



RAMAPO JOURNAL OF LAW AND SOCIETY

Volume IV, Number 1

Fall 2018

Ramapo Journal of Law and Society

Vol. IV

Fall 2018

Number 1

TABLE OF CONTENTS

SPECIAL ARTICLES

Racial Biases within Stop and Frisk:
The Product of Inherently Flawed Judicial Precedent
.....3
Kathryn Stack, Law and Society, Ramapo College

The Need for an International Tribunal for Corporate Violations
.....34
Cherylan Zarpaylic, Ramapo College

The Dangers of Free Speech: Digital Hate Crimes
.....58
Sara Eljouzi, Communications, Ramapo College

Money as Speech vs. Freedom of Speech:
Campaign Financing in the Democratic Process
.....66
James Ticchio, Ramapo College

PERSPECTIVES

The Syrian Refugee Crisis: Making a Case for State Obligation and Humanity
.....87
Olivia Dunn, Ramapo College

Mission

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.

The journal is published by an editorial board of students and faculty representing the Ramapo College undergraduate program in Law and Society, in collaboration with our colleagues at other colleges and universities nationwide.

Executive Editorial Board

Editor-in-Chief:

Antonino LaRosa, 2019

Asst. Prof. Jeffrey Ellsworth

Assoc. Prof. Sanghamitra Padhy

Assoc. Prof. Mihaela Serban

Jimmy Grissman, 2019

Timothy Hecker, 2018

Rachel Laub, 2019

Sabrina R. Santamaria, 2019

Melanie Scholsser, 2019

Web assistance: Robert Josic

Faculty Advisory Board

Renee Cramer, Drake University

Haley Duschinski, Ohio University

Mark Howenstein, Ramapo College of NJ

Kristin Kenneavy, Ramapo College of NJ

Francesca LaGuardia, Montclair State University, NJ

Krysanthi Leon, University of Delaware

Jinee Lokaneeta, Drew University, NJ

Aaron Lorenz, Ramapo College of NJ

Paul Reck, Ramapo College of NJ

Christine Scott-Hayward, California State University at Long Beach, CA

Jillian Weiss, Ramapo College of NJ

The views expressed by the authors are not necessarily those of the Ramapo College of NJ or the Law and Society program at Ramapo. While the Editorial Board has made every effort to ensure the accuracy of information contained in this journal, we cannot accept responsibility for any errors or omissions contained in the articles.

No part of this journal may be reproduced or transmitted in any form or by any means, including photocopying, recording, or by any information storage and retrieval system, without permission from the authors in writing. The authors who submitted their work to the Ramapo Journal of Law and Society retain all rights to their work.

**Racial Biases within Stop and Frisk:
The Product of Inherently Flawed Judicial Precedent**
KATHRYN STACK*

The Fourth Amendment has been described as the Constitution's penultimate protection of individual liberty, second only to the First Amendment (Mason and Stephenson, 1999). It ensures an individual's fundamental right to privacy is upheld and protects one's right to travel freely without being arbitrarily accosted. The Fourth Amendment ensures an individual's person and property are protected from abusive and baseless government actions. Every search or seizure must be accompanied by either a specific warrant issued by a judge or probable cause, which is a reasonable, objective belief that crime is afoot (Kaplan, 1978). The warrant and probable cause requirements outlined by the Fourth Amendment were intended to allow individuals to live their lives free from unjust police intervention by requiring an officer to have clear, objectively defensible reasons for performing a search or a seizure. It contained the belief that every person had the right to walk down the street without having to fear being stopped by police without cause. This right, however, has effectively been stripped from millions of Americans living in inner cities due to the policy known as "stop and frisk." Stop and frisk has allowed officers to stop and sometimes search individuals with little or no justification (Fagan and Geller, 2015).

The Supreme Court officially sanctified stop and frisk in the 1968 case *Terry v. Ohio* (*Terry*, 1968). This landmark decision created a narrow exception to the general probable cause requirement, allowing the lesser standard of reasonable suspicion to be employed to justify a limited stop and search when an officer believed a suspect was armed and dangerous. The reasonable suspicion standard of evidence is low and has nullified important Fourth Amendment protections by allowing officers unprecedented discretion, allowing the officers to search anyone, at any time (Meares, 2015). What has followed is a policy whereby hundreds of thousands of innocent people have been subjected to the indignities of being arbitrarily stopped and searched (Fagan, n.d.). Furthermore, these searches have not been conducted equitably, but have instead disproportionately targeted African American men (Harris, 1994). Despite the increasing prevalence of this program and the controversy surrounding it, the Supreme Court has largely expanded, rather than restrained, the limitations originally placed upon this program under *Terry* (O'Brien, 2011).

The Court's subsequent decisions of stop and frisk have decreased procedural safeguards for defendants and allowed almost unfettered police discretion while at the same time refusing to address or remedy the inexcusable racial bias inherent within it (Thompson, 1999). The racial ramifications of this policy are not a byproduct of an otherwise fair and just set of decisions. Instead, the Court has at best actively ignored the clear discriminatory impacts to which a doctrine such as stop and frisk would inevitably lead (Kurland and Casper, 1975). Stop and frisk has inherent racial undertones which have been propagated rather

* Kathryn Stack is a Law and Society graduate of Ramapo College.

than checked by the Supreme Court; it is a policy which relies on and leads to racism, and therefore cannot be remedied, only abolished.

Part I will focus on the procedural history of stop and frisk. It will examine the landmark decision which established the stop and frisk doctrine, *Terry v. Ohio*. This decision lowered the standard of evidence necessary to conduct a stop from probable cause to the lower standard of reasonable suspicion. It will demonstrate how there were inherent problems with *Terry's* policy, which inevitably resulted in later abuses. The Court consistently failed to provide adequate parameters which would effectively limit the use of stop and frisk. As a result, abuses have been rampant, with many stops failing to meet even the very low standard supplied by the Court. This results in millions of innocent people being stopped and frisked each year based on little more than an officer's hunch or suspicion.

Part II will show how the almost unlimited discretion granted to officers under *Terry* has inevitably been abused. Because officers are offered no clear parameters regarding who to stop and frisk and are instead left to rely almost solely on their own judgment, implicit biases, which may be subconscious, have a profound effect on their decision-making. Racial stereotypes subtly influence an officer's decision regarding whom to stop and frisk. Several studies will demonstrate that implicit bias affects an individual's decisions, even when they have no conscious bias toward a certain group. These studies will also examine how an officer's implicit bias toward African Americans can cause him to focus on African American suspects when thinking about crime and can influence his perception of whether or not an individual is armed. When a wide level of discretion is granted to officers, implicit biases will influence an officer's decision.

Part III will provide case studies of how stop and frisk operates in four major cities: New York, Chicago, Philadelphia, and Los Angeles. It will examine data from those four cities to determine if the suppositions in Parts I and II are correct. More specifically, it will analyze whether reasonable suspicion is too low a standard which allows for many innocent people to be stopped and searched. It will also examine if the increased discretion granted by the Court has indeed resulted in racially discriminatory policing. It will attempt to determine if stop and frisk can be used in a legal and racially neutral manner or if its implementation always results in widespread abuses.

I. Stop and Frisk's Judicial Precedent

Terry v. Ohio

The Supreme Court established the initial parameters of stop and frisk in *Terry v. Ohio* (*Terry*, 1968). Although many police departments prior to this decision had used stop and frisk, its legal validity had been unestablished and untested. The Court was tasked with defining what constituted a stop and frisk (as opposed to a custodial arrest and full search), and if such a policy was subject to constraints under the Fourth Amendment. Established precedent and Constitutional interpretation regarding the Fourth Amendment had long held every search and/or seizure required probable cause, which requires that the officer possess a moderately high standard of proof that crime was afoot before

being justified to act (Laser, 1995). In *Terry*, the Supreme Court broke with presiding precedent as it ruled stop and frisk did fall within the Fourth Amendment's purview, but that the traditional Fourth Amendment protections did not apply. It lowered the requisite amount of suspicion necessary to perform a stop and frisk from probable cause to reasonable suspicion. They created a narrow caveat within established Fourth Amendment doctrine, allowing a certain type of search and seizure to be exempt from the heightened scrutiny applied to its doctrinal counterparts.

The Supreme Court needed to first define what constituted a stop and frisk and when it was justified. Although the practice existed prior to the *Terry* decision, its exact legal parameters had been unclear. In its prosecution, the state asserted that stop and frisk did not rise to the level of a search and seizure, and was, therefore, exempt from traditional Fourth Amendment protections. The Court categorically rejected this notion, stating it would be "sheer torture" of the English language to claim stop and frisk was anything other than a search and seizure (*Terry*, 1968). It clarified a search and seizure could occur short of a custodial arrest and comprehensive search. The Court defined these terms far more broadly, stating a seizure occurs whenever the police restrict an individual's freedom of movement, and a search occurs even when an officer restricts his investigation to a pat down of an individual's outer clothing. Under these expansive definitions, a stop and frisk certainly constitutes both a search and a seizure. In defining these terms more broadly, the Court encompassed a wide range of police action under the Fourth Amendment's protection.

After affirming that a stop and frisk is a constitutionally protected search and seizure, the Court then ruled that a stop and frisk was exempt from the usual Fourth Amendment protections. It held a stop could occur whenever an officer had reasonable suspicion crime was afoot. This suspicion had to be articulable: more than a "mere hunch", but less than probable cause (*Terry*, 1968). A frisk could subsequently occur only if the officer had further reasonable suspicion to believe the suspect was in possession of a weapon and was an imminent threat to the officer or others. In other words, a stop and frisk could occur only if an officer had reason to believe a suspect was armed and dangerous. This exception to the probable cause requirement was intentionally narrow in scope. It was never intended to replace the long held protections afforded to citizens under the Fourth Amendment; instead, it was intended to serve as a limited exception, justified by an officer's safety.

It is important to emphasize a frisk was only justifiable when it was being employed to search for weapons. The ideological basis for this expansion of police powers was that it must be limited to that which was necessary to ensure an officer's immediate safety. Therefore, a frisk "must be limited to that which is necessary for the discovery of weapons which may be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion" (*Terry*, 1968). A frisk was limited to a brief pat down of the suspect's external clothing, and could only be used to the extent necessary for immediately identifying weapons on his person. In *Terry's* companion case, *Sibron*, the Court ruled an officer could not put their hand inside the suspect's clothing, or continue to feel an object through

the clothing after determining it was not a weapon (*Sibron*, 1968). In this way, the Court sought to limit the intrusion as much as possible, while upholding the usual probable cause standard except in cases where they deemed it jeopardized the officer's safety.

This rather remarkable exception employed by the Court was justified via a balancing test. This test assessed the reasonableness of the officer's actions by "balancing the need to search (or seize) against the invasion which the search (or seizure) entailed" (*Terry*, 1968). The "need to search" in this case was supported by the police officer's broad interest in fighting crime, as well as his immediate significant interest concerning his own safety. The Court cited the substantial risk an officer undertook whenever he interacted with a suspect, and such interactions had the very real potential to turn deadly for the officer at any time. Due to this compelling interest, the Court accepted the general probable cause standards and allowed an officer to frisk for a weapon in order to guarantee his own safety, even when he did not have probable cause for an arrest. The Court weighed the officer's safety concerns against the "brief intrusion upon cherished personal liberty" which a frisk entailed (*Terry*, 1968). While it acknowledged such an intrusion was "far from inconsiderable", it found the officer's interest in securing his own safety, even before he had probable cause to make an arrest, was the more compelling interest.

Problems Stemming from *Terry*

In *Terry*, Chief Justice Warren, the author of the majority opinion, was careful to specify that this expanded police power was limited to very specific circumstances. The Court's language suggests that stop and frisk would be used very sparingly, and only when an officer had particularized suspicion that they or others were in danger. In the abstract, much of this decision seems reasonable. It employs an objectively sound balancing test that attempts to protect an officer's safety while also ensuring an individual's right to privacy. In reality, this decision created a set of circumstances that were ripe for abuse. The main problems with this decision are twofold: the Court refused to define clearly the newly employed standard of reasonable suspicion and it acknowledged, but ignored, that these new police powers were likely to be employed to harass minority communities.

The Court was tasked with defining what constituted the requisite reasonable suspicion to justify a stop and frisk. The definition, which the Court provided, was rather vague and produced unclear real-world ramifications. In its majority opinion, the Court stated reasonable suspicion required the police to "be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (*Terry*, 1968). The factors that influence an officer's decision had to be more than a "mere hunch"; they had to point to empirical observations and rational conclusions drawn therefrom which would lead a reasonable person to believe a suspect was armed and potentially dangerous (*Terry*, 1968). Reasonable suspicion was intended to be an objective "reasonable person" standard, a standard that was supposed to serve officers in a myriad of circumstances.

Even as the Court outlined the evidentiary requirements of reasonable suspicion, it refused to clarify the specific factors which could justifiably be used

to constitute the requisite standard. It believed the multitude of unique situations and circumstances which comprise citizen-police encounters could not be succinctly restrained by the Court. Instead, it stated, the “limitations will have to be developed in the concrete factual circumstances of individual cases.” (*Terry*, 1968). This lack of specificity supplied the police with extensive discretionary power. Without clear judicial guidelines, officers were largely able to create their own set of reasonable factors (Harris, 1994). Instead of creating means of proactively delineating a set of factors, which, individually or in tandem, could suffice for reasonable suspicion, the Court instead took a much more passive role. They allowed police departments and individual officers on the street, to establish their own criteria, which only became subject to judicial discretion when it was brought before the Court. This method was especially problematic regarding a practice such as stop and frisk, since the majority of those who experienced it were never arrested and therefore never had cause to bring such challenges (Alexander, 2010).

This decision left the onus on subsequent courts to decide which factors did and did not constitute reasonable suspicion in a piecemeal manner. It was only when a case was brought before a judge that the factors used by police received any sort of check. This system afforded police an enormous amount of discretionary power. Police were able to use any factors that they deemed reasonable in order to justify a stop and frisk, factors that would only be challenged if the defendant brought the issue before the Court. Obviously, there was an enormous incentive for law enforcement to define such requisite factors as liberally as possible. Writing for the majority in *Terry*, Warren himself admitted there was validity to the argument that an officer’s “judgment is necessarily colored by their primary involvement in ‘the often competitive enterprise of ferreting out crime.’” (*Terry*, 1968). An officer had a compelling interest in using whichever tools were at their disposal to combat crime. Given vague parameters, which allowed officers to search a person based on less than the usual standard of probable cause, it was inevitable that officers would use this newly expanded police power as much as possible. It was the duty of the courts to ensure this policy was not abused and individual liberties were protected.

Under the ill-defined reasonable suspicion standard supplied by the Court, subsequent courts were either unwilling or unable to limit adequately the virtually unfettered discretion granted to police under the *Terry* decision. The *Terry* Court had created a precedent of deferring to an officer’s judgement whenever weighing the reasonableness of their actions. Throughout its decision, the Court referenced the arresting officer’s extensive experience on the police force to legitimize their decision to stop and frisk Terry and his codefendant. The Court implied that courts should defer to an officer’s judgement when deciding whether a particular case meets the reasonable suspicion threshold. This implication by the Court opened the door for subsequent decisions which explicitly stated what the earlier Court had only implied (*United States v. Cortez*, 1981). This deference on the part of the Court served to expand further police discretion and to ebb away from personal privacy. Without judicial oversight, the limitations placed upon the scope of stop and frisk were virtually meaningless.

Perhaps the most troubling aspect of stop and frisk policy was the vague and ubiquitous set of factors which courts ruled sufficed to meet the standard of reasonable suspicion (Harris, 1994). As stated before, these factors were not outlined in an overarching doctrine but were instead decided piecemeal by the courts as specific situations arose. Although precedent as law is an established tradition of common law jurisprudence, the Warren Court's decision failed to create a sufficiently complete precedent, instead explicitly transferring to later courts the task of deciding which factors constituted reasonable suspicion. These later courts were often much less liberal than the Warren Court had been, permitting a number of factors to be used to constitute reasonable suspicion. These factors were difficult to define or counter, and could be distorted to apply to almost anyone at any time.

The factors, which the courts allowed to meet, partially or wholly, the reasonable suspicion standard, were so ill defined as to be virtually meaningless. In his analysis of the New York Police Department's stop and frisk program, Avdi Avdija composed a list of the most commonly cited reasons which officers employ to justify a stop and frisk (Avdija, 2014). The most commonly cited factor was a suspect's location in a high crime area, cited in over fifty percent of incidents (Avdija, 2014). However, in Jeffrey Fagan's report on the NYPD, he found that police employed the "high crime area" justification irrespective of the area's crime rates and it was cited even when the stops were conducted in areas with some of the lowest crime rates in the city (Fagan, n.d.). However, because of the unspecified nature of what constitutes a "high crime area", and because of the minimal judicial oversight to which this practice was subjected, police were able to misapply this justification with impunity. Fagan's findings imply that officers use vague and un-scrutinized factors, such as high crime area, to employ stops and frisks without the requisite articulable reasonable suspicion. Although said factor cannot be used singularly to justify a stop and frisk, its misuse is evidence of the abuse permeating said doctrine (*Brown*, 1979).

Subsequent Supreme Court Decisions, and the Expansion of *Terry*

Post *Terry*, a series of Court decisions delineated a series of factors that did or did not rise to the requisite reasonable suspicion standard. In *Brown v. Texas*, the Supreme Court unanimously ruled that a suspect's location in a high crime area was not enough to constitute reasonable suspicion without the presence of other suspicious factors (*Brown*, 1979). In this case, officers stopped Brown because he "looked suspicious" due to the fact that he was in an area known for drug crime, and the officers had never seen him before. The arresting officers failed to cite any specific or individualized reasons for the stop, which led the Court to conclude that said actions did not meet the requirements proposed under *Terry*. This case was fairly unusual, as the Court found that the officers had failed to meet even the very low threshold of reasonable suspicion. This was mainly due to the officers failing to cite any sort of plausible justification for their actions and having freely admitted they had neither seen Brown act suspiciously nor had they any reason to believe he was armed. Although the decision in this case was almost inevitable given the circumstances, it still provided a restriction,

however nominal, on the factors which could be used to form reasonable suspicion.

The restrictions which *Brown v. Texas* had created were mostly nullified by the subsequent case, *Illinois v. Wardlow* (Illinois, 2000). The defendant, Wardlow, had been standing in front of a building within a high crime neighborhood in Chicago. According to the officers, he had not been acting in a suspicious manner prior to seeing the police but had inexplicably fled upon seeing the patrol car. He was apprehended and frisked, at which point the officers located a gun. The Supreme Court overturned the appellate court's decision, and ruled that the officers had sufficient reasonable suspicion to perform a stop and frisk. While a suspect's location in a high crime area was not singularly sufficient to justify a stop and frisk, it could be used in conjunction with other factors. Furthermore, the Court held that flight or evasive action on the part of a suspect, taken in tandem with a suspect's location in a high crime area, constituted behavior suspicious enough to meet the reasonable suspicion standard. This was a significant expansion of the *Terry* doctrine.

As stated earlier, the "high crime area" standard has been widely utilized and abused by the sample police department (Fagan, n.d.). Wardlow allowed for this spurious standard to be used provided at least one other factor was cited as well. The other factors commonly used by police to justify stops and frisks are of an equally unspecifiable nature (Avdija, 2014). Factors such as "furtive movement", "individual wearing unseasonably warm clothing", or "time of day fits the crime incident" are all factors which police may legally cite in order to justify a stop and frisk (Avdija, 2014). Many of these factors are largely subjective, which not only significantly increases police discretion, but also imposes an undue burden on the defense. The accused are burdened with the nearly impossible task of disputing factors which are largely subjective and left to be determined at an officer's discretion. Such factors are so ill-defined and ubiquitous as to potentially allow for the stop and frisk of anyone, at any time. As such, the reasonable suspicion standard affords no meaningful protections or restrictions at all.

Post-*Terry* courts consistently expanded the parameter of stop and frisk. One of the most significant cases of said expansion was the "totality of circumstances" doctrine introduced by the Supreme Court in *United States v. Cortez* (*United States v. Cortez*, 1981). In *Cortez*, the Court definitively declared it would not provide a clear definition of what constituted the requisite reasonable suspicion to perform a stop and frisk, instead relying on the totality of circumstances, or the "whole picture", when judging if an officer's actions had been reasonable. This "whole picture" could include several individually innocent factors which only rose to the level of reasonable suspicion when they were combined. Not only did *Cortez* dramatically expand stop and frisk doctrine, but it also established precedent for future decisions, such as *Illinois v. Wardlow*, which expanded said policy even further.

Cortez not only failed to provide sufficient guidelines for stop and frisk, but in its majority decision, the Court also established the precedent of ceding to the officer's discretion when determining reasonableness. Because an officer has extensive training and experience, "a trained officer draws inferences and makes

deductions – inferences and deductions that might well elude an untrained person” (*United States v. Cortez*, 1981). In this way, the Court subtly replaced the “reasonable person” standard with the “reasonable officer” standard. The Court instructed that an officer’s judgement should be relied upon even when a reasonable, but untrained, person may not have deemed the situation suspicious. *Cortez* sent the message that, due to an officer’s special and particularized knowledge of crime, subsequent courts should defer to their judgement when weighing the reasonableness of a *Terry* stop.

Once again, the decisions reached by the Court in *Cortez* seem objectively reasonable. In the abstract, it appeared to simply allow an officer to utilize all available information, or the “whole picture”, when making the decision whether or not to perform a stop. Similarly, recognizing that an officer has more experience in detecting criminality than a lay person, and allowing extra experience to weigh in an officer’s favor when judging the reasonableness of his conduct, also seems objectively fair. But, as in *Terry*, the problem with this decision lies in its application. Burger admits that defining reasonable suspicion has proved an “elusive concept” for the courts, but then proceeds to define it in an equally obtuse manner via the totality of circumstances doctrine (*United States v. Cortez*, 1981). The decision simultaneously increases police discretion while decreasing judicial oversight. Instead of mandating police be able to produce one or two specific, concrete factors to justify a stop, the Court instead allowed officers to choose from a number of unspecified and arbitrary factors to justify their actions. As long as officers cited the right set of factors, they were able to perform *Terry* stops almost completely unchecked by the courts (Meares, 2015).

While not explicitly expanding stop and frisk doctrine, *Minnesota v. Dickerson* did potentially create enormous incentives for officers to utilize stop and frisk more widely (Minnesota, 1993). The circumstances in *Dickerson* were similar to the circumstances in *Wardlow v. Illinois*, *Dickerson* was in a high crime area and turned to walk away upon seeing the officers. He was ordered to stop, at which point the officers performed a frisk searching for weapons. No weapons were found, but the officer did feel a lump in *Dickerson*’s pocket, which after several seconds of feeling it, the officer identified as cocaine. The question before the Court was whether an officer was permitted to seize contraband found during a protective search for weapons.

The unanimous decision of the Court was yes, an officer may seize contraband found during a protective search. It established the “plain feel” doctrine, which stated that as long as the officer’s initial search for weapons was valid, any contraband found therefrom was admissible. It would not instruct officers to ignore evidence found during a lawful search. However, contraband was only admissible when “its incriminating character is immediately apparent,” the officer had to be able to immediately identify the object as contraband upon touching it (Minnesota, 1993). A search could not be extended beyond that which was necessary to identify a weapon and an officer could not extend the search to determine if an object was contraband. Therefore, although justifying the seizure of contraband under the plain feel doctrine, the Court also found that the search conducted by the officers in *Dickerson* had been improper, as the officer had

continued to “mash” the object in Dickerson’s pocket, even after determining it was not a weapon. Nonetheless, the introduction of the plain feel doctrine presented an enormous potential for abuse by potentially admitting stop and frisk to be used as a tool in the War on Drugs.

Although a full analysis of the War on Drugs is beyond the scope of this analysis, a brief synopsis will be included here to exhibit how it has contributed to the rampant abuses conducted via stop and frisk. The War on Drugs led to an explosive rise in the nation’s prison population. In 1980, shortly after the War on Drugs had been declared, there were 41,100 people incarcerated in the United States for drug offenses. Today, that number is over half a million. The United States has the highest per capita incarceration rate in the world, a fact which is largely due to the unprecedented arrest levels which were disproportionately high compared with the crime rates. Since the War on Drugs began in the 1970s, more than thirty-one million people have been arrested for drug offenses (Alexander, 2010).

The astronomical increase in drug arrests was largely unrelated to the crime rate. Even as crime rates have steadily declined, the number of incarcerated individuals continues to grow (Alexander, 2010). Instead, the War on Drugs had been largely sustained by the public’s unfounded perception of crime, caused by the fear mongering rhetoric used by politicians and the media, as well as the creation of federal programs which incentivized drug crime arrests (Free, 2003). The federal government provided powerful incentives for state and local police departments to focus on drug crime. In 1988, Congress created the Byrne program, which allocated millions of dollars’ worth of funding to states who engaged in the War on Drugs. The Pentagon also provided tens of millions of dollars’ worth of military equipment to departments invested in fighting drug crime. Because of civil forfeiture laws amended by Congress in the 1980s, state and local police departments were now able to keep up to eighty percent of the property they seized from drug crimes (Alexander, 2010). This included cars, houses, money, and any other property which was seized from suspected drug dealers (Dunn, 2014). It is estimated that between 1988 and 1992 alone, over one billion dollars in assets had been seized via civil forfeiture (Alexander, 2010). The more drug offenders arrested, the more funding and assets a department would receive. Such programs created billions of dollars’ worth of incentives for police departments to engage in widespread drug arrests.

By allowing contraband to be seized during a stop and frisk, the Court inevitably intertwined stop and frisk with the War on Drugs. The police have a powerful incentive to apprehend as many alleged drug dealers and users as possible. Legally, officers must rely on either consent searches or probable cause in order to conduct a search for drugs. However, an officer can utilize the much lower standard of reasonable suspicion, as long as he claims the initial search was for weapons. Because the standard for reasonable suspicion is so low, and because the incentives to search for drugs are so high, it was almost inevitable stop and frisk would be misused to conduct drug searches.

The final case to be analyzed, *Whren v. United States*, did not directly relate to stop and frisk, although its holding had an undoubted impact on said doctrine (*Whren*, 1996). In a unanimous decision by the Court, *Whren* condoned

the use of “pretext stops” by police. Pretext stop refers to the police practice of stopping an individual, usually for a minor offense, and using said offense as a “pretext” in order to investigate the individual for another, unrelated crime. In *Whren*, an officer had observed the suspect driving in an area known for drug use. He had observed the individual acting suspiciously, and when the defendant failed to use a turn signal, the officer used the traffic violation to justify the stop. The officer admitted he had suspected the defendant of possessing drugs, and had therefore used the traffic violation as a pretext in order to investigate further. The Court ruled that such a pretext stop was permissible, as long as the reason for initiating the stop was valid. Since the defendant had committed a traffic violation in failing to use his turn signal, the underlying stop by the officer was valid, and he was therefore justified in using said stop as a pretext to investigate the drug crime. The intention of the officer in conducting the stop was irrelevant, the Court ruled, as long as the stop itself was valid.

