategically driven to fail.

Following John Galtung’s work, my paper argues that recidivism and mass incarceration are symptomatic of the United States being a carceral state. The state, instead of caring for its population, has become the perpetrator of violence against the working class, people of color and those that are drug addicted and mentally ill. This is a form of structural violence against the poor, especially minorities. Race is a function of class and as Wilson claims “racial conflict in the United States is masked class conflict” (Wilson, 2012). Slavery, for instance, was primarily an economic institution whose main goal was to garner wealth for those controlling the institution. Segregation by skin color was a convenient way to distinguish workers from the masters, and black slaves were bought and sold as units of economy as opposed to human beings. W.E.B. DuBois, one of the most preeminent African-American scholars on slavery, race, and class, argued that poor whites developed segregation due to their fear of competition from blacks. Poor whites gained social status by actively restraining blacks and aligning themselves with white slave-owners (Wilson, 2012). It was these poor whites who ultimately pushed for the passage of Jim Crow Laws and solidified stratification of class by race. A poor white person, therefore, has a higher-class status than a poor black person, due to the color of their skin (Peggy McIntosh, 1997).

Moreover, in contemporary culture, working class is synonymous with the ethnic minority; the image of the poor black has become a ubiquitous cultural
institution in and of itself. Though the image of the mammy and the cotton picker may have changed to that of the thug and the welfare queen, the underlying value of these cultural symbols, and that of working class and color individuals, remains the same. Borrowing from Kimberley Crenshaw’s work on intersectionality, it can be argued that the intersection of race and class-based systems of oppression places individuals of color in a disenfranchised position (Crenshaw, 1989). The persistence of these cultural values and symbols and the persistence of race as a function of class are mechanisms of structural violence through which poor, brown and black bodies are policed and made victims of modern day enslavement within the prison system. It is a crime just to be poor and to be of color in the United States. In this context, my paper seeks to examine the nature of high recidivism in the United States, and its implications for working class, racial and ethnic minority individuals who are incarcerated. It argues for a shift from a culture of punishment to a criminal justice system focused on rehabilitation and building capabilities.

Theoretical framework: structural violence and capability approach

"It is better to be violent, if there is violence in our hearts, than to put on the cloak of non-violence to cover impotence."

-Mohandas K. Gandhi

Structural violence theory has evolved out of Marxian and Weberian views on inequality and social stratification as sources of conflict in society (Turner, 2001). An important element in Galtung’s theory is that restraint on human potential resulting from economic and political structures constitutes structural violence. Taking a macro-perspective, Galtung argues that structural inequalities in society and failure to remedy result in systemic violence against the disadvantaged. Galtung (1969) explains that resources are unfairly distributed but “above all the power to decide over the distribution of resources is unevenly distributed” (p. 171). White, upper-class persons, or how Marx would put it, “the owners of the means of production”, usually decide who gets what in a capitalist society (Galtung, 1969, pp. 171). If an individual is poor and/or of color, chances are that this person won’t have access to basic necessities such as medical services and education, which in turn makes them powerless. Inequality in resource distribution disproportionately impacts people of color due to historical disadvantages, which is essential in understanding why so many underprivileged people end up in prison and get stuck in the cycle of recidivism. The underpinning of structural violence is that structured inequalities produce suffering as much as direct violence does.

Galtung (1969) states that understanding the potential, the actual and the difference between the actual and potential is important to addressing structural violence (p.168). In applying this concept to the incidence of recidivism rates, one
could argue that the ‘actual’ is ex-offenders recidivating, the ‘potential’ is ex-offenders not returning to prison post-release, and the ‘difference’ is providing access to resources in prison and post-release to enable rehabilitation and decrease chances of recidivism. An important element of structural violence theory is that of “potential realizations.” By this, Galtung means individuals have a potential that can either be truncated or enhanced when the distance from the “actual” to the “potential” is increased as a result of avoidable circumstances, such as when structural violence is present (Galtung, 1969). An example of this is an individual receiving inadequate rehabilitation services during their time served due to the privatization of prisons.

Structural violence is connected to race and socioeconomic status. There is extensive literature on the application of structural violence theory and its connection to race and unequal access to resources in the area of health care (Burtle, 2013). For example, compared to European American women, African American women are twice as likely to die from breast cancer due to low-grade medical services (Dorworth, 2001). Limited access to affordable preventive health care leads to less diagnosis among African American women, making them susceptible to higher cancer rates. Further, Paul Kivel provides several examples to demonstrate how racism operates in the health care system (Kivel, 2002). Kivel states that “over 20 years’ worth of studies show that people of color who arrive at a hospital while having a heart attack are significantly less likely to receive aspirin, beta-blocking drugs, clot-dissolving drugs, acute cardiac catheterization, angioplasty, or bypass surgery. Race, class, and gender clearly make a difference in how patients are diagnosed and treated” (Kivel, 2002, p. 207). As illustrated by these examples, access to health care is impinged by considerations of race, class and gender, which by Galtung’s definition could be seen as a form of structural violence.

Another example is the existence of structural violence in the education system in the U.S., specifically the school to prison pipeline which “predominantly affects the Latino and black communities, who are both victims of poverty and other signs of structural and cultural violence” (Carter, 2014). The lack of resources and adequate staff in inner city schools, as well as the zero-tolerance policies that result in kicking out black and Latino students from school for petty reasons, are some ways structural violence manifests itself in early education. Consequently, juveniles, instead of finishing school, are embracing a “street life” and ending up in prison.

Prison systems reflect a similar dynamic. For instance, in 2011, thirty-eight percent of people in state or federal prison were black, thirty-five percent were white and twenty-one percent were Hispanic. Depending on the offense, life after prison time for ex-offenders doesn’t usually change for the better. These individuals return to a life of poverty, this time with a criminal record that
prevents them from getting hired in most places, which eventually causes them to return to a life of crime and recidivate.

By using a capability approach as a lens, we can also evaluate and uncover the structural violence that exists in different policies for communities of color (Sen, 1993; Robeyns, 2005). Similar to Galtung, Amartya Sen, the political philosopher behind the Capabilities Approach Theory, examines specific components that lead to unequal life chances and capability. Sen delineates what he terms functionings, which are the makings of a valuable life (Sen, 1993). In order to live well, and be who they want to be, people need access to functionings such as “working, resting, being literate, being healthy, being part of a community, being respected, and so forth” (Robeyns, pg. 95, 2005). The core argument is that individuals can have material, mental, and social well-being only if they are provided the capability to do so (Robeyns, 2005).

The capabilities approach enables us to examine policies and institutions to determine if people are able to access basic freedoms and opportunities that allow them to live and function adequately and according to their own standards. It exposes the structural violence that exists in communities of color. For instance, a comparison of the capabilities in communities of color compared to life opportunities awarded to white privileged communities demonstrates that access to basic functionings such as food, water, sanitation, education, community engagement, and social interactions, among others, is unequal. Due to structural violence, communities of color are denied basic functionings and resources are distributed unequally favoring the upper class, the able bodied, the white, the English speakers, the U.S. born. Working class communities of color often live in segregated neighborhoods, without access to nutritious and quality foods. Green grocers, or corporate organic grocers such as Whole Foods or Trader Joes, fail to make money in working class neighborhoods where they know the families make little money, and therefore never take root in these communities. Instead, corner bodegas filled with long lasting tinned or packaged foods take precedence and make the most business out of their lotto tickets and deli items. Food deserts is just one of the many ways in which structural violence limits the capabilities of communities of color to live a healthy, valuable and holistic life.

Structural violence and the capabilities approach demonstrate the failure of our state to take care of its populations, especially those vulnerable. In the absence of denial of the basic freedoms essential to a decent life, communities are pushed towards violence contributing to mass incarceration and recidivism.

**Mechanisms of structural violence: the criminalization of race and class**

Poor people, people of color – especially are much more likely to be found in prison than in institutions of higher education.
The criminalization of race and class in the United States is a major contributing factor to high recidivism rates and a primary mechanism of structural violence. Racism and the criminalization of poverty have historically formed the general fabric of our society today. According to Karl Marx, race and class are interconnected and do not function on their own (Bohmer, 1998). Marxist theory suggests that racism developed from the expansion of capitalism, which led to the slavery of millions of African people (Bohmer, 1998). Marx explains that African societies were easier to coerce into labor compared to other societies due to their lack of political and military power (Bohmer, 1998). The ideology of black inferiority stemmed from the “justification” of slavery (Bohmer, 1998). Here, Marx makes the distinction between black inferiority developing from slavery as opposed to being the cause of slavery and indicates that the enslavement of black people, and the negative value given to blackness, were functions of an economic system of power and control, first and foremost (Bohmer, 1998).

Malcolm X, in his 1964 speech proclaimed, “You can’t have capitalism without racism.” Both racism and capitalism, the system which maintains class stratifications in U.S. society, function from notions of that which is free and unfree, and that which is powerful and not powerful. Together, racism and capitalism aim to keep the same group of people in power: the rich and the white, where the rich are the white. Both racism and capitalism are systematically maintained and unconsciously dominate our global psyches. Their hallmark, and their evil, is how they oppress and dictate unknowingly in our imaginations. McIntosh says, “It seems to me that obliviousness about white advantage, like obliviousness about male advantage, is kept strongly inculturated in the United States so as to maintain the myth of meritocracy, the myth that democratic choice is equally available to all. Keeping most people unaware that freedom of confident action is there for just a small number of people props up those in power, and serves to keep power in the hands of the same groups that have most of it already” (McIntosh, 1997, p.299).

Those with class and race privilege fail to recognize the inequalities that exist within society because their privilege allows them to remain oblivious, but what they also fail to see is that their privilege, and their freedom, are contingent upon others being disadvantaged and unfree. Like race and class, one is a function of the other.

Racism and classism have grown exponentially as dominant oppressive forces since the groundwork of slavery when the United States was first formed. It is possible to trace the underlying patterns of these forces throughout various times, places, and phenomena. For example, historically, associations with black people were seen as criminal behavior. In the 1600’s if a white woman married a
black man she was whipped and put in jail (Rothenberg, 2013). Though the laws today aren’t explicitly as extreme, the general philosophy behind them pervades our modern day society. A white person can walk down an empty street with confidence and no fear of being stopped by police. While a white, upper-class male might view a policeman as a friend and helper, a working class black male generally views a policeman as his enemy, and he remains afraid. This is predominantly due to the fact that people of color are constantly singled out due to their race, and as a result often experience unnecessary questioning, harassment and abuse when confronted by police.

Recent examples of police brutality and abuse of power as seen in the cases of Michael Brown and Eric Garner further elucidate racism in law. Both cases involved unarmed black men who were suspected of committing crimes and, without due cause or evidence, were killed by white male police officers. (Capehart, 2014; Goodman and Baker, 2014). Both cases show use of extreme violence against unarmed black men and lack of accountability for the deaths as the officers were granted immunity. These are two examples, and are symptomatic of a larger trend of racism. Across the country black men are targeted as criminals simply for living their lives and going about their day, and white men are getting away with murder under the false pretense of defense and justice. Racism has served a three-pronged sword: it criminalized black men, planted this imagery in our collective subconscious, and skewed reality enough to justify cold-blooded murder. Tim Wise says, “As long as white Americans stereotype people of color as violent, they will be blind to the warnings signs of violence in their own communities” (Wise, 2001). In this statement, Tim Wise is alluding to the fact that police officers often inflict crime upon innocent individuals whom they see as violent simply due to the color of their skin. Moreover, as long as communities continue to justify this form of policing through their own subconscious biases they will fail to see the real violence and the real perpetrator: the police, and more broadly, the system which empowers the police and profits off the casualties of racism and classism.

It is this broader system of oppression that has evolved the image of the black person as the corrupt, deplorable felon in our collective imaginations. Blackness symbolizes fear, deviant behavior, and crime, and when crime is up in society, “all that matters is to get rid of it” (Healey and O’Brien, 2007). This mindset is a major contributing factor to the growing number of Blacks and Latinos in prison. The belief, which states that people of color commit most crimes, is not only systemic and intentional, but it also justifies targeting them due to their race and sending them to prison. The punishment industry is a powerful institution that gets away with its structural racism, which is masked by the “assumed criminality” of black individuals (Healey and O’Brien, 2007). If society focuses solely on black crime and assumes that people of color are the
only ones committing crimes, they turn a blind eye to the system’s hidden agenda, which is constantly designing new ways to punish not only people of color, but also people in poverty.

Classism serves as another systemic oppression, which justifies the large numbers of poor people who are sent to prison. There is a strong correlation between racism, poverty, mass incarceration and recidivism rates. People often hold the misconception that being poor means life must be easier and cheaper because of government assistance (Blow, 2015). The truth is that life is a constant struggle and extremely expensive for those who are economically disadvantaged both inside and outside of prison. There are families struggling to find jobs and those who are fortunate to have work available for them don’t make enough income to change their situations (Blow, 2015). If being poor wasn’t enough, America’s system allows the wealthiest one percent of individuals to pay the lowest taxes. These individuals pay only 5.4 percent of their income compared to America’s poorest, who have to pay 10.9 percent (Blow, 2015). Banking, for example, a seemingly mundane but common and taken for granted necessity of life, is in fact a privilege that is denied to low-income families and individuals (Blow, 2015). According to the National Community Reinvestment Coalition (2007) whose mission is to build capital in underprivileged neighborhoods, the number of banks located in working class neighborhoods is disproportionate to the number of banks available in wealthy neighborhoods (National Community Reinvestment Coalition, 2015, p. 3). Banks refuse opportunities for loans and savings accounts to individuals who don’t have enough income because they consider them to be “risky borrowers” (Blow, 2015). This leaves disadvantaged individuals with barely any choices to create investments and save their money. They have to cash their checks in places that charge expensive service fees, leaving them with even less income than they already started with.

These are only some of the many ways low-income individuals struggle to live adequate lives. In order to cope with living in severe poverty, individuals have to go to great lengths just to eat and feed their families, and as a result they often take dangerous risks, break the law and end up in prison. All this destructive behavior usually leads to doing time in prison and it doesn’t get any better in jail. Once these individuals become ex offenders, it becomes even more difficult to have a better life after they’re released. They come out of jail even poorer because of all the court fees they have to pay as a result of being arrested, and many of these people can’t afford the fees. If they fail to pay the court fines imposed by the legal system, they have to go back to prison. This is a major reason why recidivism rates are so high. In order to survive, a criminal lifestyle becomes the only way for many because the system is not designed for people of color or working class people to succeed. In fact, the system is designed so that working class people stay working class or eventually become incarcerated. In order to
cope with living in severe poverty, individuals have to go to great lengths just to eat and feed their families.

This destructive cycle usually starts at an early age. Solely living in low-income dangerous neighborhoods puts young people at risk of becoming violent and displaying aggressive behavior (Anderson, 1994). Some of the issues that arise have to do with the coexistence between the lives that these young people experience at home compared to the “street” life experienced in their neighborhoods (Anderson, 1994). Although there are many low-income individuals who get exposed to street culture from their inner city neighborhood, there are many young people whose lives are consumed by street culture. These young individuals grow up only knowing this type of lifestyle, which usually involves gangs, drugs and no respect for the police (Anderson, 1994). In “Code of the Streets”, Anderson explains that street life is really a way for people in inner cities to culturally adapt to a lack of trust in the criminal justice system (Anderson, 1994, p. 2). Communities living in low-income neighborhoods perceive the police as the enemy, catering to white privileged society and ignoring the lives of inner city citizens (Anderson, 1994). This mentality forces these individuals to feel like they have to take matters into their own hands and live by their own rules. Anderson explains that the minute police influence becomes non-existent and people feel like they have to protect their own safety, street culture emerges (Anderson, 1994, p.2). Guns and violence usually accompany street life as a result of street culture replacing police culture. Conveniently enough, this is when the police start to show up to make arrests. Clearly, this is a vicious cycle grown out of a community that feels disenfranchised and unprotected by the larger system.

The police aren’t the only ones punishing poor young people of color who learn and adopt violent street behavior in order to survive. The school to prison pipeline helps persecute young people of color by pushing them out of the school system and into the criminal justice system (Amurao, 2013). It is a system that is believed to systemically setback young students of color and push them into prison. According to “Suspension Stories”, the school to prison pipeline begins when school classrooms are overcrowded and when a school lacks resources and staff. This caused chaos and disorganization in the classroom and as a result these under-resourced schools adopt zero-tolerance polices which implement serious punishments irrespective of the situation (Tellington and Milinski, 2014). Many students who crave better learning environments where they could become successful feel helpless, and as a result give up on school entirely (Tellington and Milinski, 2014). Moreover, the schools that are equipped with adequate resources and staff often suspend and kick out young students of color for minor offenses instead of providing them with the counseling and social services they obviously need (Amurao, 2013). This leaves the students bitter and confused (Amurao,
Many students in these positions eventually decide to drop out and fall into serious criminal behavior.

The inclination to violence springs from the circumstances of life among the ghetto poor—the lack of jobs that pay a living wage, the stigma of race, the fallout from rampant drug use and drug trafficking, and the resulting alienation and lack of hope for the future. While slavery may have been an overt form of oppression, the systematic segregation of poor people of color into these disenfranchised, violent, and unfairly policed communities is a covert form of oppression—it is structural violence. Angela Davis says, “Although government, corporations, and the dominant media try to represent racism as an unfortunate aberration of the past that has been relegated to the graveyard of U.S history, it continues to profoundly influence contemporary structures, attitudes, and behaviors” (Davis, 2003). Here, Angela Davis reveals that the forces inflicting structural violence upon poor communities of color through disenfranchisement and criminalization are societal institutions like the government, corporations, and media. These institutions run the society we live in today and continue to spread racist and classist messages and practices in such manipulative and sneaky ways that the general public often is unaware and those who are privileged by this system proclaim that racism and classism are things of the past. Understanding this truth can help expose how the prison system, a major societal institution that works hand in hand with the government, corporations, and the media, is interconnected with racism and classism and inflicts structural violence upon poor people of color. Angela Davis points out the importance of seeing the prison system through a racial lens in order to understand that prisons are obsolete and should be abolished (Davis, 2003). Even though the prison system seemingly isn’t seen by the majority as a racist institution, is would be wrong to ignore the parallels between race and class in and out of prison.

The War on Drugs

Along with the criminalization of race and class, the War on Drugs is another form of structural violence and a major contributing factor to high recidivism rates. The War on Drugs was first introduced in 1971 by Richard Nixon but then grew to prominence in 1982 under Ronald Reagan. On the surface it was a campaign to attack crime, but in reality it was a covert anti-racist regime. Reagan’s campaign mainly focused on crime and welfare in addition to developing the federal government’s position on fighting crime. Fighting crime had always been the state and local enforcement’s responsibility but under Reagan the role of fighting crime swiftly moved into the hands of federal power (Alexander, 2010). After going back and forth trying to decide whether the federal government and the FBI should be involved in tackling street crime, the Justice Department made the decision to focus their attention to drug enforcement.
instead of hunting down white-collar offenders (Alexander, 2010). President Reagan then made it official in October 1982 that it was time to declare a War on Drugs despite the lack of public awareness of any drug issues that were occurring at the time (Alexander, 2010). Immediately after Reagan’s announcement, the budgets for federal law enforcement agencies rose significantly (Alexander, 2010). The shares for the anti-drug Department of Defense increased from $33 million in 1981 to $1,042 million in 1991 (Alexander, 2010). Throughout the same time, the DEA antidrug budget flourished from $86 million to $1,026 million, and the FBI anti-drug allocations rose from $38 to $181 million (Alexander, 2010). Contrary to the growth in budget for federal law enforcement agencies, there were significant budget cuts for drug treatment centers and the Department of Education. Clearly, the War on Drugs agenda was more about tackling race than dealing with drug addiction and drug prevention.

“The War on Drugs, which led to long prison sentences for drug offenders, is largely considered a massive failure that led to prison overcrowding without significantly changing U.S. drug abuse rates” (Engel, 2014). Since it first began, the War on Drugs has cost over $1 trillion and has led to 45 million arrests (Eugene Jarecki, 2012). Michelle Alexander explains that the birth of “The New Jim Crow” was caused by the War on Drugs (Alexander, 2010, p. 72). She analyzes the parallels between Jim Crow, which were mandated racial segregation laws that lasted from the late 1800s through the mid 1900s, and the War on Drugs by considering how both systems targeted people of color and demoted them to second-class citizens (Alexander, 2010, p. 74-75). Shortly after Reagan announced his war on drugs agenda, crack became an epidemic overflowing inner city neighborhoods with people of color (Alexander, 2010). Crack addiction led to even more unemployment, homelessness and lack of access to education, as well as the mass incarceration of black and Latino individuals (Alexander, 2010). The legal system enforced harsher penalties on people who were charged with crack possessions compared to powder cocaine, and it was known at the time that crack was associated with being poor and black. The government had found another way to criminalize race and deprive black people of power. This is a perfect example of how the government and criminal justice system used structural violence against people of color.

Today, things haven’t changed for the better. Structural violence against blacks and Latinos is more extensive than ever. The United States currently puts more people in prison than any other country in the world, which completely goes against what America supposedly stands for. The United States is supposed to be a “free country” with numerous job and life opportunities for all, and although this is the reality for many white privileged people, it isn’t the reality for most blacks and Latinos. Schools are more segregated than ever before, even 50 years after Brown vs. Board of Education. “Even though the majority of illegal
drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been black or Latino” (Prison Culture, 2010). These are just a few examples of the structural violence that continues to persevere in American culture.

