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

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**Why Women Should Make the Abortion Decision:
Damned if you do, Damned if you don't
CHRISTINA SAN FILIPPO¹**

As a woman in today's society, a woman who has had life-altering decisions about her body made for her throughout her entire life, I want to call attention to other women who are just trying to make their own decisions about their own bodies.

With this work, I recognize that within society there is a split between those who support a woman's choice to have an abortion, and those who do not. I argue that both the decisions, to have an abortion, as well as to carry a pregnancy to term, have consequences. These consequences can be physical, sociological, and/or psychological. Therefore, the decision should be left to individual women to decide which consequences they are able to bear. For this reason, access to safe, medical care regarding reproduction and abortion should be available to all women, across all states.

Initially, I will establish the foundational background on the legalization of abortion. It will begin in the early 1800s, a time where abortion before "quickening" was legal for women in the United States. However, as women began to die from abortion inducing drugs, and Dr. Horatio Storer teamed with the American Medical Association to begin the "crusade on abortion," disdain for the procedure grew. Throughout the mid-to-late 1800s, states began passing legislation to ban the drugs used for abortions and, eventually, the procedure itself. Contraception was also federally outlawed with the Comstock Law of 1873. Almost 100 years later both became legalized again with the major Supreme Court cases *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*.

This legalization has not come without obstacles, however. The second section of this work delves into the state barriers put on abortion. Although legal federally, state constitutions still allow for each state to put laws in place that restrict access to abortion, including zoning laws, mandatory counseling, mandatory waiting periods, and minor consent or notification. All of these barriers within states were upheld by the Supreme Court in the case of *Planned Parenthood v. Casey*. In addition to these ongoing issues in states, the current President proposed a domestic gag rule, and reinstated a global gag rule, that limits funding to abortion providers. This section will further discuss the specific details of the state laws regarding access to abortion, and the status of the issue of abortion within the current federal administration.

Thereafter, the physical, sociological, and/or psychological effects of access, or lack thereof, to abortion may have one woman is considered. Reasons for having an abortion vary from financial instability to unstable relationships. Upon receiving one, there is mixed research on whether women suffer future physical, sociological, and/or psychological effects. A sad reality is that even if a woman wants an abortion and feels she is capable of handling these possible consequences, she may be unable to get one. Whether the reason be barriers related to geographic location or financial situation, being forced to carry an unwanted child may also bear physical, sociological, and/or psychological effects.

Finally, the analysis concludes that both having an abortion and not being able to have an abortion can have negative effects on a woman. These effects can be either

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physical, psychological, and/or sociological. Women are capable of making their own decisions, and this should include access to abortion.

I. History of Abortion and Contraception Legalization

Today, it is easy to take certain things for granted. As people living in America, the land of the free, we do not take a second glance at some of the things we are able to do. Two of these things are the ability to receive educated medical advice on reproductive health from physicians, and the ability to get a safe and legal abortion. However, this was not always the case. At certain points in history, all things regarding contraception and abortion were outlawed in the US. Though we usually think of women's reproductive health as happening chronologically – first contraception and then abortion – the attention to women's bodies happened in the opposite order. Historically, abortion began to be regulated before contraception.

Legal Abortion Before “Quickening”

Before and during most of the 1800s, certain abortions were legal, and not uncommon. A woman was only allowed to seek an abortion before “quickening,” which was when she could feel the fetus moving. Before this, it was believed that human life did not exist. Surprisingly, even the Catholic Church shared this view, believing that abortions before quickening were “prior to ensoulment” (Ravitz, 2016). In society, early pregnancies that ended were not even considered abortions, but were rather seen as pregnancies that “slipped away” (Reagan, 2008, p. 8). At this time, conception was seen as something that created an imbalance within the body, due to the fact that it interrupted a woman's menstruation cycle (Reagan, 2008, p. 8). The way abortions usually worked was that women would take certain drugs to induce abortions. If these drugs failed, a woman could then visit a medical practitioner for an actual procedure to be rid of the fetus (Ravitz, 2016). Abortions before quickening were seen as a way to “bring the body back into balance by restoring the flow,” which meant the returning of the menstrual cycle (Reagan, 2008, p. 8). It was a practice done openly and honestly for pregnant women at this time.

Abortion Outlawed: The Beginning of the End

Although abortions done before quickening were legal, they were not entirely a safe practice. The drugs that women took to induce the abortions often ended in the death of the woman, rather than just the termination of the fetus. Due to this, states began passing statutes that controlled the sale of “abortifacient drugs” as a “poison control measures designed to protect pregnant women” (Reagan, 2008, p. 10). Each of these laws sought to punish whoever administered the drug, rather than the woman who received it (Mohr, 1979, p. 43). In 1821, Connecticut passed a statute outlawing the use of abortion inducing drugs, believing they were a threat to life by causing death by poisoning. However, the law was only applicable if the woman had already experienced quickening. It is important to note that the law was not focused on the actual act of abortion and did not even mention surgical abortions; the focus was on the drugs used for abortions. After this statute was passed in Connecticut, more states began to follow. Missouri in 1825, and then Illinois in 1827, also passed legislation outlawing the use of abortion inducing drugs in an attempt to avoid deaths by poisoning. However, both of

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these states did not mention quickening, and made the use of these drugs illegal at any point during a woman's pregnancy (Mohr, 1979, pp. 22–26).

Within the next few years, several states also began passing legislation regarding abortion. However, these statutes focused more on the act of abortion, rather than the drugs that caused them. Similar to the anti-drug laws, these statutes also sought to punish the person who performed the abortion, not the woman who received it (Mohr, 1979, p. 43). In 1834, Ohio passed a law stating that “the death of either the mother or the fetus after quickening” is a felony (Mohr, 1979, p. 39). Missouri soon followed by revising their previous abortion law and making “the use of instruments to induce an abortion after quickening a crime equal to the use of poisonous substances after quickening” (Mohr, 1979, p. 40). In 1840, Maine made “attempted abortion of any woman ‘pregnant with child’ an offense, ‘whether such child be quick or not’ and regardless of what method was used” (Mohr, 1979, p. 41). This Maine offense was punishable by jailtime or a large fine. As states continued to pass anti-abortion legislation, certain groups rallied behind this new-found fight against abortion.

American Medical Association (AMA) and Horatio Storer

Despite certain states passing laws prohibiting the sale of abortion inducing drugs, the nationwide business for them continued to grow. The drugs were openly discussed, even advertised in newspapers, and were readily available (Ravitz, 2016). A woman was able to purchase the drugs from physicians, pharmacists, or order them and have them delivered by mail (Reagan, 2008, p. 10). Along with the growth in popularity of these drugs came criticism.

In 1847, the American Medical Association was founded. The establishment of this Association was the beginning of the politicization of abortion. At this time period, when a woman and a man got married, “the husband assumed virtually all legal rights for the couple” (Primrose, 2012, p. 170). This was both a law, and a patriarchal viewpoint that was accepted within society. It was seen as the duty of women to bear children to their husbands. The American Medical Association asserted that abortions not only posed health risks to women, but also prevented wives from fulfilling this role in their marriage contract. At this time women were also seeking entry into Harvard Medical School, where many sought to pursue careers in gynecology and obstetrics. These career goals threatened the role of women as subjects of their husbands, and so created a kind of push-back by the American Medical Association (Ravitz, 2016).

American Medical Association Role in Outlawing Abortion

In 1857, the American Medical Association began focusing mainly on getting abortion to be outlawed, with Dr. Horatio Storer at the head of this crusade. On top of the previously mentioned patriarchal reasons pushing for this criminalization, a couple of other factors contributed. One was the fear of immigrants in the United States. Storer was one of many Americans who shared this fear, worrying that the nation would soon become out-populated by people of other ethnicities, leaving white people outnumbered. Another was the threat that licensed physicians felt from midwives and homeopaths, who they saw as their competition in the medical field. By outlawing abortion, this threat would be neutralized, and physicians would have power and control over practicing medicine. For these reasons, physicians supported Storer and the American Medical Association in the fight to outlaw abortion (Ravitz, 2016). Overall, Storer,

backed by physicians around the nation, helped influence abortion laws by appealing to “a set of fears of white, native-born, male elites losing political power to immigrants and to women” (Reagan, 2008, p. 13). However, their anti-abortion campaign also had to try to reach women in America as well.

Dr. Horatio Storer was the son of David Humphreys Storer, a professor at Harvard Medical School in the field of Obstetrics and Medical Jurisprudence. David Storer argued that the only time an abortion was acceptable was if it was to save the life of the mother, and that a fetus becomes a human being as soon as the embryo enters the uterus. David’s son, Horatio, adopted this mentality and used it in his crusade against abortion. In 1866, he wrote a book entitled, *Why Not? A Book for Every Woman*, followed by *Why Not? A Book for Every Man*, which were widely distributed to female patients by their physicians. The books were an attempt to make women feel guilty for having abortions and convince men that they were equally guilty as the father of the unborn. Storer was smart enough to recognize that not all women may give in to arguments based on morals and guilt. For this reason, he “recommended that their physician readers appeal to women’s concerns about their own health as a way to persuade them to have their children” (Dyer, 2003). This ensured that the American Medical Association was fighting against abortion from all possible angles and viewpoints.

Anti-Abortion Laws Continue

With much help from the American Medical Association, the anti-abortion movement gained traction in the nation. This social shift towards the nonacceptance of abortion was reflected in laws passed by states at the time. Within the time period of 1860-1880, “the United States produced the most important burst of anti-abortion legislation in the nation’s history” (Mohr, 1979, p. 200). During these years, states passed “at least 40 anti-abortion [laws],” and “13 jurisdictions formally outlawed abortion for the first time” (Mohr, 1979, p. 200).

The first state to start this wave of legislation was Connecticut in 1860. The law contained four separate sections laying out all things that were now illegal regarding abortion. The first section discussed abortion in general, stating that the act was considered “a felony punishable by up to \$1000 fine and up to five years in prison” (Mohr, 1979, p. 201). The second section stated that any accomplices of the person who performs the abortion is guilty of the crime as well. The third section said that the woman who receives the abortion is also guilty of the felony, even if she attempts one on herself. The fourth section discussed abortifacient information and materials, stating that the distribution of either was punishable by fines between \$300 and \$500 (Mohr, 1979, pp. 201–202). The contents within the third and fourth sections of this statute were things that had never been mentioned before in anti-abortion laws, and signified the “evolution of abortion policy” that was about to sweep the nation (Mohr, 1979, p. 201). This Connecticut law set the stage for other states, which began passing their own more intense abortion laws. Examples include “Colorado Territory and Nevada Territory in 1861, and Arizona Territory, Idaho Territory, and Montana Territory in 1864,” which each made abortion a punishable offense (Mohr, 1979, p. 202).

Contraception Outlawed: Comstock Law of 1873

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In 1873, The American Medical Association gained a victory when the Comstock Law was passed. This statute, passed on March 2, 1873, banned both the importation and distribution of any information or drug that aimed towards the prevention of conception (Tone, 2000, p. 439). The law made it illegal to “mail contraceptives, any information about contraceptives, or any information about how to find contraceptives” (Primrose, 2012, p. 173). Congress was able to do this by “enacting the antiobscenity statute to end the ‘nefarious and diabolical traffic’ in ‘vile and immoral goods’ that purity reformers believed promoted sexual licentiousness” (Tone, 2000, p. 439). Simply put, the government banned birth control and any information related to birth control under the guise that both its availability and use would contribute to sexual promiscuity, making it obscene, and allowing it to fall under the purity laws. The penalty for anyone who was caught violating the Comstock Law was “one to ten years of hard labor, potentially in combination with a fine” (Primrose, 2012, pp. 173–174). After Congress enacted this law, twenty-four states passed their own state versions to affirm the federal law (Tone, 2000, p. 441). On top of these federal and state laws, the government also gave “the United States Postal Service authority to decide what was ‘lewd, lascivious, indecent, or obscene’” (Primrose, 2012, p. 174). This was based on the fact that the business of birth control relied heavily on interstate commerce (Tone, 2000, p. 441).

Despite the fact that birth control and all information regarding it was outlawed people did not stop having sexual intercourse. As expected, this resulted in unwanted pregnancies. Women in this position who still sought an abortion despite its illegality were forced to look elsewhere to receive the procedure, which many times consisted of unsafe and unsanitary conditions (Primrose, 2012, p. 175).