The explicit sanctification of pretext stops by the Court has troubling implications for stop and frisk. Under *Terry*, the Court held that a stop and frisk could only be performed to look for weapons when an officer had reason to believe that a crime had been or would be committed and had reason to fear for his safety. Under *Whren*, however, an officer would now be justified in performing a frisk to search for anything, not just weapons, provided that he possessed the requisite reasonable suspicion to perform a weapons search. Here is where the incredibly low standard of reasonable suspicion becomes truly problematic. Because the standard, which allows police to search for weapons is so incredibly low, and is based on a totality of undefined circumstances, police now essentially have the ability to search for anything at any time (Jonas, 1989). The probable cause standard meant to protect citizens from unreasonable searches becomes virtually meaningless when pretext searches may be used based on the much lower standard of reasonable suspicion.

When observed in their totality, the preceding set of cases merge to form an unreasonably low standard regarding stop and frisk. Beginning with *Terry*, the Court consistently failed to develop adequately strict parameters to curtail the newly expanded police discretion granted via stop and frisk doctrine. The underlying issue throughout remained the fact the Supreme Court refused to clearly define the standard of reasonable suspicion, instead leaving the onus on subsequent courts to decide if a particular case had sufficiently met the standard. Eventually, the Burger Court decided on the totality of circumstances doctrine, which effectively expanded, instead of limited, police discretion. Police were now able to choose from a number of individually innocent, difficult to define factors, which they could combine to form the requisite suspicion (Avdija, 2014). The fluidity and vagueness of said factors allowed police almost unfettered discretion in deciding who to stop and frisk (Harris, 1994). These factors offered no substantial guidelines which officers could follow, but instead were so indefinite as to be able to be fitted to almost any circumstance. The limitations placed on stop and frisk were in essence, no limitations at all.

As long as officers cited the correct factors, it was likely that a stop and frisk would be upheld (if it was challenged at all). This has led to a situation in some major cities where officers need simply to check off boxes next to a list of

factors in order for the stop to be deemed legal (Fagan and Geller, 2015). This practice has led to accusations that police in these districts will stop first, and determine the requisite reasonable suspicion later. That the factors cited conform to the individual stop is rarely checked by either the officer's supervisor or by the courts. This lack of oversight is inevitable given the vague, essentially unverifiable, nature of such factors, as well as the fact that few stop and frisks result in an arrest and therefore never have the chance to be scrutinized by a judge. Even when a judge is able to review said factors, such inquiry generally poses little benefit to the accused. The inferences and observations made by the officer are given deference by the judge, as precedent holds that an officer's training and experience allows him to reasonably detect suspicion where an average person may not. Therefore, judges should cede to an officer's discretion if they are in doubt about the reasonableness of his conduct. Vague doctrines and minimal judicial oversight have allowed police to largely bypass the probable cause requirement and conduct stops and frisks based on reasonable suspicion virtually unrestrained.

The primary object of the police is crime prevention and control. That they would use almost every means available to them to do so is a forgone conclusion. This is why police discretion is checked with policy, and police actions are reviewed and restrained by courts. However, the *Terry* doctrine had failed to sufficiently check or restrain police conduct in regard to stop and frisk. Instead, it has created powerful incentives, such as the plain feel doctrine, to utilize stop and frisk as much as possible to combat crime. *Terry* and its subsequent cases have inevitably created the abusive practices observed today in which millions of people are stopped and frisked for little to no cause (Cole, 1999). It was a doctrine doomed to be abused from the outset due to its unspecified nature. What is occurring today in many major cities throughout the U.S. is not an aberration or perversion of a fundamentally sound doctrine, it is said doctrine's inevitable conclusion.

II. The Racial Ramifications of Stop and Frisk

The Racism Inherent in *Terry*

Even before *Terry v. Ohio* had been decided, its racial ramifications were of concern. When *Terry* reached the Supreme Court, the NAACP Legal Defense and Education Fund filed an amicus brief with the Court, in which they argued against lowering the probable cause standard to one subject to less scrutiny (Kurland and Casper, 1975). The brief purported to represent the "everyman", or the numerous innocent people who had already been subjected to the indignity of a stop and frisk. It feared an even lower standard of suspicion would result in even more innocent people being harassed. This harassment, the NAACP contended, was not spread equally, but was instead unfairly perpetrated against African Americans and those living in the inner city. The Fourth Amendment was intended to protect "unpopular and underprivileged" groups such as African Americans, and to lower its protections would inevitably lead to discriminatory policing against such groups (Kurland and Casper, 1975).

The NAACP contended African Americans were disproportionately subjected to stop and frisks, and this was due to racial bias on the part of the police and not because higher levels of criminality. It cited studies which had shown that African Americans were more likely to be illegally frisked than whites, and that “observers in on-view encounters judged frisk necessary for the officer’s protection *less often* when Negroes than whites were searched” (Kurland and Casper, 1975). Although relatively few studies existed on this subject at the time, the NAACP argued that their findings confirmed that stop and frisk had been utilized in a racially biased manner.

The NAACP strongly argued against the Court’s acceptance of stop and frisk, stating, “[t]he essence of stop and frisk doctrine is the sanctioning of judicially uncontrolled and uncontrollable discretion by law enforcement officers” (Kurland and Casper, 1975). Such unchecked discretion, the NAACP argued, would inevitably have racial connotations. In the racially charged context of the 1960s, when police violence against peaceful Civil Rights protesters was rampant, it is hard to argue against such an assertion. With the benefit of hindsight, it is obvious that many officers harbored racist sentiments, which would inevitably lead to discrimination if left unchecked (Schwartz, 1995).

In its decision in *Terry*, the Warren Court both agreed with, and rejected, the arguments posed by the NAACP. It admitted racial harassment was likely to occur as a result of their ruling, but held that the courts were powerless to proactively stop such abuses. The Court referenced race in its decision only once, when it stated, “the wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial” (Terry, 1968). The exclusionary rule, which the same Court had developed several years earlier, excluded any evidence obtained illegally from being used during a trial (O’Brien, 2011). According to the same Court, it served as the only effective deterrent to police misconduct regarding the Fourth Amendment. Despite admitting to such measures’ general effectiveness, the Court refused to apply similar guidelines to stop and frisk (Thompson, 1999).

While the Court acknowledged the lower level of scrutiny inherent within stops and frisks would likely lead to discriminatory policing, it maintained that such discrimination could not be proactively deterred by the Court and any attempt to do so would only serve to impede legitimate policing (Terry, 1968). It refused to entirely ban the policy of stop and frisk simply because it was sometimes utilized in an improper manner. Furthermore, it held that application of the exclusionary rule only served as an effective deterrent when an officer’s primary motive was to obtain a conviction. Because racially biased police harassment was generally perpetrated for reasons other than pursuing prosecution and was instead conducted “in the interest of serving some other goal,” application of the exclusionary rule would be wholly ineffective in countering police misconduct (Terry, 1968). In other words, placing an outright ban on stop and frisk would do nothing to prevent some segments of the police from unfairly targeting and persecuting minorities, because such harassment would occur with or without the Court’s sanctification of said policy. All that such

Racial Biases Within Stop and Frisk

a ban would accomplish, the Court held, would be to endanger “good” officer’s lives by preventing them from legally ascertaining that the suspect was unarmed.

Although the Court refused to take proactive measures to prevent abusive discriminatory policing, it maintained that it was the duty of judges to condemn such cases when they were brought before the court. It held that such abuses could not be checked via policy, and could only be effectively dealt with after an individual instance of police misconduct had occurred. This method of scrutiny has proven to be entirely ineffective in combating racially motivated stops and frisks. In the rare event that a stop and frisk resulted in an arrest, the officer needed only to advance some of the vague, racially neutral justifications for why the stop and frisk was performed in order for his actions to be deemed unbiased. Unless an officer freely admitted race was the sole reason for performing a stop, it was incredibly unlikely a judge would rule racial bias had existed (Alexander, 2010). It is not until said policy is viewed in its entirety that the serious racial ramifications become clear.

The Court was remarkably unconcerned about the possible racial implications which would inevitably stem from the increased police discretion afforded by stop and frisk. It agreed with the NAACP’s contention that an increased level of police discretion would also result in an increase in the harassment which minorities received from “certain elements” of the police force. It viewed such harassment as unfortunate, but inevitable and as an issue which the judicial system was unequipped to adequately prevent. But what the sanctification of stop and frisk did was not just to allow a few “bad” officers to continue to abuse their discretion. Instead, it created a system whereby entire inner city police departments were able to stop and harass large swaths of minority communities with little to no judicial oversight. The narrative espoused by the Court that individual officers and police departments would “police” themselves and choose to exercise the drastically expanded police power afforded through stop and frisk strictly within the narrow confines established by the Court proved to be wholly misguided.

The Warren Court recognized (albeit briefly) that their new decision would have racial ramifications. However, they failed to predict these ramifications would not be the product of individual officers abusing their authority but would instead be built into a system which would stop and frisk certain “types” of people en masse as a matter of policy (Meares, 2015). Following *Terry*, stop and frisk became institutionalized within numerous police departments across the country. Policies were created whereby officers were instructed to “blanket certain areas and ‘stop the right people’” (Editorial Board N.Y. Times, 2013). Officers were instructed to stop people they deemed to look “suspicious”, even if they did not have a specific reason to believe that crime was afoot. The incredible level of police discretion permitted under *Terry* was not just abused by individual officers, but was employed by entire police departments. This abuse was overwhelmingly targeted toward minority communities (Eterno, 2012).

In its *Terry* decision, the Court created a system whereby individual and institutional racism was able to flourish. It presented individual officers with an almost unparalleled level of discretion allowing them to conduct stop and frisks based on vague parameters with minimal judicial oversight. The fact that this

discretion would often be utilized in a discriminatory manner was inevitable given the undercurrent of racism still present within American society. Racism was not only present in an individual officer's decision of whom to stop and frisk, however, but was also present in police department's decisions on which neighborhoods to target. Numerous studies will exhibit the implicit racism present within individuals as well as a system of racism within the criminal justice system. Due to said factors, the level of discretion afforded by the Courts was inevitably used in a racially discriminatory manner.

Implicit Bias and Its Impact on Decision-making

The almost unfettered level of discretion afforded to officers under stop and frisk has inevitably led to racially discriminatory policing given the current racial climate. Despite the progress made in combating explicit forms of racial discrimination, implicit forms of racial bias still remain widely prevalent. Unlike explicit biases, which individuals are aware they hold, implicit biases are held at a subconscious level with the biased individual often unaware that he holds such beliefs. They are the "evaluations and beliefs that are automatically activated by the mere presence (actual or symbolic) of the attitude object" (Fletcher, 2001). In other words, a person experiences these biases automatically upon encountering the subject of said bias, which causes him to act in a discriminatory manner toward said subject, often without conscious awareness that he is doing so (Fletcher, 2001).

Within American society, there has existed a pervasive stereotype which equates African Americans with violence and criminal behavior. Such stereotypes have been broadcast in the modern era via politicians, who have utilized divisive rhetoric to equate African Americans with violent and drug crimes, and the media, which disproportionately portrays black men as dangerous criminals (Alexander, 2010). The propagation of such stereotypes has resulted in many individuals holding racially biased beliefs, often without conscious awareness of doing so. This implicit bias extends (but is certainly not limited) to police officers, and unconsciously affects their judgement and discretion (Eberhardt, 2004). The presence of such implicit biases present a strong argument for limiting individual officer's discretionary power.

Because implicit biases are unconscious beliefs, researchers cannot uncover those using conventional methods and questionnaires. Instead, they "capture unintentional and unconscious racial biases by observing people's decisions and actions" (Ghandnoosh, 2014). An individual can react in a biased manner without holding any overt prejudices (Fletcher, 2001). A survey conducted in 1995 asked respondents to "envision a drug user", and then asked those surveyed what race they had pictured the imagined drug user being. Ninety-five percent of the respondents reported picturing a drug user who was black (Alexander, 2010). Another study conducted on non-black college students involved showing the students pictures of either a white or a black face and then asking them to identify if the picture of the object under the face was a gun or a tool. When the students were presented with a black face, they were able to identify the weapon more quickly than when presented with a white face, but were also more likely to misidentify the tool as a weapon as well. Respondents in

these surveys had similar reactions, even when they did not consider themselves to hold racist beliefs (Payne, 2001). These studies present just two of the numerous examples which demonstrate the persistence of racial stereotypes concerning black criminality in the United States.

The Role of Implicit Bias on an Officer's Decision-making

Implicit bias research conducted on police officers has shown that they are not immune to the negative racial beliefs which permeate American society. Studies have indicated such biases have a considerable impact on discretionary choices officers make. As is true with the general population, officers have a proclivity toward associating African Americans with criminality. A study performed by Eberhardt et al. presented officers with a set of white faces and a set of black faces and asked them to identify who "looked criminal" (Eberhardt, 2004). The study concluded, "officers not only viewed more Black faces than White faces as criminal, but also viewed those Black faces rated as the most stereotypically Black (e.g. those faces with wide noses, thick lips, or dark skin) as the most criminal of all" (Eberhardt, 2004). The more stereotypically "black" a face looked, the more it was associated with criminality (Eberhardt, 2004). This seems to imply a powerful association between African Americans and criminality in the minds of many police officers.

A subsequent study conducted by Eberhardt arrived at a similar conclusion. In this study, police officers were asked to think about violent crime and then showed them pictures of white and black faces. When officers were thus primed to imagine crime, they were much more likely to focus on the black faces than the white faces. Furthermore, when an officer was later asked to recall a black male image, and misremembered it, he generally ascribed more stereotypically black features to the image than had been present (Ghandnoosh, 2014). These findings demonstrate that officers are prone to associating blackness with criminality and to overwhelming focus on African American subjects when thinking about crime. Such findings have troubling implications for on the street police stops where an individual officer's discretion is virtually unchecked.

The impact of implicit racial bias in a police officer's discretionary role is most apparent in statistics concerning lethal use of force. A study by Correll et al. examined if racial bias affects an officer's decision concerning whether to shoot an armed or unarmed suspect (Correll, 2007). Its goal was to determine if officers were more likely, less likely, or equally likely to shoot an unarmed black suspect as compared to untrained members of the general population. In doing so, it hoped to both determine if racial bias impacted an officer's decision to use lethal force and how such a decision compared to those made by regular citizens. Participants played a video game in which they were shown a picture of either an African American or a white male, who was holding either a weapon or a non-weapon item. They were given less than a second to determine if the suspect was armed and to decide whether or not to shoot according to that assessment. The study recorded both the time it took a participant to make the shoot/don't shoot decision, and the accuracy of such decision once it was made.

The study found that both police officers and citizens spent a longer time deciding whether or not to shoot when the image presented was “stereotype-incongruent” (Correll, 2007). Images of unarmed black men and of armed white men did not correspond to the pervading societal stereotype regarding the criminality of such groups. While both officers and non-officers were able to act quickly when an image confirmed racial stereotypes (i.e. armed black man and unarmed white man), the reaction time of both groups was significantly slower when responding to images which defied conventional racial beliefs. This discrepancy in reaction times indicates a possible racial bias within both groups. It suggests the participants were able to react almost reflexively when presented with an image which confirmed racial stereotypes, but they were forced to pause and think when responding to images which did not conform to such stereotypes. It belies an underlying expectation of criminality within one group (i.e. black men) and an expectation of non-criminality within another (i.e. white men).

While the delayed reaction time for stereotype incongruent images was similar for both offices and non-officers, these groups differed in their decisions to shoot. Average citizens were considered “trigger happy” in that they were much more likely than officers to shoot an unarmed target, especially if the individual in the image was black. Police on the other hand, were much less likely to shoot an unarmed target and exhibited no racial discrepancies in the targets they chose to shoot. In other words, they were no more likely to shoot an unarmed black man than to shoot an unarmed white man. These findings are surprising, in that the delay exhibited when officers had to make decisions regarding racially incongruent images generally correlates with incorrect, racially biased decisions being made. While the study found both groups were subject to racially stereotypical beliefs, it found that average citizens, not police, were the only group susceptible of acting on such bias. The study surmised that an officer’s training allowed him to overcome his latent biases and to react in a racially neutral manner.

The final conclusions derived from the Collins et al. study are somewhat disputed by statistics regarding lethal use of force by police. Statistics concerning the use of lethal force and a suspect’s race reveal a strong discretionary bias on the part of the police officer. A study conducted by the University of Louisville and University of South Carolina analyzed the 990 fatal shootings by police officers which occurred in 2015. It concluded that unarmed black people were proportionally seven times more likely to shot by police than unarmed white people and approximately forty percent of all unarmed people killed by police were African American. Even when controlling for multiple other variables such as if a suspect suffered from mental illness and whether the suspect was attacking the police at the time of the shooting, unarmed African Americans were still twice as likely as unarmed white men to be fatally shot by police. Furthermore, those black individuals who were killed by police were less likely than white individuals to have been attacking the officer. The authors of this study attribute these discrepancies to racial bias (Editorial Board N.Y. Times, 2013).

This study attempted to control for the non-racial factors which are sometimes employed in an attempt to create a racially neutral narrative to explain such discrepancies (e.g. black men are more likely to be fatally shot

because they are more likely to be in high crime areas, because they are more likely to assault officers, etc.). In doing so, the researchers attempted to prove racial biases had an impact on an officer's decision concerning when to use lethal force. According to one of the researchers, "the only thing that was significant in predicting whether someone shot and killed by police was unarmed was whether or not they were black" (Lowery, 2016). Such statistics seem to belie the assertion that while officers still experience implicit biases, they are able to overcome them and act in a racially neutral manner due to their training. Such statistics clearly demonstrate an officer's discretion is influenced by the racial stereotypes which permeate American society.

Stop and frisk policy provides officers with virtually no concrete guidelines. Instead, officers are granted virtually unfettered discretion regarding which individuals they choose to engage with in on the street encounters. Despite repeated assertions by the Court that the suspicion requisite to performing a stop must be articulable, in reality any number of vague, unspecified factors may be employed to justify said stop. Because the discretion granted to police is so expansive and because the Court has provided so few parameters and checks to curtail it, it is inevitable that biases would impact officer's decisions regarding who to stop.

No one is immune to the constant cultural and societal influences to which individuals within a society are subjected. Unfortunately, America has a darkly racist past, the remnants of which persist today. The stereotypes and biases created by such a legacy are hard to escape and they influence an individual's perceptions and judgements on both the conscious and unconscious level. Police officers are not immune to such influences although their effects on officers may be much more serious given the degree of power entrusted to them. Sufficient checks placed upon officer's discretion can greatly reduce the potential ramifications of such bias by providing officers with racially neutral practices and tools upon which to rely, instead of simply their own personal judgements. Stop and frisk precedent fails to do this but instead provides officers with an enormous amount of power and then fails to provide any meaningful check to ensure the policy is utilized fairly.

Institutional Racism

This is not meant to imply that individual officers are solely responsible for the stark racial disparities observed in stop and frisk's implementation. An institutionally racist criminal justice system is also a major contributor to the harassment many African Americans face at the hands of police. For example, many major cities institute a policy whereby officers are concentrated in areas with a high proportion of African American residents and are instructed to "stop the right people" (Editorial Board N.Y. Times, 2013). Stop and frisk is usually not employed by police departments in majority white neighborhoods, even when these areas have high crime rates. Instead, it is consistently employed within minority communities (Editorial Board N.Y. Times, 2013).

With its decision in *Minnesota v. Dickerson*, the Court irreversibly linked stop and frisk to the War on Drugs, since contraband found during a protective frisk was ruled admissible against the defendant (*Minnesota*, 1993). As stated

earlier, police departments had incredible financial incentives to apprehend as many drug users and dealers as possible and stop and frisk became a powerful tool which permitted officers to perform searches based on less than the usual standard of probable cause (Alexander, 2010). This policy had enormous racial repercussions and was the major catalyst for the explosion in incarceration rates following its inception in 1970s (Free, 2003).

Reagan-era propaganda and rhetoric inundated the media with portrayals of drug users as young, dangerous African American males. These images, coupled with enormous police discretion regarding which individuals and locations to target, can help to explain the fact that even though white youth are the most likely demographic to sell and use drugs, three-fourths of all people imprisoned for drug crimes are minorities. In fact, a Department of Justice analysis of police departments in Seattle found that officers would often ignore white drug dealers operating in the open in favor of apprehending black dealers; even when the individuals operated in the same neighborhood and were selling the same drugs. Not only are African Americans more likely to be arrested for drug crimes, but they are also less likely to receive favorable plea bargains than white defendants and they are disproportionately waived from state to federal court systems, where the penalties are more severe. Even legislation regarding drug use can result in racially discriminatory outcomes, as crack cocaine (a drug associated with black users) was once sentenced at a 100:1 ratio with powder cocaine (a drug associated with white users), even though they are essentially the same substance (Alexander, 2010). These factors are a major reason why the incarceration rate for African American males is so disproportionately high.

Both institutional and individual biases have contributed to the racially discriminatory nature of stop and frisk. The systematic targeting of certain neighborhoods to the exclusion of others, combined with the incredible incentives presented to police departments to apprehend as many drug users as possible, are both major factors which have resulted in African American individuals and communities being overwhelmingly subjected to widespread stop and frisks. Firm legislative restrictions and comprehensive judicial oversight are both necessary to combat these institutionalized methods of racial discrimination. However, individual racial bias on the part of police officers also plays an important role and is perhaps easier to remedy than complex systematic discrimination. The undefined parameters and vague factors which form stop and frisk policy has created a system whereby individual biases are able to flourish.

Granting officers the ability to stop anyone, provided they supply a perfunctory explanation composed of any number of un-particularized, individually innocent factors, and then hindering any judicial oversight of said officer's actions, has necessarily led to racially abusive policing.

III. Empirical Case Studies of Stop and Frisk in Major Cities

The prior sections have demonstrated the potential abuses inherent within current stop and frisk doctrine. The lack of concrete restrictions on police action, coupled with the realities of individual and institutionalized biases, has created a system whereby African Americans are disproportionately targeted and harassed.

Terry stops have resulted in significant and widespread Fourth Amendment abuses within African American communities. The following section will analyze how stop and frisk has been utilized in four major U.S. cities: Los Angeles, Philadelphia, Chicago, and New York, in order to provide empirical evidence of said policy's racially discriminatory outcomes. Such abuses are not simply hypothetical, but are the daily reality for millions of minorities residing in urban areas. Stop and frisk has been utilized not as a policy of individualized suspicion, but as a system of widespread harassment. The following data will provide evidence that stop and frisk is both over utilized and conducted in a discriminatory manner.

Los Angeles

In October 2008, Yale Law Professor Ian Ayres and research assistant Jonathan Borowsky released a report entitled "A Study of Racially Disparate Outcomes in the Los Angeles Police Department" (Ayres, 2008). The report, prepared for the ACLU of Southern California, analyzed the more than 810,000 vehicle and pedestrian stops conducted by the LAPD from 2003-2004. Although the data is over ten years old, it is the most recent results which have been provided by the LAPD. The report analyzed field data reports (FDRs), which officers are required to complete after every stop is performed. FDRs provide information such as the race of the suspect, whether the suspect was frisked, and if said frisk resulted in weapons or contraband being found. The report investigated if minority suspects were more likely to be stopped, if they were more likely to be frisked following a stop, and if they were more likely than white suspects to be found with contraband.

Ayers attempted to determine if African Americans were more likely to be subjected to stops and frisks than whites, and if a racial discrepancy did exist if it was due to bias or legitimate policing (e.g. higher crime rates for one racial group than the other). Although this study does not include only street encounters, but also motor vehicle stops, it does provide important information regarding stop and frisks. African Americans were significantly more likely to be stopped and frisked than whites, even when controlling for non-race variables. Furthermore African Americans who were stopped and frisked were significantly less likely to be found in possession of contraband, which disputes the assertion that the racial disparity in stops is due to a racial disparity in crime.

African Americans were stopped by police at a rate of 4,500 stops per 10,000, as compared to only 1,750 per 10,000 non-minority residents. Even controlling for non-racial variables, an enormous disparity regarding stop rates between races still existed. Controlling for violent and property crime rates within each Los Angeles district, African Americans were still subjected to 3,400 more stops per 10,000 people than whites. This disparity was not due to a greater police presence, which would logically result in more stops, in minority neighborhoods either. In fact, African Americans were most likely to be stopped in areas in which they constituted a minority (less than one-third of the population.). Disproportionate stops cannot be sufficiently explained by racially neutral factors but may instead be the product of racially-biased policing.

Once stopped, African Americans were 127% more likely to be frisked than were stopped whites. Some have attempted to explain that African Americans are more likely to be frisked not because of racial bias, but because they are more likely than whites to be in possession of contraband. This assertion is disputed by the current statistics. When frisked, African Americans were 42% less likely to be found with a weapon, 25% less likely to be found in possession of drugs, and 33% less likely to be found with any other contraband. Furthermore, stopped African Americans were 21% more likely to be subjected to a “no-action” stop, or a stop which did not result in an arrest or citation. This evidence suggests that black Americans are stopped and frisked based on a lower threshold of evidence than white Americans. African Americans are significantly more likely to be subjected to a frisk once stopped; a factor which cannot be ameliorated by racially neutral justifications such as a higher yield rate. Such factors have led Ayers to conclude that African Americans are “over-stopped, over-frisked, and over-arrested” due to their race.

Philadelphia

In 2010, the ACLU filed a federal lawsuit alleging that thousands of people, mostly minorities, are illegally stopped and frisked annually by the Philadelphia Police Department. As part of a settlement, Philadelphia agreed to collect information regarding each stop and frisk, to be reviewed by an independent monitor appointed by the court, and to retrain officers in the use of stop and frisk (ACLU of Pennsylvania, 2016). The ACLU has analyzed the most recent data, collected in 2015, to determine if stop and frisk continues to be used in a racially discriminatory manner. Despite the city implementing new training policies, stop and frisk continues to be performed in an illegal and discriminatory manner.

The report divides 2015 into a first and second quarter, and utilizes benchmarks agreed upon by both parties to determine if a stop and frisk was conducted with the requisite reasonable suspicion. In the first quarter, 33% of all stops and 42% of all frisks failed to meet the minimum reasonable suspicion threshold and were thus illegal. The second quarter was inexplicably much worse with 62% of all stops and 53% of all frisks failing to meet the standard. This is especially troubling given that by 2015 the Philadelphia Police Department had instituted all of the corrective measures which it had agreed to in the settlement. These measures included additional training for officers and more effective internal supervision. Despite the implementation of these measures, a large proportion of stop and frisks continued to be conducted illegally.

The ACLU analyzed 2,380 stops conducted by officers during the first quarter of 2015; the total number of stops in 2015 was over 200,000. Of these stops analyzed, 2,338 resulted in no contraband being found. Frisks were only recorded in 13.6% of the cases, but there is evidence that officers are failing to report a number of frisks which they had conducted. For example, no frisk was recorded in 35% of the cases where the stated justification for the stop was an officer’s suspicion that the suspect was in possession of a gun. The report concluded, “it is simply not plausible to suggest that frisks are not conducted in

these situations” (ACLU of Pennsylvania, 2016). There is evidence police are failing to record when unsuccessful frisks are conducted.

Of the frisks that are recorded, officers tend to cite spurious justifications that result in a very low success rate in detecting weapons. Many of these justifications, such as loitering or “obstructing the sidewalk”, have been rejected by the courts but continue to be used by officers. In total, only six guns were recovered under stop and frisk during this period, a “hit rate” of 0.25%. Moreover, 95% of stops resulted in the recovery of no contraband at all (ACLU of Pennsylvania, 2016). The incredibly low success rate strongly indicates that officers do not have adequate reasonable suspicion to stop and frisk the vast majority of the individuals they do. It suggests officers rarely have articulable suspicion a suspect is armed and dangerous, which is the only condition under which a frisk can legally be performed. Despite the city’s purported efforts to improve their implementation of this policy, officers have continued to use it illegally.