When it comes to recidivism rates, there are many systemic procedures and parole laws in place that certain states include in their criminal justice systems in order to keep offenders in prison for long periods of time as well as purposefully cause them to recidivate. Many of these laws have to do with nonviolent drug offenses (ACLU, 2013). According to the American Civil Liberties Union (2013), the highest number of prisoners serving life in prison without possibility of parole were from states such as Louisiana, Florida, Alabama, Mississippi, South Carolina and Oklahoma. These states use three strike rules mandatory minimum sentences, and other “habitual offender laws” which require a life without parole sentence for nonviolent offenses (ACLU, 2013). Legislators enacted the “three-strike rule” in the 90’s as a response to the rise of violent crime, in order to prevent future crimes from occurring (ACLU, 2013). It is a policy adopted by several states, which punishes individuals after their second or third offense by sentencing them to longer sentences or life without parole. According to the Bureau of Prisons, 79-percent of the 3,278 inmates who were serving life without parole were sentenced to die in jail for nonviolent drug offenses (ACLU, 2013). In the cases that were documented by the ACLU (2013), most of the prisoners serving life without parole were either first time drug offenders or nonviolent inmates who recidivated (ACLU, 2013). Most of these prisoners are black, poor individuals who never received a high school diploma (ACLU, 2013).

There are several issues that result from “tough on crime” drug policies. They are responsible for mass incarceration in the U.S, as well as ignoring the many offenders who commit drug related crimes due to drug addiction (ACLU, 2013). Interestingly enough, the supposed intention for harsher drug related penalties stemmed from the government’s concern about drug abuse and drug related crimes, yet it seems that there is more of a focus on criminalizing drug related behavior instead of rehabilitating the addicted individual.

The prison industrial complex

The War on Drugs is a tool used by the prison industrial complex in order to criminalize drug addiction and impose harsher drug laws on non-violent drug offenses to keep people in prison longer and subsequently increasing profits for private prisons. Along with the war on drugs and the criminalization of race and class, the privatization of prisons is another form of structural violence that has dramatically increased recidivism rates in the United States. The prison industrial complex refers to the vast and rapid growth of the U.S. inmate
population as a result of the privatization of prisons, which is the transformation of prisons into for-profit corporations. It includes state and federal prisons, military prisons, county jails, and immigrant correctional facilities, which comprise the fastest growing division (Asia Pacific Economics Blog, 2014). The term is used to attribute the “extent to which prison building and operation began to attract vast amounts of capital from the construction industry to food and health care provision in a way that recalled the emergence of the military industrial complex” (Davis, 2003, p. 12). The private for profit prison industry is a multi billion dollar a year company according to Rashad Robinson, executive director for the Color of Change Committee (Asia Pacific Economics Blog, 2014). The Color of Change Committee is dedicated to educating shareholders about the horrible implications in our justice system as a result of investing in the private prison industry (Asia Pacific Economics Blog, 2014. Investing in the private for profit prison industry facilitates private companies who work with lobbyists to influence government officials in order to push for stricter laws that keep prisons filled and active (Asia Pacific Economics Blog, 2014). Their objective is to get shareholders to divest after exposing to them where their money is going.

Private prison companies aren’t the only ones benefiting from mass incarceration (Henderson, 2015). Food companies that supply prisons, such as Aramark Corporation, distribute food to about 600 prisons in North America and make millions of dollars a year doing so (Henderson, 2015). Aramark has paid the state of Michigan thousands of dollars in fines for meal shortages, unsanitary conditions and allowing the smuggling of illegal imports into prisons (Henderson, 2015). Healthcare companies such, as Corizon, provide terrible healthcare to prisoners while making 1.4 billion dollars a year (Henderson, 2015). In 2012, seven prisoners died in a Kentucky prison that had contracted Corizon as their main healthcare provider (Henderson, 2015). In addition to this, a male prisoner from Arizona went to one of the Corizon doctors on duty to get medical attention for his hepatitis C and was told they couldn’t help him (Henderson, 2015). All of these private companies are providing appalling, incompetent services to prisoners, while reaping profits. Their main concern is to make money and cut costs wherever possible, and as a result they aren’t providing their companies with caring professional staff. Instead these private companies are profiting at the cost of human lives.

The private for profit prison industry doesn’t merely include private companies who are advancing financially from incarceration. There are individuals who are cashing in as members of the prison industrial complex. Henri Wedell is one of those persons. He served on the board of directors for Corrections Corporation of America, which is one of the most invested groups in mass incarceration, and now owns more than 650, 000 CCA shares that are currently worth more than twenty-five million dollars (Downs, 2013). Another
key player who’s exploiting the criminal justice system is George Zoley, the CEO of GEO Group, which is the second largest shareholder in the prison industrial complex (Downs, 2013). He guarantees investors that the incarceration rate will remain high in order to keep his profits high (Downs, 2013). The harsh reality is that the prison industrial complex is booming, and it’s doing so despite anyone’s anti-prison or prison reform beliefs. Top investment groups who provide 401(k) plans to American workers are also highly invested in the prison industry (Downs, 2013). This means that persons who have a 401(k) through their employment are also prison industry profiteers. “This is especially true for government employees like public school teachers because their retirement funds are some of the biggest investors in private prisons” (Downs, 2013).

Committing serious, violent crimes is no longer the only reason why people go to prison. Financial incentives outweigh any government concern in ensuring that our criminal justice system is being just. Since the private prison agenda is invested in benefiting from incarceration, they need to imprison as many people as possible, especially to make the billion dollar salaries they currently have. In order to do this, GEO Group Inc., and Corrections Corporations of America (CCA), the two major corporations devoted to making profits from incarceration, are creating contracts with different states that mandate prison bed quotas (Asia Pacific Economics Blog, 2014). According to these prison contracts, if 90-percent of all prison beds aren’t filled, the states that are in contract with these prisons are obligated to pay the corporations for the empty beds (Flatow, 2013). These contracts put pressure on states to create stricter laws in order to prevent getting stuck paying a hefty tab, which in turn causes states to be completely ruthless and dedicated to keeping prison beds filled. States benefit from signing these contracts because of big tax breaks that private corporations promise to fulfill (Asia Pacific Economics Blog, 2014). This is just one of the many ways private companies interfere with the criminal justice system. The birth of the three-strikes laws in 13 states, which sentences offenders to life in prison after committing three felonies, helped establish twenty new federal prisons (Pelaez, 2014). Instead of investing in rehabilitation and education, some states such as Texas and Arizona are committed to enforcing three strikes laws, as well as to the widespread use of solitary confinement (Gottschalk, 2014).

Once an individual becomes a part of the prison system, it becomes fairly easy to return to prison for new crimes or to recidivate because of technical parole violations, especially in those states that have prison contracts with private companies. States like California, for example, started to enforce minimum lengthy supervised parole, post release as part of their 2011 realignment agenda (Gottschalk, 2014). As a result, California had a large number of offenders who recidivated because of technical parole violations (Gottschalk, 2014). Gottschalk
highlights the importance of understanding how recidivism is defined in her book “Caught” (Gottschalk, 2014, p.115-133). She makes the distinction between individuals who recidivate for committing new crimes, from those who recidivate for committing violations relating to their existing crimes (Gottschalk, 2014, p. 115-133). Although it is essential to differentiate all the groups that contribute to recidivism rates, in addition to clearly defining the concept of recidivism, I believe it is more important to find ways to lower rates of recidivism by understanding these differences instead of focusing on the correct way to define recidivism. Addressing major social issues in the U.S. is long over due. Too many offenders who suffer from mental illness and addiction keep recidivating due to the lack of importance that American culture places on rehabilitation. It’s crucial to respond to the needs of those who are imprisoned instead of relying on prisons to get rid of the problems that exist. The following section will examine the negative implications that come along with making treatment and rehabilitations facilities private.

The treatment industrial complex

The prison industrial complex has expanded dramatically to include private sectors in health care, food supply carriers, and as many private companies that used to be traditionally invested in caring and treating individuals in prisons (Issacs, 2014). Privatizing treatment facilities highly contributes to the profits of the prison industrial complex in several ways (Issacs, 2014). It allows private corporations to profit from positive efforts to lower recidivism and mass incarceration by exploiting alternatives in sentencing, parole and probation offered by state and federal levels (Issacs, 2014). Similar to the prison industrial complex, the treatment industrial complex is strategically spread out making profits from psychiatric facilities, prisoner mental health and medical facilities, drug and alcohol treatment centers, home confinement, and community corrections (Issacs, 2014).

Analogous to the prison industrial complex, privatizing treatment centers allows private companies to cut corners in order to increase their monetary gains. Some of those shortcuts include hiring inadequate staff members without the proper training, which in turn negatively reflects the care and professionalism offered to prisoners. Lack of proper care has led to the death of individuals, such as a hospital in South Florida State, where three died as a result from burning themselves with boiling hot water from the showers (Issacs, 2014). An investigation run by the New York Times to examine the problems occurring from privatizing halfway houses in New Jersey exposed the rampant violence, sexual abuse, and drug use that was taking place as a result of prioritizing profit gains (Issacs, 2014). This is the price to pay when money is a prioritized higher
than humanity. How far does the prison industrial complex have to go until society demands drastic change? Is prison abolition the answer?

Prison reform or prison abolition?
Jails and prisons are designed to break human beings, to convert the population into specimen in a zoo – obedient to our keepers, but dangerous to each other.

- Angela Davis

Prison abolitionist Angela Davis imagines our criminal justice system to be free of prisons. She has been advocating for this since the 1970’s prison movement, which is when the concept first emerged. The Attica prison riot of 1971 was the height of the Prisoners’ Rights Movement. People were rioting and fighting for better living conditions and political rights for prisoners. The prison political climate of the 1970’s segued into the reemergence of prisons in the 1980’s as a result of “global capitalism” and the “dismantling of social services in the Global South” (Davis, 2014). Today, the for profit prison industry is booming and growing rapidly. Addressing the needs of prisoners as well as major social problems isn’t on the government’s agenda. Instead the U.S. relies on private prisons to get major tax cuts and to dismiss state responsibility in having to deal with the “racial stigmatization” and permanent marginalization” that emerged from prioritizing a capitalist culture (Alexander, 2010).

The U.S. government isn’t the only system uninterested in improving its criminal justice system. “During the past twenty years, virtually every progressive, national civil rights organization in the country has mobilized and rallied in defense of affirmative action” (Alexander, 2010, p. 33). Alexander explains how civil right advocates prioritize affirmative action and education above all other issues and completely isolate mass incarceration, classifying it as a criminal justice issue (Alexander, 2010). Doing so has created what Alexander calls a “racial caste system” where offenders are the “underclass” members of a separate society who become perpetually isolated once they enter the legalized discriminatory world that is known as prison (Alexander, 2010, p.37).

It’s hard to imagine Americans today completely immersing themselves in improving our criminal justice system, especially when the prison industrial complex has taken over and completely exploited it, and when they see themselves so differently from people in prison. The prison industrial complex has become a systemic leviathan, dismantling and profiting from incarceration in every way possible, and simultaneously recruiting as many private corporations and members along the way. Clearly the criminal justice system in the U.S. is in desperate need of transformation. Maybe prison abolition is the answer but the current profiteering and exploitation of the prison system doesn’t allow this option to be considered.
Some countries are dedicated to prison reform, completely transforming what prison culture is like and serving as leading examples to the American criminal justice system. Halden, a prison in Norway, exemplifies qualities that “are so out of sync with the forms of imprisonment found in the United States that you could be forgiven for doubting whether Halden is a prison at all” (Benko, 2015). The philosophy at Halden is completely centered on rehabilitating the individual and ensuring that offenders reenter successfully (Benko, 2015). Norway doesn’t incorporate the death penalty or life sentences in its legal system, making the most severe sentence for most crimes twenty-one years in prison (Benko, 2015). Unlike the United States’s attitude towards dangerous members of society, Norway incorporates a “better in than out” manner for their most dangerous prisoners. If an individual has a severe mental illness that leaves them with violent uncontrollable impulses for example, why should they be treated badly and left in isolation for the rest of their life? In Norway, they make sure individuals with these circumstances are isolated from society but they don’t experience the abuse that many mentally ill prisoners deal with in U.S. prisons. One clear reason is because of Norway’s “social safety net”, which ensures education, health care and pensions to all citizens.

The social awareness and dedication to all persons in Norway is the same in and out of prison, which is a major difference compared to the attitudes toward incarceration and prisoners in general that the U.S embraces. Another factor that significantly stands out when it comes to the prison system in Norway is their budget for prisoners. Norway spends an average of $93,000 per inmate a year compared to the $31,000 per year the U.S spends on its inmates. These numbers are absurd when private corporations make millions or more from exploiting incarceration. These companies have more than enough to spend on better food, health care, and education and still make profits. Halden offers schooling, work hours, and therapy programs to all prisoners (Benko, 2015). In addition to this, correctional officers build relationships with offenders, so the abuse and condescending attitudes that correctional officers are known to practice are nonexistent.

**Conclusion**

Money plays the largest part in determining the course of history.
- Karl Marx

The purpose of this paper was to examine factors such as criminalization of race and class, the war on drugs, and the privatization of the prison system in order to demonstrate how these factors have significantly contributed to the structurally violent carceral state that has emerged, creating a recidivism outbreak, which includes primarily poor people of color. By looking at each factor individually and using structural violence and capabilities approach as a
theoretical framework, I was able to further understand how race, class, and capitalism are interconnected, and how throughout history these economic institutions have been used to create statuses of power and oppression. Using the capability approach theory as a tool allowed me to see even further how people of color have been disadvantaged early on in history. I discovered that criminalization of race and class, the war on drugs, and the prison industrial complex have been working together to disempower the most underprivileged individuals in society and will continue to do so. They rely on each other to ensure that poor people of color don’t have access to necessary functionings like education and health care that would make them capable members in society. It is clear that access to resources is solely determined on race and class.

Drug addiction isn’t understood or treated as a disease and the government’s lack of responsibility to its citizens is clearly demonstrated when private companies take over this responsibility and profit from treatment, food, education, and medical services that the government should be providing to all individuals for free. The structural violence perpetuated against working class people of color systemically deprives these individuals of basic human rights and then punishes and imprisons them for failing where they were strategically driven to fail. It’s much worse for people of color who are either addicted to drugs or who are mentally ill. Private psychiatric and treatment sectors who are supposed to provide medical attention and care to those prisoners who are ill, often let these offenders die in prison by ignoring them altogether. The distance between the actual and potential for people of color keeps increasing as the prison industrial complex continues to expand. The negative repercussions of privatizing prisons are inexcusable and inhumane. As a result of the massive increases in mass incarceration and recidivism across the U.S., the prison industrial complex has gained more ammunition to keep expanding. Private prison corporations rely on the constant increase in incarceration and recidivism rates. The more money these private corporations make, the more power they have to influence policy in ways that will keep the upper class, the able bodied, the white, the English speakers, the U.S. born empowered and able to succeed. It seems almost impossible to think of ways to lower incarceration and recidivism rates when powerful companies in charge of prisons are highly invested in doing the opposite.

Society’s cultural, educational and social awareness has to grow stronger and it will get more challenging to do so if we keep allowing money and power to outweigh human worth. At first, the purpose of analyzing systemic factors that I saw as significant contributors to mass incarceration and recidivism was to hopefully realize its root causes and come up with solutions. After exploring penal reform and prison abolition, I realized the only way to empower the criminal justice system and really address major social problems that are
rampant in poor communities of color, is to consider prison abolition as a remedy. To many, this seems like an inconceivable solution to consider, especially when there are violent mentally ill prisoners who would be dangerous to society if they were free. This isn’t an issue that will have a quick fix. We must explore ways to treat mentally and addicted individuals without jumping to a harsh prison sentence as a solution. Adopting attitudes about violent individuals and mentally ill persons similar to Norway’s prison system seems like a good start. Taking the time to care for each and every life would lead us towards a real path of freedom, a concept that supposedly symbolizes the U.S. Freedom doesn’t just apply to those behind bars; it should concern everyone who isn’t free to speak their minds, fearing that they will be put away just for doing so. Seeing a new American culture emerge where all people are committed to social justice is worth fighting for. There are many conversations about prison reform and abolition taking place in today’s America, but not enough voices are speaking up. Extensive literature has been written about prison reform but not enough about prison abolition. To accept any type of reform and solely designate structural problems in the carceral state isn’t enough. Doing this implies that we are willing to accept the existence of prisons and their lengthy stay for years to come. If prisons are here to stay, they should only be maintained for those who violently threaten society because of a social or mental disorder. I hope to see more individuals with abolitionist mindsets, dedicated to undoing the carceral state.

References:


On December 3, 2014, conservative legislators in the House of Representatives blocked the Employment Non-Discrimination Act (ENDA) from what was likely its last chance at passage. ENDA would have updated Title VII of the Civil Rights Act of 1964 by making it illegal for all federal and most private employers to discriminate on the basis of sexual orientation or gender identity. The first federal bill to propose such a ban was introduced into Congress in 1973 (Pizer et al., 2012, p. 719) and ENDA itself has been under consideration by lawmakers for nearly two decades. However, many lesbian, gay, bisexual and transgender (LGBT) activists have turned their attention away from ENDA in light of the Supreme Court’s recent ruling in Burwell v. Hobby Lobby (2014), which allows corporations to opt-out of certain provisions in the Affordable Care Act because of religious beliefs. In July of 2014, several prominent advocacy organizations, including the National Gay and Lesbian Task Force, withdrew their support from ENDA because they felt the religious exemption clause included in the bill would provide homophobic employers with a loophole and leave many LGBT people with inadequate legal protections (Ford, 2014, July 8).

Despite decades of effort from LGBT activists and increasing public support for legislation like ENDA, only eighteen states and the District of Columbia prohibit employers from discriminating based on sexual orientation and gender identity, with three additional states banning discrimination based on sexual orientation only (The Human Rights Campaign). Furthermore, data reveals that workplace discrimination against LGBT employees is widespread. “As recently as 2008, the General Social Survey found that of the nationally representative sample of [lesbian and gay] people, 37% had experienced workplace harassment in the last five years, and 12% had lost a job because of their sexual orientation” (Pizer et al., 2012, p. 721).

In 2011, the largest survey to date showed that 90% of transgender respondents had experienced harassment at work or had taken action to avoid it and “47% reported having been discriminated against in hiring, promotion, or job retention because of their gender identity” (Pizer et al., 2012, p. 721). Transgender and gender-nonconforming individuals also had double the unemployment rate of the general population, with rates for trans people of color four times the national rate. Additionally, “15% of respondents reported a household income under $10,000/year, nearly four times the rate of this category

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for the general population. Those who lost a job due to bias lived at this level of poverty at six times the rate of the general population” (Grant, Mottet, and Tanis, 2011, p. 51). Of those with jobs, 44% percent reported experiencing underemployment (Grant, Mottet, and Tanis, 2011, p. 55).

Data suggests that many transgender people are vulnerable in other facets of their lives as well. In 2011, 29% of transgender and gender-nonconforming people reported having experienced harassment or disrespect from police officers, and an astonishing 41% reported that they had attempted suicide, compared to 1.6% of survey respondents as a whole. Unemployment and low income were associated with even higher rates of suicide (Grant, Mottet, and Tanis, 2011). Thirty-percent of transgender respondents identified as having a disability that affected one or more major life activities, compared to 20% of the general U.S. population (Grant, Mottet, and Tanis, 2011, p. 23).

In sum, the need for more robust protections for transgender, lesbian, and gay people in the workplace is evident. Because the passage and implementation of new legislation has been slow, and because of ENDA’s dwindling prospects, many activists have shifted their focus to the courts. Specifically, many advocates have looked to Title VII of the Civil Rights Act of 1964, which already prohibits discrimination “because of sex”. Since the Supreme Court’s decision in Price Waterhouse v. Hopkins (1989), which determined that discrimination based on “sex-stereotypes” is actionable under Title VII, “many lower federal courts have begun to recognize the overlap between either sexual orientation or gender identity discrimination and sex stereotype discrimination. Indeed, this sound principle now governs in at least five circuits” (Pizer et al., 2012, p. 746).

The coup de grâce for transgender employees came in the 2012 case Macy v. Holder, when the Equal Employment Opportunity Commission (EEOC) determined in unequivocal terms, “Claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process” (p.5). This and several other rulings have given LGBT activists new hope that strong protections exist within our current legal framework and that change may not necessarily require the passage of additional laws. In this paper I will summarize the history of legal interpretations related to the “because of sex” provision in Title VII of the Civil Rights Act. I will trace the Court’s increasingly broad rulings through to the EEOC’s landmark decision, Macy v. Holder, and examine the judicial reasoning and tests employed in particular cases. Finally, I will argue that Title VII should be extended further to protect lesbian, gay, bisexual, and gender-nonconforming individuals from workplace discrimination and offer legal justifications in support of such rulings.
The Civil Rights Act of 1964 and the role of the EEOC

The Civil Rights Act of 1964 was the product of decades of work from activists who fought against the entrenched practice of racial segregation in the U.S., particularly in the South. The final law signed by President Lyndon B. Johnson was expansive, banning discrimination “in public accommodations including hotels, restaurants and food service, retail establishments, parks and recreational facilities and transportation - and in all programs and activities funded by the federal government” (Berrien, 2014). Title VII makes it “unlawful to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin” (42 U.S.C. 2000e-2(a)(1)).

The Equal Employment Opportunity Commission, a federal agency created by Title VII, is responsible for interpreting and enforcing Title VII, and has the ability to unilaterally resolve complaints filed by employees of federal agencies. In such cases the EEOC’s ruling is the final word. For private sector and local and state government employees, the Commission’s reach is still significant although it cannot issue decisions. In these cases EEOC staff can investigate complaints related to discrimination, issue findings, provide mediation, and file lawsuits in federal court against employers who discriminate (Transgender Law Center). Although judges are not required to follow the Commission’s precedents or recommendations, the Supreme Court has noted that the EEOC’s interpretations are “entitled to great deference” (McDonald v. Santa Fe Trail Transp. Co., 1976, p.279).