Contraception Legalized: Contribution of a “First Wave Feminist” Movement in the United States

Around 1915, coinciding with advocates for the right of women to vote, a large feminist movement began growing, headed by Margaret Sanger, which focused on the importance of birth control. Sanger was a nurse who visited homes and was often asked questions by women on how to prevent having more children. One of Sanger’s patients died from a self-induced abortion, which led her to become more vocal about the unjustness that comes from restricting information on birth control. Sanger believed that the only way to achieve equal rights among men and women was for society to release women from the expected role of being a childbearing wife. In 1916, she attempted to open a contraceptive clinic in Brooklyn, New York, but was shut down after ten days. Despite being open for a short amount of time, the clinic had visits from 464 women. This staggering number displays the desperate need for contraception at the time.

Sanger continued her efforts to fight for contraception, and with support growing, she created the American Birth Control League (Galvin). In 1932, after Sanger was arrested for mailing birth control products, a judge from the Second Circuit Court of Appeals “ordered a relaxation of the Comstock laws at the federal level” (Primrose, 2012, p. 182). The opinion, written by Judge Augustus Hand, stated that contraception could no longer be described as “obscene,” and that there was a great amount of damage caused by this ban. He “ruled that doctors could prescribe birth control not only to prevent disease, but for the ‘general well-being’ of their patients” (Galvin, 1998). This

was a great win for Sanger and those who also fought for the legalization of birth control.

In 1942, the American Birth Control League decided to switch their approach and portray birth control as a means of family planning rather than a way to “liberate women” (Primrose, 2012, p. 183). With this change in approach also came a name change: Planned Parenthood. Although Sanger did not approve of this shift in philosophy or name change, both helped the organization present itself as much friendlier towards both men and women, and to become socially accepted (Primrose, 2012, pp. 183–184).

As time went on, the feminist movement towards legalized contraception and abortion continued. In the 1960s, the women’s liberation movement gained much more support after many were being “inspired by the civil rights and anti-war movements” (Ravitz, 2016). This traction in the women’s movement could be seen in the years to come within court decisions.

First Comes Marriage

After the ruling by Augustus Hand in the Second Circuit Court of Appeals, there was a large move towards the social acceptance of birth control. However, a Second Circuit decision is only binding in one jurisdiction. While this was a win for those within this area, and certainly did reflect a growing social acceptance, it was not sufficient to repeal laws nationwide. At this point, disagreement among the states on the issue of abortion was rising. For this reason, the issue rose all the way to the US Supreme Court.

***Griswold v. Connecticut*, 381 U.S. 479 (1965)**

In 1965, the Supreme Court helped strike down any laws within the states that mimicked the Comstock Law in *Griswold v. Connecticut*. In this case, Estelle Griswold was the executive director of Planned Parenthood in Connecticut. Griswold was arrested for giving out information about contraception under a Connecticut law which banned this. The Supreme Court brought up the idea of privacy within homes and ruled that although the “right to privacy” is not overtly written in the Bill of Rights, it still is a fundamental right protected under the Constitution. They discussed the idea that the Bill of Rights throws “penumbras” under which certain fundamental rights lie. In this case specifically, the First, Third, Fourth, Fifth, and Ninth Amendments all cast grey areas in which the “right to privacy” stands, which is then applied against the states using the Fourteenth Amendment. The court held that the Connecticut statute was overly broad and caused more harm than needed to be done. The statute encroached on a certain area in life where privacy is essential – inside a marriage. This ruling declared that a state is unable to ban the use of contraceptives within a marriage due to the right to privacy.

Then Comes All Persons

***Eisenstadt v. Baird*, 405 U.S. 438 (1972)**

While this was a great win for birth control advocates, it only made the distribution of contraception legal for married couples. In 1972 came *Eisenstadt v. Baird*, the Supreme Court case which extended this ruling to single peoples as well. In this case, Bill Baird was arrested for selling birth control in the form of vaginal foam to

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multiple women at Boston University. He was charged under a Massachusetts statute that mimicked the previous federal Comstock Law. After the ruling of *Griswold v. Connecticut*, this statute had been amended, but it was only to legalize the distribution of birth control to married couples. In the opinion of *Eisenstadt v. Baird*, Supreme Court Justice William Brennan “declared that ‘whatever the right of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike’” (Garrow, 2001, p. 65). The foundation of this argument stemmed from the fact that “the law violated ‘the rights of single persons under the Equal Protection Clause’ of the Fourteenth Amendment” (Garrow, 2001, p. 64). This ruling helped establish legal contraception for all individuals.

Abortion Legalized Federally

Roe v. Wade, 410 U.S. 113 (1973)

In 1973, the contraception movement came to a peak when the Supreme Court ruled in the case of *Roe v. Wade*, federally legalizing abortion. In this case, a single pregnant woman in the state of Texas challenged a “criminal abortion statute which only allowed abortions ‘for the purpose of saving the life of the mother’” (Zagel, 1973). The plaintiff, named anonymously as Jane Roe to protect her identity, who was later revealed to be Norma McCorvey, asserted in the legal briefs that the statute was unconstitutional and a violation of the right to privacy, therefore the law was null and void. Texas argued that it has compelling state interests in the life of the mother, the protection of prenatal life, and in the discouragement of illicit sexual activity, making this statute constitutional. The court understood the state’s concern for the mother and unborn child but did not accept the argument regarding sexual activity. After weighing the valid points brought forward by both Roe and Texas, the Court ruled accordingly. In the first trimester, the state has no say, and all decisions are to be made between a woman and her doctor. In the second trimester, a woman is still able to receive an abortion, but the state is able to make some regulations in order to protect the mother’s life. In the third trimester, abortions are contingent upon demonstrated threats to the mother’s health, due to the fact that the life of the fetus is considered viable.

Throughout history, the idea of access to “family planning” – whether that be birth control or abortion – has been controversial. Abortion drugs were initially very common but were then banned under the Comstock Law after much lobbying by the American Medical Association. After this, feminist movements began picking up the fight for contraception. The pleas of the movements were not answered until much later, when the Supreme Court made their rulings in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*.

Before 1800s	Abortion before “quickenings” is legal, both federally and in states
1820s	States begin passing statutes outlawing the use of abortion inducing drugs
1830-40s	A few states begin passing statutes outlawing the actual procedure of abortion (Ohio, Missouri, Maine)
1860-80s	Anti-abortion statutes continue to pass throughout the states in the nation, with 13 jurisdictions formally outlawing abortion for the first time

1965	<i>Griswold v. Connecticut</i> , 381 U.S. 479 federally declares that a state is unable to ban the use of contraceptives within a marriage due to the right to privacy
1972	<i>Eisenstadt v. Baird</i> , 405 U.S. 438 federally legalizes the use of contraceptives for all individuals
1973	<i>Roe v. Wade</i> 410 U.S. 113 federally legalizes abortion

Figure 1: Legal Historical Timeline of Abortion and Reproductive Rights

II. Current Legal Obstacles Preventing Abortion

After several federal court decisions legalized abortion and the distribution of contraception, and any information regarding it, it seemed as though the fight for reproductive rights was over. Significantly, an “undue burden” on a woman was ruled as unconstitutional. Additionally, the American Medical Association, a previously large motivator in the anti-abortion movement, moved towards a more pro-choice viewpoint and backed up from being vocal against abortion. In 1990, the AMA stated that “the issue of support or opposition to abortion is a matter for members of the AMA to decide individually, based on personal values or beliefs.” In 2013, the Association as a whole shifted further towards pro-choice, stating that “the Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion,” as long as it is done in “good medical practice” and does not violate the law (Hart, 2014, p. 292).

However, the federal court rulings only set a legislative basis for states, which were then responsible for the abortion statutes within their own borders. Despite the fact that abortion was made legal on the federal level, states were, and still are, able to enact statutes that could create certain barriers making it hard for women to obtain an abortion. These barriers include zoning laws, mandatory counseling, waiting periods, and minor consent or notification. Besides being inconvenient hurdles to overcome, these barriers also insinuate an assumption that women seeking abortions have not thoroughly contemplated their decision, and/or are not able to properly educate themselves before doing so.

Hyde Amendment of 1976

In 1976, the United States Congress passed an “amendment to a federal appropriations bill specific to [the Departments of Labor and Health and Human Services].” This amendment, titled the Hyde Amendment, “prohibits using U.S. federal funds to pay for abortions in programs administered through” the two aforementioned federal departments. One of the programs that is affected by this amendment is Medicaid, which is “a joint state-federal program for low-income people.” Under the Hyde Amendment, Medicaid programs in states are unable to access and use federal funds to help low-income people get abortions. Since its installment, the Amendment has “been altered to include exceptions for pregnancies that are the result of rape and incest” (Boston Women’s Health Book Collective, 2011, pp. 341–342, 774). This Amendment is a possible barrier for women who are unable to afford an abortion on their own, which is discussed further below.

***Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)**

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In 1989, Pennsylvania passed the Pennsylvania Abortion Control Act, which sought to intensely restrict a woman's ability to get an abortion. Under this law:

A woman seeking an abortion must (i) be given certain state-approved information about the abortion procedure and give her informed consent; (ii) wait 24 [hours] before the abortion procedure [after receiving this information]; (iii) if the woman was a minor she had to obtain parental consent; and (iv) if the woman was married she had to notify her husband, in writing of her intended abortion (Medoff, 2009).

Following the passing of this law, the Planned Parenthood of Southeastern Pennsylvania filed a lawsuit, claiming that the law was unconstitutional. The suit made its way to the United States Supreme Court, which ruled that "states could regulate abortions before viability as long as the regulation did not place an 'undue burden' on a woman's access to an abortion" (Medoff, 2009). However, the Court did not give an explicit definition of what an "undue burden" entails, giving states leeway to enact restrictions on the access to abortion. The Court also upheld the first three parts of Pennsylvania's statute, but struck down the fourth, requiring husband notification. By upholding the first three, the Supreme Court allowed Pennsylvania to set the stage for other states across the nation which sought to limit the access to abortion (Medoff, 2009).

Types of Abortion Barriers

Zoning Laws

One possible barrier to abortion access that states are able to implement is zoning laws. Under the Constitution, each state has a certain amount of police powers that allow for the enactment of laws and regulations that aim to protect, preserve, and promote the public safety, health, morals, and general welfare of the people (Legal Information Institute). Local governments within states are able to pass zoning laws in the community under these police powers. "Zoning laws determine what types of land uses and densities can occur on each property lot in a municipality." In some areas throughout the nation, local governments use zoning ordinances to limit the areas where abortion providers can reside (Maantay, 2002, pp. 572–575). This topic is further discussed below.

Mandatory Counseling

According to the Guttmacher Institute, as of March 1, 2019, "34 states require that women receive counseling before an abortion is performed" (Guttmacher Institute, 2019a). The legal basis of mandatory counseling laws lies upon the principle of informed consent. This principle is the idea that patients "have the right to receive accurate and unbiased medical information from their health care provider so that they can make an informed decision about their treatment" (Medoff, 2009). Mandatory counseling laws in states make it a requirement for physicians to read a "'script' to any patient seeking an abortion" (Rose, 2006, p. 105). These scripts are specific to each state, which are left to approve of the information they wish to include. While the counseling information may vary state-to-state in terms of what exactly must be included, each have the same

general idea: to warn women who are seeking an abortion of the possible complications, side effects, and other options.

To stay in accordance with the idea of providing unbiased and objective information, states must also counsel women about options other than abortion, and the possible effects associated with them. For example, North Carolina's "Woman's Right to Know Act" states that physicians must inform the woman that she "has other alternatives to abortion, including keeping the baby or placing the baby for adoption." The act also requires abortion providers to provide patients with printed materials that detail the possible complications and effects of abortion, "as well as the medical risks associated with carrying an unborn child to term" (Stam, 2012, pp. 18–20).

The issue with this counseling is that not all the information distributed is necessarily accurate and may "dissuade women from having an abortion by giving them biased medical information ... that is deliberately inaccurate and false" (Medoff, 2009).

One piece of information included in the counseling materials of several states is the idea that "abortion is detrimental to a woman's mental health" (Medoff, 2009). While this may be the case for some women who receive abortions, it is not true for all. This topic is considered further below.