There is evidence stop and frisk is not only used illegally, but it is often used discriminatorily as well. Minorities constituted 77.06% of the stops and 88.96% of the frisks. In the vast majority of districts, African Americans were stopped at a disproportionately high rate compared to their statistical proportion of the population, even in majority white neighborhoods. For example, although African Americans only accounted for 7% of residents in one Philadelphia district, they composed 59% of all the stops within that area. The report controlled for multiple non-racial variables, such as age, sex, and location’s crime rates, to determine if these discrepancies could be attributed to factors other than race. It found that, even controlling for other variables, approximately 962 more black individuals than white individuals were stopped per every 10,000 people (ACLU of Pennsylvania, 2016). Philadelphia has a policy of virtually unchecked, illegal stops and frisks, to which African Americans are disproportionately subjected.

Chicago

The city of Chicago began collecting data on *Terry* stops following a 2003 lawsuit filed by the ACLU that challenged the constitutionality of the city’s stop and frisk program (ACLU of Illinois, 2015). In its 2015 analysis of Chicago’s stop and frisk data, the ACLU found that it was so insufficient as to make any attempt at scrutiny impossible. Under its current policy, Chicago police officers are required to fill out a “contact card” any time they make a stop. These cards are not required when the stop results in an arrest or citation and they do not record when a frisk occurs subsequent to a stop. They simply record the officer’s justification for the stop, which is then supposed to be reviewed by their superior. The collection of data is further complicated by the fact that, prior to 2014, officers completed contact cards for both voluntary and involuntary police stops and encounters without providing any differentiation between the two. Such insufficiencies have made any analysis nearly impossible.

The ACLU analyzed 250 randomly selected contact cards from 2012-2013 as well as data from the first four months of contact cards recorded in 2014. The latter data set is especially important as it only records involuntary police stops.

Officers are required to record legally sufficient justifications for why the stop was performed on these cards and each stop is to be reviewed by their superior to ensure that it was legally performed. However, the ACLU's analysis found that over half of the contact cards analyzed did not meet the minimum standard of reasonable suspicion and were therefore illegal. In these cases, officers either cited legally insufficient reasons for the stop (e.g. associating with others who were suspicious) or they provided such incomplete information as to render it impossible to determine if the stop was justified or not (e.g. only citing that the person "looked suspicious"). Furthermore, the ACLU found that none of these cases resulted in any officer being referred for further training, which implies that the method of supervision is ineffective in remedying these issues (ACLU of Illinois, 2016).

Despite incomplete record keeping, it has been determined that the city of Chicago proportionally performs the most stop and frisks of any city within the United States. From the period of May 1, 2014 to August 31, 2014, over 250,000 stops which did not result in an arrest occurred. Of these stops 72% of the suspects were black Americans, although they only compose 32% of Chicago's population. Only 9% of those stopped were white. Minority neighborhoods were also found to contain the most per-capita stops within Chicago. Even in predominantly white areas, African Americans were still stopped at a disproportionately high rate. For example, although African Americans were only 1% of the population within the Jefferson Park district, they composed 15% of the stops (ACLU of Illinois, 2016). Such data is remarkably similar to the data derived from Philadelphia and implies that racial bias may affect an officer's decision regarding whom to stop.

The data provided by the Chicago Police Department ("CPD") is wholly insufficient and hinders any meaningful analysis being performed regarding stop and frisk's effectiveness or its racial disparities. There is absolutely no information regarding the total number of stops being performed and absolutely no reports of frisks being conducted at all. The only information provided by the CPD is the number of stops performed which did not result in any further police action; a number which is startlingly high. Given this sparsity of data, it is impossible to determine the percentage of stop and frisks in which a weapon is discovered, which is essential to determining the policy's legality. If these stops rarely uncover weapons, it suggests that the reasonable suspicion standard supplied by the Court is not being adhered to and that this policy is therefore being utilized illegally. Furthermore, it is also impossible to compare the percentage of frisked African Americans found with weapons, to the percentage of frisked white Americans found with weapons. If African Americans are significantly more likely to be stopped and frisked, but significantly less likely than whites to be found with weapons, it suggests that racial profiling, not high crime rates, may be responsible for this disparity. Any type of meaningful analysis is impossible, however, given the sparsity of data provided by the CPD.

In addition to the fact that the CPD had to be taken to court to provide any data whatsoever on their stop and frisk policy, it also appears that they then provided the least amount of data possible. They have refused to collect any meaningful statistics regarding this practice and have refused to make the

Racial Biases Within Stop and Frisk

information they do have publicly accessible. Even when it is apparent that officers are conducting stops based on less than reasonable suspicion, no action has been taken to correct this behavior. It is clear the Chicago Police Department is satisfied with the way stop and frisks are currently being conducted and they have no intention of taking any meaningful steps to correct its rampant abuses. Since none of the 250,000 cases here reported will ever make it to court, officers are able to continue to act with almost no judicial oversight.

Despite the lack of any meaningful statistics, the information provided still suggests that this policy's implementation is racially biased. African Americans are stopped at a disproportionately high rate, even in neighborhoods which are predominantly white. This supposition is supported by a report recently released by Chicago's Police Accountability Task Force which was created by Mayor Rahm Emanuel to investigate the accusations of rampant racial bias and police misconduct levied against the CPD. It found that African Americans were continuously "stopped without justification, verbally and physically abused, and in some instances arrested, and then detained without counsel..." and very little was done within the police department to remedy this. African Americans were also disproportionately tasered, shot, and illegally stopped. This report lends considerable credence to the claim stop and frisk is used to harass minority communities.

Although the evidence of racial disparity in stop rates is less definitive than in other cities, Chicago starkly highlights the potential widespread abuses perpetrated through this policy. Enormous numbers of people are stopped, frisked, and never arrested. Many of these stops are performed based on less than reasonable suspicion and are therefore illegal. There is also evidence that stop and frisks have been conducted in a racially biased manner and used to disproportionately harass African Americans. The CPD has been alerted to and even brought to court over these issues, yet it has refused to take any substantial steps to remedy these widespread abuses. Chicago is a clear example of the abuses inherent within stop and frisk doctrine. It has not been used on the basis of individualized suspicion, but instead has been utilized as a policy to search huge portions of the population with impunity. The Police Department is unwilling, and the courts are largely unable, to remedy these issues.

New York City

The New York City Police Department ("NYPD") began releasing data regarding their stop and frisk policies as part of a settlement of the class action lawsuit *Daniels, et al. v. the City of New York* in 2003 (*Daniels, 2001*). *Daniels* claimed that officers repeatedly performed stops without the requisite reasonable suspicion, in violation of the Fourth Amendment, and that these stops illegally targeted African Americans, in violation of the Fourteenth Amendment. After the city's motion to dismiss was denied, they reached a settlement with the plaintiffs which included writing an anti-racial profiling policy as well as performing audits on officers who performed stop and frisks, the results of which were to be submitted to the Center for Constitutional Rights for review (*Daniels, 2012*). Officers were also required to complete a UF250 form subsequent to each stop made (*Daniels, 2012*). These forms allowed officers to check one or more boxes

citing the circumstances which led to the stop (e.g. suspicious bulge, furtive movement), as well as the suspect's race, if a frisk was performed, and if the stop resulted in any further police action (Daniels, 2012). Each of these cards was then to be reviewed by a superior, who was to ensure that the patrol officer had reasonable suspicion to perform the stop (Daniels, 2012).

Despite these purported changes, a class action lawsuit was once again brought against the NYPD in the case of *Floyd et al. v. City of New York* in 2011 (Floyd, 2013). *Floyd* once again claimed that the NYPD's stop and frisk policy had violated the Fourth and Fourteenth Amendments. The Honorable Shira A. Scheindlin, the same District Judge who had decided the *Daniels* case, found that the NYPD was liable for both performing stops without reasonable suspicion and for unjustifiably targeting African Americans, in violation of the Fourth and Fourteenth Amendments respectively. Judge Scheindlin ordered a number of remedies be instituted, including additional training for police officers, and to begin providing some officers with body cameras. The city appealed, which the Circuit Court granted, instituting a stay on the proposed remedies and remanding the case back to the District Court to be tried by a new Judge (Floyd, 2016). However, under the new New York City Mayor, Bill de Blasio, the city has dropped its appeal and significantly limited the use of the stop and frisk program.

A key witness for the plaintiffs was Jeffrey Fagan, a Law Professor at Columbia University. He analyzed data from 2,805,721 UF250 forms from 2004-2009 (Fagen, n.d.). Stop rates consistently rose each year, with 313,047 stops conducted in 2004 to 573,394 stops conducted in 2009. Of these stops, 150,000 did not meet the reasonable suspicion threshold and another 544,252 stops did not provide enough information to determine if the stop was constitutional. Over fifty percent of the stops cited "high crime area" as one of the justifications for the stop, even in areas that had lower than average crime rates. Furthermore, nearly half the stops also cited "furtive movement" as a factor, which is deemed to be an incredibly vague and difficult to define category. Despite the enormous number of people stopped, only 5.37% resulted in an arrest and guns were found only 0.15% of the time. *These rates are lower than the success rates at random checkpoints.*

These stops disproportionately affect minorities. In 2011 alone, 84% of the 685,742 stops made targeted minority residents. Fagan found that race was the single most determinant factor in predicting who would be stopped and frisked. Race was even more important than crime rates when determining which individuals would be stopped. Even when adjusting for the police presence and crime rates within a certain neighborhood, it was concluded that most stops were concentrated in minority neighborhoods and not in white areas. Even in areas where the population was over fifty percent white, African Americans were still more likely to be stopped. This led Fagan to conclude that "the NYPD's stop and frisk program is about race, not crime". Force was 14% more likely to be used against black suspects than against white suspects, and black suspects were also significantly less likely to be found in possession of contraband.

African Americans were stopped at disproportionately high rates, were more likely to have force used against them during a stop, and were less likely to be found in possession of contraband. Officers also testified that they were forced

by the department to meet a quota regarding the number of stops performed, as well as the number of summonses issued or arrests made. Officers who failed to meet these quotas were disciplined and berated by their superiors. Precincts were expected to exceed their quotas yearly, which may account for why stop rates consistently climbed throughout the 2000s. According to one officer working in a high crime area “the Constitution has been thrown out the window when it comes to stops”. This was the culture created under police commissioner Raymond Kelly and it led to the rampant abuses under stop and frisk.

The NYPD’s stop and frisk policy is significant as it marks the first time that a District Court has definitively ruled such a policy as unconstitutional. New York’s stop and frisk program highlights the issues which can result from it being utilized in an institutionalized fashion. The police department used stop and frisk as a tool to increase their arrest and citation rates. It is a program which allows officers to commit stops with almost no judicial oversight or concrete limitations, which makes it ripe for abuse by departments who intend to combat crime through whatever means possible. Officers were compelled to perform as many stops as possible, regardless of constitutional limitations. The weak guidelines regarding stop and frisk established by the Courts allowed a policy wherein millions of innocent people were stopped and harassed. The NYPD institutionally exploited the weak evidentiary requirements of stop and frisk, often performing frisks based on less than reasonable suspicion. A policy wherein random people were stopped and frisked for guns would likely have been more effective in combating gun crime.

Conclusion

Although Los Angeles, Philadelphia, Chicago, and New York are a diverse set of cities, with different demographics and crime rates, they all present similar problems with regard to the application of stop and frisk. Cities are often extremely reluctant to provide any meaningful data regarding their stop and frisk usage and will usually only do so as the result of a lawsuit. Whenever data is available, it consistently demonstrates that a significant number of stops are performed without the requisite reasonable suspicion. Officers consistently utilize vague or insufficient justifications to account for the stop, which are rarely scrutinized by a superior. Stop and frisk has not been used based on individual suspicion, but instead has been used as a convenient pretext to stop millions of people who they would be unable to legally stop otherwise. There is significant evidence that frisks are usually performed for reasons other than as a protective pat down when an officer reasonably believes a suspect is armed. Given the fact that in most cities frisks discover a weapon less than one percent of the time, it seems evident that the weapons justification is simply used as a pretext to justify said frisk. Judicial oversight is rarely applied, which allows officers and police departments to perform these stops with virtual impunity.

Throughout the sample cities, stops and frisks are not only often performed illegally, but discriminatorily as well. All of the cities analyzed have disproportionately high stop rates for African Americans, which cannot be sufficiently accounted for by crime rates or other non-racial variables. African American neighborhoods are consistently more likely to be targeted than white

ones, even when crime rates between the two are comparable. Often frisks of African Americans are less productive than frisks of white Americans, which contradicts that greater frisk rates are explained by greater rates of criminality. In each of these cities, it has been contended that stop and frisk is used as a policy to harass minorities. African Americans are more likely than any other group to be stopped, frisked, and arrested.

IV. Conclusion

Stop and frisk, as defined by the Courts, was a policy which was inherently flawed and inevitably abused. The Court was clear to delineate when a stop and frisk could legally be employed, but was not able to adequately define the parameters of what constituted reasonable suspicion. Instead, the Court in *Terry* shifted the burden to subsequent Courts, ruling that factors could only be deemed reasonable or unreasonable when specific cases were brought before the Court. This allowed officers to utilize almost any factor, provided that it had not been explicitly banned by the Court. Later decisions only served to expand this discretion even further, by refusing to clarify what would constitute reasonable suspicion, instead ruling that it was to be defined by a “totality of circumstances”. This allowed officers to combine many different, individually innocent factors, in order to meet the low threshold of evidence. These factors were often vague and ubiquitous, and could be used to apply to almost anyone. Even factors which were not sufficient in and of themselves, such as location in a high crime area, could be combined with other factors to meet the standard. This allowed police almost unfettered discretion regarding who to stop and frisk.

Officer’s discretion was further expanded by the Court’s habit of deferring to an officer’s judgement whenever attempting to gauge the reasonableness of a stop. Stop and frisk cases were rarely subjected to a judge’s scrutiny, since the majority of stops do not result in an arrest and are therefore never brought before a judge. Of the cases which are heard, the Supreme Court has consistently instructed lower courts to yield to the officer’s judgment if possible. Officers have extensive experience, the Court reasoned, which allows them to detect suspicious activity out of circumstances which may seem innocuous to the average person. Therefore, judges should be aware of this and defer to an officer’s judgement when possible. This makes the work of the defense even more difficult if they wish to dispute the validity of a stop. Suspects are already tasked with refuting vague criteria which often cannot be either proven or disproven (e.g. that they were moving “furtively”). This pattern of deferring to an officer’s judgement makes it almost impossible to successfully raise a challenge against a stop. Without judicial oversight to ensure that officers are complying with the constitutional limitations on stop and frisk imposed by the Court, it was inevitable that widespread abuses would occur.

These abuses disproportionately affect members of the African American community. Officers are granted extensive discretion regarding who to stop and frisk. In *Terry*, the Court was aware that such abuses would inevitably stem from this expanded discretion. Without any clear parameters guiding whom to stop, officers inevitably will be influenced by their implicit biases. Although explicit

Racial Biases Within Stop and Frisk

racism has been officially condemned, it is the unfortunate reality that many people still hold implicit biases which connect African Americans with criminality. These biases affect an officer's decision regarding who to stop, even if he or she is not aware of it. This is why clear policy and judicial oversight is essential in order to limit such abuses. Police departments also have used stop and frisk on a widespread scale as a convenient means of bypassing the usual Fourth Amendment protections regarding searches and seizures. Police departments have intentionally targeted minority communities, have incentivized officers to make as many stops as possible, and have ignored clear racial abuses. The abuses perpetrated under stop and frisk have not been equally dispersed across communities, but have instead been targeted towards African Americans.

The policy issues and potential abuses present within stop and frisk doctrine are not simply hypothetical, but have been proven to occur wherever stop and frisk has been implemented. Cities where stop and frisk has been employed show that it has been used as a policy to harass millions of people, not as a practice resulting from an officer's individualized suspicion. A large percentage of stops performed do not have the requisite reasonable suspicion and are therefore illegal. It is also extremely likely that the majority of frisks are not performed due to an officer's suspicion that a suspect is armed, given that less than one percent of frisks result in a weapon being found. Stops and frisks are also utilized in a racially discriminatory manner, unfairly targeting African Americans. Even adjusting for crime rates and locations, African Americans are stopped at a disproportionately high rate. There is also evidence that they are over-frisked, since the majority of frisks are conducted against them, even though African Americans are often less likely than white Americans to be found in possession of contraband. These abuses are not simply hypothetical, but are instead the direct result of a faulty stop and frisk doctrine.

The balancing test originally employed by the Courts in *Terry*, which balanced an officer's need for safety against the limited intrusion of a frisk, has become meaningless given this new development. Officers are not utilizing frisks to ensure their safety, but are instead using them as a convenient exception to the usual probable cause requirements. Furthermore, frisks are not just being performed against individuals, but against entire communities. The Court failed to predict the extent to which these expanded police powers would be used. Millions of people are stopped annually, and statistics show that less than one percent of these stops are actually necessary to ensure the officer's safety. In light of stop and frisk's real-world implementation, the balancing test no longer seems reasonable. The reasonable suspicion standard is simply too low to provide any adequate protection to minorities in the inner city who bear the brunt of these stops. Instead, the Court must return to the probable cause standard, which was necessary for all street stops before the *Terry* decision. This standard will provide adequate protection for suspects by requiring an officer to have an actual, concrete basis for performing a stop; a basis which an officer must be able to support before a judge. Raising the standard of evidence will protect millions of people from being illegally frisked, without unduly endangering officers. It is the only reasonable solution which will ensure the Fourth Amendment is upheld.

References:

Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, NY: New Press.

Avdija, A. (2014). Police Stop-and-frisk Practices: An Examination of Factors That Affect Officers' Decisions to Initiate a Stop-and-frisk Police Procedure. *International Journal of Police Science & Management*, 16(1), 26-35.

Ayres, I., & Borowsky, J. (2008). A Study of Racially Disparate Outcomes in the Los Angeles Police Department. *ACLU of Southern California*. Retrieved from <http://islandia.law.yale.edu/ayres/Ayres LAPD Report.pdf>

Brown v. Texas, 443 U.S. 47 (1979).

Cole, D. (1999). *No Equal Justice: Race and Class in the American Criminal Justice System*. New York, NY: New Press.

Correll, J., Park, B., Judd, C., Wittenbrink, B., Sadler, M., & Keesee, T. (2007). Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot. *Journal of Personality and Social Psychology*, 92(6), 1006-23.

Daniels v. City of New York, 138 F. Supp. 2d 562 (2001).

Daniels, Et Al. v. the City of New York. (2012). Center for Constitutional Rights. <http://ccrjustice.org/home/what-we-do/our-cases/daniels-et-al-v-city-new-york>

Davey, M., & Smith, M. (2013, April 13). Chicago Police Department Plagued with Systematic Racism, Task Force Finds. *New York Times*. Retrieved from http://www.nytimes.com/2016/04/14/us/chicago-police-dept-plagued-by-systemic-racism-task-force-finds.html?_r=0

Dunn, K. (2014). Reining in Forfeiture: Common Sense Reform in the War on Drugs. PBS. Retrieved from <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html>

The Editorial Board. (2013, August 12). Racial Discrimination in Stop-and-Frisk. *The New York Times*. Retrieved from http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html?_r=0

Eberhardt, J., Goff, P., Purdie, V., & Davies, P. (2004). Seeing Black: Race, Crime, and Visual Processing. *Journal of Personality and Social Psychology*, 87(6), 876-93.

Racial Biases Within Stop and Frisk

Eterno, J. (2012, June 17). Policing By the Numbers. *The New York Times*. Retrieved from http://www.nytimes.com/2012/06/18/opinion/the-nypds-obsession-with-numbers.html?_r=0

Fagan, J. *Expert Report for the Defense in David Floyd Et. Al v. City of New York Et. Al*. Report. 08 Civ. 01034 (SAS). New York City: Center for Constitutional Rights.

Fagan, J., & Geller, A. (2015). Following the Script: Narratives of Suspicion in Terry Stops in Street Policing. *The University of Chicago Law Review*, 82(1), 51-88. Retrieved from <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5860&context=uclev>

Fernan, J. (2014). Searches and Seizures: Constitutionally Protected or Discretionary Police Work? *Touro Law Review*, 30(4), 1053-69. Retrieved from <http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=2571&context=lawreview>

Fletcher, G., & Clark, M. (2001). *Blackwell Handbook of Social Psychology: Interpersonal Processes*. Malden, MA: Blackwell Publishers.

Floyd, Et Al. v. City of New York, Et Al. (2016). Center for Constitutional Rights. Retrieved from <http://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al>

Floyd v. City of New York, 959 F. Supp. 2d 540 (2013).

Free, M. (2003). *Racial Issues in Criminal Justice: The Case of African Americans*. Westport, CT: Praeger.

Ghandnoosh, N. (2014). *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*. *The Sentencing Project*. Retrieved from <http://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>

Harris, D. (1994). Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked. *Indiana Law Journal*, 69(3), 659-88. Retrieved from <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1600&context=ilj>

Illinois v. Wardlow, 528 U.S. 119 (2000).

Jonas, D. (1989). Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power. *University of Pennsylvania Law Review*, 137(5), 1791-826.

Kaplan, J. (1978). *Criminal Justice: Introductory Cases and Materials* (2nd ed.). Mineola, NY: Foundation Press.

Kurland, P., & Casper, G. (1975). *Landmark Briefs and Arguments of the Supreme Court of the United States* (Vol. 66). Arlington, VA: University Publications of America.

Laser, R. (1995). Unreasonable Suspicion: Relying on Refusals to Support Terry Stops. *The University of Chicago Law Review*, 62(3), 1161-85.

Lowery, W. (2016, April 6). Study Finds Police Fatally Shoot Unarmed Black Men at Disproportionate Rates. *The Washington Post*.

Mason, A., & Stephenson, D. (1999). *American Constitutional Law: Introductory Essays and Selected Cases* (12th ed.). Upper Saddle River, NJ: Prentice-Hall.

Meares, T. (2015). Programming Errors: Understanding the Constitutionality of Stop and Frisk as a Program, Not an Incident. *The University of Chicago Law Review*, 82(1), 159-79.

Minnesota v. Dickerson, 508 U.S. 366 (1993).

O'Brien, D. (2011). *Constitutional Law and Politics: Civil Rights and Civil Liberties* (8th ed.). (Vol. 2). New York, NY: Norton and Company.

Payne, K. (2001). Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon. *Journal of Personality and Social Psychology*, 81(2), 181-92.

Plaintiffs' Sixth Report to Court and Monitor on Stop and Frisk Practices: Fourth Amendment Issues. (2016). (Vol. 6). Report no. 10-5952. ACLU of Pennsylvania.

Schwartz, A. (1995). 'Just Take Away Their Guns': The Hidden Racism of Terry v. Ohio. *Fordham Urban Law Journal*, 23(2), 317-75.

Sibron v. New York, 392 U.S. 40 (1968).

Souris, T. (1967). Stop and Frisk or Arrest and Search: The Use and Misuse of Euphemisms. *Journal of Criminal Law and Criminology*, 57(3), 251-64.

Stop and Frisk in Chicago. (2015, March). *ACLU of Illinois*. Retrieved from http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf

Terry v. Ohio, 392 U.S. 1 (1968).

Racial Biases Within Stop and Frisk

Thompson, A. (1999). Stopping the Usual Suspects: Race and the Fourth Amendment. *N.Y.U. Law Review*, 74, 956-1013. Retrieved from <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-74-4Thompson.pdf>

United States v. Cortez, 449 U.S. 411 (1981).

Whren v. United States, 517 U.S. 806 (1996).

**The Legal Justification for an International Tribunal for Corporate
Violations: Lessons from Nuremberg**
CHERYLAN ZARPAYLIC*

There is strong legal justification for a tribunal against corporate impunity drawing on the standards that individuals were held to by the Nuremberg war crime tribunals. Corporate social responsibility is largely accepted as a mechanism to hold private corporations responsible for their actions. However, given the voluntary nature of this standard, the failure to comply or reckless and negligent actions by transnational corporations does not result in significant legal consequences (Collier, 2010). The Deepwater Horizon Oil Spill by BP in the Gulf coast is reflective of this negligent and reckless action by transnational corporations to secure profit. It is worth noting that despite the CSR measures taken by BP, and the monetary compensation, the effects of the oil spill continue in different parts of the shoreline, adversely impacting communities and the environment. This shows the limitation of corporate social responsibility, and calls for stronger binding legal measures.

Corporate accountability is also beleaguered with many legal limitations. A major drawback in holding corporations legally accountable has often been a reliance on the corporate veil; as courts have held that there is a clear distinction between the corporations and their directors and hence exempted them from responsibility. Not being bound to legal consequences has in practice served as a loophole. International human rights law remains largely state-centered and also, does not adequately account for abuses of human rights by transnational corporations, directly or indirectly. Even though there are quite a number of human rights lawsuits at the domestic level, national jurisdictions are insufficient in preventing abuses and in offering remedies to victims. Both nationally and internationally, thus there are very little legal safeguards to ensure compliance with social responsibility by corporations such as taking measures to conserve the environment or mitigating the effects of climate change, and also, bringing accountability in cases of human rights violations.

Additionally, this also points to the absence of a uniform system of enforceability, through a universal legal mechanism, despite the growth in international trade. The closest example to a universal mechanism is the World Trade Organization's dispute settling tribunal, but this system is beset by bias and conflict of interest. Thus, the vacuum in legal mechanisms to hold transnational corporations accountable, demonstrates the need for having an International Corporation Tribunal. My paper argues that the solution for corporate impunity and how to handle "who is accountable?" is to create an International Corporation Tribunal, similar to the post-World War II tribunals that were set up in order to bring to justice the individuals who had the greatest responsibility in the atrocities. Mirroring the criminal justice system in equivalence to the International Criminal Court, it has been noted that crimes against humanity have decreased in part because of the existence of the Court.

* Cherylan Zarpaylic is a Law and Society (2016) graduate of Ramapo College of New Jersey.

Similarly, the reckless and negative activities of transnational corporations on the community will reduce if an International Corporation Tribunal is established. The establishment of an International Corporation Tribunal will allow for the hearing and determining of corporate human rights violations globally, because it will not have geographic limitations as domestic law, so long as the state is a signatory to the convention. The tribunal will thus have global jurisdiction over all cases of corporate violations, as long as they have merit and the domestic courts lack the capacity to prosecute them satisfactorily. The institution will have the sovereign mandate to ensure that the activities by corporations in the transnational arena are in compliance with international human rights standards, and also, protect and preserve the integrity of every concerned stakeholder.

The institution of the tribunal will result in corporations placing a greater value on socially responsible businesses. Corporations that take proactive and diligent measures to ensure that their activities are conflict-sensitive will be rewarded in the long-term by escaping expensive litigation and punishments in the international corporation tribunal; in doing so, they will build a reputation as responsible commercial actors, gaining access to the most profitable markets in the world.