The moral directive enshrined in the Title VII was clear: “employers should focus only on characteristics relevant to employment when making employment decisions, [rather than traits that] will almost never have any bearing on whether someone can perform a certain job” (Perkins, 2013, p.427). However, in practice discrimination “because of sex” has proved challenging to define. This task has been made all the more difficult because the word “sex” was added to the Civil Rights Act only two days before its passage, and because debate on the clause was quite limited. Some historians believe that Congressman Howard Smith, who had a long history of opposing civil rights efforts, introduced the “because of sex” provision as part of an effort to stop the entire bill from being enacted (Perkins, 2013, p.428). As the story goes, the House legislators responded to Smith’s amendment with “considerable laughter” (Brauer, 1983, p.48). Thus, debates about the meaning of “because of sex” began almost immediately after the passage of the Civil Rights Act and continue to this day.
Early interpretations of the meaning of “sex”

The first courts to interpret Title VII clung to an extremely narrow reading of the statute. For instance, in *General Electric v. Gilbert* (1976), the Fourth Circuit ruled that Title VII did not protect pregnant women from discrimination. In doing so, they relied heavily on the majority opinion in *Geduldig v. Aiello* (1974), which held that California state’s policy of denying insurance benefits to cover work loss due to pregnancy did not violate the Equal Protection Clause because “the program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes” (p.497).

Early lesbian, gay, and transgender plaintiffs fared equally poorly in court cases. Jurists relied on two main devices to support narrow interpretations of Title VII’s scope: the “plain meaning” doctrine and Congress’s intent. To illustrate, in *Voyles v. Ralph K. Davis Medical Center* (1975) a U.S. district court in California held that Title VII did not protect Charles Voyles, a transgender man who had been fired from his job after revealing his intent to transition from female to male because “employment discrimination based on one’s transsexualism is not, nor was intended by the Congress to be, proscribed by Title VII of the Civil Rights Act of 1964” (p.459). Furthermore, “even the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress’ paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions” (p.457).

The opinion turned next to the “plain meaning” of the text, holding that because Title VII made no explicit reference to “change of sex or sexual preference” (p.457), no such protection existed. Similarly, in *Holloway v. Arthur Andersen* (1977) the Ninth Circuit ruled that Title VII’s plain meaning was to protect only “traditional notions of ‘sex’” (p.16). The *Holloway* court noted that bills amending Title VII to prevent discrimination based on sexual preference had been proposed to Congress several times and always failed. They took this as a signal that Congress intended for “sex” to be construed in a narrow fashion. Under this view, Title VII’s sole purpose was to “remedy the economic deprivation of women as a class... [And to place] women on equal footing with men” (*Holloway v. Arthur Andersen*, 1977, p.662). Other courts used nearly identical reasoning to rule against transgender plaintiffs in *Sommers v. Budget Marketing, Inc.* (1982) and *Ulane v. Eastern Airlines, Inc.* (1984).
Judges summarily dismissed claims brought by gay and lesbian plaintiffs as well. In *DeSantis v. Pacific Telephone & Telegraph Co.* (1979), the “Ninth Circuit firmly shut the door to potential Title VII and Section 1985(3) protections for homosexuals” (Rieke, 1980, p. 53), again citing the statute’s “plain meaning” and Congress’ intent. The *DeSantis* court also rejected the argument that gay male employees who faced discrimination because of perceived effeminacy could seek relief under Title VII. In practice, this meant that lesbian and gay plaintiffs were at a marked disadvantage even when in bringing Title VII claims that were based more on gender stereotypes than sexual orientation. Guy and Fenley have shown that “in several cases, LGBTQ individuals’ sexual harassment charges were not upheld because the court determined that the harassment targeted the plaintiff’s sexual orientation,” leaving these employees with little protection against harassment of any kind (Guy and Fenley, 2013, p. 54).

**Broadening the scope of “sex”**

As time went on however, courts became more willing to recognize broader interpretations of “sex.” In the first Title VII case to reach the Supreme Court, *Phillips v. Martin Marietta Corp.* (1971), the justices ruled that discriminating based on “sex plus” another characteristic was prohibited by the statute. In this case Ida Phillips was rejected from a position because she was a mother with young children. Phillips then sued under Title VII, arguing successfully that Martin Marietta Corp. discriminated because of sex by hiring fathers with young children, but not mothers. In a similar case, *Sprogis v. United Air Lines, Inc.* (1971), the Seventh Circuit determined that United Air Lines Inc. could not fire female employees after they were married if they did not treat males the same way.

Additionally, the rulings against pregnant plaintiffs in *Geduldig* and *Gilbert* resulted in the passage of the Pregnancy Discrimination Act (1978), which prohibits “sex discrimination on the basis of pregnancy” in the workplace. Many judges understood this as an indication from Congress that Title VII should be interpreted more liberally. The courts subsequently extended “sex” protections even further by adopting the EEOC’s position that sexual harassment should be considered a form of sex discrimination (*Doe v. City of Belleville*, 1997, p.15).

A significant victory came in the landmark Supreme Court case *Price Waterhouse v. Hopkins* (1989). Ann Hopkins, the only woman of 88 employees being considered for partnership at her accounting firm, did not receive a promotion despite having been described in reviews as intelligent and competent and having secured a $25 million contract for the company. “There were clear signs... that some of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as ‘macho’, another suggested that she ‘overcompensated for being a woman’; a third advised her to
take ‘a course at charm school’” (p.235). The partner who notified Hopkins of the firm’s decision advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" (p.235).

By ruling in favor of Hopkins, the Supreme Court signaled that narrow interpretations of Title VII were no longer appropriate. The Price Waterhouse decision introduced the notion that Title VII protected gender (i.e. the social roles and characteristics constructed in relation to biological sex), as well as traditional sex. Writing for the Court, Justice Brennan said: “Our interpretation of the words ‘because of’ also is supported by the fact that Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a ‘bona fide occupational qualification reasonably necessary to the normal operation of th[e] particular business or enterprise.’ The only plausible inference to draw from this provision is that, in all other circumstances, a person’s gender may not be considered in making decisions that affect her” (p.242, emphasis added).

Price Waterhouse introduced the “sex-stereotyping theory” which is summarized by the majority’s conclusion: “We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group” (p.251). Thus, courts have progressively expanded the boundaries of what constitutes sex discrimination. After Price Waterhouse, “the Courts’ narrow interpretation of ‘sex’ when a plaintiff presents a claim based on his or her transgender status can in fact be seen as an exception to the broader interpretations of ‘sex’ that have been embraced by courts in other types of sex discrimination cases” (Kelly, 2010, p. 237).

A change in the tides: courts begin ruling in favor of transgender plaintiffs

Following Price Waterhouse, LGBT people and their allies began fighting employer discrimination with renewed vigor, and these efforts finally began to pay off. Based on a New York City statute, Maffei v. Kolaeton Industries (1995) paved the way for later cases. “The [Maffei] Court determined that courts such as Ulane, Sommers, and Holloway were flawed in their reasoning that Congressional attempts to include sexual orientation among the list of protected characteristics signaled an intent to exclude transgender individuals from protection” (Kelly, 2010, p. 232). The New York City law in question was nearly identical to Title VII, except that it also banned discrimination based on sexual orientation.1

In their decision, the Maffei Court pointed to the remedial nature of antidiscrimination statutes in general, maintaining that such laws should “be interpreted liberally to achieve their intended purposes. Our New York City
law is intended to bar all forms of discrimination in the workplace and to be broadly applied. Accordingly, I find that the creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status creates discrimination based on ‘sex’, just as would comments based on the secondary sexual characteristics of a person” (p.556).

The *Maffei* ruling was particularly notable because it explicitly recognized important changes in scientific and cultural understandings of sex. The opinion pointed to experts who believed that at least seven characteristics determined sex, including chromosomes, gonads, hormonal secretions, internal reproductive organs, external genitalia, secondary sex characteristics, and, most crucially, self-identity (p.552). Thus, when a “plaintiff alleges that he is now a male based on his identity and outward anatomy... [Courts should recognize that] being a transsexual male he may be considered part of a subgroup of men [and] there is no reason to permit discrimination against that subgroup” (p.556).

In 2004, the Sixth Circuit followed the *Maffei* Court’s example when they ruled in favor of a gender non-conforming employee, Jimmie Smith (*Smith v. City of Salem* 2004). After Smith started expressing stereotypically feminine characteristics while at work, Smith’s co-workers began to criticize her mannerisms and appearance. Once she revealed to her boss her intention to transition from expressing herself as male to female, Smith’s employer instituted a series of tactics aimed at forcing her to resign. When Smith refused to comply with these demands, she was fired.

The Sixth Circuit reversed a previous ruling in favor of the city and wrote: “We find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because ‘Congress had a narrow view of sex in mind’ and ‘never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex’” (p.573). They held that the logic used to uphold cases like *Holloway* “been eviscerated by *Price Waterhouse*” (p.570) and concluded: “An employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex” (p.574).

Although this framing of the issue (i.e. the implication that Smith, as a transgender woman, is simply a man who wears dresses and makeup) is problematic, the case still represented a significant triumph for transgender people in the workplace. It was the first time a federal court had recognized that
transgender employees are entitled to legal protections under Title VII.

Another important ruling for transgender individuals came in the 2008 case Schroer v. Billington. Here, a D.C. district judge found in favor of Diane Schroer, a transgender woman, whose job offer from the Library of Congress was rescinded after she revealed her transgender status. The judge rejected the argument that Congress’ failure to enact legislation explicitly protecting gender identity was a sign that Congress did not intend for transgender employees to be protected by Title VII. He went even further than previous courts and argued that Schroer need not offer a “sex-stereotyping” argument in order to bring a successful claim. He introduced a “sex per se” argument by asserting: “Discrimination based on gender identity is literally discrimination ‘because of sex’” (p.212). To clarify this assertion, the judge offered a hypothetical example: “Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination ‘because of religion’ easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that ‘transsexuality’ is unprotected by Title VII. In other words, courts have allowed their focus on the label ‘transsexual’ to blind them to the statutory language itself.”

While sex-stereotyping claims may be of limited use to some transgender employees, because such suits require proof that the employer discriminated based on a gender stereotype (for example, by stating “you are too masculine to be a woman”) (Kelly, 2010, p. 230), “sex per se” arguments offer much more extensive protection. The “sex per se” theory advanced in Schroer combined with the sex-stereotyping approach discussed in Price Waterhouse and Maffei gave transgender plaintiffs formidable tools in court. In recent years, other courts have relied on these two doctrines when deciding Title VII claims and when interpreting local anti-discrimination laws in cases brought by transgender and gender-nonconforming plaintiffs.

Additionally, many courts have affirmed that same-sex sexual harassment is actionable under Title VII, even if it is related to or based on a plaintiff’s perceived sexual orientation. In Doe v. City of Belleville (1997), a case brought by brothers who had been called “fag” and “queer” and had been sexually harassed by their male coworkers, the Seventh Circuit asserted, “a homophobic epithet like ‘fag’. . . may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation” (p.593). Such comments and
behavior constitute sex discrimination under Title VII because of “the harassers’ evident belief that in wearing an earring, [the brother] did not conform to male standards” (p.575). In Doe, the Seventh Circuit explicitly overruled its previous holding in Ulane (1984), which had advanced a narrow definition of sex. The Doe court noted, “Ulane made clear that sex was not synonymous with ‘sexual identity,’ or ‘sexual preference.’ However, under the court’s analysis both ‘sexual identity’ and ‘sexual preference’ would be related to and have a nexus with an ‘individual’s sex,’ and thus would be actionable. This ‘sexuality’ approach to Title VII cannot be harmonized with Ulane” (ft. 3).

Another pivotal win came in Oncale v. Sundowner Offshore Services, Inc. (1998) where the Supreme Court ruled that same-sex sexual harassment was unlawful under Title VII. Justice Scalia, a committed conservative, authored the majority opinion for the unanimous court. In it he wrote: “Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements” (p.80). Oncale “directly undermines the holdings of Holloway, Ulane, and Sommers, which hold steadfast to the principal evil that Congress contemplated in passing Title VII: that there were not equal employment opportunities for men and women” (Kelly, 2010, p. 239).

Macy v. Holder

In 2012, the Equal Employment Opportunity Commission issued the strongest endorsement of transgender rights in the workplace to date in the case Macy v. Holder. Mia Macy, a transgender woman, had been offered a job with the Alcohol, Tobacco, Firearms, and Explosives Agency for which she was extremely qualified. Although Macy was presenting as a man during the interview process, she informed her potential employer of her intention to begin to the transition to presenting as a woman. After she revealed this information, Macy received an email from ATF stating that the position she had been had been guaranteed was no longer available due to budget cuts. After contacting an EEOC counselor, Macy learned that the position had not been eliminated but in fact had been given to someone else (Macy v. Holder, 2012).

The Macy decision, which was approved unanimously by the full five-member EEOC, stated unequivocally that transgender employees are protected from discrimination based on their gender identity and expression by Title VII. Macy spoke to the increasingly broad dimensions of sex that have been recognized by jurists, noting: “That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the
basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term "gender" encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity” (p.6).

The EEOC relied heavily on *Price Waterhouse* in their ruling, emphasizing that the Supreme Court had demonstrated that gender and sex can only be considered by employers in their decision-making when these identities are “bona fide occupational qualifications.” In all other circumstances, sex cannot be lawfully factored into employment decisions. The EEOC report vindicated both the “sex-stereotyping” and the “sex per se” argument as sufficient justifications for the legal protection of transgender people. The decision summarized: “When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim.’ This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that "an employer may not take gender into account in making an employment decision” (p.7).

Because the EEOC’s decisions are binding on all federal agencies and contractors, *Macy* has had the substantial impact of making discrimination against federal employees based on gender identity or expression unlawful under Title VII. Although the EEOC’s precedents are not binding on private employers, courts have historically given significant respect to the EEOC’s interpretations of Title VII (Transgender Law Center). Additionally, some research indicates that federal agencies wield a particularly strong legal influence in cases where federal courts are unable to come to a unified consensus on a particular policy issue (Haire and Lindquist, 1997). Thus, it is likely that future courts will pay heed to the EEOC’s findings in *Macy*. At the very least, *Macy* means that all transgender and gender-nonconforming individuals in the U.S. are guaranteed access to legal counsel from the EEOC if they experience discrimination or harassment based on their gender identity.

**Extending Title VII to prohibit workplace discrimination based on sexual orientation**

Although *Macy* was an unprecedented victory for transgender people and their allies, lesbian, gay, and bisexual people still have not been guaranteed
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protection from discrimination under Title VII. Many hoped that *Price Waterhouse* would turn the tides distinctly in LGB people’s favor, but this has not always been the case. Many courts have been reluctant to participate in what they view as the “bootstrapping” of sexual orientation onto Title VII’s sex protection.

In *Anderson v. Napolitano* (2010), the Fifth Circuit ruled against a gay man who experienced harassment in the workplace because of his mannerisms and self-presentation. The court held that Anderson’s coworkers harassed him because of the stereotype that “gay men speak with a lisp. Lisping is not a stereotype associated with women” and so the harassment in this case was due to Anderson’s perceived sexual orientation, not his sex. The otherwise sympathetic Sixth Circuit ruled against a gay plaintiff for similar reasons in a Title VII case in 2006 (*Vickers v. Fairfield Medical Center*).

The determination displayed by some judges to cling to rigid definitions of sex, in the face of precedents from the Supreme Court like *Oncale* and *Price Waterhouse*, the enactment of the Pregnancy Discrimination Act, and the growing body of scholarship which supports broader understandings of these identities, has reached positively ridiculous heights in a few instances. The reasoning employed in these cases is so jumbled and flagrantly offensive to established precedent that it hardly warrants response.

A strong case can and has been made for extending Title VII to prohibit discrimination based on sexual orientation (see Hilzendeger, 2004), particularly in the wake of *Macy*. I would like to briefly outline a few main points in this debate, which future courts and litigants should emphasize. First, courts have consistently stressed the remedial nature of anti-discrimination statutes. For instance, the Seventh Court has stated strongly that “the discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group” (*Doe v. Belleville*, 1997, p.571).

As I have noted, the LGBT community continues to face pervasive discrimination in the U.S. and by any standards could be characterized a “discrete and vulnerable group.” When one considers the overarching purpose guiding the Civil Rights Act of 1964, it becomes evident that the type of systemic and entrenched prejudice LGBT people confront is the very sort of discrimination legislators fought back against when they passed this law. Even the Supreme Court has endorsed this sort of Dworkinian argument by noting in *Oncale* that judges should look to the principles standing behind anti-discrimination laws rather than the particular circumstances Congress may have been focused on when the Title VII was initially passed. Furthermore, appeals to congressional intent hold no credibility in our modern era of Title VII jurisprudence. If Title VII can be used to protect men and whites from discrimination in the workplace
(groups legislators certainly were not thinking about when they enacted this legislation), it is inconsistent to exclude lesbian and gay people from protection because of Congress’s original intent (Kelly, 2010, p. 232).

Additionally, many leading scholars now endorse the theory that homophobia is in fact a form of gender discrimination and can be linked to misogyny and the hatred of traditional feminine characteristics. In a footnote for their decision in Doe, the Seventh Circuit recognized this by observing: “There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, a homophobic epithet like ‘fag,’ for example, may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation. Observations in this vein have led a number of scholars to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination” (footnote 27). Therefore, a legal recognition that discrimination because of sexual orientation constitutes a form of discrimination “because of sex” would be consistent with current scholarship in this area.

This consensus, as well as the scientific findings that have demonstrated that biological sex is far more complex and multi-faceted than we understood fifty years ago, has exposed the gaping holes in the “plain meaning” doctrine. Legal adherence to over-simplified, antiquated definitions of sex as simple maleness versus femaleness runs completely contrary to scientific and sociological evidence. If recent research into sex and gender tells us anything, it is that these concepts are remarkably intricate and nuanced. There is no plain meaning of “sex.”

The EEOC has already taken tentative steps towards extending Title VII protections to homosexuals in the workplace. In Veretto v. U.S. Postal Service (2011), the EEOC supported an appeal made by a gay postal worker named Jason Veretto who experienced a hostile work environment after his wedding announcement was printed in a local paper. The USPS originally dismissed Veretto’s complaint, saying that the discrimination he faced was based on his sexual orientation (not sex) and therefore was not covered by Title VII. On appeal, the EEOC ruled the Agency had improperly dismissed Veretto’s case because, although Title VII does not prohibit discrimination based on sexual orientation, it does prohibit discrimination based on sex-stereotyping. Veretto asserted that the discrimination he experienced was “motivated by the sexual stereotype that marrying a woman is an essential part of being a man” and by his coworker’s “attitudes about stereotypical gender roles in marriage.” Thus, the EEOC reversed the Agency’s dismissal and remanded Veretto to the agency for processing. The EEOC reiterated these holdings a few months later in Castello v. U.S. Postal Service (2011) using almost indistinguishable language.
The Commission’s decisions in Veretto and Castello suggest that gay and lesbian plaintiffs should be able to seek relief under Title VII if they frame the discrimination they experience as a form of sex-stereotyping. However, the EEOC has not adopted the more comprehensive approach I have advocated for, which would acknowledge that harassment because of sexual orientation is fundamentally a form of discrimination “because of sex.”

**Strengthening Title VII protections for transgender and gender nonconforming people**

Despite the victory in Macy, formidable threats still inhibit the implementation of comprehensive workplace protections for transgender and gender-nonconforming individuals. In particular, the “immutable characteristics” doctrine stands as a significant barrier to freedom of gender expression. The Fifth Circuit articulated the immutable characteristics theory in an equal protection case, *Willingham v. Macon Telegraph Publishing, Co.* (1975). Here, the court held that employers could lawfully set dress codes that dictate different standards for men and women. They reasoned, “[A] line must be drawn between distinctions grounded on fundamental rights... and those interfering with the manner in which an employer exercises his judgment... Hair length is not immutable and in the situation of employer vis a vis employee enjoys no constitutional protection” (p.1091).

Thus, employer regulations which mandate certain forms of gender expression have traditionally been upheld. In *Jespersen v. Harrah’s Operating Co., Inc.* (2006), Darlene Jespersen asserted a Title VII claim because her employer’s “personal best” dress code required that women wear makeup at all times which, “conflicted with [her] self image” and interfered with her ability to do her job. The Ninth Circuit ruled against Jespersen because “not every differentiation between the sexes in a grooming and appearance policy creates a ‘significantly greater burden of compliance’ and because, “The policy does not single out Jespersen [but] applies to all of the bartenders, male and female... [And] there is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear” (p.1112).

The thrust of immutable characteristics cases like Jesperson and Willingham is that traits like hair style and clothing apparel can be easily changed, and so employer dress codes that differentiate between the sexes should be upheld so long as they do not create a significantly greater burden on one sex over another (Clements, 2009, p.180). Similar reasoning has been used to justify workplace bans on hairstyles worn predominantly by African Americans (*Rogers v. American Airlines, Inc.*, 1981).

In order to provide LGBT people with comprehensive legal protection,
allies must push for a shift away from the dominant legal perception of “gender nonconformity as only a matter of voluntary personal preference” (Clements, 2009, p. 195). Camille Gear Rich has marshaled a powerful argument against the application of the immutable characteristics standard as it is often applied to people of color, writing: “Why should a person be required to shed passively acquired racially or ethnically marked mannerisms when they have no bearing on her potential performance of the job at issue?” (Rich, 2004, p. 1163). Rich also points to the psychological harms accrued by members of oppressed groups when they are forced to abandon expressions related to deeply felt identities in order to maintain a job.