Other information that is commonplace in counseling materials is that abortions are linked to future medical issues within women. In 6 out of the 34 states that include mention of medical issues, the emphasis is on the correlation between abortion and breast cancer, and 22 out of 34 include information about infertility (Guttmacher Institute, 2019a). However, research has shown that the claims being made are not necessarily accurate. Among the 6 states that discuss breast cancer, 5 "inaccurately assert a link between abortion and an increased risk of breast cancer" (Guttmacher Institute, 2019a). Furthermore, in 1996, The National Cancer Institute stated that after doing research, they found "no evidence of a direct relationship between breast cancer and either induced or spontaneous abortion" (Medoff, 2009). Regarding infertility, there is research showing that "vacuum" abortions, which are "the most common method used in over 90% of all abortions – poses no long-term risk of infertility" (Medoff, 2009). In 4 of the 22 states that discuss infertility, the risk is inaccurately portrayed (Guttmacher Institute, 2019a). The distribution of this inaccurate information may scare women away from having an abortion, fearing they will have serious health complications in the future.

In 13 out of the 34 states, the mandatory counseling information tells women that the fetus is able to feel pain during the procedure of the abortion (Guttmacher Institute, 2019a). However, not every state provides the same facts. In South Dakota, women are told that the fetus feels pain no matter how far along the pregnancy may be. In Texas, women are told the fetus can feel pain as early as 12 weeks, while women in Arkansas and Georgia are told it is 20 weeks (Medoff, 2009). However, research has shown "that the necessary physical structures to perceive pain develop between 23 and 30 weeks' gestation" (Gold & Nash, 2007). This disagreement between states clearly shows how inaccurate the information being distributed to women may be.

Aside from possibly dissuading women from getting an abortion by providing potential complications and side effects, the counseling information can also be laced with bias language meant to do the same. For example, in 2003, Texas passed a law entitled "Woman's Right to Know Act," which required abortion patients be given a twenty-three-pages long booklet discussing all of the possible risks listed above.

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However, the booklet refers to the fetus as an “unborn child,” using word choice to place personhood on the fetus (Rose, 2006, p. 106). It also “speaks at length about the euphoria of giving birth,” while barely touching on the possible issue of post-partum depression if the woman chooses to have the child (Rose, 2006, p. 106). The subtle use of language and emphasis on happy childbirth shows that the state favors the idea of carrying the fetus to term rather than letting the woman have an abortion.

Waiting Periods

Following the mandatory counseling, as of March 1, 2019, 27 out of these 34 states require that there be a waiting period of at least 24 hours until the woman can receive the abortion (Guttmacher Institute, 2019a). In these cases, women are required to visit the physician twice: once to be counseled, and second to undergo the procedure after the waiting period is complete. While this may be a minor inconvenience for some women, it can be quite major for others. For example, if a woman has traveled a far distance to receive the abortion, there are extra costs involved, whether that be money for gasoline, public transportation fees, and/or paying to stay in a hotel. By forcing these women to visit the physician twice, the money they are spending increases, whether that be by a few dollars for a couple of more gallons of gasoline in their car or by a few hundred dollars for an extra night in a hotel room. While the waiting period may be a helpful time for some women to read and further inform themselves on the procedure they are about to receive, it may be a burden for others who have already confirmed their decision and cannot afford these extra costs (Rose, 2006, p. 106).

Minor Consent or Notification

As of March 1 2019, 37 states in the nation require the involvement of a minor’s parent when deciding to have an abortion. In 11 of these 37 only require parental notification, while 21 require parental consent (Guttmacher Institute, 2019b). Among the many barriers put on access to abortion, “parental involvement laws have some of the highest public support” (Rose, 2006, p. 107). A large portion of this support comes from the idea that minor’s may be too immature to make this life-altering decision on their own and require the potentially important input of their parents (Rose, 2006, p. 107).

In an attempt to avoid the laws requiring them to involve their parent, some young girls travel across state lines to receive the procedure in a state that does not have these laws. If that is not a possibility, other girls turn to unsafe illegal procedures to terminate their pregnancy (Rose, 2006, p. 107). One specific example of this is Becky Bell, a seventeen-year-old girl from Indianapolis. In 1988, afraid to inform her parents that she was pregnant, Becky sought out an illegal abortion (Lewin, 1991). During the procedure, unsanitary instruments were used, which resulted in the young girl contracting a bodily infection. Within one week, Becky’s veins collapsed, her heart stopped, and she died (Rose, 2006, p. 107). This case became an example of the potential issues with the forced involvement of parents.

While parental involvement laws may seem rational, they pay no attention to the possible circumstances within each minor’s situation. For a young girl who has an open and close relationship with her parents, these laws may not pose an issue. Oppositely, for a young girl who has a distant, unhealthy, and/or violent relationship with her parents, such as Becky Bell, these laws may be extremely problematic. In a 1991 study

that looked at reasons why minors seeking abortions did not want to inform their parents, the most common reasons listed “were wanting to preserve their relationship with their parents and wanting to protect the parents from stress and conflict” (Henshaw & Kost, 1992). These reasons may be especially true in a household where the pregnancy is the result of a friend/family rape, which would put much stress on the family relationships. Due to these possible issues, 36 out of the 37 states with parental involvement laws “include a judicial bypass procedure, which allows a minor to obtain approval from a court” (Guttmacher Institute, 2019b). This procedure, if approved, grants a minor the ability to receive an abortion without involving a parent.

Current Federal Administration

Election of Donald Trump

Although states have been able to place these barriers limiting the access to abortion within their borders, the rights granted in *Roe v. Wade* have continued to hold steady in federal law. However, more recently, there has been fear of a perceived threat to these rights. This fear began with the election of President Donald Trump in November 2016. When elected, Trump vowed “to nominate socially conservative Supreme Court Justices, withhold federal funding from Planned Parenthood, and sign legislation banning abortion after 20 weeks of pregnancy” (Reinhard, 2016). Although Trump has not signed any legislation doing so, he has indeed followed through on the first two promises.

Nomination of Socially Conservative Supreme Court Justice Brett Kavanaugh

In 2018, President Donald Trump nominated Judge Brett Kavanaugh to become a Justice on the United States Supreme Court. Since this nomination, Kavanaugh has been elected to the Supreme Court, replacing Justice Anthony Kennedy, who “protected [*Roe v. Wade*] as the court’s swing vote on abortion” (Bassett, 2018). By replacing Kennedy, Kavanaugh creates “a solid conservative majority on the court,” which could potentially threaten *Roe*, given his standpoint on the issue of abortion (Gershman, 2018). Although Kavanaugh has not spoken directly about his views on the Supreme Court decision of *Roe v. Wade*, he has spoken about “the government’s ‘permissible interests’ in ‘favoring fetal life’ and ‘refraining from facilitating abortion,’” indicating his opinions on the subject lean toward a pro-life viewpoint (Bassett, 2018). However, despite the possible personal opinions of Kavanaugh, he has stated that he believes *Roe v. Wade* is a “settled law” (Gershman, 2018). While there was no further explanation on what exactly Kavanaugh meant by those words, a logical interpretation would mean that “he believes the precedent is too deeply embedded in the fabric of the law to be re-examined” (Gershman, 2018). This would mean that Kavanaugh himself is not even confident in the fact that the Supreme Court could overturn the landmark decision.

Trigger Laws

Although the possibility of *Roe v. Wade* being overturned is questionable, some states have “trigger laws” set up in the event that it does happen. These laws are blatant state bans put on abortion, but are presently unconstitutional, therefore, unenforceable. The point of these laws is to have statutes set in place, ready to “become enforceable

without further legislative action” the moment *Roe v. Wade* gets overturned, if ever (Rose, 2006, p. 102). The states that have put these laws in place are Mississippi, Louisiana, North Dakota, and South Dakota (Gershman, 2018).

Gag Rules Withholding Federal Funding from Planned Parenthood

When getting elected, President Trump also promised to withhold federal funding from Planned Parenthood. In February 2019, the Trump administration announced, “that it will bar organizations that provide abortion referrals from receiving federal family planning money” (Belluck, 2019). This new legislation is a form of a “gag rule,” which “prohibit those working in state-run health care facilities from even speaking of abortions as an option with patients” (Rose, 2006, p. 109). In this specific federal rule, “clinics will be able to talk to patients about abortion, but not where they can get one” (Belluck, 2019). This means that organizations meant to help women, such as Planned Parenthood, could potentially lose millions of dollars in funding (Belluck, 2019). As of this writing a federal court in Washington state issued a nationwide injunction that stops the rule from taking effect while various lawsuits are pending (Barbash, 2019).

Trump Reinstatement of Global Gag Rule

Aside from being present within the United States, every recent Republican Administration has enforced such gag rules internationally. “The United States is the largest donor of international family planning money, which is dispersed through the United States Agency for International Development.” This agency “funds international non-governmental organizations (NGOs) in contraceptives, training, technical assistance, and other family planning needs.” However, in 1984, the Reagan Administration instituted a global gag rule, which mandated that any NGO “that performed or promoted abortion services” were no longer “eligible for USAID funding,” even if abortion was legal in their jurisdiction. When the Clinton Administration came into power, this global gag rule was overturned. This back-and-forth has continued ever since, with the Bush Administration reinstating the global gag rule, and then the Obama Administration overturning it (Gezinski, 2012, pp. 839–840). Predictably, President Trump reinstated it – on his first day in office. This global gag rule is a large setback for many countries in the developing world, where NGOs are a primary source for women’s health care. For example, in some parts of Africa, these clinics “offer HIV/AIDS prevention and treatment, maternal health, and counseling on sexual violence like genital mutilation.” This rule also cuts funding for the International sector of Planned Parenthood (Quackenbush, 2018). By cutting funding to NGOs around the world, the global gag rule can have serious effects on a woman’s ability to get proper health care.

III. Possible Effects After Having an Abortion or Being Denied an Abortion

Before being able to fully understand the potential effects of an abortion, one should know exactly what the abortion process consists of. There are multiple different kinds of abortion procedures a woman can receive that vary in methods and depend on how far along the pregnancy is. By being fully educated on the details of the actual procedure, individuals are able to understand the issues surrounding abortion on a

more comprehensive level. The following paragraphs will go through the vital specifics of each procedure.

Receiving an Abortion: How is it Done?

First Trimester Abortions

“In the United States, most abortions (88 percent) are performed during the first trimester,” which includes the first twelve weeks of pregnancy. Currently, there are two different forms of first-trimester abortions: a medication abortion or an aspiration abortion. A woman is able to choose which one she wishes to receive. As of 2011, aspiration abortion is more commonly used than medication abortion, but the interest for the latter continues to rise. If a medication abortion fails, an aspiration abortion is necessary to abort the fetus (Boston Women’s Health Book Collective, 2011, pp. 324–328).

“In a medication abortion, the pregnancy is interrupted and expelled over the course of a few days using medicines.” While in the presence of the doctor, a woman swallows a pill containing a drug called mifepristone. Later, when at home, the woman takes another drug, misoprostol, either by inserting it vaginally or letting it dissolve inside her mouth. The abortion begins a few hours later, consisting of heavy bleeding and cramping. To ensure the abortion worked, the woman must go back to the doctor one week later for a follow-up appointment. In 95 to 98 percent of cases, this method is effective. However, if it fails, the woman must then undergo an aspiration abortion (Boston Women’s Health Book Collective, 2011, pp. 324–326).

In an aspiration abortion, also known as surgical or vacuum abortion, “suction is used to remove the pregnancy.” A thin tube, called a cannula, is “inserted into the uterus and connected to a source of suction, either an electric pump or a handheld syringe,” which then removes the fetus from the woman. Unlike medical abortions, aspiration abortions only take 5-10 minutes to complete and do not require a follow-up appointment with the doctor unless the woman is experiencing problems (Boston Women’s Health Book Collective, 2011, pp. 324–328).

Second and Third Trimester Abortions

When Do They Happen?

“In the United States, about 12 percent of all abortions take place after the first trimester” (Boston Women’s Health Book Collective, 2011, p. 332). Women enter the second trimester of pregnancy at week 12, and the third trimester at week 28 (Boston Women’s Health Book Collective, 2011, p. 332; Cha, 2015). The Centers for Disease Control and Prevention reported that in 2015, only “about 1.3 percent of abortions were performed at or greater than 21 weeks of gestation.” This means that within the aforementioned 12 percent, almost all of these abortions are done during the beginning and middle of the second trimester. In the rare cases where women seek abortions in their third trimesters, the reasons are serious and based on “an absence of fetal viability,” and/or risks to the mother’s health or life (Cha, 2015).