Historical Context

The origin of institutional mechanisms to address human rights violations by private actors in international law can be traced to the war crimes tribunals of post-World War II period: following the war, an International Military Tribunal (IMT) was created in Nuremberg, Germany. The main objective of this tribunal was to hold both high-ranking military officials and civilians accountable for systematic human rights violations committed by the Nazi regime; this had been significant in trying and in bringing justice to the victims. It is worth noting that the prosecutors of the trials at Nuremberg recognized that directors and shareholders of big German companies played a critical role, both in facilitating and supporting the Nazi administration and the crimes it committed (Jescheck, 2004).

After the Nuremberg trials, there were other tribunals often referred to as the *Subsequent Nuremberg Trials* that were conducted before British and U.S. Military Tribunals. The United States military tribunal tried owners and high-ranking corporate officials of Krupp firm, Flick trust, and IG Farben trust. They were accused for aiding and abetting inhumane acts committed by the Nazi regime, including crimes against humanity, such as torture and slave labor, war crimes, such as pillaging and slave labor, connivance in the crime of aggression and mass murder. In 1946, the British Military Tribunal was created to hear the *Zyklon B* case, which convicted Bruno Tesch and Karl Weinbacher, owner and general manager of Tesch and Stabenow respectively, for aiding and abetting murder. This company supplied a pesticide called Zyklon B to the Nazi regime, which was used to annihilate Jews held in the gas chambers of concentration camps. Weinbacher and Tesch were found guilty, despite the fact that they were not physically present at the concentration camps, for supplying the pesticide used to kill prisoners in the concentration camps (The United Nations War

Crimes Commission, 1947). The military tribunals made a significant contribution to international law, primarily by demonstrating that companies are bound by international criminal law, in as far as crimes against humanity and war crimes are concerned. Before the Nuremberg Tribunal, international law was believed to concern states only. However, the Nuremberg and *Subsequent* Nuremberg Trials made it clear that international law imposes duties not just on states, but also on individuals (Lauterpacht, 1970).

Social Contract and Private Entities

The notion of social contract can be traced to the 16th-17th century liberal philosophy and is foundational to modern notions of democracy and the relationship between government and its people. Philosophers of this era such as Thomas Hobbes, John Locke, and Jean Rousseau, argued that government was the result of a mutually accepted contract between citizens and the state. Hobbes claimed that man in the state of nature lived under perpetual condition of civil war and insecurity, where individuals could act as they please in the absence of a strong higher governing body. Hence, they entered into a social contract, in which the people gave all their power to one sovereign, called the Leviathan, to manage the affairs of the state and provide security (Williams, 2016). According to Locke, power belongs to the citizenry who, on their own will, delegate part of their power to the state so that participation in the sharing of resources among all members of a community may occur. Although, they differ on the nature of social contract, the core foundations of the concept as a mutual agreement between individuals and the government are clear.

This spirit of the social contract dominates state society relationship in our modern and highly complex and industrialized global economy (Walsh et al., 2003, p. 860). To move away from a state of undefined rights and perpetual conflicts in the struggle to control shared assets like water and land, citizens must agree to respect the rights of others in exchange for assurance that their rights too will be protected. Those who are found to have violated the rights of others, such as by trespassing, are punished (Hilty & Henning-Bodewig, 2014). Whereas the scope of rights continues to expand, especially with continual progression in human rights, the protection of individual rights through the transferal of authority to the state remains an integral component of the social contract. Over the years, the rights that the state protects have significantly expanded, including the right to property ownership and the right to associate (Hilty & Henning-Bodewig, 2014). Because citizens have given authority to the state, the institution performs the role of mediator between the society and its individuals, as well as among individuals. In the U.S., the Bill of Rights offers a framework within which the rights and obligations of citizens and the state are elucidated.

However, issues dealing with corporate-citizen relations are outside the realm of rights, despite corporation's vast economic and political influence, and have been left to judicial and legislative procedures (Walsh et al., 2003). In the United States, numerous court decisions have strengthened the position of the corporation as an entity with numerous privileges and protections that only natural persons enjoy. For example, a corporation also enjoys the freedom of

speech and the freedom to participate in a political process by making political contributions.

The rise of the corporation as a new actor in society, at par with the citizens or the state, began in the 19th century, with the first state-chartered company- Dutch East India and the British East India Company. They were trade monopolies that enjoyed significant influence, resources, and power backed by royal mandate. As companies expanded their trade operations, the need for capital grew while the state's dominant control became subordinate. During this time, entrepreneurs significantly expanded their enterprises, transforming their relationship with the state from mercantile to competitive. Although companies still relied on government to issue their operating license through the charter process, the emergence of the corporation effectively challenged the sovereignty of the citizenry (Walsh et. ales, 2003, p. 865). Unlike the state, in which the citizenry have authority to set up or remove those in power, no similar accountability was defined in the relationship between corporations and citizens.

Additionally, given the scarcity of capital and the need to expand operations, firms allowed stock options. This introduced commitment to investors as a key factor in defining a company's obligations to the society, recognizing the primary obligation to stockholders to maximize their returns (Walsh et al., 2003, p.870). But this changed in the early 1900s; the supremacy of stockholders was softened (but it never received any serious challenges), workplace standards were enacted to protect the rights of employees, and anti-trust laws controlled monopoly behavior. The SEC was created in the 1930's to supervise the capital markets; these actions were aimed at promoting confidence and transparency among investors (Binney, 2006).

Even so a regulatory environment stipulated change in the early 20th century, the authority of capital in shaping corporate-societal relations was still maintained. The next important phase of restrictions was the spate of environmental regulations carried through the 1960's and 70's (Lydenberg, 2005). This emerging movement indirectly considered the environment as an authentic stakeholder in defining obligations of companies, and firms were required to operate within specific limits in relation to the environmental commons. Regulations setting a ceiling on how corporations used resources in order to safeguard public health and the environment was a major development in the advancement of business-societal relations. To comply with these rules, companies had to allocate a percentage of their economic resources separate from dividends and earnings, resulting in a reduced return to stockholders. This notion of social contract between society and business weakened of stockholder supremacy, at least temporarily (Lydenberg, 2005, p.47). The politics of Prime Minister Thatcher and President Reagan changed this culture through their support for absence of government control, privatization, trade liberalization, and reduced taxes. Unchecked capitalism, they argued, was the only practical economic system in the globalization era. As a result, governments took a back seat and civil society emerged as a watchdog, exerting limits on corporate behavior. However, without governmental support, civil society actors had limited legal capacity to bring change, allowing corporate impunity in cases of human rights violations. For example, Rio Tinto Plc.'s operations in Papua New

Guinea and the ensuing rights violations point to the absence of legal accountability of corporate actors. It is alleged that Rio Tinto's copper mining operations in Panguna, Bougainville led to the displacement of villagers, with a significant portion of rainforest in the country destroyed (Joseph, 2004, p. 113). The waste generated from the copper and gold mines damaged the country's forests, polluted its rivers, and affected residents living around the mines. The local government supported the mining operations as they received 19.1% of mining profits from Rio Tinto Plc. Rio Tinto, with the local government, used blockade to curtail local resistance against the mining operations; approximately 15,000 people were murdered, while many more were tortured and died because they could not access medicine because of the blockade.

In the absence of legal relief in domestic legal systems, a class action lawsuit was initiated in the U.S. District Court against the multinational company Rio Tinto Plc., under the Alien Tort Claims Act, an old statute that allows foreign nationals to litigate in US courts for gross human rights violations, when the defendant is present in the US. The plaintiffs alleged that they were victims of human rights violations and they provided evidence that the MNC's operations damaged their villages, their environment, affected the health of inhabitants, and discriminated against the villagers based on their race. Additionally, they claimed that the MNC encouraged a civil war and a military blockade that led to the torturing, murdering, and bombing of innocent civilians, with women raped and villages burned (Joseph, 2004). In this case, although the U.S. District Court established that human rights abuses occurred, it dismissed the case on the grounds that the proceedings included political questions and state actions that could not be appropriately addressed by the U.S. courts (Joseph, 2004, p. 115).

This case brings into question corporate responsibility and how can communities hold MNCs such as Rio Tinto accountable, given their significant political and economic strength and the backing they receive from influential governments? The people of Bougainville did not approach their own domestic courts for justice because they knew too well that it was impossible to prevail, considering that the government was directly involved in the criminal action. Because of this, the citizenry decided to seek remedy in an international forum, yet their efforts were unsuccessful. Thus it appears logical that if companies abuse human rights and commit crimes in search for profit, they must be effectively held responsible for their conduct. Thus, for companies to be socially responsible, there must be sufficient domestic oversight and legally enforceable international regulations to ensure responsibility.

Corporate Social Responsibility: Potential and Limitations

In light of human right violations, mechanisms of corporate social responsibility have been instituted to underscore social obligations of private actors. Even though this is a relatively new idea, the key principle that companies have a responsibility to society beyond the objective of maximizing profits, gained traction many centuries ago. For example, around 1700 B.C.E., King Hammurabi of Ancient Mesopotamia introduced a code under which farmers and builders would be put to death if their negligence resulted in the inconvenience or death of other citizens (Asongu, 2007). Similarly, in Ancient Rome, senators protested

against the failure of companies to contribute sufficient taxes to finance military campaigns. However, in more modern context, this is balanced with shareholders interest. For instance, in 1622, dissatisfied stockholders in the Dutch East India Company issued pamphlets expressing anger about management secrecy and self-enrichment at the expense of shareholders (Hickey, 2009). Companies that were involved in CSR activities were critiqued for spending money that belonged to shareholders. In 1917, Ford's decision to increase wages and decrease working hours for workers, incited criticism by the Wall Street Journal as "blatant immorality" promoting a culture of rewards for no offered value (Lewis, 1976).

Although CSR is commonly viewed as a threat to the autonomy of the free market, it has gained traction in the works of scholars and practitioners as an effective mechanism of corporate responsibility. Theodore Krep defined this as 'social audit,' referring to the action of businesses reporting on social responsibilities (Blowfield, 2007). One of the most detailed analyses of CSR is by Archie B Carroll. Carroll has proposed a pyramid approach to understanding social responsibility of corporations, which includes economic, legal, ethical, and philanthropic responsibilities (1991, p. 39-48).

Economic Responsibility. It recognizes profit as the primary motive of business. Buchholtz & Carroll contend that while economic responsibilities may not include social component, businesses cannot survive if not socially responsible (Carroll & Buchholtz, 2014, p. 56). For instance although many activities that businesses undertake are economically based, few of these activities involve only economic interest; for example, compliance with international accounting standards is both an economic and a legal responsibility. Additionally, they argue that businesses are required to give back to communities in the form of services and labor, demonstrating an economic responsibility to both survive and to give back to society (Carroll & Buchholtz, 2014).

Legal Responsibility. It includes compliance with regulations and laws in the host countries or states where they operate. It incorporates compliance (passive, restrictive, and opportunistic), avoiding civil litigation, and anticipating the law (Schwartz & Carroll, 2003). Passive compliance implies compliance with the law without being aware of it. For example, if a company offered child support, and later this turned out to be a legal requirement, the company did not anticipate the law, but still acted as the law required, coincidentally being lawful. Similarly, restrictive compliance suggests that a company may wish to pursue a particular course of action, but it cannot because it is restricted by legislation. For example, a company would wish not to give out part of its profits as taxes, but the law states that taxes have to be paid. The company has to comply with the law, and therefore must pay. The third type of compliance, opportunistic compliance, is exemplified by a company selecting a particular jurisdiction due to particular actions being regarded as legal, even as they may not be legal in the company's country of origin. For example, a company may move its base to Asia to benefit from tax exemptions or because the requirements on labor standards are lower (Schwartz & Carroll, 2003). Apple's employees in the U.S. may be earning

more than their counterparts in China, due to local laws and protections in place for working standards in the US. This may be regarded as unethical behavior if employees in China are working under more severe conditions but are being paid much less. However, in both instances, the company is complying with the laws of the countries in which it operates. The second form of legal responsibility following compliance is the act of avoiding civil litigation. Here, a company decides to discontinue particular activities, which may turn out to be illegal in the future. For example, a product may be recalled from the market because there is a high risk of harm to children, while there also might be a high probability that the government will eventually compel the company to withdraw it from the market. Another example is a business that stops the production of particular products because of an adverse impact on the environment, in correspondence with legal standards. The final form of legal responsibility is the anticipation of the law, regarded as perhaps the most proactive business strategy. Under this method, businesses expect particular legislation; however, because the process may be lengthy, the business commences the implementation of particular standards that will likely be a requirement of a forthcoming updated law.

Ethical responsibilities. Unlike the legal and economic responsibilities, ethical responsibilities are not expressly defined. Ethical responsibilities are largely determined by the society in which the business operates; these expectations include values, norms, standards, and expectations that the stakeholders and the society consider to be just and fair (Schwartz & Carroll, 2003). Besides, values and ethics come first before laws, acting as the driving force, which necessitates the creation of new laws and regulations (Schwartz & Carroll, 2003, p. 515). For instance, in the United States, the Civil Rights Movement of the 1960s emerged in response to the nation's shifting values and ethics, ultimately inspiring changes to laws.

Philanthropic responsibilities. This involves societal expectations that businesses give back to the community. These responsibilities make companies 'corporate citizens'. (Schwartz & Carroll, 2003, p. 519) Nonetheless, businesses are often reluctant to commit to philanthropic responsibility because they consider it voluntary, and as such, a business does not have an actual responsibility to give back to the community (Schwartz & Carroll, 2003).

Despite the detailed analysis of the nature of responsibilities and commitment, there is equivocalness on why companies should engage in CSR, with the response being twofold. One response has been that businesses engage in CSR because of enlightened self-interest, while others, mostly scholars, argue that since businesses operate within a society, the use of CSR is necessary for companies need to commit to the larger good of society (Blowfield, 2007, p. 685). The enlightened self-interest view holds that incorporation of CSR in business practices eventually results in a competitive advantage (Davis, 1973). One of the best examples to demonstrate competitive advantage is the case of cheap labor employed by corporations in the developing world. Multinational corporations

recognize that cheap labor comes at a beyond-financial cost. Because of the sweatshop campaigns in the mid-1990s, demonstrations at the 1999 World Trade Organization meeting, and the continuous demand for CSR, many multinationals, as part of their CSR initiatives, have adopted codes of conduct, which govern their suppliers' operations. More specifically, codes of conduct are private instruments that permit companies to self-regulate and respond to the increasing demands from consumers, which may otherwise result in more stringent regulations. Through codes of conduct, companies are able to create a marketable brand image of social consciousness: as investors and consumers make shopping decisions based on conscience, they are very much interested in labor practices. For corporations that depend on brand, success relies on the positive emotional response from their customers (Locke et. al, 2007). Such as in the apparel industry, brand image is an important asset. For example, in the 1990s, Nike's branding issues demonstrate the negative economic effects a company may experience in dismissing human rights violation allegations. When Nike's CEO, Phil Knight, was faulted for running sweatshops in Indonesia, he refused to take responsibility for the practices of Nike's contractors in Indonesia. However, the corporation's position changed when the company was widely linked to the exploitation of woman and child labor. This led to a decline in the company's market capitalization and brand reputation, forcing Nike to introduce a series of public relations campaigns and establish a code of conduct in 1992. The negative reputation that Nike acquired was difficult to shake: as late as 1998, Nike's merchandise was still associated with low wages, arbitrary abuse, and forced overtime labor. Through a number of CSR initiatives, Nike has emerged as a leading industry player in CSR and now uses the strength of their brand as a source of competitive advantage.

Others believe that business that takes into account the needs of the community will develop a better community for doing business (Galbreath, 2010). There are numerous examples indicating that an improved community leads to increased profits for businesses in the long-term. For example, employees will be more willing to work for an organization that cares for its workers, investing in social improvements in the community may lead to reduced crime rates, lessening the need for protection and also, enhance positive publicity. Maignan & Ralston, note that in the United States, CSR is used as a tool for marketing or managing impressions to influence stakeholders' perception of the business (2002). Additionally, CSR measures help companies avoid governmental regulation and receive incentives through proactive approaches (Carroll & Shabana, 2010). Lesser regulations is a positive outcome for businesses as it provides the freedom to make independent decisions, an important requirement for a business to remain competitive and in sustaining their market initiatives (Davis, 1973, p. 322). From a pragmatic standpoint, a point that Davis emphasizes is that it is better to prevent rather than to cure, stemming from the notion that businesses have the opportunity to either implement programs within society, or to leave everything to the state (1973, p. 325). Leaving the entire burden to the state can benefit businesses in the short-term by limiting costs, however, if the execution of these programs is poor due to limited financial and human resources, the quality of lives and wellbeing of the

society will diminish, making it difficult for businesses to run their enterprises as smoothly as they wish. Besides, it might be the case that businesses are better endowed with resources to innovate, as compared to the government, resulting in higher quality and efficiency of social projects.

Supporters of the social role of business, emphasize the value of paying attention to society's interest on the basis that businesses have specific, inherent obligations to the society as part of a social contract thus directing business actions to conform to social values (Wartick & Cochran, 1985; Wood, 1991). This view holds that the role of business in society is far greater than the provision of goods and services and making profits. They maintain that businesses are social institutions whose responsibility is not only to their shareholders, but also to the larger society (Klonoski, 1991). Some scholars even argue that businesses exist at society's pleasure (Weaver, Trevino, & Cochran, 1999).

The main argument against CSR can be found in the works of Milton Friedman and other conservative scholars, being that the primary goal of any business organization is to maximize shareholder returns, having no responsibilities to the larger society. As Friedman's criticism of CSR standards indicate, the best way companies can benefit society is by ensuring profits are effectively distributed to shareholders, who in turn can make charitable contributions or engage in other socially responsible initiatives which they may consider socially and financially appropriate. Other critics hold that weak CSR initiatives limit ability of CSR's to bring corporate accountability: for instance, "green washing" by companies, whereby substantial resources are spent in advertising being 'green' (that their operations take environmental concerns into account) instead of allocating these resources to real environmentally sound practices. Opponents of CSR consider such actions misleading, aiming only at shaping public opinion about their business without actually benefiting the environment or the society at large (Idowu, 2009).

Both the rationale for CSR and the discussion on its limits points that despite its growing presence to commit corporations to provide socially beneficially services, only CSR measures cannot bring legally binding accountability.

International Law and Corporate Accountability

The rapid expansion of the global marketplace has overtaken the instruments of governance, permitting companies to profit in the short-term, through cheap, unregulated labor, with little regulation since in many instances transnational companies fall outside the territorial jurisdiction of states. Despite numerous measures in various international forums, there is no universal legally binding measure to hold corporations accountable. For instance, the International Labor Organization has formulated comprehensive labor standards through its recommendations and conventions, but the institution lacks the capacity to enforce these regulations. The World Trade Organization can impose economic sanctions for noncompliance, but has refused to accept linkages between labor standards and trade conditions, noting that the ILO is the most appropriate oversight agency. Other channels of international law, such as bilateral and multilateral trade agreements imposed on foreign trading partners,

have equally failed to strengthen human rights standards because they recommend policies to foreign states, failing to take into account the specific economic and social conditions in those economies. Similarly, the application of the U.S. law is confined to its domestic borders unless an express legislation by Congress creates an extraterritorial application of federal statutes. Even then, American law with extraterritorial application can only apply to American citizens and not the citizens of foreign countries. The most notable exception to this rule is the Alien Tort Claims Act, permitting foreign country nationals to file suits against U.S. companies in American courts for injuries caused outside of the United States. All of these institutional mechanisms suggest that both domestic and international protections against corporate impunity are weak. The following sections outline the effectiveness of international law standards.

International Legal System

At the international level, there are several treaties in place, which attempt to establish minimum standards for civil and criminal liability for corporate behavior. For instance the Anti-Bribery Convention by the OECD, member countries are required to criminalize all acts of bribery involving foreign public officials and create liability for legal persons (Marketwire, 2005). Similarly, the United Nations' Convention Against Corruption requires all parties to issue administrative, civil, or criminal penalties for the private sector, establish liability of legal persons, and recognize the rights of individuals to launch legal proceedings for compensation for the damage suffered due to corruption. Other examples of international treaties that provide legal protection from harm include UN Convention against Transnational Organized Crime, Council of Europe Convention on Cybercrime, and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste. Although these treaties exist to help victims of corporate misbehavior, the treaties have inherent limitations. To begin with, their scope is narrow and provides common standards only on a few issues, including pollution, corruption, and bribery. Secondly, they do not generally address human rights and do not offer liability standards related to globally recognized human rights.

ILO Standards

ILO standards include guidelines for multinational corporations to respect human rights and comply with particular labor and environmental standards. For example, the ILO has developed safety and health codes of practice for various industries including agriculture, coalmines, iron, and steel industries. The OECD guidelines include recommendations for combating bribery and strategies for employment and industrial relations. However, the main weakness of these standards is that they do not have the binding charter, and as such, they are referred to as "soft law" (Simons, 2012). One of the most important environmental standards that have been used to hold corporations accountable is the 'polluter pay principle': under this principle, companies that cause harm and pollute bear responsibility and pay for the damage. For example, in the 1989 *Exxon Valdez* accident where the company's oil tanker poured crude oil into Alaskan waters, the U.S. government and the state of Alaska fined the company

\$125 million. The company was also required to provide an additional \$900 million to finance environmental projects and clean up the shoreline, forcing Exxon to engage in a broad and costly clean up exercise (Etkins, 1999).

International Criminal Court (ICC)

Because international law primarily concerns states, the UN system lacks a specific mandate to monitor the activities of non-state entities, including companies. Apart from the International Criminal Court (ICC), there is no platform internationally that can hear cases against individual corporate executives. However, because the court has limited capacity, it can only handle a small percentage of international criminal cases. Since corporate employees only perform a supportive role and are distantly located from the scene of the crime, they are not considered a priority by the ICC prosecutor's office (Gjølberg, 2010). An important weakness of the ICC is that the U.S. is not a signatory; it is worth noting that to date, no major case involving corporate human rights violations has been heard and determined by the ICC. However, in Rwanda, two directors of the RTLM radio station were successfully convicted for their role in inciting genocide within the country.

Accountability at the Domestic Level

Corporate legal accountability for human rights violations in domestic courts falls under criminal and civil law. Gross human rights violations, including crimes such as torture, forced disappearance, slavery, and killings are both a violation of national and international criminal laws (Lajoux & Martel, 2013). While criminal accountability is only applicable to individual persons, civil liability is much broader and applies to both individuals (company management and officials) and corporate entities. Complicity of a multinational corporation in gross violation of human rights may either be considered a civil or criminal liability based on three factors. The factors critical in determining whether or not a corporation has been complicit in the violation of human rights, include: it must be established beyond any doubt that the conduct of the company facilitates, exacerbates, or enables the abuse of human rights. Second, it should be proven that the corporation knew that its conduct would lead to a violation of human rights (Pak & Nussbaumer, 2009). Finally, proximity to principal perpetrator of abuse of human rights must be considered.

Criminal liability. In most of the cases, domestic legal systems have some limitations, often focusing on cases of aiding or abetting commission of a crime. A prime example is the *Monsanto* case in which the court tried to say that even a corporation is capable of committing a crime, and thus there is criminal liability even in regard to corporations (International Monsanto Tribunal, 2017). It is important to note that different countries have different thresholds and requirements for establishing complicity of an individual or of an entity (Pak & Nussbaumer, 2009). In some countries, proving the aider's knowledge of the perpetrator's ill intention while still offering help makes the aider criminally responsible for the human rights abuses of the perpetrator.

The trial of Frans van Anraat, a Dutch national in the District Court of Hague for assisting Saddam Hussein shows the working of criminal law. In this

trial, the prosecution was able to prove to the court that Anraat was complicit with the crime of genocide that was committed by the Saddam Hussein against the Kurdish population (*Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, 2005). It was established that Anraat supplied thiodiglycol, a dangerous chemical that is often used in producing mustard gas, to the Iraqi government: it was this chemical that the government used to commit the mass murder of innocent Kurdish civilian population. Anraat, it was established, had full knowledge of the Iraqi government's plans for genocide and hence, the Court ruled that Anraat was responsible for committing crime against humanity in Iraq, sentencing him to a 17-year jail term. Such cases have been a reminder to TNCs and their top leadership that if their behavior can be linked to acts of human rights abuse, then the law shall hold them individually and collectively responsible. In some other jurisdictions, it must be proven that the aider and the perpetrator had the same intention and acted collectively to violate human rights, which makes it difficult to prove. In such instances, TNCs' officials often go without being punished or get very light punishments despite having participated in activities which led to serious violations of human rights.

Civil liability. Civil litigation, as opposed to criminal litigation, is always seen to be a more appropriate means of providing justice to victims of human rights violations. In civil litigation, the primary goal is to provide remedies such as compensation, restitution, or a guarantee of non-repetition of a specified criminal act. One of the biggest advantages of civil litigation is that the victim can initiate action independent of the state, as human rights will effectively be evoked. It is often said that civil litigations have a major impact on the responsible companies due to the associated economic loss and damage of reputation that may harm operations, as firms will avoid instances leading into civil litigation because of the potential economic consequences (Pak & Nussbaumer, 2009). Like criminal liabilities, civil claims within a given domestic jurisdiction have standards and peculiarities for admissibility. In most of the cases, the interest of the court is often to establish whether a given conduct passes the test of negligence and intent. In some jurisdictions, the prosecution needs only to prove that the TNC ought to have foreseen the consequences of their actions but effectively failed to do so, through the negligence of ignoring relevant precautionary measures. While these tests can be effective in prosecuting ill-intentioned and negligent TNCs, the burden of proof is not easy and the process cannot be adapted to a wide range of actors and contexts. Sometimes, dealing with companies that have subsidiaries operating autonomously or semi-autonomously is challenging (Hoffman & Stephens, 2013). For instance, if a parent company has subsidiaries overseas and one of the subsidiaries is engaged in activities in violation with human rights law, then it may not be easy to conjoin the parent company in the case against their subsidiary, meaning that the liability will be limited to the subsidiary. This occurs as the law recognizes each of the subsidiaries as independent legal entities responsible individually for their actions, also indicating that victims cannot demand larger compensations from the parent company unless such a company can be proven directly responsible for ill-intent or negligence.

Another problem of civil litigation is that claims are often subject to limitations of statute, with many jurisdictions operating under the 'loser pays' principle, demanding that the losing party pays all of the legal fees (Pak & Nussbaumer, 2009). This principle often discourages financially challenged individuals from pursuing cases against TNCs, which have financial resources for fear of losing the cases and being subjected to further consequence in paying all associated costs.

The United States *Alien Tort Claims Act* is considered one of the best legal mechanism that allow the victims of human rights abuse to file cases against TNCs, irrespective of the nationality of the victims or the companies, if the perpetrator is present in the US. The statute grants American federal courts the jurisdiction over civil actions filed by aliens for tort, committed in direct violation of treaties with the United States (Pak & Nussbaumer, 2009, p. 42). It is widely believed that the statute was enacted in response to frequent attacks targeting diplomats, with the limited jurisdiction of the Continental Congress to offer redress of harm inflicted upon them by local companies. This statute largely draws its authority from customary international human rights law, which prohibits torture. Although an old statute of 1898, Alien Torts Claim Act gained attention in the 1980s with the case of *Filartiga v. Irala-Pena* in the Second Circuit of the United States Courts. In this case, the Second Circuit court using the ATCA, held that federal courts had jurisdiction to hear cases of violations of international law that occurred outside the jurisdiction of the US; since then, many cases relating to violations of international law have been heard, with the ATCA having been applied to hold states, corporations, and private actors accountable for human rights violations (Kaleck & Saage-Maass, 2010).