Furthermore, LGBT advocacy groups have criticized the ways in which our social institutions tend to blame gender-nonconforming individuals for “bringing discrimination and violence on themselves” (Grant, Mottet, and Tanis, 2011, p. 8). By categorizing gender expression as an inconsequential matter that gender-nonconforming people can easily change (as opposed to an “immutable characteristic”), courts participate in, or at least authorize, this type of discrimination. Gender-specific employer dress codes purposefully police the gender expression of employees, and thereby imply that gender-nonconforming people, whose identities may be assaulted by these rules, are choosing to flout workplace standards if they do not or cannot comply.

Therefore, legal advocates who represent transgender employees must stress the ways in which dress codes mandating gender-specific performances can violate a plaintiff’s identity and serve to further oppression. Advocates must demonstrate how these dress codes are not “gender neutral” but in fact rely on and perpetuate sex stereotypes in a way that our legal framework cannot accept. For example, courts should recognize that by requiring women (and not men) to wear lipstick under a “personal best” dress code, such as the one at issue in Jespersen, employers reinforce the sex-based stereotype that women require make-up in order to look their best. Price Waterhouse emphatically declared that employers cannot lawfully force their workers to conform to sex stereotypes in order to succeed on the job.

Conclusion

Over the past fifty years enormous strides have been made in the battle for legal recognition of the rights of LGBT people. Macy v. Holder in particular has significantly advanced the resources available to transgender and gender-nonconforming individuals in the workplace. However, much work still needs to be done and new threats that endanger the rights of LGBT people have continued to emerge. For instance, following Hobby Lobby, many conservatives have actively sought to expand religious exemptions in ways that jeopardize the welfare and rights of sexual minorities. On December 4, 2014, the Michigan
House of Representatives passed the Religious Freedom Restoration Act, which some legal analysts believe would permit doctors and EMTs to refuse to treat gay or transgender patients (“License To Discriminate?”, 2014). Such laws, if enacted, would likely make it even more difficult for LGBT employees to successfully assert Title VII claims.

In order to cement Macy and Veretto, decisive action must be taken. “The piecemeal approach to providing protection to transgender” individuals, through a complex patchwork of state laws, city statutes, appellate court decisions, and EEOC rulings does not provide sufficient protection (Kelly, 2010, p. 231). Because ENDA has been abandoned, the Supreme Court is the logical forum for such action. A decision from the Court ruling that Title VII prohibits discrimination based on gender identity, gender expression, and sexual orientation would create a binding precedent and standardize the legal protections for all LGBT employees in the United States. Until the Supreme Court sets down a decisive ruling to that effect, or legislation similar to ENDA is enacted, lesbian, gay, transgender, and gender-nonconforming people will struggle to receive legal relief in cases of employment discrimination.4

References:


Interpreting ‘Because of Sex’

1 "It shall be an unlawful discriminatory practice: "(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.” Administrative Code of the City of New York § 8-107 (1)

2 See Glenn v. Brumby (11th Cir. 2011); Kastl v. Maricopa County Community College District (9th Cir. 2009); Barnes v. City of Cincinnati (6th Cir. 2005); Rosa v. Part West Bank & Trust Co. (1st Cir. 2000); Schwenk v. Hartford (9th Cir. 2000), Enriquez v. West Jersey Health Systems (Superior Court NJ 2001).

3 Hamm v. Weyauwega Milk Products, Inc. (2003): “Asymmetry of response may be evidence of sex discrimination; but to equate it to sex discrimination is a mistake... If an employer refuses to hire un feminine women, its refusal bears more heavily on women than men, and is therefore discriminatory. That was the Hopkins case. But if, as in this case, an employer whom no woman wants to work for (at least in the plaintiff’s job classification) discriminates against effeminate men, there is no discrimination against men, just against a subclass of men. They are discriminated against not because they are men, but because they are effeminate. If this analysis is rejected, the absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals. ...‘Sex stereotyping’ should not be regarded as a form of sex discrimination, though it will sometimes, as in the Hopkins case, be evidence of sex discrimination. In most cases-emphatically so in a case such as this in which, so far as appears, there are no employees of the other sex in the relevant job classification—the “discrimination” that results from such stereotyping is discrimination among members of the same sex.”

4 In July of 2015 the EEOC issued a decision in the case Baldwin v. Department of Transportation which is highly relevant to this paper. In the case a gay man (David Baldwin) alleged that he was not hired for a permanent position due to his employer’s prejudice against homosexuals. The EEOC not only found in Baldwin’s favor, but also made clear in their decision that discrimination based on sexual orientation is inherently discrimination based on sex. This means that the EEOC has moved away from a sex-stereotyping argument as their justification for protecting LGB persons from workplace discrimination. Thus, the position I advocated for in Part VI of this paper has been officially adopted as EEOC policy.
Growing up Corporate: The Dangerous Broadening Scope of Corporations’ Rights
JONATHAN MANGEL*

For Charles Mangel
You fought for social justice with the power of the typewriter and impressed upon everyone around you the astronomical importance of education. Thank you.

The rights of every man, woman, and child are held to be sacred in American political culture. Every person is entitled to certain political rights and to be free from certain arbitrary and capricious bars on their exercise of liberty. These protections include all those contained in the First Amendment to the United States Constitution, such as freedom of speech and the exercise and establishment of religion. Liberty protections also encompass rights not explicitly mentioned in the Constitution, like privacy rights drawn from the penumbras and emanations of other rights detailed in *Griswold v. Connecticut* (1965). Prior to the 14th Amendment, these protections were only guaranteed by the federal government. Since the 14th Amendment however, states have had to play by the same rules. They could no longer “deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws” (U.S. Constitution, 14th Amendment). On the whole, the 14th Amendment and the protections it provided have been a boon for civil rights and civil liberties since it was ratified in 1868. The spirit of the 14th Amendment though, that persons cannot be deprived of certain rights without due process, no longer applies to the same population as it was originally intended.

Over the course of the nation’s history, the scope of subjects receiving constitutional protections and the rights being protected have expanded. Overall, the spreading of rights to more people and broadening of protections can be a valuable development, paving the way for a more just society. In some ways though, protections are given in ways that are not logical, and to recipients that do not need them. These recipients are not individuals. Rather, these recipients are people only in the legal sense. While technically legal persons for business-related purposes, corporations have increasingly been given constitutional protections logically reserved for individuals.

The current line of corporate rights jurisprudence is normatively troubling at its best and extremely unfair in the context of the political system at its worst. In this paper, I will seek to outline the history of corporate rights jurisprudence in America, analyze that jurisprudence from a legal and political perspective, and

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Corporate Rights

offer some normative arguments to fix the problem of overzealously-distributed corporate rights. In the first section, I will detail the historical developments of corporate rights and the idea of corporate personhood. The second section will contain an explanation of corporate rights and personhood by scholars from the fields of political science, legal studies, and economics. The third section will explore the proposed policy paths of legal scholars, economist, and legislators for the future of corporate rights. Finally, the last section will offer policy solutions based on the analysis done up to that point. It will also contain predictions for the future of corporate rights and political activity in the United States in light of the political and legal climate.

The rise of the American corporation

The corporation is an exceedingly valuable legal invention. According to the US Small Business Administration (SBA), a corporation is “an independent legal entity owned by shareholders. This means that the corporation itself, not the shareholders that own it, is held legally liable for the actions and debt the business incurs” (2015). The corporation is entirely separate from the shareholders and other owners, administrators, and employees that work for it. The benefits of incorporating a business lie in facilitating economic growth in the private sector.

The legal separation of the corporation from the individuals involved in it allows for many advantages. The US Small Business Administration, an arm of the United States government, outlines some of the following benefits of a corporation: limited liability, the ability to generate capital, corporate tax treatment, and the attraction of potential employees. The limited liability benefit is probably the most topical in the discussion of corporate rights, because it is the primary manifestation of the corporate veil, the legal idea that keeps a corporation separate from its owners. If a business is incorporated, “shareholders can generally only be held accountable for their investment in stock of the company” (SBA, 2015), meaning they do not have to fear that a business they invest in performing poorly will hurt them financially any more than they willingly paid into it in the form of stock. For owners of a corporation, this mitigates a lot of the personal financial risk of starting a business, and in turn, stimulates economic growth.

The other major benefit of incorporation that is relevant to the discussion of corporate rights is the corporation’s separate tax system. Corporations are taxed as separate entities from their owners and shareholders and they are taxed at lower rates. This separate tax scheme also serves the valuable purpose of incentivizing new business ventures to sustainably grow the economy, so it is not inherently a problem. The significant aspect of maintaining separate tax systems for corporations and the individuals that comprise them, is, once again, the idea of separation, of the corporate veil between owner and business.

The evolution of corporate rights as Americans know them today can be traced to the early years of government under the United States Constitution. In 1819, the Supreme Court of the United States handed down an opinion on the case of Trustees of Dartmouth College v. Woodward 17 U.S. 518 (1819). The issue in this case revolved around the relationship between the private Dartmouth
College and the state of New Hampshire. Members of the New Hampshire state legislature sought to amend the charter of Dartmouth College, which had been operating as a private corporation under King George III’s charter since 1769. In June of 1816, the New Hampshire state legislature passed a law with the general purpose to “amend the charter, and enlarge and improve the corporation of Dartmouth College” (Trustees of Dartmouth College, par. 24). The problem in this case, according to Daniel Webster, representing Dartmouth College, is “whether the acts … are valid and binding on the rights of the plaintiffs, without their acceptance or assent” (Trustees of Dartmouth College par. 54). In a more general sense, the question to be answered by the Court was whether or not the charter between the Trustees of Dartmouth College and King George III enacted in 1769 constituted a contract between private parties, and thus, fell under the jurisdiction of the Contract Clause of the United States Constitution. The Court’s answer is a resounding yes.

In determining the validity of the acts under the constitution, Chief Justice Marshall applied the Contract Clause, which prohibits states from passing any “Law impairing the Obligation of Contracts…” (U.S. Constitution, Article 1, Section 10). The rationale for this ruling is based on the changes to Dartmouth College’s structure and function enacted by the laws of the New Hampshire legislature. In addition to changing the number of trustees governing Dartmouth College, the acts also changed the name and objectives of the corporation established in the Charter. The acts imposing these changes, Marshall argues, go too far and even become “repugnant” to the United States Constitution. Marshall reads the Contract Clause from a narrow perspective, interpreting it to restrict the government in matters of private property, not political and civil function (Trustees of Dartmouth, par. 110). Based on this principle, Marshall found the Charter granted by King George III to constitute a contract in which the state of New Hampshire could not interfere.

This seminal decision by the Marshall Court laid the groundwork for the rights that would develop later. Trustees of Dartmouth College v. Woodward entrenched the right to contract in the United States constitutional system. However, contracts and private property were only the thin edge of the wedge. With corporate contract and property rights established, Supreme Court Justices and other corporate groups would secure more rights as the nation grew.

One of the first expansions and clarifications of corporate rights came in Santa Clara County v. Southern Pacific Railroad Company 118 U.S. 294 (1886). The dispute in this case stemmed from the Californian Santa Clara County imposing taxes on the fences built by the Southern Pacific Railroad Company. The County argued it was within their authority to impose this new tax because it was allowed to tax added value on land, which, according to a California statute, included value added by fences. The company refuted this claim. The Court ruled in favor of the Southern Pacific Railroad Company, saying the taxes assessed were not allowable under the Californian Constitution and statutes concerning taxation of railroads (Santa Clara County 118 U.S. 394, page 416).

The significance of Santa Clara County does not, however, lie in the minutiae of 19th century Californian railroad taxation. Instead, it lies in the words spoken by Chief Justice Waite prior to oral argument. His famous declaration of
the rights of corporations is not mentioned explicitly in the opinion, but it creates a clear standard of jurisprudence for corporate rights that continues to this day. In response to a lengthy argument in the defendant’s brief, Chief Justice Waite declared: “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does” (Santa Clara County, Prior History). Though not binding legal precedent, the spirit of Chief Justice Waite’s words has permeated the Court’s corporate rights jurisprudence to this day. Even though the Fourteenth Amendment to the United States Constitution is not cited explicitly in more modern cases, such as Citizens United v. FEC 558 U.S. 310 (2010) and Burwell v. Hobby Lobby 573 U.S. ____ (2014), the weight of Chief Justice Waite’s words is still evident.

Free speech, as enshrined in the First Amendment to the Constitution, is a right commonly thought of as belonging to individual people. Freedom of speech, which has grown over the years into freedom of expression, encompasses spoken and written words, as well as many forms of film, photography, and even videogames. Political speech is one of the many constitutionally protected forms of expression, including volunteering, donating to campaigns, and spending money on political advertisements. The latter form of political speech was greatly expanded in the 2010 Supreme Court decision Citizens United v. FEC. According to Justice Kennedy’s majority opinion, the question confronting the Court in Citizens United revolved around a 1990 case, Austin v. Michigan Chamber of Commerce 494 U.S. 652, and the more recent McConnell v. Federal Election Commission 540 U.S. 93 (2003). Austin had previously held that “political speech may be banned based on the speaker’s corporate identity” (Citizens United 319). The ruling in Citizens United was a 180 degree turn away from Austin that deregulated the amount of money individuals, corporations, and political action committees could spend on advertisements independent of campaigns.

Under Citizens United, corporate entities, including for profit and non-profit companies, have the right to spend as much money on issue advertisements and donations to Super PACs as their treasuries allow. Some regulations remain intact, such as disclosure, and limitations on ads directly supporting or detracting from a particular candidate. However, the dangerous precedent set by Citizens United greatly expanded the rights of corporations in regards to political speech, putting them on an equal footing with human persons.

Only one year after Citizens United, the Roberts Court reversed a lower court decision that bestowed corporations with the right to privacy when it comes to disclosure of documents from a federal law enforcement agency. Federal Communications Commission v. AT&T Inc. 562 U.S. 397 (2011). By an impressive unanimous vote of 8-0 (Justice Kegan recused herself), the Court held that corporations do not have a right to personal privacy that would otherwise prevent the federal government from releasing public records about the corporation. The question revolved around the interpretation of the Freedom of Information Act’s “Exemption 7(c),” which prevents the release of public records
that “constituted an unwarranted invasion of personal privacy” (*AT&T Inc.* 12). AT&T argued that because “person” had been defined to include corporations earlier on in the statute, “personal,” the adjective form of person, must also include corporations. The Roberts Court strongly disagreed.

After the Court expanded First Amendment speech rights to corporations in 2010, they bestowed closely-held corporations with the right to religious exercise. *Burwell v. Hobby Lobby* 573 U.S. ____ (2014), asked the question: can closely-held corporations (not publicly traded, owned and operated by a small group of people), using the Religious Freedom Restoration Act of 1993 (RFRA), seek a religious exemption from the Department of Health and Human Services’ (HHS) mandate that corporations of a certain size provide health insurance that covers certain forms of contraception? The family that owns Hobby Lobby, a craft supply store, believes a few of the forms of birth control outlined in the mandate constitute abortion, which they argued was against their religious beliefs.

The Court, by an ideologically divided margin of 5-4, held in favor of Hobby Lobby. Justice Alito, speaking for the majority, wrote “that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest (*Hobby Lobby* 1). The Court found that since other non-profit organizations, such as religious hospitals, were granted exemptions from the HHS contraception mandate, it was not evenly applied to deny the same benefit to religiously operated for profit corporations. Alito maintained: “HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections” (*Hobby Lobby* 3). With these rationales for the holding in *Hobby Lobby*, the Roberts Court has greatly expanded First Amendment rights for corporations and further enshrined those protections with more exacting levels of scrutiny required to regulate them. Overall, the historical trend for corporate rights has proceeded onward and upward.

The arc of corporate jurisprudence seems to be bending toward the expansion of rights. These rights are not just economic in nature, like the right to contract exhibited in *Trustees of Dartmouth College*. With *Santa Clara County* came the explicit inclusion of corporations under the equal protection clause of the Fourteenth Amendment, and First Amendment rights of political speech and religious expression came from *Citizens United* and *Hobby Lobby* respectively. The only recent limitation on corporate personhood is the rather narrow restriction that corporations do not have “personal privacy,” when it comes to disclosure of federal documents. Through examining some of the landmark corporate rights cases of the Supreme Court of the United States, one can see the legal protections granted to the artificial person have grown nearly unimpeded since the 19th century. The next section will go on to discuss corporate personhood and corporate rights from the perspectives of social scientists, economists, and legal scholars.

**Corporations in the eyes of the beholders**
Naturally, people from different fields are going to take different perceptions and experiences into any analysis of the status of corporations and the legal culture surrounding them. Experts within a given field and across different areas of study disagree about the best way to legally construct corporations. Some think that corporations are not people in the physical or philosophical sense, and so should not be given any legal rights in the personal sense. Their opponents counter that argument by citing the corporate concept’s extreme significance in American economic development, and advocate for personal rights of corporations as essential to the continued economic health of the nation. This section explores the fault lines where the economic, legal, political, and philosophical fields conflict with each other, as well as the various places these fields can come to a semblance of agreement.

From a legal perspective, there are as many views on the personal rights of corporations as there are legal scholars who study the phenomenon. One of these scholars, Larry Ribstein, details three archetypical views of the corporation in today’s legal world. The first, Ribstein says, is the “corporate person,” which “views the corporation as a distinct bundle of rights and obligations” and “substitutes an artificial legal entity for the underlying individuals who act through the corporate form” (1995, p. 96). Upon initial examination, it seems this is the theory *Citizens United* and *Hobby Lobby*. However, the version of the “corporate person” explained by Ribstein also entails “pervasive government power to regulate corporations,” because corporations are, in fact, created by the government (1995, p. 96). Under this interpretation of corporate personhood, there are few mechanisms impeding government regulation of the corporation. Rita C. Manning, another legal scholar, agrees that corporations have some rights as persons, but are also subject to regulation under this different type of personhood.

Manning explains the relationship between corporate personhood and moral and legal accountability. In describing her thoughts on holding corporations accountable for their actions, Manning writes: “one need not argue that a collective is a metaphysical person in order to ascribe fault responsibility or accountability to it” (1984, p. 83). In other words, corporations can still be held accountable for their actions, whether they are financial, legal, or otherwise, without being labeled as persons. This argument rings true because the use of the word “person” for corporate legal status seems to be a term of arbitrariness or convenience, not necessity.

The second major theory of the corporation detailed by Ribstein is the “contractual theory.” He indicates the contractual theory of corporations “is understood as a set of contractual arrangements, which ought to be no more regulated than other contracts” (1995, p. 100). On its face, this theory exudes a neoliberal economic tilt. It would maintain that governments “create” corporations as they “create” any contract, through enforcement. Every other feature of corporations, such as limited tort liability, stem from the contracts and agreements corporations make, and do not justify government regulation (Ribstein, 1995, p. 100). The right to contract has been established in the Constitution and strengthened through various Supreme Court rulings, such as *Dartmouth* and *Lochner v. New York* 198 U.S. 45. Though the right to contract,
and thus to corporate rights under this theory, is not unlimited, Ribstein poses few limitations on the workings of corporations under the contract theory. Ribstein’s final theory of corporate legal structure is the “unconstitutional conditions” model. Expounded by Richard Epstein, the unconstitutional conditions structure of corporate legal theory holds “incorporation and a corporation’s transaction of business outside of its incorporating state as privileges or subsidies states grant to business” (Ribstein, 1995, p. 106). Epstein’s “unconstitutional conditions,” though, runs afoul of several tenets of both the corporate personhood theory and the contractual obligations theory. Unconstitutional conditions theory requires the state’s role in incorporation, as per corporate personhood, but decries constitutional regulations of the corporation as inefficient and even unnecessary, as per the contract theory. This view is contradictory in nature and less than ideal for a framework of realistic government oversight of corporate legal activity.

From a business ethics perspective, one of the primary pieces of the corporate personhood discussion is just how to hold corporations responsible for the actions of those who run them. The question of corporate responsibility is inextricably tied up in this discussion. If the corporation is its own legal entity, can it be held responsible for its actions? If the corporation is not its own legal entity, who is held liable for the corporation’s wrongdoing or losses?

As explained above, the legal idea of incorporation in the United States holds the corporate entity to be financially independent from its shareholders or owners. However, the ethics of this process are called into question by various legal scholars, economists, and philosophers. Arun A. Iyer explores many different conceptions of corporate ethics. He contends that corporate personhood, when viewed as a contract between the corporation and society, is too simple to truly capture the corporate-social relationship (2006, p. 397). Iyer distills the arguments of both corporate personhood supporters and critics into the language of contracts. In either case, the corporation enters a social contract with the society in which it exists. For the supporters of corporate personhood, it is the corporation as its own entity that enters into this agreement. For the critics of corporate personhood, it is the individual shareholders that constitute the corporate funds (Iyer, 2006, p. 404). While Iyer continues to argue that social-corporate relationships are too dynamic to lump into contracts like that, the idea of liability and ethics is what matters here.

Those ethics and responsibilities boil down to the question of whether or not a corporation, regardless of whether it is a legal person, is a moral agent. A moral agent is someone or something that can be “held responsible in a moral sense for their actions and omissions” (Henriques, 2005, p. 91). In this way, the moral agency of a corporate person is paramount to the prosecution of corporate criminal wrongdoing. Recognizing the corporate entity as separate from the individuals it is composed of allows law enforcement the flexibility to punish the corporation, instead of the individuals that may have had no knowledge or hand in the criminal action. This distinct corporate liability cuts both ways though, as the individual decision-makers in the corporate structure are then harder to prosecute because of this separation. In the vein of corporate personhood though,
moral agency for the corporate entity further contributes to the idea of separateness. If a corporation can be held accountable for the actions taken in its name, it is wholly separate from its investors and decision-makers.