Procedure Details

Why women should make the abortion decision

For second and third trimester abortions, the procedures differ from those in the first trimester. Currently, there are two different methods used to abort a fetus after the first trimester: dilation and evacuation (D&E), and induction abortion (Boston Women's Health Book Collective, 2011, p. 332).

In a D&E procedure, the fetal and placental tissues are removed by using a combination of instruments and suction. This method is more commonly used, and quite similar to the aspiration abortions performed during the first trimester. However, due to the fact that the pregnancy is further along, the woman's cervix must "be opened wider to allow the larger pregnancy tissue to pass, which requires the clinician to soften and dilate the cervix ahead of time." This can take anywhere from a few hours to two days and can be done either by the use of instruments (osmotic dilators), or drugs (misoprostol). The earlier a woman is in her pregnancy, the less time this portion of the abortion takes. After the cervix is prepared, "the clinician removes the pregnancy (fetal and placental tissue) with vacuum aspiration, forceps, and a curette (a small, spoonlike instrument)" (Boston Women's Health Book Collective, 2011, pp. 332–333).

"After a certain point in pregnancy (usually around twenty-four weeks), a D&E can no longer be performed and the only option is an induction abortion." In an induced abortion, a woman is given drugs that induce labor. The drugs that are used can vary depending on the circumstances of the situation, and can either be inserted into the vagina, be given through an intravenous line, or injected into the woman's abdomen. These drugs cause contractions of the uterus, thus sending the woman into labor. The fetus and placenta are then 'delivered,' expelling the pregnancy. This method "usually takes place in specialized facilities or hospitals," and takes more time than D&E's. Due to this, and the fact that it forces women to endure the mental and physical stress of labor, induction abortion is less commonly chosen than D&E. However, in a case where the pregnancy being ended is wanted, this method allows the woman to deliver and hold the fetus, and say good-bye (Boston Women's Health Book Collective, 2011, pp. 332–334).

Reasons Why Women May Get an Abortion

Despite the possible attempts by state law to limit a woman's ability to get an abortion, the medical procedure is still performed across the nation. While the specific reasoning behind every abortion is different in each individual situation, in many cases, there are common themes of reasoning.

In 2004, a study was done by the Guttmacher Institute to explore the reasons why a woman may seek an abortion. In the study, over 1200 abortion patients at 11 providers completed a survey that asked questions regarding their reasoning. The first portion of the survey was open ended, asking the woman to briefly explain why she was choosing to get an abortion at that time. If there were multiple reasons, she was asked to give them in order from most to least important. After that, there were specific reasons listed that the woman had to confirm whether or not were applicable to her. There were three large reasons listed that then provided even more specific sub-reasons underneath. These three included: "having a baby would dramatically change my life," "can't afford a baby now," and "don't want to be a single mother or having relationship problems" (Finer et al., 2005, p. 113). Under "having a baby would dramatically change my life," the sub-reasons for why it would do so were because it would interfere with the patient's education and/or career, and/or because she already had other dependents in

her life (Finer et al., 2005, p. 113). Under “can’t afford a baby now,” a few sub-reasons for lack of funds were because the woman was unemployed, could not leave her job to care for the child, and/or could not even afford the basic necessities of life (Finer et al., 2005, p. 113). Under “don’t want to be a single mother or having relationship problems,” a couple sub-reasons were because the woman was unsure about her current relationship, or because she was not in a relationship at the moment (Finer et al., 2005, p. 113). After the breakdown of these three large reasons, there were various others listed, including: “have completed my childbearing,” “don’t want people to know I had sex,” “don’t feel mature enough to raise a child,” “victim of rape,” and “result of incest” (Finer et al., 2005, p. 113). Finally, the questionnaire provided a space where the woman could write in her own reasons that were not listed or did not qualify within the given categories. The results showed that most women identified with reasons that fell within the three large ones, with 74% of respondents feeling that “having a baby would dramatically change [their] life,” 73% saying they “[could not] afford a baby [at the moment],” and 48% “[citing] relationship problems or a desire to avoid single motherhood” (Finer et al., 2005, p. 113). This study provided many possible reasons as to why a woman may seek an abortion.

In 2013, a similar study was published by BioMed Central Women’s Health that examined the reasons why women get abortions. This study looked at the data collected during the *Turnaway Study*, which was done to evaluate “the health and socioeconomic consequences of receiving or being denied an abortion in the US” (Biggs et al., 2013, p. 1). Although the premise of the *Turnaway Study* was not to focus on the reasons why women wanted an abortion, those who participated were required to give their reasoning. This 2013 study took those women’s answers and analyzed them. The sample for this study was “954 women from 30 abortion facilities across the US,” who were questioned between 2008 and 2010 (Biggs et al., 2013, p. 1). Many of the reasons women mentioned in this study overlapped with those given during the 2004 study, falling under the general concepts of financial instability, partner-related issues, and inconvenient timing. However, some women delved into other reasons motivating their decision. Out of all the respondents, 12% had health-related reasons regarding either herself, the fetus, or both. One woman explained that the medication she had been taking for her bipolar disorder was known to cause birth defects and felt it would be considered child abuse to bring a baby into the world knowing that it may have life-altering defects. Five percent of respondents mentioned reasons that included family members. One woman was scared her family would not accept that she would be having a biracial child, while another stated that her dad wanted her to finish school before having a child (Biggs et al., 2013, pp. 7–8). The 2013 study differed from the 2004 study in the fact that the women were only given open ended questions to answer, rather than checking off possible reasons from a provided list. This emphasis on personal words helped yield answers that reflected how each woman’s reasoning is specific to her own life and situation.

It is important to note that every woman and situation is different. While these studies show a plethora of reasons why women decide to get abortions, the circumstances surrounding every single abortion are personal to the individual(s) involved. The range of reasons can include physical and mental health issues, economic needs, and/or fear of social stigma.

Potential Physical, Sociological, and Psychological Effects of Abortions

A hypothetical woman who wanted an abortion did it. She jumped through all the hoops: she was granted the fundamental right to receive one by the federal government, came to the educated and reasonable decision that she wanted one, overcame any legal barriers her state instituted on the matter, and was able to get the abortion she sought out to get. Now what? Does the life-altering procedure she just underwent truly alter her life? Or does she return to her regular weekly schedule, viewing the abortion as a minor inconvenience in her life?

The general consensus on this matter is contradicting. When speaking about physical, sociological, and psychological health, some research states that there are no effects on women who receive an abortion, while other research state that they are indeed affected. That is because “both opponents and advocates could easily prove their case by picking and choosing from a wide range of contradictory evidence” (Arthur, 1997, p. 7).

Physical Effects

After receiving an abortion, there is research concluding that women may suffer from possible physical health effects in the future. The effects that will be discussed below are increased risk of breast cancer and future reproductive health issues.

Breast Cancer

One health risk that has been linked to abortion is an increased risk to breast cancer. According to biologist and endocrinologist Joel Brind, Ph.D., as stated in an article published in *Human Life Review*:

Breast lobules, which are the lactational apparatus of the breast, remain in their immature Type 1 and 2 states unless they are stimulated by a pregnancy. The pregnancy signals the mother’s body to send estrogen (a potential carcinogen) to her breasts, and the lobules begin to multiply. This multiplication continues until the thirty-second week of pregnancy, when the milk cells are fully mature. If a woman has an abortion or delivers prematurely before the thirty-second week, cancer is more likely to develop in the immature cells. Mature milk cells are much less prone to becoming cancerous (Adamek, 2017, p. 28).

Many other health professionals agree upon this statement and have offered further medical information. One comprehensive review that looked at the link between breast cancer and induced abortion stated that “it is only after 32 weeks’ gestation that elevated levels of pregnancy hormones allow sufficient maturation of cancer-resistant breast tissue to occur” (Lanfranchi & Fagan, 2014, p. 5). After carrying a pregnancy to full-term, “only about 10 to 30 percent of a mother’s breast tissue remains susceptible to forming cancer,” and this risk decreases another 10 percent with each subsequent pregnancy (Lanfranchi & Fagan, 2014, p. 6).

Future Reproductive Health

Another physical health risk that has been linked to abortion is the risk of future reproductive health issues. Although occurring in less than 1% of cases, after an

abortion, there is a possibility that a woman can develop an upper genital tract infection. The upper genital tract involves the pelvis and fallopian tubes, which are important parts of a woman's reproductive system. Serious infections can cause major issues to these, including chronic pelvic pain and damage to the fallopian tubes. This damage can consequentially lead to future issues, such as infertility and ectopic pregnancy (Boston Women's Health Book Collective, 2011, p. 318; Lohr et al., 2014, p. 4).

Physical Health: Opposing Views

Despite these statements, there have been dissenting opinions on the idea that induced abortions and breast cancer are linked. "In February 2003, the National Cancer Institute (NCI) convened a workshop of over 100 of the world's leading experts who study pregnancy and breast cancer risk" (National Cancer Institute, 2003). The conclusion of this workshop was that having an abortion "does not increase a woman's subsequent risk of developing breast cancer" (National Cancer Institute, 2003). The NCI is a part of the National Institutes of Health under the United States Department of Health and Human Services, and states on the website homepage that it is "the nation's leader in cancer research." Due to the fact that it is an organization under the federal government, one can assume that the research they publish is trustworthy. This disagreement upon health professionals makes it hard for women to know the true risk. The scientific facts of the development of breasts points to a clear correlation between abortion and breast cancer, but the highly respected National Cancer Institute dissents from that idea. Similarly, in regard to the possible development of an upper genital tract infection, it is difficult for women to measure the possible risk. The fact that it happens in only 1% of cases is promising, but women are left unsure of whether or not they will end up falling into that small percentage until they actually undergo the abortion procedure.

Sociological Effects

Social Norms and Stigmas

Within every society, there are certain human behaviors that become normalized over time. These behaviors, also known as "social norms," can include essentially anything about a person, such as how they speak or dress, their mannerisms, or traits of their personality. A stigma can be described as "an attribute that is deeply discrediting that negatively changes the identity of an individual to a tainted, discounted one" (Kumar et al., 2009, p. 626). Stigmas are created and reproduced through a social process. In a 2001 *Annual Review of Sociology*, Link and Phelan describe this process:

In the first component, people distinguish and label human differences. In the second, dominant cultural beliefs link labelled persons to undesirable characteristics – to negative stereotypes. In the third, labelled persons are placed in distinct categories so as to accomplish some degree of separation of 'us' from 'them'. In the fourth, labelled persons experience status loss and discrimination that lead to unequal outcomes (2001, p. 367).