The statute allows victims to sue corporations for violations, irrespective of their geographic area of operations in the United States if it is proven that their actions violate international human rights law and the corporate actor is registered or is legally present in the US. In cases where domestic courts have been weak in pursuing violators, victims from various parts of the world have used this forum to sue TNCs. Many victims consider these courts as their only option to receive compensations for the injuries they have suffered.

The United States courts have been very receptive to international human rights cases. Considering that the justice system in this country is not easily corruptible, as is the case in many developing nations, it can be seen that a high number of victims come from developing countries to the United States in order to sue large corporations for abuse of their rights. This trend has forced U.S. courts to set high standards for admissibility of these claims, ensuring that only those that are highly justified are accepted for trial, often applying the policy of *forum non conveniens* to weigh facts and to determine if they have jurisdiction over such cases before allowing their admission (Hoffman & Stephens, 2013). This policy seeks to determine if there are other alternative forums where such cases can be satisfactorily addressed without trying them within the United States; if other forums exist where cases against TNCs can be addressed, then federal courts may consider referring the cases back to such forums. Based on this high threshold, the cases selected for trial are often those, which cannot be fairly addressed in other forums.

Another principle, which may be evoked by U.S. courts to dismiss applications of foreign complainants, is the *acts of state doctrine*, which holds that the U.S. courts should not act in a manner that may suggest the making of foreign policies, as they are not internationally entrusted with this role (Cherry, 2012). These limitations mean that although the U.S. *Alien Tort Claims Act* may offer the best forum where plaintiffs from all over the world can seek justice against TNCs, the United States courts often dismiss such cases on legitimacy grounds. For example, in the case of *Wiwa v Royal Dutch Shell*, in which Shell was alleged to have been involved in supporting Nigeria's military in operations against the Ogoni people, as the company made sure that nine people were convicted and executed, including the bribing of witnesses to testify against them. In 2009, the Royal Dutch Shell agreed to a settlement of US\$15.5 million, donating \$5 million of these funds to a trust that would benefit the people of Ogoni (Kaleck & Saage-Maass, 2010). These cases provided hope that multinational corporations could be held accountable for their human rights violations. However, in September 2010, the decision in the Second Circuit Courts in *Kiobel v Royal Dutch Petroleum Co.* brought a completely new dimension to the issue. The court held that the liability of companies is not recognized under customary international human rights law, and as such, multinational corporations cannot be held to account under ATCA (Kaleck & Saage-Maass, 2010). Furthermore, on February 4, 2011, the Second Circuit court rejected the request to reconsider the September ruling in *Kiobel*, emphasizing that the ATCA jurisdiction does not cover civil actions brought against companies (Simons, 2012). This indicates that ATCA has its own inherent weaknesses and it cannot be relied upon as the only tool to address corporate human rights violations.

Market Mechanisms for Corporate Accountability

Voluntary Codes of conduct: From the 1970s, corporate behavior and its negative impacts on human rights and communities has generated much debate. Nonetheless, at the time, the response from companies was that human rights belong to the jurisdiction of the states as opposed to private entities (Kinley & Tadiki, 2004). With the absence of a concrete legal framework to compel multinational corporations, numerous market-based efforts have materialized, including consumer initiatives and NGO campaigns targeting specific company brands. This has compelled companies to modify their policies in a manner that allows them to demonstrate compliance with globally recognized human rights standards. As a result, companies have rolled out various self regulatory measures and also, participated in international initiatives including the ILO Tripartite Declaration of Principles, UN Global Compact, Kimberly Process Certification Scheme, SA 8000, and the Extractive Industries Transparency Initiative, among many others (Toffel et. al, 2012).

Voluntary codes of conduct differ from one company to another, and are influenced by many factors, including but not limited to, the industrial sector in which the company operates and the commitment to human rights. While voluntary initiatives by corporations have resulted in a more conscious behavior among corporations, it has various fundamental weaknesses (Hoffman &

Stephens, 2013). Many company codes include ambitious commitments, and even though they sometimes explicitly refer to globally recognized human rights norms, no mechanism exists to legally enforce such commitments. Consequently, numerous industries and companies end up adopting weaker or stronger codes with different levels of seriousness (Hoffman & Stephens, 2013). Additionally, practical evidence indicates that in many instances, companies have shown that they are not effective in monitoring their own compliance. An additional problem associated with the prevalence of voluntary codes of conduct is that such codes may be treated as actual legal responsibilities of companies and considered substitutes for such responsibilities (Toffel et. al, 2012).

Examples of effective voluntary mechanism can be found in the following two cases: *Ocean Trawlers* and *Walmart*. A Swedish and Norwegian Television documentary accused Ocean Trawlers a Norwegian company of engaging in illegal fishing in 2004. The documentary generated a heated debate in public forums about the company's practice to the extent that non-governmental organizations urged consumers to boycott the company's products. Although the allegations were later proved to be false, they had an adverse impact on the brand, in conjunction with the company's inability to sufficiently defend itself (Richardson, 2006). This however led to a complete shift in the company's practices to be more sustainable and they have since collaborated with WWF to develop a traceability program that tracks their sourcing and entire supply chain, from the point when the fish is caught to the point when the final product is delivered to consumers (Cherry, 2006). Because of these initiatives, Ocean Trawlers has made significant strides in meeting public expectations in terms of transparency and to demonstrate its business practice whenever malpractice is suspected.

Following a lawsuit by female workers in 2001 on the use of child labor in Bangladesh (Marketwire, 2005), *Wal-Mart* created a Standard for Suppliers guideline, and also, terminated its contractual relationship with 141 factories that used child labor. Wal-Mart's Standard for Suppliers states that the company has a zero-tolerance policy with child labor; it set 14 years as the minimum age at which subcontractors and suppliers can employ workers (Backer, 2007). It also stipulated non-discrimination based on gender, beliefs, or any other personal characteristics, yet it is important to emphasize that gender discrimination was never given specific acknowledgment in the 2005 code of conduct. Further, despite stringent corporate code of conduct, enforcement is a challenge and *Walmart* lacks the capacity to enforce its code in developing economies. Additionally, Walmart has initiated many other CSR initiatives to promote social good. In 2009, Wal-Mart transitioned its CSR commitment to a higher level through the incorporation of an Advisory Board on Gender Equality and Diversity, which is responsible for offering equal and improved opportunities for all employees in top management positions. This shift has led to a significant increase in the number of female employees and managers in the company from 23,873 in 2005 to 25,246 in 2010 (Walmart, 2010). In 2012, the company made a commitment to ensure that its Sustainability Report achieves three objectives: the use of 100% renewable energy, zero waste, and manufactured products that sustain both the environment and people. For example, in its effort to create zero

waste, the company has committed to eradicate landfill waste from its stores in the United States by 2025 (Backer, 2007). Even though the company does not use the Global Reporting Initiative (GRI) guidelines, its audits use measurable targets. For instance, its suppliers who manufacture toys in China must sign up to the ICTI CARE process, which was developed by the international toy industry, with the goal to ensure that safe and humane working conditions for their workers in toy factories around the globe. Additionally, through its Ethical Sourcing team, Wal-Mart undertakes internal validation inspections to ensure that all of its suppliers comply with the ICTI CARE process and the stringent requirements contained in its Standards for Suppliers (Backer, 2007). The market mechanisms have introduced change in how market operates and their commitment to social justice no doubt. But these measures are voluntary and do not allow binding commitment.

OECD mechanisms: Other than the measures that corporations undertake, intergovernmental organizations have also tried to develop codes and recommendations for companies, as least as far as human rights are concerned. In this regard, the OECD procedures for multinationals are very significant. The Organization for Economic Cooperation and Development (OECD) is an exclusive forum in which governments from 34 different countries that operate market economies collaborate with one another and non-OECD members in promoting prosperity, economic growth, and sustainable development. The organization equally provides a platform where countries can seek solutions to common problems and achieve coordination of local and international policies. The OECD procedures represent a transnational agreement which includes a series of recommendations for multinational companies, offering voluntary standards and principles for conducting responsible business in line with applicable laws to human rights, employment, environment, corruption: these guidelines have been approved of member countries and non-member countries alike (Hoffman & Stephens, 2013). In terms of human rights, the OECD procedures are considered to be complimentary, non-legal standards since they stipulate that companies should endeavor to respect the human rights of all individuals affected by their activities in a manner that is consistent with the host country's commitment and obligations. The procedures are implemented through the National Contact Points, who determine if the accusation warrants further investigation, provides conciliation, or mediates between the parties, and when necessary, issues recommendations (Skudiene & Auruskeviciene, 2012). Through the determination that a corporation has contravened the guidelines, the corporation is required to make changes to its conduct based on the recommendations provided by the National Contact Points. If the company fails to comply with the recommendations, the National Contact Points may publish information relating to its non-compliance: the assumption is that public scrutiny will eventually exert pressure on the corporation. The OECD guidelines appear to be the most effective non-legal mechanism in promoting corporate responsibility as far as human rights are concerned, providing a specific code of conduct, which universally applies to all companies from all member countries. Furthermore, the codes apply not just within OECD countries, but also across the globe since OECD companies that operate in non-OECD countries are still subject.

However, these guidelines also have setbacks, considering they are voluntary and non-guiding. Multinational Corporations do not assume any legal liability if they fail to comply, making them less effective, particularly for corporations that are not substantially affected by public blame (Pak & Nussbaumer, 2009). Another weakness is that in cases regarding human rights violations committed by multinational companies, the primary mandate of the National Contact Points is to promote investment and trade, therefore lack a strong background in addressing complaints. Furthermore, the guidelines of the OECD lack a recourse mechanism for victims, whereas the National Contact Points fails to achieve reconciliation.

The above discussion shows that there are a number of mechanisms-both voluntary and legal, which can be used to ensure that any abuse of human rights by a TNC is adequately prosecuted, with compensation properly awarded. However, each of these interventions has unique drawbacks, which make them weak in addressing some of the cases in a way that satisfies the needs of the complainants. Self-regulatory techniques introduced by Transnational Corporations are commonly not sufficient in addressing human rights abuses at the corporate level. International treaties have been blamed for their narrow scope in addressing corporate misconduct, making them insufficient in addressing human rights abuses committed by TNCs (Pak & Nussbaumer, 2009). ATCA has widely been considered promising because of its specificity in addressing corporate misbehavior in any part of the world; however, it has many hurdles for individuals who are seeking justice, especially if they are citizens of other countries. Therefore, it means that there is need to have better mechanisms which can be used to deal with gross violations of human rights by transnational corporations.

Holding TNCs Accountable Through International Tribunal with Special Jurisdiction

The violation of human rights by transnational companies is an issue of concern, and the need for a universal forum through which these abuses can be addressed is growing. Currently, the international community has no tribunal specifically designed to address such human rights abuses committed by corporations, as well as lacking the faculties to provide satisfactory redress to the victims of these violations. As of now, litigation against these corporations on human rights violations is only possible at the domestic level through jurisdiction of the domestic courts or extraterritorial jurisdiction in foreign courts. When local courts are inadequate or weak, justice to the victims may forever remain a dream, even if the violation is very gross. In most of the developed countries around the world, justice systems have been trying to come up with ways of addressing this problem. However, even highly effective domestic legal systems may not offer the most appropriate solutions in addressing human rights violations of TNCs at an international level due to aforementioned jurisdictional restrictions. It is, therefore, necessary to construct an international forum through which these issues can be addressed without the concern for legitimacy restrictions or territorial jurisdiction: through this forum, domestic courts may be

complemented on a global scale, by addressing cases of human rights violations committed by transnational corporations.

Policy Recommendation: Creation of an International Corporate Tribunal

Review of the existing systems and structures used in addressing human rights abuses by TNCs suggests the need to create a more effective legal mechanism. By minimizing the burden that exists upon domestic courts, the responsibility of such transnational cases will be placed solely upon the proposed tribunal, doing nothing more than focusing on the special issues brought forward, having special jurisdiction over violations of human rights and other corporate crimes in establishing issues of criminal liability, without any fears or favors. This will help tide over the limitation of existing systems, which lack the means of enforcing human rights laws in the context of transnational corporations' global operations (Pak & Nussbaumer, 2009).

Creating this tribunal will specifically help in addressing the inadequacies of the domestic courts in addressing the issue of human rights violations committed by transnational corporations, enhancing the accountability of such companies in upholding human rights. To ensure that the tribunal has legitimacy to prosecute cases in any part of the world, it should be established by the United Nations, particularly assigned to the United Nations Security Council, based on examples such as the former Criminal Tribunal for Yugoslavia (ICTY) and Criminal Tribunal for Rwanda (ICTR) (Bernhard, 2008). Both the ICTY and ICTR were created as *ad hoc* tribunals for a limited duration, with the sole purpose to address atrocious crimes committed by individuals on particular territories. An alternative approach would be to create such a tribunal by adopting an international treaty. An example of such a tribunal is the International Criminal Court (ICC), which has jurisdiction over war crimes, genocide perpetrated by individuals, and crimes against humanity. An additional example is the International Tribunal for the Law of the Sea (ITLOS), a permanent court, which has jurisdiction over disputes involving both states and juridical persons, on all matters relating to ocean space, its resources, and its use. By creating the tribunal along these lines and following the tribunal models mentioned above, the creation of an international Corporate Tribunal is highly recommended.

The jurisdiction of this tribunal should cover issues such as the displacement of local populations, environmental degradation, and child and forced labor, corporate fraud, and corruption (Bernhard, 2008). Additionally, the applicable standards on which the tribunal can be based are already in place, that is, as United Nation norms (titled Norms on the Responsibility of Transnational Corporations) (Barnali, 2005). Even though the United Nations norms lack the status of an international treaty, they incorporate a list of obligations and duties that multinational corporations should comply with. Specifically, they recognize the general obligations of multinational corporations and governments in promoting universal respect for fundamental freedoms and human rights (Barnali, 2005, p. 47). In addition, it is the responsibility of states to ensure human rights are respected and protected and provide the requisite

administrative and legal framework to ensure that TNCs and other companies incorporate the norms and other international and national laws. The United Nations norms already have important provisions for human rights and multinational corporations, yet it is vital that an international body establishes a firm legal mechanism to monitor TNCs' compliance with these norms, possibly operating in the same way as the International Criminal Court in The Hague, Netherlands (Barnali, 2005, p. 56). The jurisdiction of this tribunal should not be geographically limited, but it may have a mandate to refer a case to the home country, and if it is perceived a fair trial, it can be granted in the domestic courts, as well as hearing appeals from various countries or cases that cannot be effectively tried in domestic courts.

Although laws and regulations exist that define how business entities should operate in relation to the environment and society, these laws are disjointed and do not offer a clear focus on how these corporations should be held responsible in cases of possible abuse. The international human rights bodies also lack definite structures that can be used to protect the environment and people from some of the abuse, due to the ambiguity of the law. The United Nations can develop new norms, which should be adhered to by these companies, especially given that the world is now struggling to fight environmental degradation. Under Rome Statute's Article 17, there is a provision that whenever a country is unable or unwilling to prosecute a case genuinely, the International Criminal Court automatically assumes jurisdiction in prosecuting the case.

If implemented effectively, this policy will provide a number of advantages beyond other existing mechanisms used in addressing human rights abuses by multinational corporations. The main advantage of this tribunal is that it will not have geographic limitations as other systems, which are currently in place. Cases from whichever part of the world can be prosecuted in this court, as long as they have merit and the domestic courts lack the capacity to prosecute them satisfactorily. The tribunal will have a well-founded legitimacy, having the shared mandate of sovereign states in the UN system. As a United Nations' agency, it will have a team of highly skilled employees from various parts of the world, vastly impervious to corruption, bribery, and other ill-intentioned techniques often employed by TNCs when litigating in developing nations.

Conversely, it is also important to realize that this tribunal may have a number of weaknesses affecting its ability to operate properly. The primary weakness is a possible conflict of interest between the tribunal and domestic courts, as it may be difficult to determine when jurisdiction shifts from domestic courts to the international tribunal. It is also possible that it may take a long time before such a tribunal can be established as an organ within the United Nations, considering the internal involvement of numerous stakeholders. Lack of corporations among the member countries, as is the case faced by International Criminal Court, may also hinder the ability of this tribunal to undertake its duties. For instance, in the case of the ICC, the most influential players, such as the United States, are not members, raising doubts to the universality and viability of an international corporate tribunal. These challenges can be overcome if all sovereign states become signatories of the Statute, with each member state committing to the policies and principles set to govern this proposed tribunal.

Conclusion

It is clear that transnational companies should be held accountable for their actions in the various countries in which they operate. Even so most companies are actively committed to corporate social responsibility, as a way of compensating for some of the negative impact of their activities, this does not allow for legal redress mechanism for victims. Sometimes the harm committed by transnational corporations is so destructive that accountability beyond corporate social responsibility should be required: this accountability can be enforced and monitored through the creation of an International Corporation Tribunal. The tribunal will have a global jurisdiction to enable and address issues relating to operations of transnational companies in any part of the world. It will not be focused on punishment, but rather finding a solution by which all stakeholders will approve as sufficient and provide victims justice.

Fundamentally, corporations are tasked with the duty to offer the society in which they function a service, beyond the simple, financial goal to 'make business'. The social justice, as well as the injustice, achievable through corporations is immense, entailing the necessity for transnational corporations to be responsible. Through the implementation of a transnational corporate tribunal, such companies can be measured to global standards, in alignment with norms already in place around the world, ensuring accountability and the equal protection of the rights of all peoples in the world. Ultimately, we are becoming an increasingly interconnected global society: we must recognize the obligation to hold corporations to the same standards that we do for individuals or sovereign states around the world, understanding that if we stand for the equal protection of rights, we must also stand for the equal accountability of violations to our rights.

References:

Asongu, J. J (2007). *Strategic Corporate Social Responsibility in Practices*, Greenview Publishing Co.

Backer, L. (2007). Economic globalization and the rise of efficient systems of global private lawmaking: Wal-Mart as global legislator. *University of Connecticut Law Review*, 39(4). Retrieved from https://www.uniceub.br/media/49569/Economic_Globalization_and_Rise_of_Efficient_Systems_of_Global_Private_Lawmaking.pdf.

Barnali, C. (2005). Beyond the Alien Tort Claims Act: alternative approaches to attributing liability to corporations for extraterritorial abuses. *Northwestern Journal of International Law and Business*, 26(1).

Bernhard, A. (2008). Home state responsibility and local communities: the case of global mining. *Yale Human Rights Development Law Journal*, 11(1).

Binney, G.W. (2006). Corporate purpose and values: time for a rethink. *HULT*

International Business School: Ashridge Executive Education. Retrieved from <https://www.ashridge.org.uk/faculty-research/research/publications/corporate-purpose-and-values-time-for-a-rethink/>

Blowfield, M. (2007). Reasons to be cheerful? What we know about CSR's impact. *Third World Quarterly*, 28(4), 683-695.

Blowfield, M. & Googins B. K. (2006). Business leadership in society. *Boston College Center for Corporate Citizenship: Carroll School of Management*.

Carroll, A. B. (1991). The pyramid of corporate social responsibility: toward the moral management of organizational stakeholders. *Business Horizons*, 34(4), 39-48.

Carroll, A. B., & Buchholtz A. K. (2014). *Business And Society*. Stamford, CT: Cengage Learning US.

Carroll, A. B. & Shabana K.M. (2010). The business case for corporate social responsibility: a review of concepts, research and practice. *International Journal of Management Reviews*, 12(1), 85-105.

Cherry, D. (2012). Ocean Trawlers makes sustainability a business tactic. *Intrafish*. Retrieved from <http://www.intrafish.com/news/article1266532.ece>.

Collier, D., & Evans J. (2010). *OM2*. Mason, OH: South-Western Cengage Learning.

Davis, K. (1973). The case for and against business assumption of social responsibilities. *The Academy of Management Review*, 16(2), 312-322.

Ekins, P. (1999). European environmental taxes and charges: recent experience, issues and trends. *Ecological Economics*, 31(1), 39-62.

Galbreath, J. (2010). How does corporate social responsibility benefit firms? Evidence from Australia. *European Business Review*, 22(4), 411-431.

Gjølberg, M. (2010). Varieties of corporate social responsibility (CSR): CSR meets the 'nordic model.' *Regulation & Governance*, Wiley Publishing, 4(2), 203-229.

Hickey, C. (July 21, 2009). CSR: not just a recent phenomena. [Web Blog post] Sustainable development & competitive advantage. Retrieved from <https://sdca.wordpress.com/2009/07/21/csr-not-just-a-recent-phenomena/>

Hilty, R. M. & Henning-Bodewig F. (2014). *Corporate Social Responsibility*. Heidelberg: Springer.

Hoffman, P. & Stephens B. (2013). International human rights cases under state law and in state courts. *University of California at Irvine Law Review*, 3(9). Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226559.

Idowu, S.O. (2009). *Professionals' Perspectives Of Corporate Social Responsibility*. In W.L.

Jescheck, H. -H. (2004). The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC Statute. *Journal of International Criminal Justice*, 2(1), 38-55.

Joseph, S. (2004). *Corporations And Transnational Human Rights Litigation*. Oxford (England): Hart Publishing.

Kaleck, W., & Saage-Maass, M. (2010). Corporate accountability for human rights violations amounting to international crimes: The status quo and its challenges. *Journal Of International Criminal Justice*, 8(3), 699-724. Retrieved from <http://dx.doi.org/10.1093/jicj/mqq043>

Kinley, D. & Tadaki J. (2004). From talk to walk: the emergence of human rights responsibilities for corporations at international law. *Virginia Journal of International Law*, 44, 942.

Klonoski, R. J. (1991). Foundational considerations in the corporate social responsibility debate. *Business Horizons*, 34(4), 9-18.

International Monsanto Tribunal, Advisory Opinion, The Hague, April 18, 2017. Retrieved from <http://www.monsanto-tribunal.org/Conclusions>

Lajoux, A. & Martel S. (2013). Sustainability rising. *NACD Directorship*, 39(2), 24.

Lauterpacht, H. (1970). *International law: the collected works of Hersch Lauterpacht*, vols. 1-2. In E. Lauterpacht (Ed). Cambridge [Eng.]: University Press.

Lewis, D. L. (1976). *The public image of Henry Ford: An american folk hero and his company*. Detroit: Wayne State University Press.

Locke, R., Kochan, T., Romis, M., & Qin F. (2007). Beyond corporate codes of conduct: work organization and labour standards at Nike's suppliers. *International Labour Review*, 146(1-2), 21-40.

Lydenberg, S. D. (2005). *Corporations And The Public Interest: Guiding the Invisible Hand*. San Francisco: Berrett-Koehler Publishers.

Maignan, I. & Ralston D. A. (2002). Corporate social responsibility in Europe and

the U.S.: insights from businesses' self-presentations. *Journal of International Business Studies*, 33(3), 497-514.

Marketwire. (2005). Caught using child labor, Wal-Mart cannot run away from its responsibilities, say anti-sweatshop groups. *Marketwire*. Retrieved from <http://www.marketwired.com/press-release/caught-using-child-labour-wal-mart-cannot-run-away-from-its-responsibilities-say-anti-570656.htm>.

OECD. (2011). *2011 Update of the OECD Guidelines for Multinational Enterprises*. OECD Publishing. Retrieved from <http://www.oecd.org/corporate/mne/oecdguidelinesformultinationaenterprises.htm>.

Pak, N.S. & Nussbaumer J.P. (2009). Beyond impunity: strengthening the legal accountability of transnational corporations for human rights abuses. Berlin [Ger.]: Hertie School of Governance. *Working Paper Series*, (45).

Public Prosecutor v. Frans Cornelis Adrianus van Anraat, District Court of The Hague, The Netherlands, 09/751003-04, 23 December 2005.

Richardson, K. (2006). Pirate captain's birdseye. *Green Politics*. Retrieved from <http://greenpolitics.healthwealthandmusic.co.uk/enviroment/wildlife/cod-sold-in-hundreds-of-chippies-linked-to-russian-black-market-3.html>.

Schwartz, M., & Carroll A. B. (2003). Corporate social responsibility: a three-domain approach. *Cambridge University Press: Business Ethics Quarterly*, 13(4), 503-530.

Simons, P. (2012). International law's invisible hand and the future of corporate accountability for violations of human rights. *Journal of Human Rights and the Environment*, 3(1), 5-43.

Skudiene, V., & Auruskeviciene, H. (2012). The contribution of corporate social responsibility to internal employee motivation. *Baltic Journal of Management*, 7, 49-67.

Toffel, M. W., Short, J. L., & Ouellet, M. (2012). Reinforcing regulatory regimes: How states, civil society, and codes of conduct promote adherence to global labor standards. *Harvard Business School Working Paper*, 13(45).

The United Nations War Crimes Commission. (1947). Case no. 9. The Zyklon B case: Trial of Bruno Tesch and two others. *Law Reports of Trials of War Criminals*, 1(9), 93-103. London [Eng.]: Library of Congress. Retrieved from https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf.

Walmart. (2010). Walmart global sustainability report. *Walmart*. Retrieved from

http://c46b2bccodb5865f5a76-91c2ff8eba65983a1c33d367b8503d02.r78.cf2.rackcdn.com/a7/9e/824c9b13422a894a6acc7f77ef7d/2010-global-responsibility-report_129823709422550601.pdf.

Walsh, J. P., Weber K., & Margolis J. (2003). Social issues and management: our lost cause found. *SAGE Journals: Journal of Management*, 29(6), 859-881. Retrieved from http://journals.sagepub.com/doi/abs/10.1016/S0149-2063_03_00082-5?journalCode=joma.

Wartick, S. L. & Cochran, P. L. (1985). The evolution of the corporate social performance model. *The Academy of Management Review*, 10(4), 758-769.

Weaver, G. R., Trevino L.K, & Cochran P.L. (1999). Integrated and decoupled corporate social performance: management commitments, external pressures, and corporate ethics practice. *The Academy of Management Review*, 42(5), 539-552.

Williams, G. (2016, May). Thomas Hobbes: moral and political philosophy. *Internet Encyclopedia of Philosophy*. Retrieved from <http://www.iep.utm.edu/hobmoral/>.

Wood, J. (1991). Corporate social performance revisited. *The Academy of Management Review*, 16(4), 691-718

The Dangers of Free Speech: Digital Hate Crimes
SARA ELJOUZI*

Hate Crimes in the Digital World

Hate speech on the Internet has perpetuated a free reign to attack others based on prejudices. While some may dismiss the attacks as rants reduced to a small online community, the truth is that their collective voice is motivating dangerous behavior against minority groups. However, the perpetrators of online hate speech are shielded by anonymous creators and private usernames, and, furthermore, their strongest line of defense rests in the United States Constitution:

In the United States, under the First Amendment to the Constitution, online hate speech enjoys the same protections as any other form of speech. These speech protections are much more robust than that of the international community. As a result, hate organizations have found a safe-haven in the United States from which to launch their hateful messages (Henry, 2009, p. 235).

The freedom afforded to online users has ultimately compromised the safety of Americans who are targets of hate speech and hate crimes. The First Amendment was created to protect citizens' right to free speech, but it has also established a sense of invincibility for extremists who thrive in the digital world.