**Normative constructions of the corporation**

*Embracing personhood as a means of accountability*

Boston College law professor Kent Greenfield maintains an interesting liberal view of the corporate personhood doctrine. Instead of corporate personhood causing the scourge of unchecked corporate rights, he argues the cause is rather a lack of true personhood for corporations. He explains that “corporations are separate in order to facilitate investment. So, when I invest in General Motors, I’m insulated from liability of that company” (Greenfield, 2015). This corporate veil that keeps private investors legally separate from the entity in which they invest is paramount to United States’ economic progress. Greenfield argues that a separate corporate “person” protects individual investors. They do this by aggregating the risk into one entity with deeper pockets and the ability to persist for extremely long spans of time: the corporation.

The key distinction Greenfield draws, though, rests in the type of legal protections granted to the corporate person. Greenfield first explains that being a legal person allows one to sue and to be sued, which is important for holding corporations accountable to the public, as well as each other. The parallel between individual personhood and corporate personhood is the kinds of rights granted outside the courtroom. According to Greenfield (2015):

> When it comes to First Amendment speech matters, I think there are situations in which corporations should be protected in saying things that are germane to their business and are important in the public debate. But I don’t think corporations should have the same free speech rights you and I do, because once they get far afield from their business, then it becomes much less relevant to the public debate, and it’s much more likely to be a matter of self-dealing.

This key distinction, that corporations are persons only so far as it pertains to their business, is essential to Greenfield’s normative design of corporate personhood. In other words, the corporate veil separating the corporation from its shareholders and managers (and those individuals’ beliefs and ideologies) still exists.

In an amicus brief to the Supreme Court in the case of *Burwell v. Hobby Lobby*, Greenfield and other corporate lawyers argued that corporate personhood, the doctrine that led to Hobby Lobby’s victory, should actually have led to its defeat. Hobby Lobby should have lost “because of that idea of separateness. The family that owns Hobby Lobby incorporated Hobby Lobby in order to protect them from legal liability in order to separate the family from the business of the company” (Greenfield, 2015). In the Supreme Court’s ruling on *Hobby Lobby*, the owners of the company got to have their cake and eat it too. They kept the legal distinction that keeps their own wealth and liability separate from the corporate coffers, and they gained the ability to impose their own religious beliefs as if they were the company’s. In Greenfield’s eyes, the Court got it wrong. They should have recognized that shareholders are people, and Hobby
Lobby is a person, as well as that they are separate people. It is in this complete separateness that Hobby Lobby then would lose its religious exercise rights.

**Corporate personhood as the bane of democracy**

Democratic Senator Al Franken of Minnesota takes quite a different position than Professor Greenfield on the issue of corporate personhood. In a statement made on the floor of the US Senate on January 26, 2012, the second anniversary of the *Citizens United* ruling, Senator Franken painted an extremely bleak picture of the ruling’s impact on American politics. He said: “the Supreme Court handed down the landmark decision, Citizens United, and with it, they gave corporations a blank check to utterly destroy our political system” (Franken, 2012, “Statement on the Anniversary of Citizens United”). As can be evinced by the fact that American politics is still functioning as of this writing, Senator Franken’s warning seems a bit hyperbolic. In Franken’s eyes, and the eyes of many critics of the *Citizens United* decision, the evil of corporate money in politics stems not from the ideal of corporations exercising free speech, but from the favors, and ultimately, corruption, corporate money could inspire.

Much to Franken’s dismay, the Court disagrees with his diagnosis of the political problem. In the Court’s opinion on *Citizens United*, Justice Anthony Kennedy wrote: “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” (2010, p. 42). The conventional wisdom that exorbitant amounts of money in politics is the equivalent of buying favors from politicians may stand up to a cursory examination of its logic, yet political science research does not entirely support this conclusion.

One experiment conducted by Daniel Houser and Thomas Stratmann in 2008 was one of the first empirical tests of campaign finance theories in a laboratory setting. They concluded that “while high-quality candidates are almost always elected in publicly-financed campaigns, this is not the case when campaigns are financed by quid-pro-quo special interests” (Houser and Stratmann, 2008, p. 234). In Franken’s argument, corporations in the post-*Citizens United* world manifest Houser and Stratmann’s “quid-pro-quo special interests.” However, the real political relationship between candidates and interest groups, independent funding and vote choice while in office, is more complicated than simple quid pro quo. The appearance of quid pro quo corruption though, is just as serious as actual corruption, as it undermines public faith in the democratic process (*Buckley v. Valeo* 424 U.S. 1).

Harvard law professor Lawrence Lessig concurs that money in politics degrades the overall quality and integrity of American democracy. Lessig details his views on the dangers of campaign financing as it currently stands, and the role corporate speech plays in it, in his 2011 book *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*. For Lessig, the degradation of American democracy has two primary elements: bad governance and a loss of public trust in the democratic system (2011, p. 8-9). The bad governance element harkens back to the existence of quid pro quo bribery and the idea of moneyed donors receiving access to legislators the bulk of the constituency does not. The loss of trust can be justified as a serious problem because the Supreme Court has
maintained, as they did in *Buckley v. Valeo*, that it is a compelling government interest to stamp out even the appearance of corruption.

In discussing the loss of public trust in the American democratic system, discussions of “special interests,” or at least, perceived “special interests” is imperative. Many of these “special” interest groups (a negative moniker meant to vilify any organization with a policy agenda) are corporations or industries, such as “Big Oil,” or “Big Tobacco,” but interest groups can also include labor organizations or single-issue political organizations such as the National Rifle Association. The Supreme Court’s *Citizens United v. Federal Election Commission* ruling in 2010 allows these interest groups to spend as much money as they want on political advertisements, which, according to Lessig, has greatly contributed to the loss of public faith in the democratic system.

In his crusade to raise awareness for the corrupting agents of campaign finance gone awry, Lessig cites various survey data on public trust in government. For instance, the American National Election Study (ANES) showed in 1964 that “64 percent of respondents believed the government was run for the benefit of all and 29 percent believed the government was run for the benefit of a few big interests.” In the 2008 ANES, those numbers were 29 percent and 69 percent respectively (Lessig, 2011, p. 167). Though the ANES studies predate *Citizens United*, they show quite clearly the perception of corruption or, at best, poor prioritization by elected representatives that undermines public faith in the government. Post-*Citizens United*, Common Cause, Change Congress, and Public Campaign, conducted a poll that only compounded the conclusion that the American people are losing trust in their government. According to this poll, 74 percent of respondents “agreed that special interests have too much influence,” 79 percent agreed “that members of Congress are ‘controlled’ by the groups and people who finance their campaigns,” and a paltry 18 percent of respondents “believed that lawmakers listen to their voters more than to their donors” (Lessig, 2011, p. 167). If the pre-*Citizens United* data cannot be used to conclude that corporate money creates the perception of corruption, if not actual corruption, then the post-*Citizens United* numbers are staggering. Lessig’s argument, together with Senator Franken’s campaign against *Citizens United*, create a potent moral argument against the potentially corrupting influences of money in electoral politics as allowed by *Citizens United*.

**Something in between**

Dr. David Ciepley at the University of Denver contends something wholly unique for the legal construction of the corporate person. His article, entitled “Beyond Public and Private: Toward a Political Theory of the Corporation,” argues that corporations “are not simply private,” because government grants corporations their private sovereignty, but “they are privately organized and financed and therefore not simply public” either (2013, p. 139). Ciepley’s desire to create a separate legal class for corporations, with its own rules and regulations, does not seem entirely new. The points he raises though, call into question the normative attitudes of society toward the corporate idea.

Ciepley points out that the corporation as a legal idea was attributed to nonbusiness entities before it took the financial and economic world by storm.
Thus, he argues, the rights of a corporation are not inherently business-related. He outlines the three rights of corporations to be “1) the right to own property, make contracts, and sue and be sued, as a unitary agent (a legal ‘person’). 2) the right to centralized management of this property; and 3) the right to establish and enforce rules within its jurisdiction beyond those of the laws of the land,” (Ciepley, 2013, p. 141). This interpretation of the rights and functions of the corporation, while not exclusively business-related, does not necessarily broach the level of social rights attributed to American corporations today. Though Ciepley’s definition includes the ability to “enforce rules within its jurisdiction beyond those of the laws of the land,” it does not allow for the right to run contrary to the laws of the land. Corporations, even under Ciepley’s definition, are still bound to the laws of the state in which they reside. So, even though corporations are made legitimate by laws and sustained by private enterprise, they still do not get a blank check on imposing their own social values.

**Striking a balance between business rights and personal rights**

*The role of the Court*

The legal and political problems stemming from the unfettered growth of personal rights for corporations requires a multi-faceted solution and the cooperation of many political and legal actors. As it is with many, if not most, legal movements in United States history, the Supreme Court needs to be involved in setting the rules for the game of First Amendment rights for corporate persons. Ideally, the Court would overturn *Citizens United* completely on the basis that corporate speech rights, though existent as far as business matters go, does not warrant unfettered political speech in the form of money. This seems extremely unlikely though, as the composition of the Court has not changed in any way that would be amenable to overturning *Citizens United*. The only alteration to the makeup of the Court since 2010 is the retirement of Justice John Paul Stevens and his subsequent replacement with Justice Elena Kagan. Justice Stevens joined the majority in part and dissented in part in *Citizens United*. Justice Kagan, based on her ideology and appointment by a Democratic president, would most likely vote the same way as her predecessor, maintaining the status quo of unfettered independent expenditures in campaign finance and political speech for corporate persons.

The likelihood of the decision being overturned in the next few years also seems uncertain, at best. The Court’s 5-4 split in favor of the Court’s conservative, Republican-appointed justices, and the hostile environment in Congress almost ensure that if an appointment is made before the 2016 presidential election, it would need to be one with a center-left ideology, as opposed to a more overt liberal one that would more likely overturn *Citizens United*, just to have a chance of passing the Senate’s confirmation hearings.

In addition to the political difficulties of overturning *Citizens United*, the court runs into self-inflicted doctrinal problems as well. Upon deciding *Burwell v. Hobby Lobby*, and conferring the rights of the Religious Freedom Restoration Act on the corporate person that is Hobby Lobby Inc., the Supreme Court painted itself further and further into a corner. If the Court wanted to overturn *Citizens United*, it would need to overturn *Hobby Lobby* as well. A single switch in
personnel on the Court could allow for these changes in jurisprudence to occur almost overnight, given a case before them. The political realities though of current divided government, uncertainty for the fate of the presidency in the 2016 election, and the Court’s own recent decisions create an environment where the expansion of individual rights for corporate persons being reversed is extremely unlikely.

Should the political realities somehow be conquered, and the Court stares down a new First Amendment corporate personhood case, the Court has more than enough legal logic on its side to redefine the social and political rules of what it means to be a corporate person. The primary mistake of the Roberts Court in *Citizens United* was a fundamental misreading of the concept of political corruption and a flawed attribution of political rights to an inherently apolitical entity.

The Court held in *Buckley v. Valeo* (1975) that it was not just actual quid pro quo corruption the government had a compelling interest in curtailing, but also the public perception of corruption. As Lawrence Lessig pointed out in his book *Republic, Lost* (2011), there is no clear line of causation that a campaign contribution or independent expenditure from a company causes an individual elected official to change their policy positions. What those contributions do rather effectively however, is erode the American people’s faith in the integrity of the democratic process. To reiterate the results of a post-*Citizens United* poll Lessig discusses at length, 79 percent of Americans agreed “that members of Congress are ‘controlled’ by the groups and people who finance their campaigns” (Lessig, 2011, p. 167). The wording of the poll discussed here, about members of Congress being “controlled” by their campaign financiers, fits perfectly the “perception of corruption” Congress is fully empowered to prevent.

For this reason alone, *Citizens United* is based on faulty logic that is not in step with the times. Perhaps limiting Congressional campaign finance reform powers to fighting quid pro quo corruption was more efficacious in the days when industry magnates would leave suitcases of money in Congressional offices, but not today. The complex system of campaign finance in America today is inextricably tied up with corporate money. Though Boston College Law professor Kent Greenfield is correct that individual campaign donors and spenders, such as the Koch brothers and Sheldon Adelson, spend a lot more money than corporations on campaigns (which is its own problem that needs to be addressed), one step in the right direction would be to correct the Roberts Court’s mistake in conferring the same political speech rights as individual humans on corporations. Corporations do not vote. Corporations do not run for office. Corporations only exist as an abstract idea, held together by societal norms and a common desire to aggregate liability and profits in business. The corporation has no right to empty its coffers in an arena composed of, created by, and administered for the people.

The corporate rights jurisprudence of the Roberts Court did not stop with *Citizens United* though. The more recent *Hobby Lobby* decision, which allowed small, closely held corporations to use the Religious Freedom Restoration Act to get out of supplying employees with medical insurance plans that covered various types of contraception, only led the Court more astray.
The Religious Freedom Restoration Act passed in 1993 in response to the Supreme Court decision *Employment Division of Oregon v. Smith* 494 U.S. 872 (1990). *Smith* set the precedent that “as long as a statute was generally applicable and not directed at religion, it would be upheld, regardless of whether it infringed on a religious practice” (Drinan and Huffman, 1993-1994, p. 531). Many religious groups and civil rights groups felt the Court went too far, that the precedent was too dangerous to the free exercise of religion. In response, Congress passed the RFRA of 1993, which reinstated the compelling interest test for free exercise claims that had been the basis of free exercise jurisprudence pre-*Smith* (Drinan and Huffman, 1993-1994, p. 533). It was under this test, reinstated by RFRA, that the Roberts Court judged whether or not the contraception mandate element of the Affordable Care Act was unconstitutional.

In order to pass the compelling interest test (or “strict scrutiny” as it is often referred to), the government’s actions need to meet several criteria to be deemed constitutional: the law in question must serve a compelling government interest and it must do so in the least restrictive way while pursuing that compelling government interest. According to Distinguished Professor of Law at Widener University, Alan E. Garfield, the Court was wrong to rule in favor of Hobby Lobby’s exemption from the contraception mandate. In an article published in the Columbia Law Review five months before the Court’s decision was published, Garfield outlined just why the Court should not grant the religious exercise exemptions for Hobby Lobby, a corporate person.

In addressing the issue of whether or not mandating companies to provide health insurance that covers contraception serves a compelling government interest, Garfield reflects on a few harsh political realities. Cases such as *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* 546 U.S. 418 (2006) have strengthened RFRA by requiring that not only must the government show a compelling government interest, but it must also prove that the exemption from the law being sought would undermine this compelling government interest (Garfield, 2014, p. 7). The majority of the Court found that to be the case in *Hobby Lobby*. In her dissent, Justice Ruth Bader Ginsburg admonished the majority by pointing out that “federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes” (*Burwell v. Hobby Lobby* 26). Justice Ginsburg’s argument is that the exemption status granted to religious organizations, small companies, and companies with preexisting health plans does not undermine the government’s interest of allowing affordable access to contraception for women, regardless of their employer. A key distinction regarding Hobby Lobby’s exemption claim is motivation. Small companies that may not be able to afford the coverage and companies with older healthcare regimes that need time to acclimate to the new system all have practical reasons for exemption. Hobby Lobby’s owners’ complaint is not a practical objection, but an ideological one.

The part that the Roberts Court got wrong in *Hobby Lobby* and in *Citizens United* before it is that corporations, separate from their shareholders, board of directors, or any individual in charge, do not have political preferences or the ability to exercise any religion. Garfield sums it up rather nicely when he recites an eighteenth-century quote about corporations: “Did you ever expect a
corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?” (2014, p. 3). Corporations do not exercise religion, their owners and operators do. In deciding that Hobby Lobby’s religious exercise rights were protected by the Religious Freedom Restoration Act, the Roberts Court tore asunder even more of what the corporate veil was supposed to be.

The policy remedy for ailing corporate persons

It seems the issues of corporate personhood and the individual rights bestowed on them manifest themselves twofold. First, the rights attributed to corporations stem from a fundamental misinterpretation of the purpose of incorporation as a legal and business practice, primarily that it is a profit driven venture meant to separate the individuals running the corporation from individual legal and financial liability for the corporation’s business failures and legal faults. In fact, Garfield explains “the primary benefit of incorporating is to limit liability of these other parties for the actions of the corporation” (2014, p. 3). When viewed through the lens of economic risk and financial liability, incorporation of a business makes perfect sense. What incorporation is not meant to do, however, is create an entirely separate person capable of their own decisions, political views, and religious rights. The corporate veil exists for financial purposes, not personal ones.

The second problem stems from the first. The owners of a business, whether they are massive publicly traded companies, or the small, closely held corporations like Hobby Lobby, should not be allowed to pick and choose when to remain separate from their corporations. As Garfield aptly points out: “why should these parties, who would fiercely oppose piercing the corporate veil in any other context, be able to take advantage of ignoring the corporation’s separate identity” when it comes to other elements, like religious expression? (2014, p. 4). The inherent hypocrisy of a Swiss cheese-like corporate veil is laughable, and should have been quickly dismantled by the Court and legislators.

Based on these two fundamental problems with American Supreme Court corporate personhood jurisprudence, two strategies for dealing with them become apparent. The first is to completely redefine the corporate person. This method would require massive overhaul decisions by the Supreme Court, miraculous legislation from Congress, or even a constitutional amendment. Though extremely unlikely, a redefinition of corporate personhood would definitely clear up the legal air surrounding corporate rights. The second apparent route for critics of the current corporate status quo is to address the corporate veil. The Court’s allowance for a buffet-style corporate separation, in which owners are allowed to pick and choose which financial and social elements of their lives they want separated, needs to end.

Redefining the corporate person could come about in many different ways. For instance, legal culture could dictate that corporations are no longer people, but rather, something else. Another way though, would be to keep corporations’ status as their own legal person, just with separately defined social and political rights from human people. For instance, adoption of the phrase “corporate person,” as the only way to refer to incorporated entities would pave the way for
completely separate rights for individuals and the corporations governed by individuals.

The precedent that corporate persons be treated differently from human, individual persons has already been set, and set by the Roberts Court no less. In Federal Communications Commission v. AT&T Inc. 562 U.S. 397 (2011), the Court held that “corporations do not have “personal privacy” for the purpose of exemption” from the Freedom of Information Act, which “requires federal agencies to make records and documents publicly available upon request, subject to several statutory exemptions” (AT&T Inc., 2011, p. 1). AT&T’s argument, as mentioned above, was that because corporations are considered legal “persons” under the Administrative Procedure Act, the “personal privacy” exemption for divulging information pursuant to the Freedom of Information Act applies to the company’s data archives. The Roberts Court unanimously disagreed, stating (2011):

Adjectives typically reflect the meaning of corresponding nouns; but not always. Sometimes they acquire distinct meanings of their own. The noun “crab” refers variously to a crustacean and a type of apple, while the related adjective “crabbled,” can refer to handwriting that is “difficult to read” (AT&T Inc., p. 4).

Though the differences Chief Justice Roberts points out in this piece of the opinion seem to be more rhetorical than anything else, the importance of rhetoric in writing law cannot be overstated. By taking AT&T’s legal argument to task, Chief Justice Roberts potentially (and maybe unintentionally) drove a wedge between the corporate person and the individual person. By creating a discrete difference between corporate persons’ privacy rights and individual persons’ privacy rights, Chief Justice Roberts has opened the door for the addition of other discrepancies in rights allocation. It is possible that, further down the road, other personal rights, such as exercising religion, or making political speech, will be more clearly defined for individual persons because words like “personal,” will be construed as belonging wholly to the individual person.

In a similar vein to the delineation of corporate rights and individual rights, one must address the declarations of Chief Justice Waite in Santa Clara County v. Southern Pacific Railroad Company 118 U.S. 394 (1886). His dicta that (1886):

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does. (Santa Clara County, Prior History)

would be rendered irrelevant by a redefinition of “corporate person” as separate from individual persons, whom the Fourteenth Amendment was originally designed to protect. Instead, Chief Justice Waite’s attitude can be realigned to apply to corporate persons in a different way. In order to maintain the equal protections of corporate rights under the Fourteenth Amendment, the Amendment must be read differently for corporate persons and individual persons.
Two separate doctrines of interpretation for the equal protection clause of the Fourteenth Amendment, one for corporations and one for individual people, would go a long way in allowing for clear separation of the two, as well as prevent precious individual rights, like political speech and the exercise of religion, from piercing the corporate veil. If all “corporate persons” are protected equally among their corporate peers, the spirit of the Fourteenth Amendment still applies without conferring the rights of individuals on corporations that have no business claiming free exercise rights.

National policy overhaul on any controversial issue is always exceedingly difficult. While campaign finance is not an issue the average American cares about as much as religious freedom, political elites have a vested interest in maintaining the current campaign finance regime, and thus, the ability for corporations (as well as individuals) to spend as much money on politics as is in the coffers. Lawrence Lessig describes this vested interest as “systemic corruption,” a set of rules policymakers must play by in order to do their jobs. He argues policymakers abide by these rules because it is “just the way things are done,” no one need feel guilty, or evil, by participating in this system ... a lobbyist arranging a fund-raising event for a target member of Congress is ‘just doing his job” (2011, p. 238). The entrenchment of this system of regulatory favors for campaign funds has shaped modern policy, as well as taken the United States of America’s elected officials and forced them to spend a disproportionate amount of their time fund-raising, instead of writing legislation (Daley and Snowberg, 2011). Overcoming the challenges of such a completely intertwined system will be difficult and there are people fighting to do just that.

The second major policy route to fixing the endemic problem of the blurred line between corporate personhood rights and individual personhood rights is to address the corporate veil, the legal barrier separating the incorporated entity from the individual people that run it. The corporate veil is deteriorating in all the wrong places, preserving all the business benefits and adding new means of social control to the corporate arsenal. There should be no half corporate veil. There are two options for mending the corporate veil: preserve nothing or restore it all.