Throughout history, worldwide, societies have constructed and enforced stereotypical social norms on women as a whole. Some of the most widely held stereotypes are based around the fact that women bear children. Female sexuality can be seen "solely for

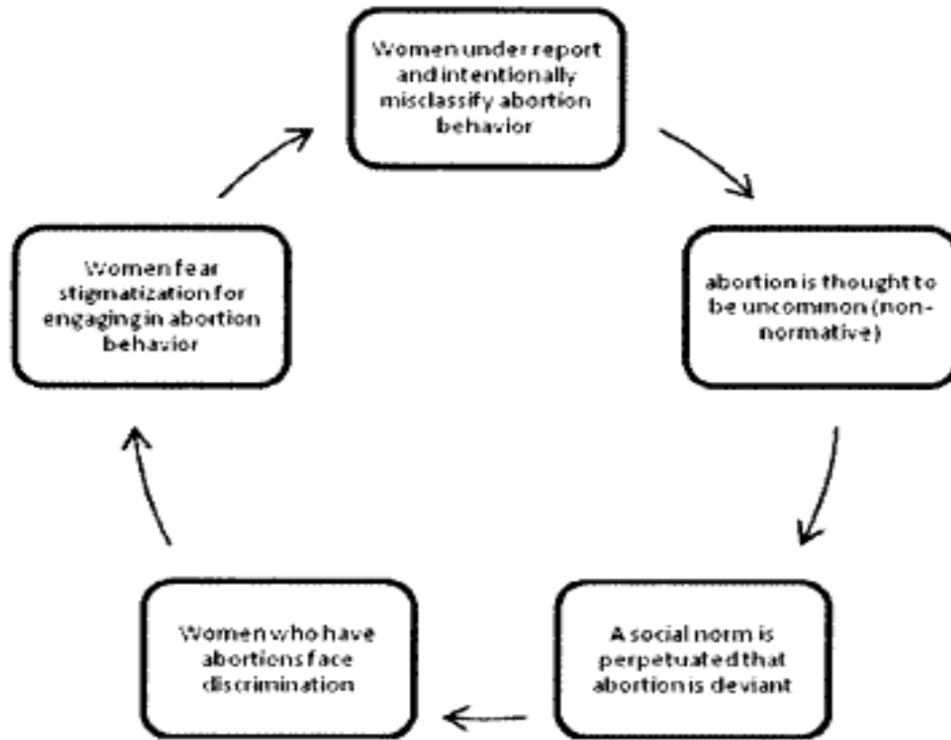
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procreation,” and becoming a mother viewed as being natural and inevitable (Kumar et al., 2009, p. 628). Due to this, societal norms may expect women to be instinctually warm, kind, caring, and nurturing. Therefore, when a woman wishes to end a pregnancy by receiving an abortion, she is challenging these “assumptions about the ‘essential nature’ of women” by using “her agency to deem a potential life unwanted and then [acting] to end that potential life” (Kumar et al., 2009, p. 628). By terminating a fetus, which would eventually develop into a baby, a woman getting an abortion deviates from the assumption that she should be naturally maternal. Instead, she may be labelled with opposite stereotypes, seen as being heartless, promiscuous, and/or selfish. Consequentially, for those who accept these social norms about women, abortion can be seen as a stigmatized act (Kumar et al., 2009, pp. 628–629).

Stigma Causes Underreporting, Which Perpetuates Further Stigma

Over the past several decades, surveys have been an essential way for researchers to gather data on topics they are studying. However, “the usefulness of surveys in studying highly personal or sensitive individual characteristics” has been questioned (Jagannathan, 2001, p. 1825). This may include topics that involve things that are typically regarded as private matters, such as mental health, income, and/or sexual behavior. Personal topics like these can easily have some type of stigma attached to them if a person deviates from any type of social norm within the matter. Survey data involving these topics may be inaccurate if people refuse to participate, even if they are affected by the topic, in fear of being a social deviant. As previously mentioned, abortion is a controversial issue in society that has been stigmatized. Therefore, women who have gotten abortions may feel a social pressure to stay silent, making “it challenging to know the true prevalence of abortion in a given community” (Kumar et al., 2009, p. 629). Studies that have specifically looked at the underreporting of abortions have stated that “only 35% to 60% of abortions are reported in surveys” (Jagannathan, 2001, p. 1825). The social construction of deviance in regard to abortion creates an ongoing cycle of silence about the topic. This cycle is demonstrated in the following chart, provided by Kumar (2009, p. 629):

Figure 2: Cycle of Stigmatization in Society



This chart shows how “silence and fear of social exclusion keeps women” from speaking openly about abortion, “thus sustaining the negative stereotype” (Kumar et al., 2009, p. 630). Underreporting of the issue makes it seem uncommon, which makes it a deviant from social norms. Those who do not behave in accordance with social norms are typically outcasted or discriminated against, making women who get abortions fear stigmatization and not report it, consequentially creating inaccurate data due to underreporting. This then brings the issue back to the beginning of the cycle (Kumar et al., 2009, pp. 629–630).

Psychological Effects

Similar to the physical health effects linked with abortion, the idea that there are mental health consequences after receiving the procedure is a topic of controversy. However, the issue with psychological compared to physical is the fact that every individual is different, and every mind works in unique ways. Physical effects are a matter of science and fact, while psychological effects rely on the unpredictability of the human brain. There is research concluding that after receiving an abortion, women may suffer from possible mental health effects. The effects that will be discussed below are “post-abortion syndrome,” anxiety/panic disorders, and depression.

Post-Abortion Syndrome

The largest source of controversy within the discussion of abortion and possible mental health effects stems from the concept of “post-abortion syndrome.” The idea behind this syndrome is that abortion can cause women “severe and long-lasting guilt, depression, rage, and social and sexual dysfunction,” and can be categorized under post-

traumatic-stress-disorder (Arthur, 1997, p. 7). However, this so-called syndrome is “not recognized in the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association” (Robinson et al., 2009, p. 269).

Anxiety/Panic Disorders and Depression

Over the years, studies have been done that concur with the idea that abortion is linked to post-abortion syndrome and further mental health problems. Research has stated that most panic disorders in adults form in the six months following a major stressful life event. Therefore, if women view the abortion they received as a traumatic life event, it “may trigger a psychological .. process that culminates in an anxiety disorder” (Coleman et al., 2009, p. 775). Aside from anxiety disorders, a 2009 study found:

Women who have aborted are at a higher risk for a variety of mental health problems including anxiety (panic attacks, panic disorder, agoraphobia, PTSD), mood (bipolar disorder, major depression with and without hierarchy), and substance abuse disorders when compared to women without a history of abortion (Coleman et al., 2009, p. 775).

When looking specifically at anxiety and depression, the study found that among women who had abortions, the risk for panic disorders increased by 111%, and the risk for depression increased by 45% (Coleman et al., 2009, p. 773).

Furthermore, in 2011, “a comprehensive review and analysis of 22 of the world’s best large studies of abortion’s impact on women’s mental health” concluded that “women who had undergone an abortion experienced an 81 percent greater risk of mental health problems” (Adamek, 2017, p. 32).

Psychological Effects: Opposing Views

Despite the studies claiming that women who get abortions are at a higher risk for mental health issues, there is also research that opposes this view.

One study examined 442 women over a two-year period to assess their mental health after receiving an abortion. Those who participated were evaluated one hour before the abortion, and then one hour, one month, and two years after. The study assessed the women for “preabortion and postabortion depression and self-esteem, postabortion emotions, decision satisfaction, perceived harm and benefit, and posttraumatic stress disorder.” The results concluded that two years after receiving their abortion, 72% of the women were satisfied with the decision they made, and 69% would make the same decision again. From pre-abortion to post-abortion, depression decreased, self-esteem increased, and some women reported feeling a sense of relief more than any negative emotions (Major et al., 2000). Further research has agreed with this, stating that “although there may be sensations of regret, sadness, or guilt,” more frequently, women “report feeling relief and happiness” following their abortion (Adler et al., 1990, p. 41). It is important to note that “feelings” do not translate into true psychological issues. For example, a woman may feel a sense of sadness following the procedure, but that does not imply she is clinically depressed.

Link Between Socio- and Psycho-

When looking at whether abortion has a psychological effect on women, it is important to note the intersectionality between sociology and psychology. As discussed above, culturally developed societal norms and stigmas influence individuals to behave and think certain ways. Therefore, the way abortion is socially accepted within a certain group may have an impact on the psychological effects a woman experiences after getting the procedure. If a woman belongs to a community where there are stereotypes put on women, and stigma surrounding abortion, she may have a poor view of herself afterwards. “Women may feel that they are selfish or immoral because they perceive themselves to be defying familial expectations, cultural norms or ideas of motherhood” (Kumar et al., 2009, p. 633). In comparison, if women are part of a community that shows support for their personal decision, they “may experience less grief and anxiety than those who were unsupported by their communities or the larger environment” (Kumar et al., 2009, p. 632). This interrelationship shows how important it is to be socially accepted within society, and how being outcasted may cause real psychological issues within human beings.

Trauma from Unwanted Pregnancy

When looking at the possible realness of “post-abortion syndrome,” it is essential to look more deeply at the root of the issue. This syndrome claims that abortion is an event so traumatic that it may lead to serious psychological effects for women. However, this poses the question: is the abortion the traumatic life event triggering psychological issues, or is it the unwanted pregnancy?

In 2008, the American Psychological Association’s Task Force on Mental Health and Abortion published a report that “concluded ‘that among women who have a single, legal, first-trimester abortion of an unplanned pregnancy ... the relative risks of mental health problems are no greater than risks among women who deliver an unplanned pregnancy’” (Kaplan, 2009). Furthermore, one study concluded that abortion patients who “had no intention to become pregnant” were significantly less depressed than women whose pregnancy was wanted and “viewed as personally meaningful by the woman” (Adler et al., 1990, p. 42). These research findings indicate the possibility that it is the unplanned/unwanted pregnancy that raises the risk of psychological issues, rather than the actual abortion.

Abortion is Not Always an Option

Making the choice to get an abortion is a huge decision. Women are forced to decide whether they want to alter their lives by going through pregnancy and bringing a child into the world, or if they want to terminate the fetus and risk the possible side effects. However, for some women, the burden of this choice is not the only difficult part about the situation. Depending on circumstances, even if a woman wants to get an abortion, the likelihood of getting one may be close to impossible. As discussed above, states have been able to pass statutes within their borders that make it difficult for a woman to get an abortion. These legislative barriers include zoning laws, mandatory counseling, waiting periods, and minor consent or notification. On top of these legal obstacles put in place by the state, there may be additional conditions that cause prevention of the procedure. Two large circumstances that may play into a woman’s decision are her geographical location and her financial situation.

Reasons Why Women May Not Be Able to Get an Abortion

Zoning Laws and Access to Abortion Providers

Zoning Laws

One large obstacle for women who wish to receive an abortion is the ability to access a provider. As discussed above, some local governments attempt to block abortion providers from residing in an area by using zoning laws, applicable under the police powers given to each state. The use of these zoning ordinances to limit providers can make it extremely difficult for women who want to get an abortion to be able to find a place to receive the procedure within a reasonable geographical range.

A couple current examples of the use of these zoning laws to limit access to abortion providers can be seen in Manassas, Virginia, and San Antonio, Texas. In 2015, both the city's made amendments to their zoning codes that consequentially affected the access to abortion providers.

In Manassas, Virginia, the amendment "[requires] medical care facilities, including abortion clinics, to obtain a special use permit that would be granted only after a period of public comment and City Council approval." This means that any new clinics trying to open in Manassas would need to obtain the permit, as well as any current clinics that want to relocate or make expanding renovations. Due to the fact that the city's council is predominantly Republican, the need for their approval may cause a possible barrier for abortion providers (Stein, 2015).

In San Antonio, Texas, a bill was passed in 2013 that required "all facilities that provide abortion services [to] meet the standards of an [ambulatory surgical center] in order to remain in operation." Then, in 2015, a zoning code amendment was passed that put restrictions on where these centers can be built. Under the new amendment, ASC's cannot be built in C-1 areas – a level of classified area for commercial use – "without permission from the Zoning Committee and the City Council, both of which will then have to vote on each individual case." Similar to the amendment made in Manassas, Virginia, these San Antonio zoning laws "effectively [target] any future abortion providers in the city (Cato, 2015).

Access to Abortion Providers

"Most abortions are provided by freestanding clinics," and "fewer than 5 percent of abortions are performed in hospitals" (Boston Women's Health Book Collective, 2011, p. 317). As of 2008, only 610 hospitals in the US perform abortions, and 87% of counties do not have an abortion provider. This means that for the women who want an abortion but do not live in that small thirteen-percent that have providers, they must travel outside of their local community to get one. Large organizations such as Planned Parenthood and The National Abortion Federation provide resources for women to help find the closest abortion providers (Boston Women's Health Book Collective, 2011, pp. 317–318).

Financial Situation and Cost of Abortion

Just like anything in life, the abortion procedure has a cost. According to Planned Parenthood, an abortion can cost anywhere between zero and almost a thousand dollars. Whether it is performed in a clinic or hospital, and is paid for by the patient, insurance,

or government funding, someone is paying for it in the end. However, the price tag of the procedure is not one-size-fits-all. The cost of an abortion varies on many factors, including where the procedure is taking place or how far along a woman's pregnancy is.

Another factor is the type of abortion a woman decides to get, as discussed above. Due to the fact that these abortions include various differences: where they take place (home vs. doctor's office), what is used (medication vs. instruments), and follow-up care, the cost of the type a woman gets may vary. Further, if a woman has to get an aspiration abortion after the failure of a medication abortion, she is forced to pay for both.

A few final factors that involve the cost of an abortion are whether or not a woman has health insurance and her overall financial situation, which will be further discussed below (Emily @ Planned Parenthood, 2014).