Hate Speech and The First Amendment

In June 2017, a case arose in the Supreme Court that challenged the limits of free speech. In *Matal v. Tam*, 582 U.S. ___, the court unanimously ruled that they cannot deny the creation of trademarks that disparage certain groups or include racist symbols (Volokh, 2017, p. 1). The unanimous decision triggered a debate about hate speech in relation to the First Amendment. Justice Samuel Alito was among the Supreme Court Justices who weighed in on the conversation. He explained:

[T]he idea that the government may restrict speech expressing ideas that offend ... strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate' (as cited in Volokh, 2017, p. 1).

While this undeniable sentiment forms the democratic foundation of our Constitution, the problem is not only about reciting hateful phrases or creating hostility. Hate speech can in fact incite violence and lead to hate crimes, leaving

* Sara Eljouzi is a Communications major. She graduated from Ramapo College of New Jersey in Spring 2018.

Dangers of Free Speech

targeted groups vulnerable. In one case, Ryan Wilson, the leader of ALPHA HQ, a white supremacist group, threatened and harassed Bonnie Jouhari, a Fair Housing Specialist and her daughter (Henry, 2009, p. 239). According to *HUD v. Wilson* (2000):

Wilson used his website to target Jouhari. Jouhari's photograph was posted on the site, and was accompanied by the warning: 'Traitors like this should beware, for in our day, they will be hung by the neck from the nearest tree or lamp post'. The website also displayed a picture of her daughter, who was labeled 'a mongrel'. In addition, the website included a bomb recipe, and a picture of Jouhari's office being blown-up by explosives" (as cited in Henry, 2009, p. 239).

The language used was threatening with blatant racial undertones because her daughter was biracial. Threats of lynching clearly referenced the history of slavery and subsequent ongoing brutalization of African Americans in the United States, further promoting their racist ideals. They made physical threats against her and forever changed her life by publicly targeting her and promoting her as a target. The Department of Housing and Urban Development eventually took action, but "Jouhari repeatedly sought assistance from the Federal Bureau of Investigation. The Department of Justice reportedly declined to pursue the matter due to First Amendment concerns" (Henry, 2009, p. 239). Thankfully, HUD's involvement in the case ultimately led to the removal of the photos from the website. However, this could not undo the harm of victimization Jouhari had suffered. The people who attacked Jouhari and her daughter online became intertwined in their lives. The hate speech manifested into hate crimes that included threatening phone calls and sitting outside of her office for hours, sometimes taking pictures of her. After becoming public targets:

Bonnie Jouhari and her daughter spent years on the run from white supremacists who had launched a vicious campaign of harassment and intimidation in southeastern Pennsylvania. Hopscotching from state to state, Jouhari was unable to return to the career she loved, and her teenage daughter, Dani, became deeply depressed. Dani never got over the trauma, Jouhari says, and sank into substance abuse and homelessness after serving as an Army medic (Rubinkam, 2015, p. 1).

This case is one of many that shows the way online hate speech can lead to personal confrontations and hate crimes that ruin the lives of victims.

Hate Speech and Hate Crimes

Like the previous case with Jouhari, it is important to understand that hate speech and hate crimes can be directly linked:

In hate crime, a person is attacked not randomly, but precisely for being perceived as X. In other words, hate crime identifies, categorizes, and labels persons according to real or supposed features such as sex, race, class, sexual orientation etc. This act of labelling a person as some-one or something is in itself already a linguistic act of positing, an act of denomination and determination that attributes a social status to a person (Posselt, 2017, p. 15).

Although hate crimes involve physical acts, it is motivated by prejudices of the attacker, which are often expressed by hate speech. The motivation of hate crimes is to further a biased ideal and express ideas of hatred that are meant to instill fear in the victim:

Hate crimes do not only inflict injuries on others, they also communicate a certain message on several levels and to different addressees: to the attacked individual and bystanders, to the social group the individual belongs to and to sympathisers of the offender as well as to society at large (Posselt, 2017, p. 15).

What gives hate crimes their label is the message behind them. Their physical acts are harmful, but their power comes from spreading hateful messages and victimizing minority groups. They seek to promote their agenda and recruit others to also share in these extreme views by verbal and physical actions:

If it is true that hate crime “speaks” and that it is precisely the linguistic-symbolic moment that constitutes hate crime in its specificity, then language and speech can no longer be conceived as merely additional features of hate crime, rather they are essential to it. Thus, hate speech would be the general type and hate crime merely a subspecies of it (Posselt, 2017, p. 15).

Textual Analysis

“Due to the proliferation of the Internet and the breadth of its reach, bigoted messages can be communicated with ease and to a much larger audience than ever before” (Henry, 2009, p. 235). Analyzing a website that is established to attack certain groups and promote a racist agenda can shed light on hate crimes in the digital world. The historically racist website Stormfront was created to promote White supremacy, while communicating ideas about the inferiority and necessary fear of other races. The homepage says: “We are the voice of the new, embattled White minority!” (Stormfront website). The objective of the website is to promote White nationalism and, by characterizing themselves as a minority, they are spreading the idea that they are no longer dominant, leaving them vulnerable in society. The people who created the website and the majority of users are White people who reject the idea of “Whiteness as a location of structural advantage, a standpoint, and a set of core values, practices and norms” (Sorrells, 2013, p. 63). They want to justify the website, showing that they need to advocate for the minority opposed to the standard ideal that White people enjoy

Dangers of Free Speech

certain privileges because of their race. The new standard they want to establish is that White people are at risk of becoming obsolete and that society is actively working toward making them powerless.

Create Collective Identity

On the opening page of the website, there are multiple forums with various discussions relating to White supremacy that are distinguished by topic or age/gender. The forums “can help convince even the most ardent extremist that he is not alone, that his views are not, in fact, extreme at all. [...] Extremists appear to be using the Internet to create a collective identity” (Gerstenfeld, Grant, & Chiang, 2003, p. 40). The forums are usually initiated by a question or concern proposed by one user and anyone is free to respond to it. Members are anonymous, but they directly reply to each other’s comments about similar issues and validate their feelings. Aside from creating unity through forums with hundreds of replies, the website also boasts about the number of users to the site to further reinforce the notion that their ideas are shared by many others. Below is a picture from the website that is found on the bottom of the homepage, welcoming viewers to look at the number of visitors:

[Visitor statistics for the past 90 days](#)

verified by Google Analytics with [IP anonymization](#).

(Stormfront Website)

However, the number and their perceived growing popularity may not be accurate. “The actual author or sponsor of a site does not always need to be obvious. Therefore, a single individual can claim to be representing a large group, and very few visitors to the page will be the wiser. A webmaster can also bolster the apparent popularity of a site by including a hit counter, which keeps track of the number of visitors to a web page [...] and perhaps even by artificially inflating the hit count” (Gerstenfeld, Grant, & Chiang, 2003, p. 40). The website wants viewers to acknowledge that they are part of an online community who shares their views and be unafraid to speak openly about controversial topics. Another way to encourage unity in a more dangerous way is the website’s ability to facilitate meetings in person. There is a private forum that is only accessible to continuing members with information about upcoming events:

Forum	Last Post	Threads	Posts
Private Forums			
 Sustaining Members (1 Viewing) Private forum for those who've supported Stormfront financially. Sub-Forums: Stormfront Radio Show , Stormfront Core Support Group , Lifetime Members	Private	12,051	374,053
 This year's Stormfront Summit Sept. 30, 2017 Private forum for those planning to attend next year's Summit Sept. 30 weekend near Knoxville, Tennessee.	Private	43	712

(Stormfront Website)

The forum wants to encourage members to feel exclusive and give them the power to form relationships. Because it is locked, it encourages regular members to become sustaining members in order to be included in the plans. The meticulous planning and organization of large groups meeting in person can motivate hate crimes and unite individuals with a dangerous agenda.

Spread Fear

One of the primary objectives of the website is to spread fear about people who are not White and to create fear about society endangering the rights and power of White people. The forum below is two of the most recent discussion topics with the first talking about the danger of Jews and the second saying that Whites are under attack by minorities:

Topic	Author	Time	Views	Replies
Jews are dangerous	Coldstar	Today 02:03 AM	20,581	278,484
12-13-17: "We are clearly under siege"	lord flints volunteer	Yesterday 12:05 PM	50	1,889

(Stormfront Website)

Through these forum posts, the website seeks to reference ‘the other’, relegating “those delegated as non-White to lower and inferior positions in the hierarchy” (Sorrells, 2013, p. 58). The website warns against non-White people who are not as intellectually capable trying to overthrow the dominant power of Whites. They consistently mention other races as incapable of intellectual thought and who are a threat to White supremacy. They encourage hate by characterizing them as harmful to White people with personal anecdotes and by associating certain stereotypes with people of other races. In one forum post, a woman asks her fellow members if they are also afraid of Black people:



(Stormfront website)

Dangers of Free Speech

The members who responded all agreed that they were afraid of Black people as well. All of the members distinguished Black people as the “other” by using the term “them”. The second woman referred to Black people in a store as a “mob” instead of a group, evidently expressing a negative connotation and assuming they were there to cause problems. The third woman responded by agreeing with the unanimous fear, but also mentioning that she would be afraid to express that openly in fear of being called racist. The author, continuing, states: “I know it isn’t “fair” of the world for Blacks to have to be born with such a disadvantage, but the first rule in wanting to help them is that you don’t become like them” (Stormfront). The website wants to establish the inferiority of other races to promote White supremacy and give others a reason to believe that other races are distinctly different from White people.

Opposing Views

The description under the opposing views forum explains that the website welcomes guests with views who do not align with White supremacy. However, when I entered, it simply tried to take away the credibility of opposing views. For example, there was a link to further prove their point about the Holocaust not existing and another link about stories of fabricated hate crimes to endorse the view that hate crimes are essentially not real:



Thread / Thread Starter	Rating	Last Post	Replies	Views
Sticky: Tales of the Holocaust (1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 ... Last Page) Yehuda_Abraham	★★★★★	Today 12:42 AM by StillLurking	9,917	2,307,227
Sticky: Fake Hate Crimes (links & quotes only please) (1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 ... Last Page) Svyatoslav_Igorevich	★★★★★	12-13-2017 02:25 AM by sonofeurope	162	164,409

(Stormfront website)

The forum is misleading because it makes it seem as though others are welcome to oppose White supremacy and challenge their ideals, when in fact it is simply destroying opposing views through sources that are not supported. They used biased articles that are not credible, but give the appearance of looking professional. It seems to justify their point from an outside source; the viewers are not going to check the credibility of every article. In fact, the author of this website could be producing these outside articles. A lack of genuine facts and knowledge can lead to dangerous misinterpretations and stereotypes about people of other races.

Hate Crimes Online

The Internet is being used to promote racist ideas and “because the First Amendment guarantees freedom of speech broadly, the United States government is limited in its ability to regulate online speech through existing civil and criminal law, and governmental attempts to pass new content-based laws regulating online speech by and large have been declared unconstitutional” (Henry, 2009, p. 236). Hate speech online can lead to hate crimes in person as

extremists seek support in one another, constantly growing their community's prejudices. Their speech is fully protected and Americans are left vulnerable as "the reluctance of the Justice Department to take legal action, even when faced with documented harassment and intimidation, is striking" (Henry, 2009, p. 236). With little protection and growing websites online, extremists are able to successfully intimidate their victims, while bolstering their recruiting efforts. The First Amendment was meant to preserve the democratic freedoms afforded to citizens, but a cyber world of hate has evolved, posing a threat to equality in the digital world.

References:

Gerstenfeld, P., Grant, D., & Chiang, C. (2003). Hate online: A content analysis of extremist Internet sites. *Analyses of Social Issues and Public Policy*, 3(1), 29-44. Retrieved from

[http://spssi.onlinelibrary.wiley.com/hub/journal/10.1111/\(ISSN\)1530-2415/](http://spssi.onlinelibrary.wiley.com/hub/journal/10.1111/(ISSN)1530-2415/)

Henry, J. (2009). Beyond free speech: novel approaches to hate on the Internet in the United States. *Information & Communications Technology Law*, 18(2), 235-251. doi: 10.1080/13600830902808127

Posselt, G. (2017). Can hatred speak? On the linguistic dimensions of hate crime. *Linguistik online*, 82, 5-25. <http://dx.doi.org/10.13092/lo.82.3712>

Rubinkam, M. (2017, December 2017). Former Berks housing worker once targeted by KKK loses daughter, blames harassment. *The Morning Call*. Retrieved from <http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-harassed-housing-worker-from-berks-20150529-story.html>

Sorrells, K. (2013). *Intercultural Communication: Globalization and Social Justice*. New York, NY: Sage Publications.

Stormfront homepage. (2017). Retrieved from <https://www.stormfront.org/forum/index.php>

Volokh, E. (2017, June 19). The Slants (and the Redskins) win: The government can't deny full trademark protection to allegedly racially offensive marks. *The Washington Post*. Retrieved from https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/the-slants-and-the-redskins-win-the-government-cant-deny-full-trademark-protection-to-allegedly-racially-offensive-marks/?utm_term=.a31db099e57a

Volokh, E. (2017, June 19). Supreme Court unanimously reaffirms: There is no 'hate speech' exception to the First Amendment. *The Washington Post*. Retrieved from

Dangers of Free Speech

https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/supremecourt-unanimously-reaffirms-there-is-no-hate-speech-exception-to-the-first-amendment/?utm_term=.7933ea675d26

**Money as Speech:
Campaign Financing in the Democratic Process
JAMES TICCHIO***

American legal culture, as revealed by the ebb and flow of court cases favoring and then weakening government regulatory power, has created a system in which private interests are able to influence public policy decisions. This has limited the representation and participation of citizens in the democratic process. Following USSC rulings, *Citizens United v. FEC* and *Burwell v. Hobby Lobby Stores Inc.*, which recognized corporations as individuals, the rights of corporations to free speech and freedom of religion has been secured in the law. As a result, massive donations to the political system are protected under First Amendment grounds, granting corporations one of the strongest legal protections in the American legal system.

The treatment of corporations as individuals is not only dangerous, but also undermines democracy. The flood of corporate money entering the American political system has a number of negative consequences. Most notably, politicians may be inclined to change their position on key political issues in exchange for corporate donations. This can be viewed as corporations treating political candidates as investments, an idea antithetical to an ideal democracy. Additionally, the strong influence of money in politics has led to a scenario in which politicians are required to spend large amounts of time soliciting funds, both for their own reelection and also to pay for their respective political party's dues. The result is a system in which politicians are forced to take time out of researching and implementing sound policy to instead raise money to maintain their current position in government.

A number of solutions have been proposed for curbing the influence of campaign contributions in the American political system such as the institution of federally financed elections, capping campaign contributions at lower levels to block large donations from wealthy individuals etc. Even though there is equivocalness on the solutions, it is widely agreed in the policy environment that it is important to create a regulatory environment in which the American people can be assured that their politicians are acting independently of corporate interests. A core idea of this essay is the competition between corporations' incentive to freely invest their capital to influence politicians, and the desire to protect voting rights by limiting the degree to which any one individual can sway their representative. Through a careful study of legislations and Supreme Court rulings regarding campaign finance, my essay examines the limitations of money in elections, especially corporate financing of elections.

Legislations to Regulate Election Finance

Legislation for federally financed elections, was first proposed by Theodore Roosevelt, in the State of the Union address in 1907 (FEC, 2014). Roosevelt's proposal sought to limit private contribution in elections by creating

* James Ticchio is a law and society graduate of Ramapo College. He is currently studying law at Georgetown University.

Campaign Finance

federal funding. Since 1907, a number of initiatives have been enacted to regulate campaign finance and maintain a transparent process. More importantly, in 1966 the Federal fund for elections was established (FEC, 2014). This was followed by the Revenue Act in 1971, which distributed money checked off by taxpayers directly to the nominee (FEC, 2014). The legislation limited campaign spending to all candidates who received the public money and placed a ban on all contributions for that candidate (FEC, 2014). In addition, the 1971 Federal Election Campaign Act required detailed reporting of all campaign contributions and expenditures by federal candidates to ensure transparency in the political process (2 U.S code §431 et seq., Public Law 92-225, 1972). Later amendments extended this act to also cover Presidential primary conventions (2 U.S code §9031 et seq.) and Presidential nomination conventions (FEC, 2014).

The legislations signify an increasing Congressional desire to maintain a transparent political process. The Bipartisan Campaign Reform Act of 2002 (BRCA) is an excellent example to elucidate this commitment to regulate party fundraising and limit political spending. BRCA even regulates soft money and electioneering communications (FEC, 2002). The BRCA

bans national party committees from raising or spending money outside the limits of the Federal Election Campaign Act..including soliciting, receiving, directing, transferring or spending soft money in connection with federal elections and limits their ability to do so in connection with state elections (FEC, 2002).

What is interesting to note here is that the Supreme Court has upheld the campaign finance regulations, although tempered. Both in *Buckley v Valeo* and *McConnell v. FEC*, the court rulings demonstrated that regulation can be a valid guide for campaign finance regulation. However, this position significantly shifted in the *Citizens United* and *Burwell* rulings.

Campaign Finance and the Court

Throughout America's legal history, the Supreme Court has made several rulings regarding the validity of restrictions on campaign financing. The Court's position in the early cases after Congressional efforts to regulate campaign finance was sympathetic to the government's efforts to curtail the corrupting influence of money in politics. However, this shifted in 2010, and since then the court has taken a more stringent stand in favor of the right of private entities to contribute money to their politicians to the extent of providing free speech protections. The court has eased many of the restrictions of the early years and opened the process to potential donors and spenders, with very few limits on their activities (Biersack, 2018).

Buckley v. Valeo

In 1976, New York Senator James Buckley challenged the constitutionality of the Federal Election Campaign Act (FECA) and the Presidential Election Campaign Fund Act in the US District Court for the District of Columbia (FEC, 1975; 1976). The defendants in the case included, Francis R. Valeo, Secretary of the Senate and Ex officio member of the newly formed Federal Election

Commission, and the Commission itself (FEC, 1975). The Federal Election Commission Act (FECA) was enacted to implement restrictions on financial contributions to candidates and reporting of contributions beyond the stipulated threshold amount. The appellant's claim was that the limits on electoral expenditures by FECA violated First Amendment's freedom of speech and association clauses.

The Supreme Court upheld the limitations on campaign contributions for federal candidates, the disclosure of campaign financing in the FECA and the public financing of federal elections. The Court argued that campaign contribution limits and the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence over government affairs stemming from the dependence of candidates on large campaign contributions (*Buckley v. Valeo*, 1976). The contribution ceilings, it ruled, serve the basic governmental interest of safeguarding the integrity of the rights of individual citizens and candidates to engage in political debate and discussion and hence did not violate the First Amendment (*Buckley*, 1976). The Court held the limitations of the FECA enrich the "integrity of our system of representative democracy" by guarding against political corruption (*Buckley*, 1976). In fact the Court was clear in rejecting the claim that the contribution limits discriminate against minor and third parties by stating that the limits may benefit minor parties because major parties receive a larger amount of their money from large contributions (FEC, 1975).

With respect to the expenditure limits, the Court stated that

these provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate (*Buckley*, 1976, p. 424).

The Courts position was that since these practices do not have potential for corruption, limiting them did not serve a greater governmental interest to necessitate a restriction on Free Speech. The claim that campaign contributions are protected as a form of free speech is the bedrock for a larger argument favoring the ability of corporate interests to invest in the American political process. Donations provide donors with a greater opportunity to contribute to political discourse, as well as offering them the ability to launch advertising campaigns to communicate their ideologies. The Court successfully identifies, however, that allowing wealthy Americans to inject money in the political process risks undermining the ability of other segments of society to be heard by their representatives, effectively limiting the ability of some segments of society to exercise free speech.

The *Buckley* case provides an argument favoring the regulation of private money in the political process by pointing out the negative impact that this funding could have on the American democratic system. Although it did not go as far as FECA, but by supporting the use of contribution limits and explaining the zero sum nature of free speech, the Court establishes that vast sums of private money in politics may work against democratic ideals. This ruling epitomizes the

Campaign Finance

Supreme Court's recognition of the need to curtail the influence of money in politics as a means of preserving the rights of less wealthy Americans. This trend continued in the *McConnell* case, which supported the role of the state in protecting democratic expression from corporate interests.

McConnell v. FEC

The *McConnell v. FEC (2003)* case brings into question the constitutionality of the Bipartisan Campaign Reform Act's (BCRA). BCRA's key objective was to reform the process by which money is raised for--and spent during-- political campaigns, including soft money. The key provisions included in BCRA a) restricted soft money donations made directly to political parties and on the solicitation of those donations by elected officials; b) curtailed advertising that unions, corporations, and non-profit organizations can engage in up to 60 days prior to an election; and c) limited political parties use of their funds for advertising on behalf of candidates (*McConnell*, 2003). The case challenged Congressional authority to impose ban on soft money and regulate the source, content and timing of political advertising, as it was argued to be a violation of First Amendment's free speech clause?

Since the regulations introduced in the BCRA dealt with mostly soft-money contributions and not with campaign expenditures, the Court held that this was not a restriction on free speech, rather it served a governmental interest in preventing "both the actual corruption threatened by large financial contributions and... the appearance of corruption" (*McConenell*, 2003, p.4). The Supreme Court opined that

the Government defends §323(a)s ban on national parties involvement with soft money as necessary to prevent the actual and apparent corruption of federal candidates and officeholders. Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits (*McConnell v. FEC*, 2003, p. 33).

Ruling in support of contribution limits, the Supreme Court made clear in *McConnell (2003)* that there is substantial evidence in these cases to support the determination by Congress' that such contributions of soft money give rise to corruption and the appearance of corruption (*McConnell*, 2003). The Court noted "for instance, the record is replete with examples of national party committees' peddling access to federal candidates and officeholders in exchange for large soft-money donations"(*McConnell*, 2003, p.41).

This rationale significantly strengthens the legal argument that can be made for the Court's ability to enact contribution limits for the purpose of reducing corruption. This demonstrates a clear linkage seen by the Court between money in politics and corruption, providing grounds for the judiciary to take action to reduce the availability of private money in the political system. In addition to contribution limits, the Supreme Court also restricted the use of corporate and union money from being used in electioneering communications (FEC, May 2002). These restrictions helped to lessen the potentially corrupting

influence of money in politics by distancing corporate and union money from the outcome of elections. To this point, the court stated “Because those entities may still organize and administer segregated funds, or PACs, for such communications, the provision is a regulation of, not a ban on, expression. *Beaumont*, 539 U.S., at ____ (slip op., at 15)” (*McConnell*, 2003, p.98). What is noteworthy in the Court’s position in this case is the fine distinction it drew between regulating and forbidding freedom of expression. However, this support for campaign finance regulation, notable in *Buckley* and *McConnell* was reversed in *Citizens United v. Federal Election Commission in 2010*.

Citizens United v FEC

Following *McConnell*, Citizens United challenged the restrictions on electioneering communications, and the limits on corporations and labor unions to fund such communications. This arose in the context of a film-Hillary: The Movie-which Citizens United wanted to show prior to the elections, but was restricted due to federal election commission rules about electioneering communications. The film centered on whether Senator Hillary Rodham Clinton would make a good president. The questions raised in *Citizens United* opened a further examination of the constitutionality of BCRA especially with regards to its application to political speech, which is not campaign speech.

In 2010, the United States Supreme Court, in the *Citizens United v. Federal Election Commission* ruled on the constitutionality of the Bipartisan Campaign Reform Act (Sullivan, 2010). The case focused on the constitutionality of the restriction on unions and corporations from spending general funds for “...electioneering communications’ or for speech that expressly advocates the election or defeat of a candidate” (Sullivan, 2010). Overruling portions of *McConnell v. FEC* the majority held that under the First Amendment corporate funding of independent political broadcasts cannot be limited by BCRA. Upholding the value of free speech to a democracy, the majority maintained that this includes corporations as well. The Supreme Court argued against contribution limits and opined that the First Amendment provides that ‘Congress shall make no law ... abridging the freedom of speech, and this included corporations. The majority opinion held that “§441b’s prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions” (*Citizens United*, 2010, p.3). It was argued in *Citizens United* (2010) that

We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption (p.45).

Campaign Finance

In a 5-4 decision, the U.S. Supreme Court ruled that corporations and unions have the same rights to political speech as individuals under the First Amendment. It found no compelling government interest for prohibiting corporations and unions from using their general treasury funds to make election-related independent expenditures (Sullivan, 2010). The Court even overruled the holding in *Austin v. Michigan Chamber of Commerce*, which has established the constitutionality of the existing contribution limits on electioneering communications (*Citizens United*, 2010). The Court held that

Austin is overruled, and thus provides no basis for allowing the Government to limit corporate independent expenditures... No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations (*Citizens United*, p. 50).

The Supreme Court further observed that the expenditure bans that applied to individuals, corporations, and unions did not fall under the quid pro quo category established in *Buckley* to limit direct contributions to candidates, and therefore were not protected by that precedent (*Citizens United*, 2010). Thus, the Court allowed for the restricting of direct contributions to candidates, but not independent expenditures, which according to the Court did not count as corruption (Sullivan, 2010). The Court opined

While a single *Bellotti* footnote purported to leave the question open, 435 U. S., at 788, n. 26, this Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy. *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____, distinguished (*Citizens United*, p. 40-45).

McCutcheon v. FEC

In 2014, the United States Supreme Court made another ruling on campaign finance reform in the case *McCutcheon v. FEC* (*McCutcheon v. FEC*, 2014). In this decision, the Supreme Court, struck down the aggregate limits on individual contributions during a two-year period to all federal candidates, parties and political action committees combined (*McCutcheon*, 2014).

The case arose due to a controversy over biennial limits, which inhibited Alabama resident Shaun McCutcheon from contributing in the elections. In the 2011-2012 election cycle, he had

...contributed to 16 different federal candidates during the 2012 elections, complying with the base limits applicable to each (i.e., \$2,500 per candidate, per election) ...(After having met the aggregate biennial limit, Mr. McCutcheon could not contribute to)... another 12 federal candidates

and to a number of non-candidate political committees, including the Republican National Committee (*McCutcheon v. FEC*, p.1).

Consequently, Mr. McCutcheon and the Republican National Committee filed a complaint on the grounds that the biennial limits violated the First Amendment (*McCutcheon v. FEC*).

Chief Justice John G. Roberts, Jr. delivering the opinion for the four-justice plurality held that the aggregate limit curtailed participation in the democratic process and was not effective in meeting the stated objective of BCRA, which is addressing political corruption. In *McCutcheon* (2014) Justice Roberts opined

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption....We have consistently rejected attempts to suppress campaign speech based on other legislative objectives....Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties. *Id.*, at 359; see *McConnell v. Federal Election Comm'n*, 540 U. S. 93, 297 (2003)..And because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access (*McCutcheon*, 2014, p. 18-19).

Since the aggregate limit fails to meet the "rigorous" standard of combating corruption, from a First Amendment perspective it is unconstitutional as it unnecessarily curtailed an individual's freedom of speech. The plurality maintained that corruption could be controlled by other means than setting the aggregate limit.