The first of two major ways to restore integrity to the corporate veil is to tear it down altogether. Instead of investors, boards of directors, and other corporate decision makers picking and choosing when to maintain the corporate veil, the legal system could just give them what they seem to want (the ability to press their own views on others through corporations), and eliminate the protections of incorporation entirely. While calling this method extreme would most certainly be an understatement, it has the potential to remind corporate decision makers of the original purpose of the corporate veil, and make them clamor for its restoration. Eliminating the corporate veil entirely would make every individual shareholder, employee, and administrator of a corporation financially liable for the corporation’s losses and legal problems. If those in favor of piercing the corporate veil for social purposes stared down the barrel of that prospect, they would probably change their tune about corporate free exercise rights. The other, more moderate argument for restoring the corporate veil and
the legal separation it provides is to backtrack jurisprudence to a pre-\textit{Hobby Lobby} status in which corporations are wholly separated from their owners/administrators.

As Boston College Law Professor Kent Greenfield explained in his interview from \textit{On the Media}, one possible solution to fixing the Courts’ errors in cases like \textit{Hobby Lobby} and \textit{Citizens United} is more corporate personhood, judiciously applied. Greenfield explains the argument he made in a brief on behalf of the government in \textit{Burwell v. Hobby Lobby} (2015):

based on that idea of separateness... Our argument was that they should not be able to separate themselves from the company for purposes of liability, but say that they’re one and the same for purposes of religious rights. So, corporate personhood should have led the court to say “Look, \textit{Hobby Lobby} is one thing, the shareholders are the other, and the shareholders’ religious beliefs don’t really affect the company one way or the other.”

This argument is one of the ideal possibilities for restoration of the corporate veil. Separateness is complete separateness, and shareholders and owners cannot compromise that view whenever they see fit.

Going forward, the people and policymakers of the United States need to ask questions about the role corporations play in society. The idea of incorporation is a boon for business people, entrepreneurs, and the public because it allows for economic expansion that would otherwise be too risky for any rational investor to participate in. Private economic venture is the heart of capitalism, which basically constitutes an ideology in America. For these reasons, incorporation is not going away in America. Getting rid of incorporation as a business and legal tool in order to solve the problems of misplaced corporate rights would be like vacuuming away oxygen to put out a fire. It would accomplish the goal, but destroy an essential entity. So, instead of replacing corporations with an alternative, the American government can restore corporations to their rightful, economically productive place in society, instead of the social role they now play as well.

The most realistic way of achieving the goal of limiting and reversing the growth of individual rights for corporations is to restore the corporate veil. The recent decisions by the Supreme Court to allow the degradation of the corporate veil expanded the non-economic role corporations play in society. These decisions added means of social control, such as political spending, and religious exercise to the corporate repertoire, which is beyond the historical scope and purpose of the corporate person.

If any arm of the United States government is to initiate this change in the treatment of corporate rights, it would most likely need to be the courts. As Lawrence Lessig has pointed out, the current system of campaign finance and corporate interest in Washington is too ingrained in the policymaking process to yield any substantial change without overcoming some titanic obstacles. The presidency has very little direct power in deciding how to treat the issue of corporate rights, especially in an era of divided government when Congress and the president do not work together. The president’s power lies instead in the
appointment of Supreme Court justices, who are the real power players in this issue. The Court as it is currently composed has a slim to none chance of overturning the *Citizens United* or *Hobby Lobby* decisions that have so expanded corporate rights.

The hope for the future of curtailing the reckless expansion of corporate rights lies instead in the Court changing, and the sitting president (who would most likely need to be a Democrat) selecting a justice more amenable to a narrower interpretation of the definition of the “corporate person.” The odds of this event are difficult to bet on. Two of the oldest members of the Court most likely to leave it dissented in *Hobby Lobby* and *Citizens United*. In that case, a liberal or center-left appointee would only maintain the status quo. This prospect would also rely on the Democratic party keeping the White House in 2016, as well as being able to secure the confirmation of a left-leaning justice in a potentially divided government. Overall, the prognosis for corporate rights in America appears to read in favor of more rights for corporate persons in more areas of life. Ultimately, this development has the potential to distort policy and politics at best, and interfere in the lives of every day Americans at worst.

**Conclusion**

The status of the American corporation has greatly expanded over the last few years. The Supreme Court has taken measures to augment the corporate entity in America with more rights than just limited liability for stakeholders and separate taxation. The court has heaped onto those economic rights abilities and liberties typically reserved for the individual person. *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010) and *Burwell v. Hobby Lobby* 573 U.S. __ (2014), have greatly expanded the rights of corporations in the social arena. *Citizens United* declared that anyone (individuals, corporations, unions, etc.) can spend unlimited money on political advertisement and other expenditures, which greatly inflated the amount of money in politics. This has led to more corporate money flowing into campaign coffers, more corporate sponsored campaign fundraisers, and more (perceived, if not real) outside influence in Washington. *Hobby Lobby* expanded the Religious Freedom Restoration Act of 1993 to protect the religious exercise rights of small, closely-held for-profit corporations. These rights are typically thought of as only practiced by individuals. After all, how can an abstract entity, existing only for the purpose of limited liability and capital formation, practice religion or hold political views that warrant unfettered political speech?

These new rights corrode the American people’s faith in the democratic system, as pointed out by Harvard Law Professor Lawrence Lessig, and interfere in the private lives of employees. The only way to correct the problem of expanding corporate rights is to reverse the dangerous trend of the fading corporate veil. As Kent Greenfield argues, corporate personhood is the legal separation of the owners and the corporation, so the religious views of the family that owns Hobby Lobby Inc. should not be allowed to pass their religious views off as the company’s. The entire purpose of the corporate veil is to remain separated. If corporate shareholders and owners wish to preserve the corporate
veil for financial gain, they should be prohibited from cutting it down as a means of social control.

In the end, there are so many moving pieces in the policy-making puzzle, it is difficult to tell where American corporate rights will go next. Recent trends indicate the expansion of corporate rights in the future seems more than likely. Which rights will be conferred on corporations next is difficult to predict. Hopefully, the Court overturns its erroneous precedent soon, as to mitigate the social damage of the purely economic and abstract corporate person.

Much of this problem though, stems from a misnomer in the legal vocabulary. A separate legal entity is not inherently a person. The use of the term “corporate personhood,” to indicate legal separateness is arbitrary and vulnerable to vagueness and manipulation. Categorizing an abstract entity, given purpose and legitimacy by legal documents and a social contract, is not a person. While the actual mechanism of “corporate personhood” is vital to economic growth and entrepreneurship in America, the term “corporate personhood” is not. Instead, a company separated from its investors and directors by the corporate veil should be called what it is: a corporation, not a corporate person. In law, rhetoric is of paramount importance. Though a change of rhetoric will not change legal culture overnight, the removal of the word “person” from the corporate label returns it to the economic purpose corporations actually serve. It may be a small step in the right direction, but corporations must be treated differently from real people. Individual rights belong to individual persons, not to corporate entities, if for no other reason than corporations have “no soul to be damned, and no body to be kicked” (quoted in Garfield, 2014, p. 3).

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Alternative Affirmative Action: 
Evaluating Diversity at Flagship Universities under Race Blind Admissions 
Elizabeth Bell*

America’s commitment to equality, justice, and fairness has been called into question in affirmative action debates.1 Even so K-12 schools continue to have racially stratified achievement, and pervasive segregation that prevents students from reaping the benefits of racially and ethnically diverse learning environments. Americans have remained divided, with citizens and social scientists rarely in consensus on how to encourage the enrollment and graduation of students from diverse backgrounds. Eight states have shifted towards alternative affirmative action procedures (Figure 1), where voter referendums, executive orders and legislation have outlawed preferential treatment based on race in university admissions.

Through a comparative case study of two alternative affirmative action policies, the Texas Top Ten Percent Policy and the One Florida Plan, this paper will assess and compare the resulting diversity of student bodies at the flagship state universities. Additionally, the ethics of these two policies will be evaluated

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based on the principles presented by Virginia Held. According to this investigation, both the Texas Top Ten Percent Policy and the One Florida Plan have not increased the attendance of racial and ethnic minorities at state flagship universities in Texas and Florida, as originally intended. However, innovative strategies at the university level have been implemented to attract diverse groups of students by providing economic and educational support to those who face systemic disadvantage in the midst of “race-blind” admissions. These university policies have the potential to guide future policymakers in admitting racially diverse students without having to consider race as a factor in college admissions.

**Historical context**

Affirmative action debates began with Franklin D. Roosevelt advocating legislation like the 1933 Unemployment Relief Act, which stated that “no discrimination shall be made on account of race, color, or creed” (Anderson, 2004, p. 11). During the civil rights movement these programs expanded to include granting minorities preferential treatment in employment and educational opportunities to account for historical discrimination and exclusion, which “many whites and conservative allies” considered “reverse discrimination and unfair” (Anderson, 2004, p. 76-97). This rhetoric is echoed by contemporary conservatives in the movement to champion meritocracy as an alternative to affirmative action. However, as the Johnson administration found, in the era of segregated schools, preferential treatment was necessary because “if businesses continued to hire the most skilled person for a job, it would almost always be white applicants” (Anderson, 2004, p. 97).

As a result of these political disagreements, many citizens have pursued litigation for more clarity on the constitutionality of affirmative action policies. In the *University of California v. Bakke* case in 1978, the Supreme Court found that “racial diversity serves a compelling state interest, allowing public institutions to count race as one of many diversity factors for admission” under strict scrutiny standards established by the court (Lloyd, Leicht and Sullivan, 2008, p. 1). Strict scrutiny is the assessment the court applies to cases in which a universities’ consideration of race as a factor has been challenged. Affirmative action programs meet strict scrutiny if the consideration of race is “narrowly tailored to achieve the only interest that this Court has approved: the benefits of a student body diversity that encompasses a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element” (Lloyd, Leicht and Sullivan, 2008, p. 1).

However, in the 1996 *Hopwood* decision in the U.S. Fifth Circuit Court the use of race in college admissions was outlawed. In *Gratz v. Bollinger* the Supreme Court found that the University of Michigan undergraduate college program was not narrowly tailored in the use of race in admissions. Nonetheless, in *Grutter v. Bollinger* the Supreme Court found that another University of Michigan program was narrowly tailored enough to meet strict scrutiny standards. More recently, in *Fisher v. The University of Texas at Austin* the Supreme Court sent the case back to the lower court to avoid making a decision until they gather all the necessary information on the admissions program. In
response to the conflicting rulings, universities and state lawmakers have adjusted admissions procedures accordingly, in order to avoid litigation.

For example, as a result of the 1996 \textit{Hopwood} decision, which outlawed the use of race in college admissions in Texas, the state legislature instituted the Top 10\% Plan, which guarantees students ranking in the top 10-percent of their high school class admission to any state universities along with increased financial aid. The law also specified the eighteen factors, which should be considered for students not automatically admitted: “family income, parents’ level of education, first generation college status, and financial and academic record of the student’s school district” (Kahlenberg, 2014, p. 27). At the University of Texas at Austin (UT) these consideration factors became known as the Personal Achievement Index, as opposed to the Academic Index (which emphasized standardized tests and GPA) prior to \textit{Hopwood}. The personal achievement index was created in order to encourage a more diverse class, because of the disadvantages students with less resources face in standardized tests (Lavergne and Walker, 2002).

Following the footsteps of Texas, Florida enacted its own alternative affirmative action to include socio-economic factors instead of race. Governor Jeb Bush announced Executive Order 99-281, or the “One Florida Plan” including the Talented 20 plan, which guarantees students ranking in the top 20-percent of the graduating class that also submitted ACT or SAT scores admission to the State University System, “though not necessarily to their school of choice” (Kahlenberg, 2014, p. 50). In addition, the One Florida Plan banned the consideration of race, ethnicity, and gender while allowing factors such as “family education background, socioeconomic status, graduate of a low performing high school, geographic location and special talents” to be considered (Kahlenberg, 2014, p. 50). Furthermore, the One Florida plan increased access to financial aid programs for first-generation students and for the students eligible for the Talented 20 program. However, even after a decade of implementation it remains unclear whether these laws have improved racial and ethnic diversity, which will be assessed in this study.

\textbf{Ethical theory}

Since public policy is grounded in the pursuit of a more ethically responsible society, the laws will be examined through the lens of Virginia Held’s political theory of care. The \textit{Ethics of Care} has five central components:
1. “The compelling moral salience of attending to and meeting the needs of the particular other for whom we take responsibility,”
2. The “conception of persons as relational, rather than as the self-sufficient independent individuals of the dominant moral theories,”
3. A restructuring of the personal (private) and the political (public) realms,
4. A celebration of emotion, and
5. A de-emphasis on abstractions” (Held, 2007, p. 10-13).

Whereas Kant and Mill consider citizens as independent, rational beings, Held highlights the importance of caring relations between citizens in the foundation of her theory. Held argues that the morality of dependence is fundamentally human, which has been overlooked by moral theorists such as
Kant and Mill who hold that “moralities (are) built on the image of the independent, autonomous, rational individual” (Held, 2007, p. 10). This relational view of society is essential to the discussion of affirmative action because in many ways affirmative action is the way in which we care for those whose systemic disadvantage we take responsibility for (racism, slavery, Jim Crow, segregation, sexism, classism etc.). These instances of care require not only human reason, but also human emotion. The rational, independent, enlightened self-interest helps preserve fairness, while the compassionate, emotional, relational component insures the preservation of life, success and happiness. In order for society to fulfill its potential or telos, there must be an element of care along with a moral minimum of justice and fairness. In this way we strive toward Held’s normative civil society in which “the needs of every child would be a major goal, and doing so would be seen to require social arrangements offering the kinds of economic and educational” support that ensures the mutual consideration of other people as citizens with value (no matter their test scores or the amount of money their parents make) (2007, p. 136).

Instead of the classical view, where justice is the ultimate goal in society with the role of care as a peripheral component, Held argues that justice and care are intertwined, not mutually exclusive. Held argues that “there can be care without justice” but “there can be no justice without care, for without care no child would survive and there would be no persons to respect” (2007, p. 17). Furthermore, she argues that care as a practice “shows us how to respond to needs and why we should. It builds trust and mutual concern and connectedness between persons” (Held, 2007, p. 42). In the case of affirmative action, the ethics of care would advocate responding to disadvantaged and excluded populations by providing accommodations for these students that help build back the trust that some students lose in the university system. For example, to accommodate racial and ethnic minority and low-income students, universities can pursue outreach, scholarship programs and expanded financial aid that increase confidence and trust in our university system.

In the South, Black and Latino students together comprise more than 90 percent of the student population in extreme poverty schools (Orfield and Lee, 2005, p. 27). Additionally, 87-percent of the average black student’s peers are black, revealing the extreme isolation of high poverty and majority black schools in the South (Orfield and Lee, 2005, p. 27). In Texas, bachelor’s degree attainment remains stratified by race with 33-percent of white students graduating with a bachelor’s degree, while only 17-percent of black students and 10-percent of Hispanic students graduating with a bachelor’s degree (Creusere et al, 2015). According to Education Secretary Arne Duncan, “in 20 states, the districts with the highest percentage of minority students spend fewer state and local dollars than in districts with the lowest percentage of minority students... And sadly, over the last decade, this divide—this inequity—has only gotten worse. Since 2002, the gap between per pupil expenditures in high and low poverty school districts has actually grown wider—from a gap of 10.8 percent to a gap now of 15.6 percent” (U.S. Department of Education, 2015). In Florida, severely segregated schools are considered institutions of concentrated disadvantage and policies “that attempt to resolve the achievement gap by
funding equity or classroom size changes” would probably fail if the segregation issue were not addressed (Orfield and Lee, 2005, p. 27).

Despite the inequities, critics of affirmative action consider preferential treatment in admission as increasing negative stereotyping and eroding perception of minority students’ competence. Instead of considering race in admissions, opponents suggest that affirmative action programs should be focused on enhancing performance of historically underrepresented groups while retaining standard evaluations (which could be interpreted as standardized tests). In this way, policies would demonstrate the success of minorities in leadership positions that they were able to acquire through dedication and work ethic (Anderson, 2004, p. 343). This argument is problematic considering the flawed underlying assumption that “those who develop the tests and measures, as well as those who implement them, are fair and unbiased” (Crosby, 2004, p. 58-59). While it would be ideal to provide a free market in which students could compete based on standard evaluations, this neglects the inequality that is evident and perpetuated by our flawed K-12 education system.

Additionally, the prevailing inequality would perpetuate negative stereotypes about the competence of racial minorities more than the consideration of race as one of the many factors in college admissions. Stratified achievement and segregation are both concepts that students come in contact with every day, and it seems that these inequities have the potential to increase negative stereotypes of racial minorities more significantly than the consideration of race as one among many factors in admissions. Race as a factor in admissions under strict scrutiny standards involves personalized assessment with a multiplicity of factors that assess a student’s viability, which works to provide more opportunities for disadvantaged groups despite what might be considered their “market value.”

Held celebrates the ability of care to tame problematic market forces. For example, the University of Phoenix—a profit making institution aiming to have 200,000 students, with uniform class syllabi, almost no full-time teachers, and lots of online learning—may well by the higher education of the future. Here we can see the values of the market: the way the worth of value of an activity or product should be ascertained is by seeing the price it can command in the marketplace; those whose work is not rewarded with profits are not doing work that has worth; efficient management and high productivity take priority over, for instance, independent thought or social responsibility (Held, 2007, p. 115).

Held argues that once educational institutions are taken over by the values of the market, “anything other than economic gain cannot be its highest priority, since a corporation’s responsibility to its shareholders requires it to try to maximize economic gain” (Held, 2007, p. 115). In this way, Held argues that we “put economic gain ahead of devotion to knowledge” (Held, 2007, p. 116). Some scholars advocate competition based on standardized tests as a healthy and reasonable way of demonstrating acquired knowledge. On the contrary, Held argues that our schools should not be competing based on test scores, because these are ways for market forces and corporations to subordinate schools to the demands of the market which necessarily impedes “the function that culture needs to perform to keep society healthy, the function of critical evaluation, of
imagining alternatives not within the market, of providing the citizens the information and evaluations they need to act effectively as citizens” (Held, 2007, p. 123). In practice, the Texas Top Ten percent law curbed the influence of standardized tests, which disadvantage students with less resources, exemplifying the ethics of care in its ability to consider more pertinent factors such as how well the student could do with the limited resources available to them. However, the One Florida Plan incorporated standardized tests as a necessary component for automatic admission to the State University System. No doubt the partnership with College Board, which administers the SAT, played a role in this measure.

Unlike the values of the market, “the values of shared enjoyment or social responsibility, or collective caring” are evident in the efforts on the part of universities to diversify and accommodate disadvantaged students (Held, 2007, p. 118). When political scientists study diversity on campus, they are studying the practice of care between students of diverse backgrounds. The campus cares for diverse groups of students by providing safe places to interact, and a diverse student body whose differences foster connections between persons of all races, religions, political leanings, and socio-economic statuses. An ethical university should be structured to meet the needs of students no matter their socio-economic, racial, or religious background. This is the way to reach equality of opportunity in higher education, and affirmative action policies that seek to partner with low-income schools and provide extra support to disadvantaged students may well be an integral component of caring for underrepresented populations. Currently, the alternative affirmative action programs in Texas and Florida may seek to provide equal opportunity by admitting students from disadvantaged high schools, but it is unclear whether these initiatives are improving racial and ethnic diversity, as originally intended.

Method

The most-similar comparative case study methodology will be utilized to evaluate and compare the One Florida plan and the Texas Top 10% law. The most-similar comparative case study is useful because while both of the laws incorporate a measure that guarantees a certain percentage of top ranking high school students’ admission to state universities, the Florida initiative incorporates measures to improve the performance of underprivileged students before entering college. The percent plans are relatively similar, which will provide analytical leverage for the other provisions and university level policies that make the plans different.

The independent variable is the policy implementation of race neutral affirmative action procedures of the Top 10% law at the University of Texas at Austin and Texas A&M University and the implementation of the One Florida Plan at the University of Florida. Given the limited scope and resources available, these flagship state universities should provide a lens into the diversity of college campuses in the two states. The similarities and differences within the policies will aid in understanding possible explanations for the higher or lower enrollment results of racial and ethnic minority students. Thus, the dependent variable is the admission rates of racial and ethnic minorities a couple years before the measures were passed compared to the current admission rates. This
variable will be evaluated based on the common data set statistics at each university, and whichever law (or university implementation procedures) has had the most consistent success in admissions of racial and ethnic minorities will be considered the more “successful” plan in adhering to the ethics of care.

**Top Ten Percent Plan**

On a statewide level, the Texas Top Ten percent law was coupled with The Towards Excellence, Access and Success (TEXAS) Grant in 1999 and the Top 10 Percent Scholarship Program in 1997 to increase financial aid and indirectly encourage more racial diversity following the ban on racial preferences post-*Hopwood*. At the university level, the implementation of the Top Ten percent law at the University of Texas (UT) differs from the implementation at Texas A&M University (A&M) based on the relevant court cases and respective university response. For instance, as a result of *Grutter v. Bollinger* (2003), UT “reopened the possibility of using racial/ethnic preferences in admissions” while A&M “chose not to reinstate racial preferences after the *Grutter* ruling but continued aggressive outreach, recruitment, and scholarships to promote diversity” (Kahlenberg, 2014, p.31). Following the ban, UT implemented recruitment programs for underrepresented geographic areas and K-12 partnerships including UT Outreach, which provides “test prep, application help and financial aid advice” (Kahlenberg, 2014, p.33). Additionally, in response to the backlash from minority students and parents, A&M stopped granting preferential treatment to legacy students after announcing the continuance of their race-blind admissions standards (Kahlenberg, 2014, p.27). Both UT and A&M have developed scholarship programs such as the Longhorn and Century Scholarships that “enabled economically disadvantaged top 10% graduates to attend their institutions” (Harris and Tienda, p. 15-17). Based on the relevant research and available data on racial and ethnic diversity at UT and A&M, it seems that University level implementation had more success in encouraging the enrollment of minorities than the implementation of the Top Ten percent law.
Figure 2. Source: University of Texas at Austin.