Cost of Abortion: Health Insurance, Income, and Funding

A large factor that plays into the cost of the procedure is whether or not the patient has health insurance. This factor is different from the rest because it does not determine the actual cost of the procedure, but rather how the procedure will be paid for. If she does have health insurance, it may cover some or all of the costs of the abortion. The patient must call her insurance provider to find out about her coverage. If she does not have health insurance, or chooses not to use it to maintain privacy, the patient must pay out of pocket (Emily @ Planned Parenthood, 2014). Depending on her income and/or financial situation, this factor may be debilitating to the woman seeking the abortion and completely prevent her ability to get one. Simply put, if you cannot pay for a service, you cannot receive a service.

One source, The National Network of Abortion Funds, provides a website where women can search their location and find different organizations that may help them with the costs of their abortion (Boston Women's Health Book Collective, 2011, p. 320). On the "About" page of their website, the NNAF states that some of their member organizations "work with clinics to help pay for [women's] abortions[s]." Other member organizations offer to help with different factors that may cost the woman, such as childcare, transportation, and/or a place to stay if they had to travel for the abortion (*About: What are Abortion Funds*, n.d.).

In some states, the government may offer financial assistance to women through "Medicaid programs [that] use state funds to provide abortion coverage." However, "twenty state Medicaid programs do not fund abortion under any circumstances." As mentioned above, the Hyde Amendment prohibits state Medicaid programs to use federal funds to help pay for abortions. This barrier contributes to a lack of funding, which in turn hurts poor women who are desperately searching for a way to pay for the procedure (Boston Women's Health Book Collective, 2011, pp. 341–342).

Furthermore, if the domestic gag rule takes effect, this will affect the range of choices for women without other health insurance. As discussed above, the Trump Administration announced in February 2019 "that it will bar organizations that provide abortion referrals from receiving federal family planning money" (Belluck, 2019). This gag rule affects places such as Planned Parenthood, which provides many reproductive health services to women who cannot afford health insurance.

Relation Between Geographical Location and Financial Situation

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Individually, the possible geographical and financial obstacles of receiving an abortion are difficult to deal with. However, for some women, the issues may intersect. Take for example a woman who is financially struggling and must travel over 30 miles to reach the nearest clinic that performs abortions. Not only must this woman travel a far distance to undergo the procedure, but she is also forced to worry about all the costs associated with it. First, there is the cost of the actual abortion. Then, there are the travel costs to get to the clinic and back home, whether it be gas money or public transportation fees. If she has children and does not want to bring them with her, there is the possible cost of childcare while absent. If her state has a mandatory waiting period, she is forced to pay these transportation and childcare fees a second time when going back to the clinic to get the procedure. If she gets a medication abortion and requires a follow-up appointment a week later, she has to pay them a third time. On top of all of this, there is the cost of her time. The time it takes for her to travel the far distance, possibly multiple times, is time she could have spent at her job making the money she desperately needs.

Physical, Sociological, and Psychological Effects on Women Denied Abortions

For women who seek an abortion but cannot receive one due to factors mentioned above, there may be certain physical, sociological, and/or psychological effects.

Physical Effects

Pregnancy

For women who are unable to get an abortion, the physical effect is obvious: pregnancy. If cannot abort the fetus inside of her, she is forced to continue the pregnancy, and carry the child inside of her until it is delivered. According to a website powered by the American Academy of Family Physicians, being pregnant comes with many physical effects. These effects include, but are not limited to, tiredness, nausea, frequent urination, lightheadedness, heartburn, and vaginal discharge and bleeding (*Changes in Your Body During Pregnancy*, 2009). Two of the largest, and most obvious, physical changes with pregnancy are belly and breast growth. As the fetus develops into a fully functioning baby, it grows, causing a woman's uterus and belly to grow in size as well. Breasts also physically change during pregnancy to allow a woman to breastfeed her child once born, as discussed earlier.

Episiotomies

In addition to pregnancy, the actual delivery of a child may bear its own physical effects on a woman's body. One of the most common of these effects is the use of an episiotomy during childbirth. "An episiotomy is a surgical enlargement of the vagina by means of an incision in the perineum, the skin and muscles between the rectum and vagina." This is done "as the baby's head is crowning," in order to "enlarge the vagina so that forceps [can] be inserted high into the pelvis, thereby assisting in the birth of the baby." Aside from the physical incision made to the body, episiotomies may lead to further physical effects, such as postpartum pain, infection at the site of the incision, problems with having intercourse, and vaginal swelling. One article published in 1995

stated that “The American College of Obstetricians and Gynecologists (ACOG) estimates that as many as 90 percent of women giving birth to their first child in a hospital will have an episiotomy.” Although this number may have changed throughout the years, this statistic shows how significant episiotomies have been within the last twenty years (Griffin, 1995).

Sociological Effects

Financial Instability

One factor that may motivate a woman to seek an abortion is her current financial situation. In a 2004 study discussed above, 73% of participants listed “can’t afford a baby now” as their reason for abortion, with sub-reasons including that the woman was unemployed, could not leave her job to care for the child, and/or could not even afford the basic necessities of life (Finer et al., 2005, p. 113). While many women identify with these reasons, not all are able to receive the abortion they want. In these cases, the intense burden of financial instability becomes a possible reality, with the newly added cost of raising a child. While there is the option of giving the child up for adoption, that is not the right choice for every woman.

One study published in 2018 looked at the socioeconomic outcomes of women who were denied wanted abortions compared to women who were able to get them. Similar to the study discussed earlier, done by BioMed Central Women’s Health, this study looked at data collected during the *Turnaway Study*. After analyzing the collected data, it was determined that women who were unable to get the abortion they sought were more likely to “experience economic hardship and insecurity lasting years” (Foster et al., 2018, p. 407). More specifically, compared to women who were able to receive a wanted abortion, women who were unable were “more likely to be in poverty for 4 years after denial,” and “less likely to be employed full time” six months after denial (Foster et al., 2018, p. 407). These results are an example of how following through with an unintended pregnancy as a result of being unable to receive an abortion can have a negative sociological impact a woman, pushing them into severe financial struggle.

Welfare Stigma

As discussed earlier, when something deviates from the widely accepted social norms and stereotypes within society, it is stigmatized, creating further stereotypes. One of the generally accepted ideas about America is that it is a land full of equal opportunity for everyone. “Most Americans believe that anyone can succeed [through] hard work, and that those at the bottom of the social heap have not tried enough to make it.” Due to this, being impoverished and receiving help from public assistance programs has become a stigmatized act. This is especially true in the case of women who face financial struggles as a result of unintended pregnancy. People who are impoverished due to a physical or mental disability are less stigmatized than those whose financial dependency on the government results from something that is perceived as a “personal failure, such as [being an] unwed mother.” These stigmas further perpetuate stereotypes on poor people and women as whole groups (Goodban, 1985, pp. 403–404).

One study aimed to further examine this social stigma, interviewing one hundred black single mothers who were getting assistance from public programs. The women were asked a variety of questions about being on welfare, such as why they were on it

and their feelings surrounding it. Many of the women “believed that they were on welfare for temporary, uncontrollable reasons having to do with their situation, rather than personal characteristics.” Out of the one hundred women, “sixty-one said they were sometimes ashamed of their welfare status” (Goodban, 1985, pp. 414–418). The results of this study exemplify the severity of stigma and stereotypes within society.

Psychological Effects

Postpartum Depression

One of the most well-known psychological effects of giving birth to a child is postpartum depression. This form of depression is experienced by women in “the postpartum period, which is increasingly viewed as up to 1 year after childbirth” (O’Hara, 2009, p. 1258). Furthermore, women who give birth to a child resulting from an unintended pregnancy have a possible higher risk of developing postpartum depression compared to women who gave birth to a child that was planned and wanted. One study in North Carolina analyzed a group of 550 women who were 12 months postpartum for the possibility of depression. This group included a mixture of women whose pregnancies were intended (64%) and women whose pregnancies were unintended (36%). The results concluded that “depression was more common among women with unintended pregnancy [12%] than women with intended pregnancy [3%]” (Mercier et al., 2013, pp. 1116–1118). Although every individual is different, the possibility of developing postpartum depression is a real consequence that may affect women who give birth to a child. These results imply that this fact may be especially true for women whose pregnancies were unwanted and/or unintended, which can include women who wanted to get an abortion but were unable to. Postpartum depression has also been linked to further psychological, such as suicidal ideation and self-harm (Coker et al., 2017).

Link Between Socio- and Psycho-

When looking at whether being unable to get an abortion has a psychological effect on women, it is important to note the intersectionality between sociology and psychology. Social norms and stereotypes within society can cause people to become outcasted if they do not act in accordance.

As discussed above, being impoverished and receiving help from government programs is stigmatized in American society. In the study that examined one hundred black single mothers on welfare, over half of the participants admitted to sometimes being ashamed of their status. This shame stemmed from the feeling that “they could not seem to succeed no matter how hard they tried, and [were] stigmatized by a society that devalues the poor.” Consequentially, this shame and guilt resulted in a handful of the participants experiencing low self-esteem (Goodban, 1985, p. 418). All of these feelings circle back to the socially normative belief in America that poor people do not work hard and accept government handouts, and that is why they are poor. Aside from guilt and low self-esteem, low socioeconomic status has also been linked as a risk factor for postpartum depression in women who gave birth (O’Hara, 2009, p. 1261).

When comparing women who receive a wanted abortion to women who do not receive a wanted abortion, it is important to note that both may suffer from physical,

sociological, and psychological effects. A summary of the effects that were discussed can be found below.

	Possible Physical Effects	Possible Sociological Effects	Possible Psychological Effects
Women Who Receive a Wanted Abortion	-Increased risk of developing breast cancer -Future reproductive health issues	-Stigmatized for deviating from the social norm that women should be maternal	Developing: -Post-Traumatic Stress Disorder (Post-Abortion Syndrome) -Anxiety/panic disorders -Depression
Women Who Do Not Receive a Wanted Abortion	-Must endure all bodily changes that come with pregnancy (belly growth, breast growth, nausea, frequent urination, etc.)	-Being financially unstable/living under poverty line -Stigmatized for being on welfare	-Postpartum Depression

Figure 3: Possible Effects of Receiving and Not Receiving a Wanted Abortion

IV. Conclusion

Abortion is an issue that has been relevant for over two hundred years. Before and during most of the 1800s, certain abortions were legal, and not uncommon. However, a woman was only allowed to seek an abortion before “quickening,” which was when she could feel the fetus moving. Before this, a fetus was not equated with a human life. Women who wished to abort their fetus were given certain drugs that would induce the process, and if those failed, a woman could visit a medical practitioner to remove the fetus.

Although abortions done before quickening were legal, they were not an entirely safe practice, and often ended in women dying. As a result, in the 1820s-40s, states began passing various laws in an attempt to control the procedure, which included outlawing the abortion inducing drugs (Connecticut, Missouri, and Illinois), the instruments used in the procedure (Missouri), or the actual procedure itself (Maine).

Within the late 1840s-50s, the American Medical Association was founded and began a crusade against abortion, headed by Dr. Horatio Storer. The Association, made up of licensed physicians, aimed to tarnish society’s view of abortion by painting it as a dangerous and immoral procedure. This anti-abortion movement gained traction, and the social shift towards the nonacceptance of abortion began to reflect in state laws. Beginning in the 1860s, states began passing legislation to criminalize the procedure of abortion and continued to do so throughout the early-to-mid-1900s.

In 1873, Congress went even deeper into the issue of women’s reproductive health and outlawed the importation and distribution of any information or drug that

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aimed to prevent conception with the passing of the Comstock Law. However, with much help from the feminist movements fighting for contraception, this was later declared unconstitutional by the Supreme Court in *Griswold v. Connecticut* in 1965 (married persons), and then *Eisenstadt v. Baird* in 1972 (single persons).

In 1973, the Supreme Court struck down all state laws criminalizing abortion with the landmark case of *Roe v. Wade*, which made the procedure federally legal. Despite seeming like a victory for reproductive health, this federal ruling only set a legislative basis for states. Within their own borders, states are responsible for the abortion statutes, and can create certain barriers making it hard for women to obtain an abortion. These barriers include zoning laws to limit the areas where abortion providers can reside, mandatory counseling and/or waiting periods for women who want an abortion, and parental consent or notification requirements for minors. These state barriers are all federally legal under the 1989 ruling of *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Some states even went as far as to implement “trigger laws” that will automatically ban abortion if *Roe v. Wade* ever gets overturned.