Implications of *Citizen's United* and *McCutcheon* on the Democratic Process

Citizens United and *McCutcheon* show that Court rulings, by granting private entities increased protections similar to individuals, have legitimized the power of corporate entities and the sway of outside groups over political parties and election campaigns. This has implications for the democratic representation process as it enables political donations from large donors at the cost of excluding representation of people in the election process. In the 2012 Presidential elections, the majority of the roughly \$1,300,900,000 of campaign contributions came from the east coast, Texas, and California (FEC, Interactive national map). Of the money contributed by individuals, \$675,735,684 came from donations under \$200, \$129,511,373 came from donations ranging from \$200.01-\$499,

Campaign Finance

\$113,173,897 came from donations ranging from \$500-\$999, \$150,215,602 came from donations ranging from \$1,000-\$1,999, and \$345,764,922 came from donations \$2,000 and above (FEC, Interactive national map). The numbers for individual contributions show that roughly 25% of individual contributions come from donations at or exceeding \$2,000 and approximately 35% of individual contributions came from individuals whose donations met or exceeded the \$1,000 mark. While it is no doubt that the rulings have enabled more money to flood into funding elections, it is not clear as to how exactly this impacts our political process.

Analysts have identified two key areas of campaign finance landscape that have been restructured by *Citizens United* and *McCutcheon*: Political Action Committees (PACs) and Lobby Politics.

Political Action Committees (PACs). PACs are entities entrusted to collect campaign contributions for or against a candidate or issue. PACs include committees registered with the FEC-i) the separate segregated funds (SSFs) and ii) non-connected committees. PAC's limited the amount of money individuals could donate for campaign.

Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr. (2002)

Approximately 4,500 PACs are registered with the Federal Election Commission...The number of active PACs has declined by 12 percent since 1988. Among the active PACs, 1,400 are associated with corporations, 670 are tied to a membership or industry group (such as the American Medical Association), and 240 are associated with labor unions. Another 670 are ideological groups. (p. 8).

In addition to determining how much money PACs spend in politics, it is also helpful to look at how much the PACs spend relative to their contribution limits. Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr. (2002) estimated that

Only 4 percent of all PAC contributions to House and Senate candidates are at or near the \$10,000 limit. The average PAC contribution is \$1,700. Corporate PACs give an average contribution of approximately \$1,400 to legislators; trade associations and membership PACs give average contributions of approximately \$1,700, and labor union PACs give average contributions of \$2,200...If all 2300 active corporate, labor and trade PACs gave the maximum amount to all incumbents running for reelection to the House or Senate (about 420 candidates), then total PAC contributions would be roughly \$10 billion – 40 times more than what these PACs actually gave in the 2000 election (p. 8).

Supreme Court ruling in *Citizens United* and the DC Circuit Court of Appeals decision in *Speechnow.org v FEC (2010)* completely changed the nature of PACs and led to new campaign expenditure units called the SuperPacs. The Court in *Citizens United* declared that corporations and unions could make unlimited donations like individuals and removed cap on these donations. Hence,

following the ruling in *Citizens United v. FEC* corporations, while labor unions and incorporated membership organizations were prohibited from making direct contributions to candidates or from making "...expenditures in connection with federal elections" (FEC, 2008), they were allowed to sponsor SSFs which could influence federal elections ((FEC, 2008). The core of *Citizens United* is the idea of SuperPacs as completely independent of candidates, and hence the unregulated money from big donors wouldn't be corrupting to lawmakers (Overby, 2015). In reality, this distinction between coordinated and independent action is murkier than it seems.

Additionally, the organizations were permitted to absorb establishment and operating expenses for the SSFs and those expenses are not subject to the limits on contributions (FEC, 2008). SSFs do not have "... to report any fundraising or administrative expenses that are paid for by its sponsoring organization. (The SSF must, however, report these expenses if it pays for them)" (FEC, 2008). Nonconnected political committees must report "...all its operating and solicitation expenses" (FEC, 2008). Further, nonconnected political committees maintained their financial independence. This means that the nonconnected political committee must pay for its own administrative expenses, using the contributions it raises." (FEC, 2008). While corporations may contribute to these committees, the donations are subject to the previously mentioned contribution limits (FEC, 2008). Nonconnected political committees can solicit money from the general public (FEC, 2008, SSFs and Nonconnected PACs).

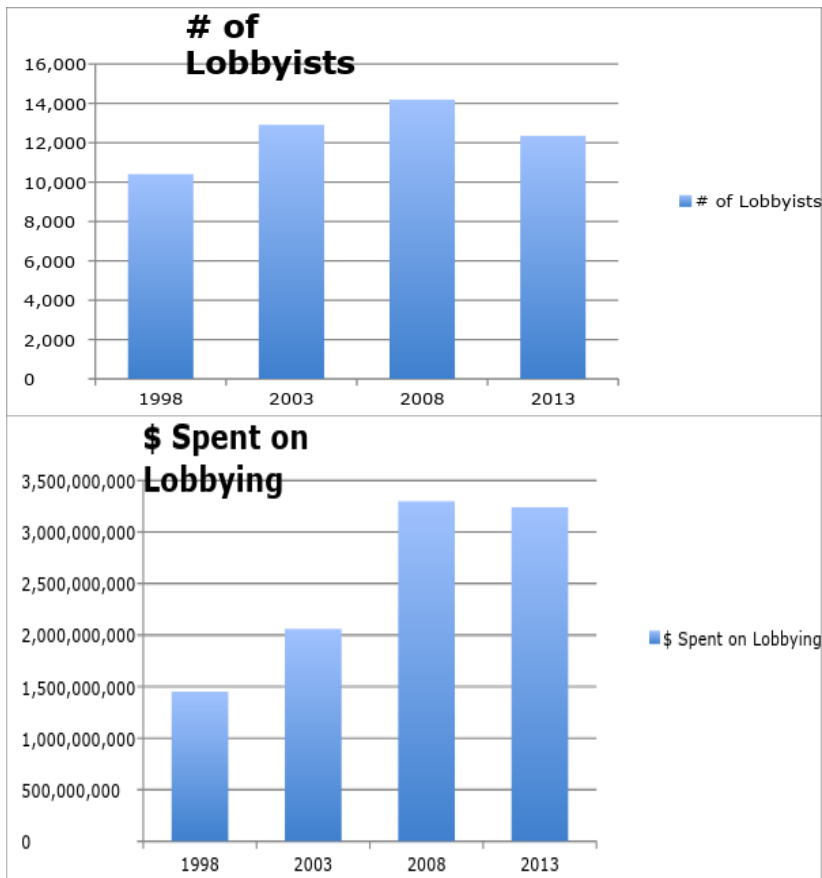
Lobbying. Proponents of federally financed elections argue that lobbyists are a source of politicians' money, and in the absence of restriction on campaign finance, lobbyists donate money to political candidates and sway key public policy decisions. Most organizations that sponsor political action committees such as PACs (or SuperPacs now) also maintain active lobbying operations; as a result, campaign contributions and lobbying often occur together.

Sabato (1984), in his survey of multicandidate political committees, found that 68% of the corporations, unions, and associations with PACs also have lobbying offices or representatives in Washington (p. 124 cited in Wright, 1990, p. 418). John R. Wright argues

since PAC contributions are often rewards for past support rather than inducements for future support, a representative's financial constituency provides important information about the representative's general policy orientation. Strong financial support, or lack of support from particular groups may signal the extent to which a representative can be persuaded, and this information may in turn affect groups' decisions about whether or not to lobby (Wright, 1990, p. 419).

The records from the Center for Responsive Politics on lobbying and money spent shows a direct correlation between increasing number of lobbyists and money spent by organizations (Center for Responsive Politics, 2014).

Campaign Finance



In addition, as Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr. (2003) have argued lobbying groups spend an incredible amount of money to get the attention of candidates, especially through campaign contributions. They note

Legislators and their staffers are busy people. Campaign contributions are one way to improve the chances of getting to see the legislator about matters of concern to the group. One estimate is that one hour of a legislator's time costs around \$10,000 (Langbein, 1986) (Ansolabehere, Figueiredo, Snyder, 2002, p. 126).

Of course, being able to meet with politicians is not clear evidence of money having a significant impact in politics. The issue arises from what happens during those meetings.

According to a survey implemented by Grossman and Helpman,

SIGs (Special Interest Groups) provide legislators with intelligence of various sorts, including technical information about the likely effects of a policy, assessments of how the legislator's home district will be affected, and information on how other legislators are likely to vote (Grossman, Helpman, 2001, p. 5).

Through buying access to politicians, groups can educate representatives to vote in favor of their own interests. This is not a rare occurrence for some organizations, and can be a common practice for some. Through their study, they found that

99 percent of the groups prepare testimony for congressional or agency hearings, 98 percent meet with legislators in their offices, 95 percent have informal contacts with legislators at conventions, lunches, and the like, and 92 percent present research results or technical information to policymakers (Grossman, Helpman, 2001, p. 4-5).

Interest organizations also spend considerable resources to provide research data to candidates, so as to inform their choices. Grossman and Helpman's (2001) study showed

36 percent of the groups indicated that direct contact with government officials was one of their three most time- and resource-consuming activities (out of a list of 27 choices), while 27 percent identified testifying at hearings and conveying research results and technical information as among their three most consuming activities. No other activities were mentioned as being critical ones as often as these three (p. 5).

This relationship between lobby groups and politicians indicates that organizations can buy frequent access to politicians with large sums of money and use this access to inform representatives about issues in a potentially skewed manner. It points to the possibility that the information received by government representatives would largely come from the organizations that can afford to get access to politicians.

Money in Elections: Why it Matters?

Money in elections refers to the direct financing of campaigns. Money clearly has an impact on elections, although its influence expands when considering the collection of dues and the allocation of government positions. Politicians cannot outright buy votes, but if they raise a large amount of money for their party, they may win endorsements, use of party facilities, and other aspects of party infrastructure that do help to win elections.

Professor of Politics at Princeton University, Martin Gilens argues that the levels of money spend in elections suggests that affluent Americans policy preference matters more than any one else. Gilens (2014) argues

...at thousands of proposed policy changes, and the degree of support for each among poor, middle-class, and affluent Americans. His findings are staggering: when preferences of low- or middle-income Americans diverge from those of the affluent, there is virtually no relationship between policy outcomes and the desires of less advantaged groups. In contrast, affluent Americans' preferences exhibit a substantial relationship with policy

Campaign Finance

outcomes whether their preferences are shared by lower-income groups or not (p.1).

Further, adding to this argument, Martin Gilens and Benjamin Page (2014) claim that

the central point ...is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence (p. 3).

Second, as Gary C. Jacobson (1985) claim that money usually enables the candidates but the question is not how much but how it is spent. He observes

Taken at face value, the evidence is overwhelming that the challenger's level of spending has a strong impact on the vote, whereas that of the incumbent has virtually no impact at all. But the evidence remains open to doubt on two grounds. One is the probable inadequacy of the 2SLS model... The other doubtful, albeit equally stable, finding is that incumbents do not gain votes by spending in campaigns. No incumbent seems to believe it, and there is at least circumstantial evidence (from, for example, the 1982 elections) that their skepticism is quite justified. If so, the problem lies in the limits of what aggregate data of the kind analyzed here can tell us (p. 55).

Jacobson (1985) goes on to add:

If both candidates spend beyond the point needed to become thoroughly familiar to voters, then the substance of the campaigns, the contents of campaign messages, become the dominant factors... Like non-incumbents, sitting members may sometimes need to spend beyond a certain threshold to remain competitive; but nearly all of them do so when the necessity arises, so aggregate spending data are largely uninformative. How the money is spent, rather than how much, is what matters (p. 56).

Based on Jacobson's argument, federally financed elections would take money away that could otherwise go towards informing voters about public policy issues.

If election spending favors the non-incumbent, then "the greatest likelihood remains that restrictions on campaign money will have the general effect of hurting challengers (Jacobson, 1979 in Jacobson, 1985). Anthony Gierzynski and David Breaux (1991) echo this claim

As in congressional elections, the impact of money on the vote in state house elections depends on who is spending it. While money spent by challengers has a significant impact on the vote in every state (except Nebraska), money spent by incumbents apparently does not. Only in New York and Colorado do incumbent expenditures appear to make a difference in the vote. This result is undoubtedly due to the fact that

incumbents who spend do so because they are in trouble (p. 213).

Some scholars however are not in complete agreement with this assumption. According to a 1994 paper written by Steven Levitt,

Campaign spending has an extremely small impact on election outcomes, regardless of who does the spending. Campaign spending limits appear socially desirable, but public financing of campaigns does not ...an extra \$100,000 (in 1990 dollars) in campaign spending garners a candidate less than 0.33 percent of the vote” (Levitt, 1994, p.780).

To defend the different results of his study, Levitt (1994) says,

Previous studies of congressional spending have typically found a large positive effect of challenger spending but little evidence for effects of incumbent spending. Those studies, however, do not adequately control for inherent differences in vote-getting ability across candidates. “High-quality” challengers are likely to receive a high fraction of the vote and have high campaign expenditures, even if campaign spending has no impact on election outcomes (p.777).

So, according to Levitt, every \$100,000 a candidate spend earns them 0.33 percent of the vote. This \$100,000: 0.33 percent of the vote correlation may be impacted by diminishing returns. For example, after the first \$100,000, the next \$100,000 will only provide a candidate with 0.22 percent of the vote, and the next \$100,000 will provide 0.15 percent. In this case, campaign spending does not offer a significant advantage with this math, although I will also consider the alternative scenario in which the \$100,000 is not impacted by diminishing returns. Under this assumption, spending money on elections would seem to have a small influence on most elections. Using his ratio of \$100,000 for .33 percent of the vote, only in cases where there are massive spending deficits would there be a significant shift in the vote (these scenarios are discussed below). These numbers are significant for President Obama’s 2012 election, in which he spent roughly \$274.8 million more dollars than Mitt Romney (FEC, Interactive national map). This is roughly a \$166 million gap in 1990 dollars. Using Levitt’s rule again, I calculated that President Obama earned an extra five percent of the vote.

Third, an important question raised is if money spent in election can influence policy making process? At least in some ways, the answer to this question is yes, although lobbying behavior does not necessarily reflect this reality. When analyzing universities tendency to lobby politicians for earmarks, John M. de Figueiredo noted

We then use these elasticities to calculate the marginal benefit of lobbying for an average lobbying university. On the basis of the point estimates and results in this paper, the marginal return attributable to \$1.00 of lobbying is \$1.56 without representation on the House Appropriations Committee

Campaign Finance

(HAC) or Senate Appropriation Committee (SAC). When there is representation on HAC, the marginal return attributable to \$1.00 of lobbying is \$4.52; with representation on the SAC, the marginal return attributable to \$1.00 of lobbying is \$5.24 (De Figueiredo and Silverman, 2006, p. 598).

Essentially, universities that would get a greater return on their lobbying dollars lobby less. The concept of a “return on lobbying” (Blumenthal, 2009) would, however, appear to be clear evidence that money does have a hand in influencing politicians’ votes on the legislative floor. John M. de Figueiredo (2006) underscores this

We also find that, after controlling for lobbying, HAC and SAC members send a disproportionate share of academic earmarks to their constituent universities. Contrary to those who claim there is no relationship between federal spending and committee membership (Mayer 1991; Ray 1980), our study provides evidence that committee members direct federal spending toward their districts (p. 600).

There does seem to be an obvious impact of spending money on politicians. The previous conversation regarding the rise of corporate power, compounded with the impact of money in the political process, shows the extent to which corporations can influence American politicians. This entire process then receives legal protections under the guise of being an expression of free speech.

Fourth, Stephen Ansolabehere, John M. de Figueiredo and James M. Snyder Jr. (2003) state that

Legislators are often posited to hold key ‘gatekeeping’ positions and can threaten regulation or harassing oversight unless interest groups contribute (p. 109). Legislators who are committee chairs or who serve on powerful committees raise substantially more than other members, and legislators who are party leaders raise significantly more than backbenchers. Also, economic PACs give donations in ways that fit with a simple arbitrage pricing model: economic PAC contributions are pegged to the odds that a politician will win a seat, while donations from individuals and ideological PACs are not (p. 110).

A Podcast on NPR titled “I’m Calling to Ask for Your Contribution” also addresses how money is moved to important political committees. According to this Podcast, members of the Ways and Means Committee generally receive around an extra \$259,000 in campaign contributions (Planet Money: NPR, 2012, I’m Calling to Ask 1:30). This is because

...The Ways and Means Committee has jurisdiction over the entire tax code of the United States. And so when you’re on that committee, you have an incredible amount of power over how much taxes corporations pay, individuals, everybody, and so therefore all those corporations and the

moneyed special interests, care about your candidacy. They care about what you do on that committee and therefore they shove a lot of money in your direction totaling, you know, an average of around \$259,000 (Planet Money: NPR, 2012, I'm Calling to Ask 1:30-2:00).

NPR enlisted a PhD from the Sunlight Foundation, a non-profit organization that tracks money in politics, to see what committees were the most and least profitable for politicians (Planet Money: NPR, 2012, I'm Calling to Ask, 2:15). According to NPR, "It turns out, there are certain committees that actually hurt your fundraising..." (Planet Money: NPR, 2012, I'm Calling to Ask, 2:50). This data, for example, revealed that the

...judiciary costs you almost \$200,000 in your fundraising. And that is because you have jurisdiction over the court system, judicial nominations, there's just not a lot of moneyed interest that care about what goes on in judiciary, at least compared to Ways and Means or Financial Services. So an interesting thing about this, this isn't just something that people talk about. The leadership of both parties actually rank their own committees as either A committees, B committees, or C committees, according to how much power people have on those committees, and therefore how much they can raise money and so if you get on an A committee, you're actually, as a lawmaker, expected to raise more money and give it over to your party (Planet Money: NPR, 2012, I'm Calling to Ask, 3:00-3:50).

This NPR segment discusses the possibility that raising revenue may be a way to gain favor with your political party. Gaining favor with your party may make your fellow Republicans, Democrats, etc. more willing to endorse and support you in primaries and general elections. Essentially, even if it can be proven that money does not directly help politicians win elections, it is still possible for money to corrupt the political process by giving rich politicians more power in the party.

Fifth, even if money does not buy politicians' votes or win elections, it does consume an incredible amount of politicians' time that could otherwise go towards performing their duties effectively. The NPR podcast titled "I'm Calling to Ask For Your Contribution" stated that

...Even though they're doing fundraising, it could be argued, more than they're eating breakfast, lunch, and dinner, I mean, that's something that was really stood out from the reporting that we did and that's going to be a part of this hour is just how, everyday and constant and relentless this fundraising is (Planet Money: NPR, 2012, I'm Calling to Ask, 4:30-4:45).

To build on this point of how much time politicians spend fundraising, Senator Dick Durbin said

I think most Americans would be shocked, not surprised but shocked, if they knew how much time a United States senator spends raising money, and how much time we spend talking about raising money, and thinking

Campaign Finance

about raising money, and planning to raise money, and, you know, going off on little retreats, and, and conjuring up new ideas on how to raise money (Planet Money: NPR, 2012, I'm Calling to Ask, 4:50-5:10).

In the same podcast, Congressman Peter DeFazio described a call center located near the capitol that is used for raising funds. When asked if the people he described at the call centers were members of congress, he said, "Yeah, no, these are lines of members of Congress..." (Planet Money: NPR, 2012, I'm Calling to Ask, 6:00-6:05). This, as the NPR reporter summed up "You know, essentially, every single congressperson has a second job, which is being a telemarketer", clearly shows resource waste in the Senate due to fundraising (Planet Money: NPR, 2012, I'm Calling to Ask, 6:15-6:20).

Finally, it is important to note that a large amount of fundraising money constitutes party dues. Representatives spend a colossal amount of time and resources to raise money for their political party. Gary C. Jacobson states

National party organizations, particularly the Republican, have assumed an increasingly important role in financing campaigns. Greater central control leads to a more efficient distribution of the party's collective campaign resources, which, among other things, promises to raise the overall level of electoral competition. It also leads to more coordinated campaigning, with greater emphasis on national themes and programs (Jacobson, 1985).

Jeff Zeleny, in his essay "Of Party Dues and Deadbeats on Capitol Hill" in the New York Times goes on to elaborate on this point by saying

Whether or not they are in competitive races, lawmakers are asked to mount vigorous fund-raising drives to fill their own campaign chests. Then they dole to the party, which spreads the money to the most competitive campaigns in the country (Zeleny, 2006).

If the party relies on certain politicians' incredible fundraising abilities, it may give that politician greater access to more influential positions, election assets, and campaign endorsements. The following quote from a politico article explains this connection

There is no set deadline for members to pay up, though they have to pay within each election cycle. But, with the fall campaign drawing closer, party strategists say they'd like the money to come in sooner rather than later. For those who don't shell out by the end of the cycle, there could be consequences. They could lose the ability to use NRCC facilities, such as fundraising call centers (Isenstadt, Sherman, 2014).

Opensecrets.org, using data from The Center for Responsive Politics, supports this claim even further

While there is no official system of dues collection, it's widely understood that members of Congress who want support from the party apparatus come election season must kick in money themselves, and any member hoping to attain a leadership position or prime committee slot must kick in much more. The fees reportedly escalate from tens of thousands of dollars for junior members to hundreds of thousands for senior members who want top committee posts (Choma, 2014).

This suggests that candidates need resources to win elections and money plays an important role in elections. David Greene in the NPR podcast "Senator By Day, Telemarketer By Night" claimed "On average, the race to win a seat in the House of Representatives costs between one and \$2 million. For the average Senate race it's millions more" (Planet Money: NPR, 2012, Senator By Day). Planet Money's Alex Blumberg reports that, "According to the Center for Responsive Politics, a non-partisan group that tracks money in politics, nine out of 10 races, the candidate with the most money wins. That's in the House. In the Senate, it's eight out of 10." (Planet Money: NPR, 2012, Senator By Day). Steve Driehaus, a one-term congressman from Ohio, said that, "...you know they expect you to be raising money. That will be a determining factor as to whether or not they feel it's a good use of their resources to support your reelection efforts." (Planet Money: NPR, 2012, Senator By Day).

Conclusion

Throughout American history, a general shift in societal values favoring the interests of wealthy private firms has developed. The evidence for this shifting legal culture can be found in multiple different sources, although most importantly in the Supreme Court decisions on campaign finance. The result has been an increase in the power of private entities to influence the American political process under the guise of freedom of speech. Ironically, this increased freedom of speech for some has come at the expense of others, who now have less say in the democratic process.

By allowing wealthy Americans to donate incredible sums of money to politicians, America's legal culture has created an environment in which politicians are more likely to be receptive of the interests of the wealthy, and specifically of likely donors. This increased attention towards certain groups of Americans comes at the expense of others, as politicians desperate to secure their re-election are unlikely to act in the interest of poor Americans, as this will be unlikely to provide a good return on their political investment. There are several solutions that can be adopted to curtail the corrupting influence of money in politics. Federally financed elections, for example, would eliminate the need for politicians to scramble to raise money, or be controlled by the wealthy electorate. Stricter regulations through federally financed elections will allow politicians to be autonomous from lobbyists and focus on the policy making process. While federally financed elections are a good solution to the problem, they are not the only option available to those seeking to slow the influence of money in the American political system. Contribution limits serve a similar function to federally financed elections by putting wealthy and poorer donors on a more even

playing field, as a small group of rich donors will become as important to a politician as a similarly sized poor group. Whichever solution is taken, it is important for America's political system to be separated from the corporate sphere to ensure that the interests of the public are best represented in our political machinery.

References

Ansolabehere, S., Figueiredo., & Snyder, J. (2003). Why Is There So Little Money in U.S. Politics? *The Journal of Economic Perspectives*. Vol. 17 No. 1. Pp.105-130. Retrieved from <http://www.jstor.org/stable/3216842>

Ansolabehere, S., de Figueiredo, J. M., Snyder, J. M. Jr. (2002). Why Is There So Little Money in U.S. Politics? *National Bureau of Economic Research*. Retrieved from <http://www.nber.org/papers/w9409.pdf>

Biersack, Bob (2018). 8 years later: How Citizens United changed campaign finance, *Center for Responsive Politics*, OpenSecrets.Org, February 7, 2018. Retrieved from <https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/>

Blumenthal, Paul. (2009/04/09). Return on Lobbying Investment: 22,000%. Retrieved from <http://sunlightfoundation.com/blog/2009/04/09/return-on-lobbying-investment-22000/>

Buckley v. Valeo. 424 US 1 (1976) Retrieved from <https://www.fec.gov/law/litigation/Buckley.pdf>

Center for Responsive Politics. (n.d.). *Election Stats*. Retrieved from https://www.opensecrets.org/bigpicture/elec_stats.php?cycle=2012

Center for Responsive Politics. (2014). *Lobbying Database*. Retrieved from <https://www.opensecrets.org/lobby/>

Citizens United v FEC, 558 US_2010
Retrieved from <https://www.supremecourt.gov/opinions/09pdf/08-205.pdf>

Choma, R. (2014). *Republican Dues Crackdown Pays Off*, August 22. Retrieved from <http://www.opensecrets.org/news/2014/08/republican-dues-crackdown-pays-off/>

De Figueiredo, J. M., Silverman, B. S. (2006). Academic Earmarks and the Returns to Lobbying. *Journal of Law and Economics*, Vol. 49, No.2, pp. 597-625. Retrieved from <http://www.jstor.org/stable/10.1086/508248>

Federal Election Commission. (1975; 1976). *Court Case Abstracts*. Retrieved from http://www.fec.gov/law/litigation_CCA_B.shtml

- Federal Election Commission. (May 2002; June 2002; June 2003; January 2004). *Court Case Abstracts*. Retrieved from http://www.fec.gov/law/litigation_CCA_M.shtml
- Federal Election Commission. (2008, May). *SSFs and Nonconnected PACs*. Retrieved from <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml>
- Federal Election Commission. (2014, April). *Public Funding of Presidential Elections*. Retrieved from <http://www.fec.gov/pages/brochures/pubfund.shtml>
- Federal Election Commission. (n.d.). *BCRA Overview for Reporters*. Retrieved from http://www.fec.gov/press/bkgnd/bcra_overview.shtml
- Federal Election Commission. (n.d.). Interactive national map showing contribution amounts to different presidential and primary candidates. *National Map*. Retrieved from <http://www.fec.gov/disclosurep/pnational.do>
- Federal Election Commission. (n.d.). *Primary Matching Funds*. Retrieved from <http://www.fec.gov/info/chone.htm>
- Gierzynski, A., Breaux D. (May, 1991). Money and Votes in State Legislative Elections. *Legislative Studies Quarterly*, Vol. 16, No. 2. Pp. 203-217. Retrieved from <http://www.jstor.org/stable/439978>
- Gilens, Martin (2014). *Affluence and Influence Economic Inequality and Political Power in America*. Princeton University Press.
- Gilens, M., Page, B. (2014). *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, April 9. Retrieved from <http://www.princeton.edu/~mgilens/Gilens%20homepage%20materials/Gilens%20and%20Page/Gilens%20and%20Page%202014-Testing%20Theories%203-7-14.pdf>
- Grossman, G. M., Helpman, E. (2001). *Special Interest Politics*. Retrieved from <http://books.google.com/books?hl=en&lr=&id=B70omthxalQC&oi=fnd&pg=PR11&dq=grossman+helpman+2001&ots=fet1QmoJPR&sig=mTg9sv4jpb20PbOKoUW-idv23io#v=onepage&q=grossman%20helpman%202001&f=false>
- Isenstadt, A., Sherman, J. (2014). Pay up: House GOP cash woes prompt dues crackdown. *Politico*. Retrieved from <http://www.politico.com/story/2014/07/house-republicans-cash-woes-108790.html>
- Jacobson, G. C. (1985). *Money and votes reconsidered: congressional elections, 1972-1982*. Vol. 47, No. 1. Retrieved from <http://link.springer.com/article/10.1007/BF00119352>

Campaign Finance

Levitt, S. (1994). Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S House. *The Journal of Political Economy*, Vol 102, Issue 4. Retrieved from <http://pricetheory.uchicago.edu/levitt/Papers/LevittUsingRepeatChallengers1994.pdf>

McConnell v. FEC, 540 US 93 (2003). Retrieved from <https://www.supremecourt.gov/opinions/03pdf/02-1674.pdf>

McCutcheon v. FEC, 572 US _ (2014). Retrieved from https://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf

Overby, Peter (2015). 5 Years After 'Citizens United,' SuperPACs Continue To Grow, *NPR*, January 13. Retrieved from <https://www.npr.org/2015/01/13/377024687/five-years-after-citizens-united-superpacs-continue-to-grow>

Planet Money: NPR. (2012). *I'm Calling to Ask For Your Contribution*. Money In Politics, May 22. Retrieved from <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=149712857&m=149720439&live=1>

Planet Money: NPR. (2012, March 30). *On Tour With Nancy Pelosi, Fundraising Rock Star*. Money In Politics. Retrieved from <http://www.npr.org/templates/transcript/transcript.php?storyId=149698946>

Planet Money: NPR. (2012). *Senator By Day, Telemarketer By Night*, March 30. Retrieved from <http://www.npr.org/templates/transcript/transcript.php?storyId=149648666>

Sullivan, K. (2010). Summary of Citizens United v. Federal Election Commission, March 2. Retrieved from <http://www.cga.ct.gov/2010/rpt/2010-R-0124.htm>

Wright, J.R. (1990). Contributions, Lobbying, and Committee Voting in the U.S. House of Representatives. *The American Political Science Review*, Vol. 84, No.2. pp. 417-438. Retrieved from <http://www.jstor.org/stable/1963527?seq=2>

Wright, S. J. (1976). Politics and the Constitution: Is Money Speech? *The Yale Law Journal*, Vol. 85 No. 8. Pp. 1001-1021. Retrieved from <http://www.jstor.org/stable/795582>

Zeleny, J. (2006, 08 01). Of Party Dues and Deadbeats on Capitol Hill. *New York Times*. Retrieved from http://www.nytimes.com/2006/10/01/us/politics/01dues.html?ex=1160280000&en=deb489ab8c706352&ei=5065&partner=MYWAY&_r=0

U.S Code References

U.S.C. §431 et seq. (Public Law 92-225)

26 U.S.C. Sec.9036 and 9037(b)

2 U.S.C. §9031 et seq.

***The Syrian Refugee Crisis:
Making a Case for State Obligation and Humanity***
Olivia Dunn*

Syria presents a grave human rights crisis. UNHCR estimates that since 2011, 5.6 million people have fled Syria, and millions more are displaced within Syria as the war continues. The humanitarian crisis in Syria demands nation states to rise to the moral and ethical responsibility to act and protect those trapped or fleeing the civil war in Syria. Yet, developed western states have been restrained in their action, which has undermined the international commitment to protection of the rights of refugees. Through an analysis of the convention of refugee rights and state response to the refugee crisis, my essay argues for greater responsibility to protect human rights of refugees through inclusive economic policies.