Data analysis of admissions suggests that the racial diversity at UT increased more significantly than A&M, especially after the reinstatement of the use of race in applications. As we can see in Figure 2 and Figure 3, the first class admitted after the University of Texas at Austin stopped using race as an admissions factor had fewer minorities. However, once the university began implementing programs to reach out to prospective students at schools with more racial diversity there was an increase in admission shown by the years 2001-2010. Hispanic enrollment increased from 15-percent to 19-percent, and Black enrollment fluctuated between years never increasing by more than 1-percent.

In order to account for fluctuations in the population, Figure 3 compares the percentage of racial minorities graduating from high school and the percentage of that minority represented at UT.

Figure 3. Source: Kahlenberg, 2012, p. 30.

As shown in Figure 3, despite the best efforts on the part of universities, “the new policy created a student body that was increasingly disproportionate to the demographics of the State of Texas” (Charleston, 2009, p. 14). The dotted line represents the percentage of Black, Hispanic or American Indian students in Texas that graduated from high school eligible for college and the solid line represents the enrollment percentage of that race or ethnicity at UT. Clearly, the disproportionate underrepresentation of Hispanic and Black students exists, however it seems that when UT incorporated race as a factor the gap between these two measurements slowly starts to decline by a couple (1-3) percentage points. This improvement is not evident at A&M.
Racial diversity at Texas A&M seems to be even more stagnant than UT’s enrollment, as shown in Figure 4. Additionally, while it seems as though there is an increase in Latino/Hispanic enrollment after 2010, this can actually be attributed to the Department of Education changing racial classifications. After 2010, the demographic “Hispanic” was grouped with multiple other racial categories including mixed race and those identifying as “Latino”, which creates a confounding variable in the comparison of the enrollment over time. The data would seem to highlight an increase in Hispanic enrollment, however even after the reporting changes the student body at Texas A&M does not accurately reflect the amount of racially diverse students who acquire a high school diploma, shown in Figure 5.

![Texas A&M Fall Freshman Enrollment](image)

*Figure 4. Source: Data from University released Common Data Sets (CDS)*

The gap between Hispanic and Black students who graduate with a high school diploma and the proportion of those demographics present in the student bodies of Texas A&M hasn’t improved since the inception of the Top Ten Percent law. Additionally, it seems that before the implementation of the percent law, the gap between Hispanic students graduating from high school and the proportion represented at A&M was around 18-percent, while this gap remains at a constant 20-percent after the implementation of the Top Ten Percent Law.
Many experts respond to stagnating racial diversity at Texas flagship universities by arguing that “by itself, the 10 percent plan will not adequately diversify campuses” (Tienda et. al., 2003, p. 2). For instance, Harris and Tienda utilize administrative data on applicants and enrollment of Hispanic students to evaluate the effects of the Top Ten percent law on this demographic. After examining UT and Texas A&M University before and after the Top Ten percent law was in effect, the authors conclude that “Hispanics are more disadvantaged relative to whites under the top ten percent admission regime at both UT and TAMU” because the average “percent of Hispanic applicants admitted to UT-Austin and TAMU was lowest after the enactment of the top 10% law” (Harris and Tienda, 2012, p.1). Before the implementation of the Top Ten percent law, “Hispanics enjoyed an admission advantage relative to whites under affirmative action (3.2 and 12.2 percent points at UT and TAMU, respectively), but faced lower admission prospects compared with whites under both alternative admission regimes” (9). While scholars and citizens agree on the noble ends of affirmative action in encouraging achievement among underrepresented groups, some scholars would consider using means in which Hispanics are advantaged regardless of socioeconomic status and other admissions factors as not the most ideal implementation (Kahlenberg, 2012). In response to this argument, Harris and Tienda propose that “simulations of Hispanics’ gains and losses at each stage of the college pipeline across admission regimes confirms that affirmative action is the most efficient policy to diversify college campuses, even in highly segregated states like Texas” (Harris and Tienda, 2012, p.1).
In their explanations for why enrollments haven’t increased for minority students, other scholars argue that the Top Ten percent plan was not a significant shift in university policy. Chapa argues that “the automatic admission of any applicant in the Top 10% of his or her high school class was standard practice,” even at the University of Texas at Austin, before the top ten percent law was initiated (Chapa, 2005, p. 189). This is a substantial finding that is echoed by many other researchers on the Top Ten percent plan, which suggests that the implementation of the plan did little to change the system already in place for university admissions (Tienda et. al., 2003; Harris and Tienda, 2012; Charleston, 2009). It should also be noted that authors attribute “UT’s success in recruiting more minorities under HB 588” to “its vigorous recruitment efforts as well as restricted financial aid programs” not the implementation of the Top Ten percent law (Walker, 2000). This is another confounding variable in the studies that examine enrollment rates without looking at the universities policies that were implemented to make up for the possibility of decreasing enrollment of disadvantaged students. This finding suggests that university level implementation, not the Texas Top Ten Percent law provided an alternative approach to affirmative action solely based on the consideration of race.

However, not every university is willing or able to implement programs that encourage racial diversity. The difference between UT racial diversity and Texas A&M racial diversity highlights a successful reinstatement of the use of race supposedly under the strict scrutiny standards established by the court, along with the socio-economic factors in the Personal Achievement Index. These small differences in the admission process at UT could provide Held’s system of care to account for prevailing racial inequity, while also adhering to the standards of justice by only considering race under strict scrutiny standards.

In my analysis of the literature in favor of the Texas Top Ten percent law, I found that authors often overlook essential variables such as the average enrollment rates of racial minorities over time. For instance, in response to the concern that “underrepresented communities do not have confidence in the openness and integrity of the educational systems and further, are often unable to access high-quality education and training without affirmative action” (Dudley-Jenkins and Moses, 2014, p. 94), some researchers argue that the Top Ten percent law has improved disadvantaged students’ college aspirations. In a random sample of Texas senior public high school students, researchers found through statistical analysis that knowledge of the percent plan increased the number of racial minority students considering going to college (Lloyd, Leicht and Sullivan, 2008). While this data may seem to highlight a benefit of the percent plan, an increase in college aspirations cannot address the entire implementation of the percent plan because the authors overlook essential variables such as enrollment rates.

Many low-income first-generation and minority students face obstacles to enrollment even though they have college aspirations, which some school districts in Texas are trying to address through the innovative Summer MELT
Alternative Affirmative Action

program.† Unless the data on enrollment shows an increase in underprivileged students, the Top Ten Percent plan should not be touted as a successful alternative to affirmative action. However, other researchers do confirm that “the fall 2002 freshman class at the University of Texas had many more top 10% minority students and more African American and Latino students than the last class admitted using race-conscious affirmative action” (Lavergne and Walker, 2004), while the “Texas A&M’s freshman class in the fall of 1999 had far fewer minorities then was the case before Hopwood” (Chapa, 2005, p. 190). While the increase in student representation during this time period for the University of Texas is notable, the authors neglect to compare the enrollment rates to the average percentage of minorities during the period following the reinstatement of race-conscious affirmative action and instead look at a single year's data. Each year is going to fluctuate, and it is important that researchers of affirmative action look at the trends between multiple years to get a more accurate picture of the real outcomes of the policy.

In another study done by the Higher Education Opportunity Project, researchers highlight that while “universities changed the weights they placed on applicant characteristics aside from race and ethnicity in ways that aided underrepresented minority applicants, these changes in the admissions process were insufficient to fully restore black and Hispanic applicants’ share of admitted students” (Long and Tienda, 2010). Furthermore, Charleston employs a comparative case study methodology in his research, arguing that “because anti-affirmative action legislation has damaged efforts to increase diversity within higher education” as shown by the prevailing racial disparity relative to the population, “state systems will have to be more systematic regarding state efforts to attract, admit, and matriculate students who have historically maintained under-representation relative to their share in the population” (Charleston, 2009, p. 14). Additionally, while certain universities are willing to devote the time and resources to these systematic efforts not all universities may have equal success in implementation (as shown by TAMU), which creates further inequality across state university systems.

In response to the accusation that the Top Ten Percent law admits unprepared students who are forced to drop out, researchers have investigated how students from lower-income high schools are doing at the selective colleges they can now receive automatic admission to. After observing the grade point averages and retention rates of students who would not have been admitted to the University of Texas at Austin and Texas A&M University before the Top Ten percent law, Tienda and Niu argue that many students from low-performing Texas high schools (even students with SAT scores under 900) are doing quite well (Tienda and Niu, 2006, p. 190-191). However, Furstenberg argues that the students who would not have been able to enroll in a selective college without the Top Ten percent plan have lower GPAs and lower probability of graduation

† While at the Greater Austin Chamber of Commerce I assisted in the implementation of this program in which counselors offer support over the summer regarding deadlines and important dates/events to begin attending a University for first-generation, low-income students. For more information see Castleman, Benjamin and Page, Lindsay. Summer Nudging, EdPolicy Works, 2013.
(Furstenberg). The difference between these studies is that Tienda and Niu consider doing well as being in good standing with the university, while Furstenberg compares students from lower-performing high schools to all students’ GPAs at the universities. Both studies employ similar methods (statistical analysis), but Tienda and Niu account for the vastly unequal K-12 education system in Texas while Furstenberg doesn’t control for this variable. In this way, Tienda and Niu’s findings seem more compelling even though they are counterintuitive. The fact that students with significantly lower SAT scores are able to stay in college with good standing should be evidence suggesting that the Top Ten percent law’s deviation from considering standardized test scores in admissions of students in the top of their high school class as effective, and justified under the ethics of care.

The movement away from a reliance on standardized test scores is also encouraged by Sigal Alon and Marta Tienda (Alon and Tienda, 2007). The authors argue that before we evaluate how well our new systems are working for disadvantaged students we must first realize why we identify groups of disadvantaged students in the first place. One of the ways our system disproportionately disadvantages students is through “the emphasis on test scores in college admissions” which “notably benefits those with more resources,” causing “selective institutions to give underrepresented minorities an admissions boost to achieve campus diversity” (Alon and Tienda, 2007, p. 507). However, at many universities standardized test scores continue to be emphasized despite “mounting evidence that test scores have low predictive validity for future academic success, particularly when compared with performance-based measures like grades or class rank” (p.507). Here we see the values of the market, where the motivations for selective institutions to “climb the pecking order in various college ranking systems” overpowers the need to create a system in which all have the opportunity to succeed (p.508). The use of standardized tests is not advocated by Held, but as long as other factors are given equal weight, including socio-economic factors, the disadvantages students face could be addressed. However, these tests are also sometimes used to establish merit scholarships, which further disadvantage those with less financial resources who do not have the luxury of taking costly test prep courses.

My initial intent was to examine the socio-economic diversity before and after these laws, but the data for the Fall Freshman student bodies separated by family income is not provided in the Common Data Sets published on the university webpage. Currently, universities are only required to release statistics on the racial composition of their incoming freshman classes but socio-economic status can be excluded. As a result, there is less literature on this topic and less data analysis readily available. However, as we can see in Figure 6, researchers have found that there is more socio-economic diversity under the Top Ten percent law. In the 2010-2011 school year there was close to 27-percent of the incoming class receiving Pell Grants, while only 18-percent were Pell Grant recipients from 1994-1999 (Kahlenberg, 2014, p. 35). Therefore, under the Ten percent law university level policies played a large role in helping more economically disadvantaged students, but this still does not solve the issue of racial and ethnic diversity.
Kahlenberg highlights that low-income students are the most underrepresented population at the university level, which provides justification for utilizing economic affirmative action. For instance, “in a 2013 report, Anthony Carnevale and Jeff Strohl noted that while white students are overrepresented at selective colleges by 15 percentage points, the overrepresentation of high-income students is 45 percentage points, three times greater” (Kahlenberg, 2014, p. 3). He argues that because “wealth is accumulated over generations, the nation’s steep wealth inequality reflects in some important measure the legacy of slavery and segregation as well as ongoing discrimination in the housing market” but that “smartly structured economic affirmative action programs can address the instances of discrimination indirectly, without conflicting with our legal system and public perceptions of fairness” (Kahlenberg, 2014, p. 24).

As a result of the stagnant, yet consistent percentage of racial minority students after the implementation of the Top Ten Percent law, Kahlenberg argues that “it is possible to produce a critical mass of African American students in leading universities without resorting to racial preferences” (Kahlenberg, 2014, p. 17). However, it should be clear that in the university implementation racial preferences are included although not explicitly. Kahlenberg himself agrees that university level implementation of alternative affirmative action procedures have been a determining factor in the admission of racially diverse student bodies under the percent plan. Kahlenberg highlights:

Universities ... have spent money to create new partnerships with disadvantaged schools to improve the pipeline of low-income and minority students. They have provided new admissions preferences to low-income and working-class students of all races. They have expanded financial aid budgets to support the needs of economically disadvantaged students. They have dropped legacy preferences for the generally privileged—and...
disproportionately white—children of alumni. They have admitted, irrespective of test scores, hard-working students who graduated at the top of their high school classes, thereby granting access to students from low-income schools that had little history of sending graduates to selective colleges when racial affirmative action was in place (Kahlenberg, 2014, p. 1).

These changes in university policy are inherently race-conscious, and while these strategies have been adopted at some universities it should be noted that Kahlenberg utilized a comparative case study methodology in which many different states were analyzed. In no way does this mean that all of these efforts have been put in place by all colleges affected by bans on race based affirmative action, but Kahlenberg’s research does show that these efforts listed above do enable colleges and universities to obtain the diverse student bodies in a new way.

However, he also argues that it is unrealistic to use race-based and class-based affirmative action simultaneously. This is problematic because UT considers both race and socio-economic status and is touted as the most successful implementation of these programs in his study. As Gaertner and Hart argue, there is no other factor that can serve as a proxy for race, which is why UT has been able to obtain both socio-economic and racial diversity simultaneously (Gaertner and Hart, 2013, p. 15). While they agree with Kahlenberg that socio-economic affirmative action needs to be pursued, they also note that “the failures of these class-based approaches to achieve desired levels of racial diversity seem to vindicate the nearly unanimous conclusions of prominent affirmative action researchers that “the correlation between income and race is not nearly high enough that one can simply serve as a proxy for the other” (Gaertner and Hart, 2013, p. 15). Therefore, if universities resorted to only employing economic affirmative action, the racial diversity at the University would not be ensured, as seen in the stagnant racial diversity at Texas A&M University.

Finally, research suggests that racial minorities not in the top ten percent of their high school class have significantly lower enrollment, retention and graduation rates after the implementation of the Top Ten percent plan (Cortes, 2010). The author highlights how after the elimination of race as a consideration in admissions, there was an increase in the graduation gap between minorities and non-minority students in Texas. Other researchers confirmed these findings in their regression discontinuity approach, which found “no evidence of effects on college choice in the schools with the lowest college-sending rates” (Daugherty, Martorell, and McFarlin, 2012, p. 21). So not only does the Top Ten percent fail in increasing access to higher education for the high schools that need it most, it also could be contributing to crowding out underrepresented groups not eligible for the automatic admission from attending the state flagship universities.

Based on the enrollment rates at UT and Texas A&M, and the relevant research explored in this section it seems the Texas Top Ten Percent law has not improved the racial and ethnic diversity at state flagships, but that innovations at the university level have the potential to fundamentally alter the way programs are tailored to consider race as a factor. Partnerships with historically excluded
high schools, expanded financial aid programs including scholarships targeting low-income students and an emphasis on outreach and recruitment all have the potential to revitalize a supportive and attentive university structure. Additionally, it seems that considering race as an admissions factor helps universities acquire racial and ethnic diversity based on the higher enrollment rates at UT compared to those at A&M. These programs work toward fulfilling Held’s normative ethical theory, in which a broad compassionate system of care reestablishes trust and respect between all different types of citizens.

**One Florida Plan**

The One Florida Plan has been met with equal, if not more, skepticism by scholars because of the preemptive actions taken by Governor Jeb Bush to ban affirmative action based on race before the measure was placed on the ballot for citizens to vote on. As Charleston highlights, “when Ward Connerly‡ took his campaign to end affirmative action to Florida in 1999,” the Governor “requested a review of Florida’s affirmative action plans in an effort to assess the legal viabilities thereof. Though he publicly opposed Connerly’s initiatives, deeming them divisive, he voluntarily initiated the One Florida Plan” (Charleston, 2009, p. 14).

Supporters of the law tout the Talented 20 Program and the increased financial aid as a way to increase educational access for underrepresented populations while opponents argue that these efforts have not been successful in encouraging the enrollment of disadvantaged students. The percent plan was paired with “significantly increased funding for need-based financial aid” as well as “a partnership between Florida and the College Board to improve college readiness” by increasing “the number of students, particularly low-income and minority students, enrolling in and passing Advanced Placement (AP) classes” (National Conference of State Legislatures). Succinctly, the initiative puts forth programs specifically targeting low-income schools with large minority populations by increasing the accessibility of college curriculum and providing teacher compensation for teaching advanced placement courses at low performing schools. In effect, the program is intended to provide the students who need it most with the help they need in order to get to college. This is a stark difference between the Texas law and the Florida plan, because while Texas focused solely on college enrollment and partially on financial aid, the executive order in Florida specifically targeted the inequity in K-12 schools that creates the problem of not having socio-economic and racial diversity at the university level. However, as K-12 education reformers have observed, change moves slow throughout these statewide initiatives, which creates a dilemma for the universities now unable to utilize race as an admissions factor.

As a further justification for this plan, the Governor’s office states that “some schools are more equal than others” with high-performing schools offering “tougher curriculums, more experienced teachers, and better opportunities” and that “not surprisingly, the large majority of students attending these low-

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‡ Ward Connerly has been leading the movements in various states to ban affirmative action based on racial preferences through initiating voter referendums. For more information see: [http://www.politico.com/arena/bio/ward_connerly.html](http://www.politico.com/arena/bio/ward_connerly.html)
performing schools are minority students from impoverished families” (The State of Florida Governor’s Office). In this way, the state was attempting to take responsibility for those whose disadvantage Florida institutions have perpetuated and historically caused, which exemplifies the ethics of care. In order to diminish this inequity, the plan hopes that with the “43% increase in need-based financial aid” that the “cost of tuition need not be a barrier to a higher education for those low-income students who show an effort and desire” (p.15). Now, more than ever the One Florida plan needs to be evaluated in light of the experiences in other states as to what does and does not improve the educational success of underrepresented populations.

The central component of the One Florida Plan is The Talented 20 Program, intended to enhance the diversity of the state university system (SUS) by admitting high performing underrepresented student populations who might otherwise not be eligible for admissions. However, researchers highlight that this program is not increasing the admission of underrepresented populations. In fact, in Kahlenberg’s comparative case study, he finds that “only 30 of 16,047 had the possibility of being affected by Talented 20” meaning that students affected by the program would have gotten into college without the help of this program (Kahlenberg, 2012, p. 50). This finding is confirmed by researchers claiming that the Talented 20 plan was largely inconsequential for underrepresented populations based on enrollment rates at Florida’s flagship universities (Lee and Marin, 2003, p. 37; Charleston, 2009, p. 21; Horn and Flores, 2003, p. 9). Charleston explains how “the reactive measures taken by California, Florida, and Texas proved ineffective as the idea of “percent systems” usually encompass those students already on target to qualify for the state institutions’ admission standards” (Charleston, 2009, p. 21).

In addition, my data analysis confirms that this law did not consistently increase the racial diversity at the University of Florida shown in Figure 7. Over time, the enrollment of Black students increased to 10-percent in 2006 up from 5-percent in 1998, but declines back to 6-percent by 2014. While it is impossible to determine which specific factors contributed to this fluctuation, surely the financial crisis in 2008 played a role. More importantly, the racial minority that appears to have increased since the law’s implementation can be explained by reporting changes from the Department of Education in 2010. The University of Florida grouped multiple ethnic groups including mixed race individuals in the Hispanic/Latino category, which increased the enrollment numbers of this demographic after 2010. Therefore, “post-2010 data can’t be fairly compared to pre-2010 data” and the reason for enrollment changes is speculated to be because “there are more K-12 students in the state than there were in 1999” and “because of the Bright Futures program” (Gillin, 2015).
According to Figure 8, the speculation above proves correct. Even though there are more Hispanic students graduating from high school, Hispanic students have become more underrepresented in the student body of the University of Florida after the implementation of the One Florida executive order. Additionally, Black enrollment was lowest the year One Florida plan was initiated, and the percentage of Black students graduating from high school has declined after the implementation of the One Florida plan. Based on these findings it seems that even after a decade of implementation and after the university was able to incorporate preferential treatment to disadvantaged groups in other admissions processes like financial aid and outreach, the enrollment rates have stagnated relative to the diverse population of Florida.
Furthermore, in their comparative case study analysis, Horn and Flores highlight how merely admitting students is not sufficient to address the “forces that tend to keep institutions segregated” (Horn and Flores, 2003, p. 8). In fact, if a “disadvantaged minority student is admitted but cannot afford to attend, or believes s/he will be treated badly on campus, the decision to admit may mean little” therefore, admission should be considered a necessary but not sufficient condition for accomplishing the goals of affirmative action (p.9). This is a defining difference between the Texas Top Ten percent law and the One Florida plan. While the One Florida plan emphasized increasing equity among K-12 pipelines and increasing financial aid, the Texas Top Ten percent plan did not do much other than guaranteeing admission. Additionally, this finding emphasizes a major issue that is not addressed in this study, which should be investigated by future researchers. Graduation rates of racial and ethnic minorities at these state flagships would also provide a lens into how well the university is supporting underrepresented groups.