On top of these state-by-state barriers, there are also federal barriers that prevent women easy access to an abortion. In 1976, the Hyde Amendment was passed to prevent federal funds from being used by state Medicaid programs to help low-income people get abortions, and it is still in effect today. When President Trump took office, he re-implemented a global “gag rule” that prevents any international non-governmental organizations that perform or promote abortion services from receiving funding from the United States Agency for International Development. In 2019, the Trump Administration implemented a “gag rule” within the US, barring organizations that provide abortion referrals from receiving federal funds. However, despite the possible attempts by state and federal law to limit a woman’s ability to get an abortion, the medical procedure is still performed across the nation.

In the end, each individual's story is different. Your circumstances are different, your reasoning is different, your journey is different, and your aftermath is different. All of the research in the world cannot predict how a woman is going to be affected by either receiving an abortion or being unable to receive an abortion. The most common reasons and effects of these two situations can be summarized in the tables below.

Common Reasons Why a Woman May Want to Receive an Abortion	Reasons Why a Woman May Not Be Able to Receive a Wanted Abortion
<ul style="list-style-type: none"> • Having a baby would dramatically change her life (Further reasons: would interfere with her education and/or career; she already has other dependents in her life) • Cannot afford a baby right now (Further reasons: she is unemployed; she cannot leave her job to care for the child; she cannot even afford the basic necessities of life) • Do not want to be a single mother or having relationship problems (Further reasons: she is unsure about her current relationship; she is not in a relationship at the moment) 	<ul style="list-style-type: none"> • Zoning Laws- Local governments attempt to block abortion providers from residing in an area by using zoning laws • Personal Geographical Location- As of 2008, 87% of counties in the U.S. do not have an abortion provider, forcing many women to travel outside of their local community to receive one • Personal Financial Situation- An abortion can cost anywhere between zero and almost a thousand dollars. A few factors that affect the cost include: where the procedure is taking place, how far along the pregnancy is, what type of abortion the woman gets, and/or if the woman has health insurance • Further Barriers- Mandatory counseling, mandatory waiting periods, minor consent or notification

Figure 4: Common Reasons Why a Woman May Want to Receive an Abortion vs. Common Reasons Why a Woman May Not Be Able to Receive an Abortion

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	Possible Physical Effects	Possible Sociological Effects	Possible Psychological Effects
Women Who Receive a Wanted Abortion	-Increased risk of developing breast cancer -Future reproductive health issues	-Stigmatized for deviating from the social norm that women should be maternal	Developing: -Post-Traumatic Stress Disorder (Post-Abortion Syndrome) -Anxiety/panic disorders -Depression
Women Who Do Not Receive a Wanted Abortion	-Must endure all bodily changes that come with pregnancy (belly growth, breast growth, nausea, frequent urination, etc.) -Episiotomy	-Being financially unstable/living under poverty line -Stigmatized for being on welfare	-Postpartum Depression

Figure 3: Possible Effects of Receiving and Not Receiving a Wanted Abortion

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**Creating Terrorists:
Issues with Counterterrorism Tactics and the Entrapment Defense
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Terrorism is a phenomenon that instills a significant level of fear among the American public. The capacity for destruction is immense and it has the potential to harm the entire nation in a matter of seconds. The constant exposure to terrorist attacks and terrorist-related arrests in the media leads many to mistakenly conclude that it is a common threat. The complex and often misunderstood nature of terrorism leads law enforcement to devote the majority of their resources towards subduing such threats and subsequently claiming a victory in the war on terror. However, law enforcement strategies may actually play a role in the number of terrorists who are apprehended and thus, increase the perception of the likelihood of an attack. While few could successfully argue that the capture of a homegrown terrorist is harmful, a closer look at the characteristics of these cases reveals many concerns.

Although there is no single agreed-upon definition of terrorism, it generally refers to the use of violence against civilians in hopes of accomplishing a political objective (Hoffman, 2006). The term is often misused, and society lacks a concrete understanding that the goal of terrorism is to incite political change (Hoffman, 2006). An individual who engages in violent acts against any number of people cannot be labeled a terrorist if he or she lacks politically motivated ideology. This definition provides a very important framework when analyzing defendants in terrorism prosecutions. It calls into question whether the individuals targeted and arrested by the Federal Bureau of Investigation are legitimate terrorists. As this paper will show, it is likely that many of them are ordinary individuals with weak willpower who eventually succumbed to the coercive tactics of law enforcement. In these instances, the entrapment defense should come into play and provide protection for the innocents. Instead, the unclear language of the entrapment defense appears to provide law enforcement legal cover to engage in these questionable tactics.

Entrapment defenses are systematically unsuccessful; in every terrorism-related case that has emerged after 9/11, the defense has failed (Norris & Grol-Prokopczyk, 2016). This is due to a combination of both the content of the law of entrapment itself as well as the counterterrorism strategies of law enforcement. These fundamental issues have the capacity to diminish the integrity of the criminal justice system as it systematically incarcerates those who should be exonerated through the entrapment defense. This threatens the entire purpose of the law by promoting the use of questionable police tactics while simultaneously refusing to give legal protection to targets. Without this legal protection, the goals of the government in protecting society and civil liberties are not fulfilled. Terrorism investigations are initiated in the name of protection, but this paper argues that society is not being protected through the incarceration of an individual with neither the desire nor the means to complete a large-scale attack.

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The Rise of Undercover Operations

Historically, the federal government infiltrated radical movements such as the Ku Klux Klan, communists, anarchists, and civil rights activists in order to obtain information regarding their objectives and strategies. America's history is replete with targeting movements that were deemed a threat to the norms of society. Sting operations and the use of informants were first initiated during these time periods so that the government could educate itself on the movements that they feared. This tendency further expanded during the 1956- 1972 FBI COINTELPRO program (Norris, 2016). This was fueled by intense paranoia and the fear of those who were dedicated to fighting segregation and structural racism. The program became known for violating civil liberties through the use of heavy surveillance to eradicate movements that the government deemed undesirable. This was considered appropriate, because agents viewed the interest of stopping "dangerous" criminals as more important than upholding individual rights guaranteed by the constitution. In many cases, government agents became "agent provocateurs;" they encouraged action in order to obtain convictions (Norris, 2016). This refers to the process of an officer approaching a target, coaxing them to commit a crime, and then arresting them shortly after. Despite the intensive operations taking place, very few entrapment cases emerged during this time period. Once the public was informed about the intrusive nature of the strategies, the program abruptly came to an end (Norris, 2016).

As expected, the methods and goals of the government regarding terrorism prevention were entirely altered after the devastating attacks on September 11, 2001. The FBI was heavily criticized for failing to prevent this attack; it brought many weaknesses of national security into light. Faced with such a disturbing event, President Bush promised that "never again" would such an attack occur. Thus, the War on Terror began, with law enforcement strategies towards terrorism dramatically shifting as it became the nation's top priority. Far more funding and technology were devoted towards terrorism investigations (Federal Bureau of Investigation, 2016). The response was an aggressive, preventative policing technique that relied heavily on informants, surveillance, and sting operations. As a direct consequence of 9/11, terrorism investigations doubled between 2001 and 2003 and terrorism convictions quadrupled (Laguardia, 2013). In every single state, the FBI is currently investigating potential homegrown terrorists (Federal Bureau of Investigation, 2016). A former FBI agent, Michael German, highlights the many changes in police tactics:

prior to September 11, 2011, if an agent had suggested opening a terrorism case against someone who was not a member of a terrorist group, who had not attempted to acquire weapons, and who didn't have the means to obtain them, he would have been gently encouraged to look for a more serious threat. An agent who suggested giving such a person a stinger missile or a car full of military-grade explosives would have been sent to counseling. Yet... such techniques are now becoming commonplace (Norris & Grol-Prokopczyk, 2016, p. 609).

Strategies that were never previously considered are now heavily relied upon. The last few decades have been characterized by untrustworthy informants, undercover operations, wiretappings, warrantless surveillance, and coercive tactics (Kamali, 2017).

Unfortunately, these questionable methods have only expanded over the last seventeen years, bringing many new issues into light.

Issues with Counterterrorism Strategies

Characteristics of Targets

In order to understand the issues that accompany counterterrorism strategies, it is important to carefully analyze how individuals are targeted in the first place. When looking at the individuals who are initially flagged for investigation, it is apparent that most are Muslim-Americans (Norris, 2016). These individuals are easily identified due to the high levels of warrantless surveillance taking place in Muslim communities (Kamali, 2017). Racial profiling is seemingly common due to systematic negative views of Muslims and the subsequent fear that arises from this profile. Federal agents initially target individuals based on religion and ethnicity as if it is a strong indicator of wrongful activity (Aaronson, 2011). These tactics operate on the assumption that only Muslims contemplate committing terrorist acts against the United States (Aziz, 2011). This tendency developed after the 9/11 attacks and have only increased since then, highlighting a disturbing trend (Norris, 2016). Perhaps the most recent example of this fear of foreigners is the immigration ban proposed by President Donald Trump. It reveals the innate fear of a terrorist attack and reflects the reasoning behind why millions of citizens of Muslim communities are being denied entry into the United States (Mosher & Gould, 2017).

In addition, the defendant profile overwhelmingly consists of mentally ill, lonely young men who lead unaccomplished lives (Norris & Grol-Prokopczyk, 2016). These individuals are easy targets because they are generally weak-minded and therefore easily persuaded. Due to these characteristics, it is presumed that they are highly susceptible and unable to fully understand the repercussions of their participation in a terror plot. The goal of many terrorism investigations is to identify an individual with some level of sympathy towards the terrorist cause (Norris & Grol-Prokopczyk, 2016). Therefore, the question is not whether the individuals are capable of committing a successful large-scale attack on their own, but whether they can be induced to do so. This becomes a problem because individuals coinciding with this profile are far more likely to fall victim to the coercive tactics of law enforcement.

In fact, one study identifies 20 cases of “loner suspect terrorists on a quest to locate friends,” and states that 13 of these “terror plots” might more appropriately be called “FBI plots” (Bejesky, 2015, p. 446). This suggests that targets might simply be lonely; the informant plays on this desire to have friends, gains their trust, and then convinces them to commit a crime. The case of Eric McDavid is a particularly devastating case that reflects this idea. Throughout the duration of the FBI’s operation on McDavid, he had little motivation to carry out any attack (Norris, 2016). The FBI preyed upon his need for companions by using a female informant to force radical environmental ideology on him by promising a sexual relationship. The promise of intimacy is commonly used and is referred to as the “honeypot” strategy (Norris, 2016). When McDavid asserted that he no longer wanted to be a part of the informant’s plan, the informant became angry and tried to manipulate him further. Though he maintained that he did not want to participate, he was still arrested because he had already purchased bomb ingredients under the informant’s direction. Though his

criminal intent was very questionable and indicated that the only reason he continued was due to the romantic relationship, he was still sentenced to 19 years in prison. In 2015, however, he was released, after evidence that should have been disclosed to the defense attorney was discovered. McDavid, fitting the common profile of a young man seeking companionship, had still served nine years of his life in prison for a crime that he had no desire to commit. He was erroneously convicted as a terrorist because his actions lacked political motivation.

Questionable Tactics

Once the target has been identified, the government begins utilizing an array of strategies to aid in their investigation. In the commonly used sting operation, the government creates the criminal opportunity in order to identify and arrest those desiring to engage in crime (Field, 2017). The goal is to offer the individual rewards, hoping that he or she will agree to the criminal proposition. Many civil rights activists, including the American Civil Liberties Union (ACLU), disagree with the use of sting operations due to the concerns they raise (Field, 2017). The use of sting operations leads many to question why the government should use their power to guide someone towards crime instead of away from it. However, in *Sorrells*, the Supreme Court gave law enforcement permission to engage in sting operations because they are intended to solely provide the opportunity to individuals already motivated to commit the acts on their own (Peters et al., 2013). Even still, proactive tactics may create severe issues because it tends to “test the virtue of citizens rather than aid in the detection and prosecution of crime” (Hughes, 2004, p.55). The idea is to stop a crime before it occurs, although it is nearly impossible in terrorism cases to determine if the crime would have occurred had the government not initiated an investigation. While sting operations and undercover setups may be an efficient way to satisfy the goal of identifying hard-to-reach criminals, they also run the risk of “ensnar[ing] almost anyone if taken far enough” (Stevenson, 2005, p. 9).