The Context

While the civil war in Syria has roots in the colonial context, ethnic tensions, and the war in Iraq, the catalyst for the ongoing civil war can be traced to Bashar al- Assad's election in 2000 and the rise of ISIS (Polk, 2013). Assad though democratically elected, systemically denied rights to people. The persecutions carried under the Assad regime, caused pro democracy uprisings in 2011, which turned into a violent and bloody civil war in Syria (Rodgers, Gritten, Offer & Asare, 2016). By 2012, a civil war engulfed Syria, with rebel groups and Assad's forces battling over cities, villages, and countryside, killing thousands of civilians along the way, and denying civilians access to basic necessities. As of August 2015, 250 thousand people have lost their lives from the Syrian Civil War (Rodgers, Gritten, Offer & Asare, 2016).

UN commission of inquiry on Syria has reported that both the government and rebel forces war have used "civilian suffering- such as blocking access to food, water and health services through sieges- as a method of war" (Rodgers et al., 2016, para. 8). Rebel forces, which include ISIS, have waged a campaign of terror

inflicted severe punishments on those who transgress or refuse to accept its rules, including hundreds of public executions and amputations. Its fighters have also carried out mass killings of rival armed groups, members of the security forces and religious minorities, and beheaded hostages, including several Westerners. (Rodgers, Gritten, Offer & Asare, 2016, para. 10)

In August 2013, Assad's forces allegedly inflicted chemical warfare on their own people. Hundreds of civilians were killed when rockets filled with sarin, a nerve

* Olivia Dunn is a Law and Society Graduate of Ramapo College. Since her graduation in 2016, Olivia has pursued a Masters in International Peace Studies at Trinity College, Dublin.

agent, were fired on suburbs surrounding Damascus, Syria's capital city. Although Assad denied responsibility for the chemical warfare, Western powers do not believe that the rebel forces have enough resources to obtain chemical weapons (Rodgers et al., 2016).

The ongoing civil war has forced more than 4.5 million to flee. Syrians have fled to neighboring countries like Lebanon, Jordan, Turkey, and about 10% of Syrians have made the dangerous trek to Europe as well (Rodgers et al., 2016). The journey to Europe up the Mediterranean is acknowledged to be "the world's most dangerous migration routes...the International Organization for Migration estimates that 22,400 migrants and asylum seekers have died since 2000 in attempts to reach the European Union, many of them at sea" (Sunderland, 2015, para. 2). Although millions have fled, thousands of citizens remain in Syria, and continue to suffer. The UN reported, "about 70% of the population is without access to adequate drinking water, one in three people are unable to meet their basic food needs, and more than 2 million children are out of school, and four out of five people live in poverty" (Rodgers et al., 2016, para. 17). Further, due to blockades by ISIS, rebel and Assad's forces humanitarian agencies have been unable to enter into areas where people are in desperate need of "life-saving aid" (Rodgers et al., 2016, para. 18).

Despite the plight of Syrians, the response in Europe to the Syrian refugees has been hostile. The massive influx of refugees has caused many countries like Turkey and Hungary to fence off and close their borders (Park, 2015). Refugees who have made it into these countries have suffered further abuse. For instance, a Human Rights Watch report noted that in Hungary, police harassed, beat and even threw tear gas at refugees to try and "control" them (Human Rights Watch, 2016). Hungary refused to allow refugees to board trains and busses traveling to Austria and Germany, further hindering refugees on their already difficult journey to freedom (Hartocollis, 2015).

In Turkey, authorities have detained refugees without access to lawyers. Turkish authorities have even forced refugees to return to their war torn home countries, completely violating international laws of non-refoulement (Amnesty International, 2015). A refugee who was at first welcomed in Turkey, after fleeing Syria, commented "They treated me like a refugee, someone who needed protection and had fled from the war. Now they treat me as if I am a terrorist or a security threat" (Sunderland, 2015, para. 22).

According to an *Amnesty International* (2015) study, "Refugees Endangered and Dying Due to EU Reliance on Fences and Gatekeepers", countries have built fences to protect their borders and have blatantly denied them access to asylum. John Dalhuisen, Amnesty International's Director for Europe and Central Asia, noted "The expanding fences along Europe's borders have only entrenched rights violations and exacerbating the challenges of managing refugee flows in a humane and orderly manner" (Amnesty International, 2015, para. 4).

"Where there are fences, there are human rights abuses. Illegal push-backs of asylum-seekers have become an intrinsic feature of any EU

external border located on major migration routes and no one is doing much to stop them” (Amnesty International, 2015, para. 16).

The report also notes *that* the building of fences and gates have not stopped refugees from coming, but have just forced them to take more dangerous routes. The most vulnerable group of refugees is children. Many have drowned at sea, died of hypothermia, starvation and illness (Human Rights Watch, 2015). A video documentary by *Human Rights Watch’s* (2015) titled “Desperate Journey: Europe’s Refugee Crisis”, notes the journey of a mother who was compelled to resort to using smugglers to get her daughters from Syria to Turkey. The video also portrays detention camps where refugees were fenced in like cattle, unable to leave or have any freedom of movement.

The dire conditions caused by the civil war in Syria and treatment of refugees who have fled their homes, demands states to fulfill their responsibility to protect refugees. However, this is challenged by protectionist claims by nation states, and stereotyping of refugees as threats to national security. The tension between claims of national interest and protection of human rights brings to light the need for inclusive policy.

Human Rights Law and Protection of Rights of Refugees

The atrocities committed by Hitler’s Nazi Germany during the Holocaust, the violence against, and the persecution of Jews gave rise to an international regime committed to the protection of human rights of refugees. The international community drafted the Universal Declaration of Human Rights (1948) and the Convention Concerning the Rights of Refugees (1951); they include the ethical and legal framework for the protection of human rights of refugees and obligates state parties to provide shelter and guarantee the right to non-refoulement, to those who seek refuge in their country for fear of persecution (Boswell, 2000).

The Universal Declaration of Human Rights is the foundation of human rights law; it provides the normative framework to protecting dignity of all human beings regardless of their citizenship, race, religion, ethnicity, sex, or gender. The recognition of the inherent dignity of every human being and non-discrimination are its most important tenets. Article 1 of the Universal Declaration of Human Rights says, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (The United Nations General Assembly, 1948, para. 10). There is an emphasis on the idea of dignity as essential to the concept of human rights. Article 2 goes further to show that human rights are universal and is based on the principle of non discrimination.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent,

trust, non-self-governing or under any other limitation of sovereignty (United Nations General Assembly, 1948, para. 11)

UDHR universalizes the notion of well-being and respect for all human beings. The Convention on Refugees focuses on the human rights of refugees; attends to the specific needs of refugees such as the right to asylum, non refoulement, and determines obligations of state parties. So far, 137 countries have signed the Convention of Refugee Rights document. The convention has been key to developing the definition of the term refugee, and outlining both international and state parties responsibility. This is considered to be one of its main contribution as it highlights the unique needs of refugees.

Refugee, as stated in the convention, is “someone who has a well-founded fear of persecution for their gender, race, religion, or political beliefs, and must flee to another country” (Gallagher, 1989, p. 14). They are unable to return to their own home country due to fear of persecution. Gallagher (1989) notes

The signatories made an effort to be specific as to those conditions that could cause one to be seen as a refugee. The reasons the terms ‘race’, ‘religion’, ‘nationality’, and ‘membership of a particular social group or political opinion’ were included in the definition have been obvious antecedents of the period during and between the two World Wars....The provisions concerning the right to seek asylum and non-refoulement were efforts to avoid the forcible repatriations of individuals who did have a ‘well-founded fear of persecution’ that occurred following World War II (p. 580-581).

This suggests that only certain people may qualify for refugee status, and this emphasizes the uniqueness and importance of the term refugee. The unwilling movement from their homes distinguishes refugees from migrants (Worster, 2014). The U.N.’s definition of a refugee underscores that this person is out of his or her country of origin; this differentiates refugees from internally displaced persons (Newman & Van Selm, 2003). The definition underscores that fear of persecution for refugees has forced them to involuntarily move from their home countries to seek aid, refuge and safety in a foreign country. Fear of persecution may include asylum seekers as well.

The UNHCR assimilates the rights of refugee status to the grant of asylum. It often refers to refugees as ‘asylum-seekers’. In addition, and very importantly, in an Annex to the Final Act of the Refugee Convention, the delegates to the convention that drafting the convention itself specifically observed that the receipt of refugees by states was an act of granting asylum (Worster, 2014, p. 489).

Limitation of the Convention of Refugees

It is important to note here that this categorization also highlights the restrictive nature of the Convention. Human rights scholars argue that the definition of refugee coined by the U.N. is too strict, leaving millions of people

who may not specifically fit into their guidelines unprotected by international or human rights law. Worster (2012) argues that, “the Refugee Convention is one of the cornerstones of the larger human rights system for protecting vulnerable persons and yet it is also a very narrow instrument, protecting a very specific group of persons” (p. 94). It does not include stateless persons, internally displaced persons etc. It also excludes individuals and people who receive aid from United Nations program, like the United Nations Relief and Works Agency, even so they may be living in a conflict zone and suffering from persecution (Worster, 2012, p. 100-101). Susan Akram (1999) states that the number of people who do not fall under the U.N. Convention's strict definition of refugee has been increasing in number, as victims of ethnic cleansing and genocide are not technically included.

Convention refugees, of course, comprise only one category of uprooted people; the category does not encompass causes of refugee status such as genocide in Rwanda; the use of rape as a weapon of war or ethnic cleansing in the former provinces of Yugoslavia; the deployment of child soldiers in Sierra Leone or Sudan; private wars among warlords in Liberia and Somalia; or massive bombings of civilians for political, ethnic or nationalistic reasons such as the Israeli bombings of villages in South Lebanon or the Russian bombings of villages in Chechnya. (p. 214-215)

Additionally, even though non-refoulement, protection from forced returning of a refugee to their home country because of a well-founded fear of violence and persecution on return, is guaranteed under the refugee convention, it does not apply to all people seeking refuge or asylum. In the 1951 Convention Relating to the Status of Refugees, there are two different classes of refugees listed who are not protected by the non-refoulement clause. 1) The first class includes individuals who have “committed a crime against peace, a war crime or a crime against humanity, committed a serious nonpolitical crime outside the country of refuge prior to admission as a refugee, or have been guilty of acts contrary to the purposes and principles of the United Nations” (United Nations General Assembly, 1951, p. 16). 2). The second class includes individuals who may have once been recognized as refugees, but are now considered threats to the national security of their country of refuge. These individuals may “pose a compelling threat to national security or public order, present a danger to the security of the country of refuge, or have been convicted by a final judgment of a particularly serious crime and constitute a danger to the community of the country of refuge” (Worster, 2012, p. 103). This suggests that the criteria developed in the convention of refugee rights excludes many vulnerable groups such as stateless persons, internally displaced persons etc, and does not take into account the historical, political and social context.

A further important challenge of the Convention of Refugee rights is the absence of clear determination of obligations of states. This question brings into tension the rights of sovereign states versus the ethical responsibility to protect. Proponents of state sovereignty believe that the state, as a sovereign entity, has the right and the power to resolve its obligations written in the Refugee

Convention. Wellman and Cole (2011), in their book, “Debating the Ethics of Immigration: Is There a Right to Exclude?”, argue that the state does have a right to exclude. Wellman believes that as a sovereign nation, immigration and political policies are part of that country’s sense of self, with no other institution being able to influence that. Wellman argues that each nation has a sense of self, as do their people as part of that nation, therefore they are responsible for deciding who may enter their borders. Wellman claims that this sense of self for nation states is crucial for forming national identity and rights to freedom for their citizens as a whole. He argues that competent nations should be respected for their competency and not be forced to allow foreigners into their country if they do not wish to have them. “An essential part of group self-determination is exercising control over what the ‘self’ is” (Wellman & Cole, 2011, p. 41). As sovereign nations, each state has the right to define what their sense of “self” is; a right that cannot be infringed upon even by the United Nations.

However, this emphasis on state sovereignty and the national self has meant that states have rights to deny asylum. Worster (2014) claims that documents protecting or granting asylum to refugees have been specifically worded to prioritize state sovereignty in order to show that it is the state’s right to grant asylum; no one else’s. He argues that the right to asylum is not recognized as an individual’s right to asylum, but as a right of the state, within its sovereignty, to grant asylum to an individual. “The way in which the right to asylum is articulated in those instruments suggests that it is not meant to be a right of the individual to receive asylum, but rather a right of the state to grant it, that must be respected by other states” (Worster, 2014, p. 478). Akram (1999) shows that many states have used their sovereignty to interpret their Refugee Convention obligations in extremely restrictive ways, including blatantly denying refuge to people in need

In Europe, but primarily in the United States, recent legislation has instituted a host of new procedural barriers to asylum applications, as well as measures such as prolonged detention of asylum seekers, expedited removal proceedings, denial of access to judicial review of refugee claims, restrictions on the ability of refugees or asylum seekers to obtain authorization to work, and restrictions on basic benefits necessary for refugees to survive (p. 216).

The restrictive interpretation of asylum granting by states and subsequent, criminalization of refugees has led to mass detention of refugees and denial of freedom of movement.

Freedom of movement, as guaranteed and recognized by the Universal Declaration of Human Rights as a human right, essential to human dignity. Goodwin-Gill argue that “next to life itself, liberty of the person and freedom of movement are among the most precious of human rights, intimately linked to the general notion of liberty as autonomy or self-government” (Goodwin-Gill, 1986, p. 60). However, state practice and the Syrian refugee movements shows that it is not being upheld by states, in the pretext of national security.

The debates about state sovereignty and the denial of responsibility is one of the critical challenges of the refugee crisis in Europe following the war in Syria. For example, on the Macedonian-Greek border, thousands of Syrian refugees have been forced into makeshift camps where they have been detained until further notice (Park, 2015). The illegality of crossing borders makes everything a refugee does in that country illegal; their very existence becomes illegal. Guy S. Goodwin-Gill (1986) explains how the detainment of refugees became essential in strengthening the sovereign state's power over the rights of individual people

Situations of mass influx and politically sensitive individual cases neatly juxtapose sovereign self-interest and international legal principles relating to refugees and fundamental human rights. Detention cannot be isolated from (it is sometimes conditioned by) actual or perceived abuse of the asylum process, or by like threats to the security of the state and the welfare of the community. It is frequently symptomatic of restrictive tendencies toward refugees which themselves reflect elements of xenophobia and self-reservation(p. 194).

The limitation of the convention in addressing the needs of refugees, the claim to national self by states, and the exclusion of refugees from society needs to be addressed. While sovereignty is important, it restricts our ability to protect human well-being, and hence a framework to protect rights of refugees needs to look beyond sovereignty.

A Prescriptive Solution Of State Obligation:

Philosopher Hannah Arendt argues that human beings inherently have an obligation to treat one another with dignity, which is the foundational basis of human rights law (Cioflec, 2012). Eveline Cioflec's (2012) in "On Hannah Arendt: the Worldly In Between of Human Beings and its Ethical Consequences" illustrates Arendt's belief in common responsibility that is within all human beings, and the importance of compassion and understanding for all of humanity. Arendt believed that policies on human interaction, like immigration, refugees and human rights, must be created to benefit all of humanity as we owe such respect to one another. Thus, the protection of human dignity is a paramount responsibility, and this as other scholars have argued, cannot be possible without the freedom of movement and open borders.

Political theorists, Wellman and Cole (2011) argue that open borders are essential to the equality of human beings. Cole views people as autonomous rulers of their own life who should be free to move and exercise agency. They should be "free and equal choosers, doers, and participators in their local, national, and global communities" (Wellman & Cole, 2011, p. 297). Cole claims that there are no moral distinctions between citizens and outsiders, and therefore "the exclusion of 'outsiders from the distribution of goods within our political community stands in need of moral justification" (Wellman & Cole, 2011, p. 178). Mark Gibney (1988) in "Open Borders? Closed Societies? The Ethical and Political Issues" argues that protection of freedom of movement is integral to social justice. He uses Rawls theory of justice to demonstrate that freedom of

movement can be beneficial to all of society. Advancing on Rawl's Difference Principle, the idea that public policy must be used to benefit the least advantaged of society, he argues that higher taxes on the rich should be used to fund aid and welfare programs for refugees entering the country. He argues that while in the short term, it may require reallocation of resources, in the long term the inclusive economy to support refugee programs will be beneficial to society. Gibney (1998) argues that by applying the Difference Principle globally, the immigration of people from poorer countries to richer countries would just be another part of creating initial inequality to the countries that receive immigration, but can overall benefit the global community by spreading the wealth.

The ethical claim to human dignity, inclusive economics, and social justice should be central to public policy as well. Nobel laureate Amartya Sen (1987) in his book *On Ethics and Economics* argues for a greater centrality to ethics in public policy. He claims "that the nature of modern economics has been substantially impoverished by the distance that has grown between economics and ethics" (Sen, 1987, p. 7). Sen argues for greater attention to welfarism. He notes

once that straitjacket of self-interested motivation is removed, it becomes possible to give recognition to the indisputable fact that the person's agency can well be geared to considerations not covered-or at least not *fully* covered- by his or her own well-being. (Sen, 1987, p. 41)

Countering Utilitarian welfare economics, Sen (1987) argues that agency and well being need to be understood separately in order for welfare economics to truly work. "Insofar as utility-based welfarist calculus concentrates only on the well-being of the person, ignoring the agency aspect, or actually fails to distinguish between the agency aspect and the well-being aspect altogether, something of real importance is lost" (Sen, 1987, p. 45). Further, economists argue that agency or self-interest is what motivates people and the economy to be successful. This is based off of rational behavior, which includes internal consistency of choice and maximization of self-interest, which is the correspondence between the choices that person makes and their self-interest. Sen (1987) points that rational behavior cannot be measured because it varies depending on one's relationship with society, including class, race, gender, etc. Therefore, the self-interest of one person will not be the same as another's, as everyone has different experiences within society.

Borrowing from Sen (1987), it can be claimed that the rational behavior, agency, and well-being of Syrian refugees will not be the same as people who live in stable environments. The rational behavior of a refugee is more of survival and restarting their life than personal gain. Through welfare economics, both agency and well-being must be seen as interdependent. Bringing ethics back into economics could enable protection of right of refugees: first, it will establish the moral obligation to help refugees. Second, the application of ethics into the modern economy will allow for more participation and inclusion in the economy giving opportunities to refugees. One of the biggest struggles of refugees is to make a decent living once arriving in a host country. The provision of support

Syrian Refugee Crisis

structures and opportunities is important for them to be able to contribute to the economy. By allowing refugees to earn a wage once entering their country of refuge, the welfare of the state will not suffer. The welfare of the state may actually improve by allowing more people to contribute to the economy and pay taxes towards welfare programs. This will mitigate the economic and social concerns of Western nations aiding refugees. The influx of refugees will increase the number of workers, create businesses and provide services to consumers. The social issues of cultural adaptation can be dealt with by providing support programs to refugees, and this in turn will lead towards greater understanding and respect for cultures.

The answer to the Syrian Refugee Crisis is not to exclude refugees, but to welcome them, aid them, and give them a livelihood, school for their children, and an opportunity at a new life in their country of refuge through inclusive public policies. Arendt's belief in human dignity and equality and Sen's inclusive economics can be used to understand how the developed states could better deal with the Syrian Refugee Crisis, and ensure freedom of movement to those fleeing the war. Instead of trying to shove off refugees on neighboring countries, there must be solidarity and unity amongst nations to recognize that the only thing that matters is restoring dignity to Syrian refugees, and instead of excluding them from society, should develop integrative policies that are all-inclusive, burden sharing, aimed to resettle Syrian refugees.

References

Akram, S. (1999). The world refugee regime in crisis: A failure to fulfill the burden-sharing and humanitarian requirements of the 1951 refugee convention. *American Society of International Law* 93, 213-216.

Amnesty International. (2015). Refugees endangered and dying due to EU reliance on fences and gatekeepers. *Amnesty International*. Retrieved from <https://www.amnesty.org/en/latest/news/2015/11/refugees-endangered-and-dying-due-to-eu-reliance-on-fences-and-gatekeepers/>

Boswell, C. (2000). European values and the asylum crisis. *International Affairs (Royal Institute of International Affairs 1944)*, 76(3), 537-557.

Cassidy, J. (2015). The economics of Syrian refugees. *The New Yorker*. Retrieved from <http://www.newyorker.com/news/john-cassidy/the-economics-of-syrian-refugees>

Cioflec, E. (2012). On Hannah Arendt: The worldly in-between of human beings and its ethical consequences. *South African Journal of Philosophy*, 31(4), 646-663.

Gallagher, D. (1989). The evolution of the international refugee system. *The International Migration Review*, 23(3), 579-598.

Gibney, M. (1988). *Open Borders? Closed Societies? The Ethical and Political Issues*.

Westport, Connecticut: Greenwood Press, Inc.

Goodwin-Gill, G. S. (1986). International law and the detention of refugees and asylum

seekers. *International Migration Review*, 20(2).

Hartocollis, A. (2015). Why migrants don't want to stay in Hungary. *New York Times*. Retrieved from

<https://www.nytimes.com/interactive/projects/cp/reporters-notebook/migrants/hungary-treatment-refugees>

Hidalgo, J. (2012). Christopher Heath Wellman and Phillip Cole, debating the ethics of immigration: Is there a right to exclude? *The Journal of Value Inquiry*, 46(4), 491-495.

Human Rights Watch. (2015). *Desperate Journey: Europe's Refugee Crisis*.

[Video file]. Retrieved from <https://www.hrw.org/middle-east/n-africa/syria>

Human Rights Watch. (2016). *Hungary: Migrants abused at the border*.

Retrieved from <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>

Lyman, R. (2015). Treatment of migrants evokes memories of Europe's darkest hour. *The New York Times*, Retrieved from

<http://www.nytimes.com/2015/09/05/world/treatment-of-migrants-evokes-memories-of-europes-darkest-hour.html>

Newman, E., & Selm, J. V. (2003). *Refugees and forced displacement:*

International security, human vulnerability, and the state. New York: United Nations University Press.

Nordland, R. (2015). A mass migration crisis, and it may yet get worse. *The New York Times*. Retrieved from

http://www.nytimes.com/2015/11/01/world/europe/a-mass-migration-crisis-and-it-may-yet-get-worse.html?_r=0

Park, J. (2015). Europe's migration crisis. Retrieved from

<https://www.cfr.org/backgrounders/europes-migration-crisis>

Polk, R. W. (2013). Understanding Syria: From pre-Civil War to post-Assad. *The Atlantic*. Retrieved from

<https://www.theatlantic.com/international/archive/2013/12/understanding-syria-from-pre-civil-war-to-post-assad/281989/>

Syrian Refugee Crisis

Rodgers, L., Gritten, D., Offer, J., & Asare, P. (2016). Syria: The story of the conflict. *BBC News*. Retrieved from <http://www.bbc.com/news/world-middle-east-26116868>

Sen, A. (1987). *On Ethics and Economics*. Malden, MA: Blackwell.

Sunderland, J. (2015). The mediterranean migration crisis: Why people flee, what the EU should do. *Humans Right Watch*. Retrieved from <https://www.hrw.org/report/2015/06/19/mediterranean-migration-crisis/why-people-flee-what-eu-should-do>

United Nations General Assembly. (1948). The Universal Declaration of Human Rights. *United Nations, Treaty Series*. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>

United Nations General Assembly. (1951). Convention relating to the status of refugees. *United Nations, Treaty Series*. Retrieved from <http://www.unhcr.org/3b66c2aa10.html>

Wellman, C. H., & Cole, P. (2011). *Debating the Ethics of Immigration: Is There a Right to Exclude?* New York: Oxford University Press.

Withnall, A. (2015). Syrian defectors reveal horrors of life under Bashar al-Assad's regime in reminder for West to 'not just focus on fighting ISIS'. *Independent News*. Retrieved from <http://www.independent.co.uk/news/world/middle-east/syrian-defectors-reveal-horrors-of-life-under-bashar-al-assads-regime-in-reminder-for-west-to-not-10458185.html>

Worster, W. T. (2014). The contemporary international law status of the right to receive asylum. *International Journal of Refugee Law*, 26(4), 477-499.

Worster, W. T. (2012b). The evolving definition of the refugee in contemporary international law. *Berkeley Journal of International Law*, 30(1), 94-160.