Additionally, the authors explain that “outreach and aid programs that target minority communities... double or triple applications from minority students” which is why when universities claim they have ended affirmative action, they are really pursuing race attentive policies on other fronts (p.9). The efforts are consistent at the university level as a result of both the One Florida plan and the Texas Top Ten percent plan, but not all universities put the same amount of time and resources into these targeted programs. Finally, Horn and Flores (2003) conclude that while “these other forms of race-conscious
affirmative action under the right conditions can help some campuses at least partially recover their preexisting levels of diversity,” none of them show potential “for keeping up with the transforming populations of the states or creating greater equity in educational systems, which showed profound inequalities even at the peak of affirmative action” (p.9).

**Conclusion**

While most of us agree on the noble mission of affirmative action, the fundamental issue is that the presuppositions and personal bias vested in these types of policies cloud our ability to judge with Held’s standards of compassion and care. Inherently, most of us love our families and want the success of our families more than others, which make us skeptical of systems that threaten the power of the groups we identify with (race, gender or class). However, John Rawls’s description of self-interest would oblige society to acknowledge the disadvantages citizens are born with and institute programs to accommodate the less fortunate (Rawls, 1971).

Rawls casts his readers into a theoretical veil of ignorance, preventing them from knowing their parents, or the quality of schools and hospitals in the neighborhood. This veil of ignorance forces readers to acknowledge their own privilege. In this omniscient view we can all acknowledge that statistically speaking, life would be much more difficult in a low-income or underrepresented minority family, especially when going off to college. Furthermore, Rawls urges us to offer accommodations which could tip the scales of justice, to counteract systemic oppression (Rawls, 1971). In this way, it is in our civic duty to diminish inequalities and unfairness by recruiting and retaining low-income and underrepresented minorities at universities for the common good of society.

Many scholars who study affirmative action overlook the concept of self-interest, but I make the case that it is in the self-interest of all of us to strive toward a more robustly diverse society that encourages the success of every individual no matter their socio-economic status, no matter their race, and no matter their gender because we all fundamentally benefit from interactions with diverse groups of people. The benefits of diversity are uncontestable. As the former president University of Michigan states, the educational benefits of racial and ethnic diversity are not theoretical but real and proven repeatedly over time. This is a conclusion embraced both by the Supreme Court in its definitive 2003 ruling on the matter, *Grutter v. Bollinger*, and by 13 other schools which, along with Columbia, jointly submitted a brief in the Fisher case asserting that diversity encourages students to question their assumptions, to understand that wisdom and contributions to society may be found where not expected, and to gain an appreciation of the complexity of the modern world. Currently, our K-12 education system is segregated (by socio-economic status, race and ethnicity, political leanings, etc.) and this encourages the opposite effects of diversity. Students are in ethnocentric learning environments with those of the same background, and thus have more simple views of the way our world works. Essentially, instead of understanding that any one issue has a multiplicity of answers (which facilitates creativity and innovation), our system encourages simplicity and conformity.
Therefore, diversity appeals to more than those who agree with the ethics of care as a duty to each other, because it is also in our independent, rational self-interest to encourage diverse learning environments. If we believe in freedom of speech we also believe in the value of diverse opinions, which encourages each and every member of society the opportunity to contribute and deliberate. Additionally, if our future leaders are equipped with the innovative thinking skills that can cut across difference, we can collectively accomplish better compromise. Diversity in higher education is essential to the health of our democracy and the underlying values of our constitution and American way of life.

In the wake of recent movements to ban preferential treatment of historically underrepresented groups in Texas and Florida, it is worth investigating whether these solutions are addressing the underlying inequities leading to pervasive achievement gaps between disadvantaged and advantaged students. It remains clear that students from different races do not receive an equal chance for college success, which undermines the normative goal of valuing every student no matter their circumstances as Held suggests.

In Texas, “although white men make up only 48% of the college-educated workforce, they hold over 90 percent of the top jobs in the news media, 96 percent of CEO positions, 86 percent of law firm partnerships, and 85 percent of tenured college faculty positions (Kurland, 2012, p.5). In Florida, “once in college, young white and Asian students are still more than twice as likely as blacks and Latinos to receive B.A. degrees” and the reality is that “almost all the traditional considerations in admissions disproportionately help white students since they are much more likely to be legacies, to have households with more educational resources, to attend more competitive suburban schools, to receive more information about college, and to be able to pay for professional preparation for admissions tests” (Horn and Flores, 2003, p.9). The problem with affirmative action is that while both sides agree that historical exclusion and injustices merit government action, citizens do not agree on how to best achieve these noble ends.

Through the examination of these two similar, yet slightly different approaches to affirmative action my report illuminates whether these plans should be considered successful in achieving greater equity and care for students facing disadvantages from our current systems. While the One Florida plan eliminated the consideration of race altogether, the Texas Top Ten percent law left room for the court decisions to guide university actions. As the data shows, UT has been more successful than A&M in attracting and enrolling minority students and UT reinstated the consideration of race after the court decision in *Grutter v. Bollinger*. Unlike Texas, the measures in Florida were targeting the K-12 system by making a push for more college readiness at low-income schools. The implementation of this program has been slow moving, as is to be expected with a state-wide shift in education policy, and therefore the ban on affirmative action before the results of the K-12 initiatives have taken effect is ill timed, and could have negatively affected the admittance of minority students. That is, until the university realized that there needed to be a change in policy. Additionally, the recent cuts in the budgets allocated to providing need based merit aid to
underprivileged students removes one of the measures that had potential to increase accessibility for low-income and racial minority students.

In addition to the flawed assumption that the K-12 initiatives would immediately yield higher enrollment of low-income and minority students, the One Florida plan shouldn’t be considered successful even after two decades of implementation in improving diversity at the state flagship. As the enrollment rates show, the enrollments of minorities increased after the university had time to incorporate preferential treatment in other admissions procedures such as outreach, and financial aid. However, these enrollment rates also can’t be taken at face value due to the change in 2010 of racial categories, which prompted A&M, and the University of Florida to combine multiple racial categories into “Latino” enrollment, which was the only population that experienced an average increase in enrollment.

Based on the evidence presented in this report, I conclude that both the One Florida plan and the Top Ten Percent law did not create more accessible college options for racial and ethnic minorities. In both cases, the admission of students in the top ten, or twenty percent of their high school class was already standard procedure for most state universities.6 These laws may have increased socioeconomic diversity but they have done little to account for increased attendance of minorities relative to their share of the population. Additionally, no other factor serves as a proxy for race, which suggests that in order to insure racial diversity the consideration of race would need to be an aspect of the college application. Essentially, if we force our universities to pursue race-blind admissions we ignore prevailing inequalities and have no safeguard for a critical mass of racial minorities.

The positive outcome of both plans was the indirect pressure placed on universities experiencing drops in admission of racial minorities to pursue outreach programs, scholarship programs, and ban legacy preferences that advantage white students. All of these efforts have been proven to increase minority and low-income enrollment. Yet, the caveat here is clear: if universities are using more resources on outreach and financial aid programs to attract minority students, the tuition could go up and make college more unaffordable to everyone. Additionally, the scholarship programs already put in place are being cut, which puts more financial strain on the university. It is essential that policymakers who pass bans on the consideration of race are cognizant of the possibility of increased burden on universities and be sure to fund appropriately.

Based on this comparative case study it seems that state flagship universities can increase racial diversity by banning legacy preferences, instituting outreach programs to disadvantaged schools, and increasing financial aid and scholarships. All of these university measures have the potential to foster racial diversity without having to consider race as a factor in the college application. It will be important to study the implications of the policies on racial diversity in college and university campuses. Future researchers should address the following questions: How can universities incorporate socio-economic and race factors in admissions under the strict scrutiny established by the Supreme Court? How have these laws affected retention and graduation rates of underrepresented groups?
References:


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1 “Affirmative action is the process of a business or governmental agency in which it gives special rights of hiring or advancement to ethnic minorities to make up for past discrimination against that minority.” See more at [http://definitions.uslegal.com/a/affirmative-action/](http://definitions.uslegal.com/a/affirmative-action/).

2 However, standardized tests have been proven to disproportionately disadvantage those with less resources, which will be discussed later. See, Alon and Tienda (2007).

3 Pell Grants are federally funded scholarships to those with household income around 60,000 or lower, therefore this population signifies the low-income representation in student bodies.

However, the Florida Bright Futures Program now faces $347 Million in cuts by 2017-2018. During the 2014 legislative session “the Florida Bright Futures Scholarship Program has been reopened by the U.S. Department of Education’s Office for Civil Rights for potentially violating test score requirements, one of the state’s criteria to determine eligibility for the merit scholarship, has the effect of discriminating against students on the bases of national origin and race” (Florida College Access Network 2014).

Until the increase in Texas population, prompting the passage of statutes only requiring state universities to admit up to 75% of the freshman student body of students in the top class ranks.
An Origin of Welfare Stigma
KEVIN GU

The Great Depression affected millions of families throughout the United States in the 1930s. The federal government finally stepped up in 1935 to create a comprehensive program to address the staggering need of the impoverished in the country. That year, President Franklin D. Roosevelt formally signed into law the Social Security Act, a landmark bill that not only created the Social Security Program, but also the Assistance to Families with Dependent Children program (AFDC). With AFDC, however, came the continued stigmatization of welfare in the United States (Handler and Hollingsworth, 1969). Since the 1960s, “the hallmarks of the AFDC family as portrayed in the press... [are] the recurrent themes of alcoholism, mental deficiency, promiscuity, illegitimacy, and a general unwillingness to participate in the economic life of the community...”. A Gallup Poll conducted in 1965 showed that critics of welfare characterized welfare recipients as “dishonest and lazy... lacking initiative” (Miller, 1965). This paper explains the origins of that representation. Drawing on modern psychological research, it shows how differing models of agency employed by the working and middle class help explain the existence of welfare stigma.

The paper is split into five different sections. First, it reviews the two different models of agency used by the middle and working class. It examines how individuals grounded in each model of agency might interpret a decision to enroll in welfare differently. Second, the paper explains why the middle class model of agency has become the prevalent model. Third, it shows how this model of agency contributes to welfare stigma through the conceptualization of stigma. Fourth, it addresses a potential counterargument to this understanding of welfare stigma, namely that all government assistance is stigmatized, regardless of models of agency. Lastly, it describes some of the legal implications of this new understanding of welfare stigma. The paper outlines how middle class legislators designed welfare reform for working class individuals through a middle class model of agency in the 1996 welfare reform bill. I also discuss how an understanding of differing models of agency may shape future welfare reform.

Two models of agency
Modern psychological research has shown a significant difference in the models of agency used by working and middle class individuals. For the United States in particular, the literature shows that “lower and higher [socio-economic status] European Americans engage with different symbolic and material worlds and thus have different ideas about what it means to be an agent” (Snibbe and Markus, 2005). These models of agency are a “powerful, yet often tacit, set of assumptions about what constitutes normatively ‘good’ action” (Stephens et al, 2009). In the middle class context, “the model of agency that is most prevalent” is a disjoint model of agency, which “emphasizes expressing uniqueness and

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exerting environmental control.” “Good” actions, therefore, influence the environment according to individual motives, goals, and preferences (Stephens et al, 2009). In the working class context, conversely, the prevalent model is the conjoint model of agency, or “maintaining personal integrity (e.g., honesty, loyalty, reliability)” and self-control and being “responsive to obligations and expectations of others, roles, and situations.” In this environment, “good” actions “adjust to the environment and promote interdependence with other people” (Snibbe et al, 2005; Markus and Kitayama, 2003; Hamedani et al, 2010; Stephens et al, 2009).

Experimental research has also validated these conclusions. Undergraduates who grow up in a middle class context, when presented with five pens of two differing colors, were more likely to choose the “minority color” pen. In contrast, those who grew up in working class contexts were much more likely to pick the “majority color” pen. Even car advertisements targeted towards these two groups emphasized different models of agency. Car advertisements that were targeted towards working class consumers were “significantly more likely ... to mention relationships and connection,” a reflection of the conjoint model of agency employed by the working class. Car advertisements targeted towards middle class consumers, on the other hand, were “significantly more likely ... to contain messages of extreme uniqueness,” an expression of the disjoint model of agency employed by the middle class (Stephens et al, 2007).

Individuals grounded in the two different models of agency might interpret a decision to enroll in welfare very differently. Those employing the working class, or conjoint, model would be more likely to emphasize the impact welfare has on an individual’s relationships with his family and community. A decision to enroll in a government welfare program, then, could be interpreted through the conjoint model of agency as one designed to strengthen relationships with others, to ameliorate financial tensions within a family, or to pay back support received from others. A choice to enroll in welfare, therefore, is still agentic, in that it still reflects an individual acting in the world, but in a way that is appropriate for the working class context (Markus et al, 2003). Individuals using the disjoint model of agency, in contrast, might view a decision to enroll in welfare as passive, and lacking in agency. In the disjoint model “good” actions are those which exert environmental influence according to unique individual goals. Choosing to take welfare instead of taking control of the environment, therefore, could be interpreted as failing to exercise agency. Individuals applying these two models, thus, could view a decision to enroll in a welfare program very differently.

The prevailing model of agency

To understand which model of agency becomes prevalent in society, it is important to understand whether the working or the middle class has more
power in society. The research on power shows that power can be defined as “relative control over another’s valued outcomes.” Power, accordingly, is dependent on control over resources; with those resources, it is possible to reward or coerce others in order to control outcomes (Fiske and Berdahl, 2007). Because the middle class controls political and socioeconomic resources in the United States, their model of agency becomes prevalent.

The working class has practically no political representation in the United States. Not only are they less likely to vote, and therefore to decide who represents them, less likely to have well-informed preferences, and therefore to decide what policies are beneficial, and less likely to contribute money or energy to political campaigns, and therefore to help preferred candidates win, but they are also much more likely to be completely ignored by their legislative representatives. Recent research has shown that “the opinions of constituents in the bottom third of the income distribution have no apparent statistical effect on their senators’ roll call votes.” Analysis of the data from Senate roll call votes showed “senators are vastly more responsive to the views of affluent constituents than to constituents of modest means.” In fact, for those at the tenth percentile of national income, estimated levels of political responsiveness “are, in most cases, negative.” Without political responsiveness to their needs, the working class is shut out of discussions about government policy, and is left without control over political resources. Indeed, the research points out that the disparities in political responsiveness “are especially troubling because of the potential for a debilitating feedback cycle...: increasing economic inequality may produce increasing inequality in political responsiveness, which in turn produces public policies increasingly detrimental to the interests of poor citizens, which in turn produces even greater economic inequality, and so on” (Bartels, 2005). Lack of political resources ties in directly with the working class’s lack of socioeconomic resources.

The middle class controls socioeconomic resources in the United States. It has, by definition, “higher paying jobs, more education...and more geographically extended social networks” (Stephens et al, 2009). The middle class is often associated with at least some college education, while working class members oftentimes only have high school diplomas. The middle class consists mostly of white-collar workers, while blue-collar, pink-collar, and clerical workers are relegated to the working class. The working class makes less money than the middle class, often with much less job security (Gilbert, 2014; Thompson and Hickey, 1994; Beeghley, 2004). All these factors are compounding – individuals that come from poorer families are less likely to attend college, and those who do not attend college are more likely to earn lower wages (Kaufmann, 2009; Pascarella and Terenzini, 2005). The middle class, with more education, better jobs, and higher income, therefore, controls socioeconomic resources in the United States. Indeed, many “new social movements” that have arisen are now being attributed to the social power of the middle class (Offe, 1985). That power, the result of control over political and socioeconomic resources, allows the middle class to control the outcome of public discourse.

Power is inextricably tied to the beliefs that become normative and preferred. A review of the literature shows a clear tie between power and the
“beliefs that prevail” with regards to stereotypes (Fiske, 1993). Because the powerful control access to resources like education and wealth, “their beliefs are likely to prevail” and it is their stereotypes that are likely to become the norm (Major and O’Brien, 2005; Sewell, 1992). This logically extends to middle class beliefs about models of agency. The middle class possesses social power due to its control over political and socioeconomic resources, so it is their model of agency, the disjoint model, that becomes normative.

How the disjoint model leads to stigma

The disjoint model of agency stigmatizes welfare programs. The mechanism by which disjoint observations about welfare become stigma can be seen through the conceptualization of stigma. Widely accepted research on the conceptualization of stigma reveals four components that are essential for the creation of stigma (Link and Phelan, 2005). The disjoint model of agency and its perceptions of welfare act through the second of these four components, associating human differences with negative attributes.

By viewing decisions to take welfare through the lens of a disjoint model of agency, society creates a vital component of stigma, associating human differences with negative attributes. Not all human differences are associated with negative attributes – society does not stigmatize against those with curly hair, or green eyes, or black eyeglass frames. However, when it is environmental control which is perceived as agentic, as under the disjoint model of agency, welfare recipients’ seeming lack of environmental influence is interpreted negatively. The decision to take welfare can be influenced by many environmental factors, but, taken through the disjoint model, instead reflects a lack of agency. Because the middle class uses this disjoint model to understand working class families’ decisions, they associate this lack of agency with negative attributes, like laziness or indolence. In fact, media portrayals of welfare recipients describe them as “lacking initiative,” when “initiative” is normatively preferred only in the disjoint model of agency. Through the middle class model of agency, the prevalent model, the decision to take welfare acquires a vital component of stigma. It is the difference between the two models of agency, the difference between how the actor, part of the working class, interprets the action and how society, which reflects the views of the middle class, interprets the action, which leads to welfare stigma.

Counter-argument, or isn’t all government assistance stigmatized?

A counter-argument might be that this theory of welfare stigma is irrelevant because it is government assistance as a whole that is stigmatized, not just government welfare. They might claim that the disjoint model of agency is unsympathetic towards any form of government assistance, as any “handout”
reflects poorly upon the individual. The research, however, does not bear out this point.

A clear illustration of this can be seen in a comparison of middle class government assistance, like the home mortgage interest deduction, and working class government assistance, like welfare. The home mortgage interest deduction is a tax rebate given to homeowners who pay interest on their mortgages – they are allowed to deduct the total expense of the interest from the income that they have earned when calculating their income for tax purposes. It is common: 34.1 million households in the United States claimed it in 2012, costing the government a total of $68 billion dollars (Forbes, 2013). Despite the fact that it costs the federal government four times as much as welfare does, however, the home mortgage interest deduction is not stigmatized to the degree welfare is. The most recent data shows that, “among the 66% of homeowners who have a mortgage, 73% claim a deduction.” Those who did not claim a deduction did not do so because the deduction was stigmatized, but simply because it did not make economic sense (Keightley, 2014).

The welfare program, by contrast, is highly stigmatized. Previous quotes have already demonstrated how the stigma arose as early as the 1960s. The literature has shown that as recently as the 1990s, recipients of the then-primary program for federal welfare, Assistance for Families with Dependent Children, were portrayed negatively in the media and society. Recipients were characterized as having “deviant” childbearing and childrearing behaviors, and characterized in the media as “rejecting the American work ethic” (Jarrett, 1996).

Evidence of the effects of this stigma was found in the relatively low participation rates for AFDC as compared to the home mortgage interest deduction. The literature showed that, in 1983, the “probability of being on welfare if initially eligible” was only 38-percent. Economic analysis revealed that the low participation could “be successfully modeled as a utility-maximizing decision resulting from stigma” (Moffitt, 1983). Welfare stigma, then, is unique, and can be better understood as a reflection of the differences between middle class and working class models of agency than simply as a manifestation of stigma surrounding government assistance.

**Legal implications of differing models of agency**

The difference between the middle class and working class models of agency has resulted in welfare legislation targeted to increase agency in the disjoint sense. After looking at the socioeconomic backgrounds of congressional officers, it is logical this would be the case. In comparison with those on welfare rolls, where only 2-percent possessed a four-year degree and 40-percent had not graduated from high school at all, most members of the United States Congress received extensive education. In the 113th Congress, which served from 2013-2014, 93-percent of all House Representatives and 99-percent of all Senators had a bachelor’s degree, and none had failed to graduate from high school (Hamilton et al, 2001; Manning, 2013). Of the 535 members of Congress, 99 continued their education after graduating from college to earn a master’s degree, 20 had a Ph.D., 25 a M.D., and almost half, 226, a J.D. By every definition, Congress is
overwhelmingly comprised of middle class, not working class, individuals (Gilbert, 2014; Thompson and Hickey, 1994; Beeghley, 2004).

The 1996 welfare reform Congress passed was largely a reflection of the values of its middle class disjoint model of agency. Remarks given by President Bill Clinton, who graduated from Georgetown, Oxford, and Yale, about the bill are indicative of this: “Today the Congress will vote on legislation...to transform a...cycle of dependence...to one that emphasizes work and independence” (Clinton, 1996). “We’re going to make it all new again and see if we can’t create a system of incentives which reinforce work and family and independence. We can change what is wrong” (Clinton, 1996). His remarks focused on independence, on the independence that the new bill would bring to those on welfare, independence that is a crucial feature of the middle class model of agency, but not of the working class model of agency. The welfare reform that was passed in 1996 was designed to increase agency amongst those on welfare, but only from the disjoint perspective, which the working class likely did not even subscribe to.

Conclusion

By and large, recent psychological research has clarified differences in middle and working class perceptions of agency. Middle class perceptions, which are more likely than working class perceptions to become preferred, revolve around independence and environmental influence. When these views are applied to welfare, those on welfare seem to lack agency, and that observation helps explain the stigma that surrounds government welfare. Although the federal government attempted to address this stigma by increasing the agency of working class families with the 1996 welfare reform act, that legislation reflected the middle class upbringings of members of Congress, not the working class contexts families on welfare dealt with. Future legislation, therefore, ought to consider the conjoint model of agency which working families employ. With outlays from government welfare totaling more than $17 billion every year, the success of such a program is important for American families and the American economy (Administration for Children and Families, 2015). We owe it to those on welfare to consider not only our own views on what constitutes “good” action, but theirs as well.

References:


An Origin of Welfare Stigma