Another questionable tactic is the use of informants. As law enforcement strategies became more “aggressive, proactive, and preventative,” the number of informants began to increase (Norris & Grol-Prokopczyk, 2016, p. 617). One study found that 580 cases have been prosecuted for terrorism since 9/11, with 317 of these cases involving the use of an informant (Norris & Grol-Prokopczyk, 2016). In another study of 508 terrorism cases, 243 used informants (Aaronson, 2011). As demonstrated in these studies and others, the majority of terrorism investigations typically involve an informant. The FBI now boasts a list of over 15,000 informants to aid in their investigations (Aaronson, 2011). Individuals are often coaxed into committing a terrorist act with the informant, who provides the idea as well as the means. The individual is simply following along with the plot, and they often lack a concrete understanding of the nature of their actions. It becomes an even greater issue when considering that many informants have discretion regarding what interactions to record (Field, 2017). There are subsequently many interviews that go unrecorded; the nature of these conversations and their potentially exculpatory contents will never be known to the court.

There are many legal issues connected to the use of informants; the Supreme Court generally has a negative view towards their use (Aaronson, 2011). Many informants have criminal records, lie during trial, fail to record integral conversations, and are motivated financially. It is therefore reasonable to conclude that they have a

“vested interest” in the investigation and they would benefit if a person succumbed to the proposition of a terrorist plot (Field, 2017). Informants are generally either compensated for their time or working to remove a criminal charge; again, their underlying motives may impact behavior (Norris & Grol-Prokopczyk, 2016). Informants are offered large sums of money for their participation, thus encouraging them to provide evidence of terrorism, no matter how weak it may be (Norris, 2016). In some cases, informants were even obtained through blackmail; agents would threaten to deport undocumented individuals or tell wives that they were being cheated on if they didn’t agree to become an informant (Aaronson, 2011). This interest in the outcome of an investigation may lead informants to take extreme measures in order to satisfy the government’s goals. Physical violence is not an exception. In one case, the informant threatened to slit a young man’s throat if he decided to back out of the plot (Norris & Grol-Prokopczyk, 2016). Agents and informants may also use an array of other tactics as a method of inducement. This includes constantly pressuring the suspect, offering jobs, providing large sums of money, supplying them with alcohol or drugs, threatening death or bodily harm, and urging suicide (Norris & Grol-Prokopczyk, 2016). Each of these factors may ultimately drive the suspect to agree to the proposed terror plot. While the promise of financial gain is not enough to drive most people to commit terrorism, the targets are not representative of the population. They are targeted for their vulnerability and are thus highly susceptible to promises of resources. It is easy to imagine that “most, if not all, individuals have a ‘price’ at which they would commit most crimes” (Carlson, 2007, p.1103).

James Cromitie is one of the best-known cases highlighting the many issues involving the use of informants. He met Hussein in church one day, who became a brotherly figure to him. Unbeknownst to Cromitie, Hussein was an informant for the FBI. Although Hussein told the FBI that Cromitie had an elaborate and violent terrorist plan, the court could not find any active involvement in the plot. Hussein later coaxed him into agreeing to bomb synagogues when he played on Cromitie’s intense hatred of Jews (Aaronson, 2011). He did not take any action alone and no incriminating evidence was discovered aside from the testimony of the informant. Throughout each stage of the process, Cromitie made several mistakes, highlighting his incapability. He could not activate the bomb, forgot codewords, and forgot to set the timer on the bomb. Even in the very beginning, he made it clear that he did not want to harm; he only agreed to plans that would kill the lowest number of people (Laguardia, 2013).

It seemed that Cromitie participated solely to please Hussein, who was giving him much-desired friendship as well as money. Hussein promised him a quarter of a million dollars if he proceeded with the plot, even though the FBI was reportedly unaware that such a deal was offered. Cromitie was still convicted, despite Judge McMahon stating that she “believe[d] beyond a shadow of doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition” (Norris & Grol-Prokopczyk, 2016, p. 612). The issues regarding the informant were also acknowledged. Hussein was paid \$100,000, hours of time were dedicated to this investigation, and the costs of prosecution were staggering. The informant became a joke at trial: he lied in court several times, had his own criminal record, and discriminately videotaped interactions with the defendant. Like many others, this case is characterized by an incapable defendant and visibly dishonest informant.

A Difficult Task for the FBI

There is an intense pressure to find and capture terrorists in our post 9/11 society, making the search for terrorism a top priority despite the difficulty that accompanies the search. With little other options, the use of sting operations and informants appears to be an honest effort to keep the public safe. From the perspective of the FBI, it is nearly impossible to identify a terrorist before an attack happens (Federal Bureau of Investigation, 2016). Dark networks are hard to identify and are very unpredictable; the nature of terrorism makes it particularly problematic to detect. Proactive law enforcement strategies are therefore considered necessary to discover and prevent certain crimes due to their “invisibility” (Hughes, 2004, p. 45). Law enforcement must then rely on hunches because that is the only information available; they may have reason to believe that someone may engage in crime and then attempt to confirm their suspicions (Hughes, 2004). Further, there are guidelines set forth in the United States Attorney General’s *Guidelines on Federal Bureau of Investigation Undercover Operations* in order to promote good conduct. This does act as a restraint on unlawful behavior and when used in addition to statutory requirements, increases the likelihood that civil liberties will be preserved (Stevenson, 2008).

Additionally, many of the tactics even resemble actual terrorist recruiters. Current law enforcement strategies do try to “imitate the recruitment process” (Laguardia, 2013, p. 187). This may indicate that law enforcement is catching those who may have fallen victim to terrorist recruiters’ promises in the future (Field, 2017). Looking at the actions taken by many defendants, it also becomes clear that they may have been slowly headed towards the path of criminality on their own. Some purchased weapons from undercover officers or bought materials on their own accord (Field, 2017). Some even made very clear statements in support of terrorist ideology and their desire to win fame in Al Queda. Many posted violent thoughts and encouraged violence against the United States in online forums. The FBI cites social media as an effective strategy for identifying potential terrorists precisely for this reason (Federal Bureau of Investigation, 2016). While social media accounts are being monitored, the target will often make pro-terrorist comments. Perhaps even more worrisome is that even when informants seemingly gave the target multiple opportunities to withdraw, some still refused to walk away from the plan (Field, 2017). Courts would receive severe backlash if they were to exonerate a defendant who later committed an act of terrorism.

Consequences of these Strategies

Even despite the difficult task that the FBI is faced with regarding terrorism, the current use of counterterrorism strategies is inherently harmful. Returning to the definition of terrorism, a true terrorist is not motivated by financial gain, but by terrorist ideology and radical beliefs. Trevor Aaronson (as cited in Field, 2017) exemplifies the harmful repercussions of counterterrorism tactics by boldly stating that:

the FBI currently spends \$3 billion annually to hunt an enemy that is largely of its own creation... today’s terrorists in the United States are nothing more than FBI creations, impressionable men living on the edges of society who become bomb-triggering would-be killers only because of the actions of FBI informants.

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In other words, without government intervention, it is extremely unlikely that these defendants would have ever committed a terrorist act on their own. This issue has also gained support from the ACLU, who agree that most defendants did not take any steps towards becoming a terrorist before contacted by an informant (Field, 2017).

It is helpful to take the utilitarian perspective and calculate costs and benefits of such strategies. Counterterrorism tactics, especially the use of informants, are significantly costly and dominate the majority of the FBI's budget (Miceli, 2007). It incarcerates individuals who are not actually dangerous while simultaneously wasting resources; large sums of time and money are devoted to such operations and prosecutions. In addition to the strategies themselves, terrorism prosecutions are costly for taxpayers because offenders receive long prison sentences. It is also expensive in terms of sending an innocent person to prison; there is no way to calculate the degree to which entrapment affects the lives of the vulnerable individuals who are targeted and later convicted. These tactics may also unnecessarily increase the crime rate and public perceptions of the prevalence of terrorism (Miceli, 2007). There is publicity involved because once the person completed enough steps under the direction of the government, they are arrested and then the media quickly explains how the FBI prevented an attack (Aaronson, 2011). However, there is an increasing number of articles that criticize these arrests and argue that the FBI is not doing their job, despite the arrests being made.

The fact that law enforcement fixates on the stereotypical profile of a Muslim terrorist takes away resources and focuses on the wrong people (Aziz, 2011). An issue arises when the FBI then fails to detect right-wing terrorist plots in a shocking number of cases because they are not deemed as threats (Norris, 2016). Even though the country has been harmed more by radical conservatives, the FBI still prefers to focus on the Muslim community. This focus blinds law enforcement from detecting legitimate terrorist plots that create actual harm to the United States (Aziz, 2011). This is the reason why despite all the money, time, and infringement on rights that is devoted to terrorism, the FBI still failed in preventing actual attacks that killed hundreds of individuals (Aziz, 2011). Right-wing extremists are responsible for more deaths in the United States than Muslims, yet they consistently remain ignored by the government until it is too late (Aziz, 2011).

However, because they are deemed effective, the use of law enforcement stings and informants are increasingly prevalent. This increase should be accompanied by an increase in protections against the convictions of otherwise innocent defendants. This has not occurred, calling the integrity of the system into question. A police officer should not use his power to push one toward crime, but to guide one out of crime (Laguardia, 2013). Judge Marston supports this point by stating that officers should attempt to improve the "would be criminal" as opposed to "aiding in his further debasement" (Laguardia, 2013, p.184). Yet, the favorable outcomes for the government at trial send the message to police that it is okay to use unreliable informants and pressure suspects (Laguardia, 2013). Regarding terrorism, the government is encouraging rather than preventing.

Success of Strategies: Is America safer?

After examining the issues that accompany counterterrorism strategies, it is important to establish whether the public safety claim is valid by determining whether

these strategies actually reduce the threat of terrorism. Strategies employed by law enforcement must be evaluated to determine if they are fulfilling the original goal of their programs. One study demonstrated that only 9% of the 580 terrorism cases presented an actual threat (Norris & Grol-Prokopczyk, 2016). In other words, only 9% of convictions may have actually prevented a terrorist attack. Another study claims that only 1% of terrorism prosecutions were a product of a true threat (Aaronson, 2011). In 2007, the Justice Department indicated that they had saved many lives by intervening in potential terror plots; they victoriously claimed that there were 261 terrorism cases prosecuted 2001-2006 and thus saved many lives a result (Bejesky, 2015). However, there is a growing amount of evidence that refutes their bold claims of success. During those 5 years, there were only 2 legitimate cases of terrorism that harmed citizens; though there were 261 prosecutions, only 2 attacks caused damage (Bejesky, 2015).

Another study concluded that since 9/11, there were 11 cases of "potentially significant" terrorist threats and only 3 of them succeeded (Downs & Manley, 2014, p. 14). These 3 attacks resulted in 17 deaths and a couple hundred injuries in total. While still devastating, terrorist attacks are much less likely than the FBI and the media leads citizens to believe. Faced with these statistics, it seems that the money devoted to these operations is not justified. An interesting finding to add is that the terrorist crimes that defendants are charged with typically do not involve any violence. Only 6% of jihadists had a violent offense before the arrest for terrorism (Norris, 2016). In fact, the most common charge is providing material support to a terrorist group, which accounts for 192 out of 508 cases (Aaronson, 2011). It is important to note that the most common charge does not result in any form of violence. The least common were bombings (6), attacks on public transport (4), and hostage taking (2) (Aaronson, 2011). Those last three crimes are typically deemed to be stereotypical terrorist crimes, although the statistics show the opposite is true.

In reality, these strategies may actually decrease public safety by focusing on the wrong individuals. The FBI has consistently failed to follow other leads that could have prevented danger. Warnings often ignored as agents focus more on sting operations. This would indicate that the nation is not safer, but perhaps more in danger. For example, the FBI had been monitoring Timothy McVeigh, the terrorist responsible for the Oklahoma City Bombing for a while before he committed the attack. Unfortunately, however, the attack was not prevented, despite surveillance taking place (Kamali, 2017). Even U.S. Senators even expressed concern with the Department of Justice's claim that many terrorism plans were thwarted by stating: "we have not yet seen any evidence showing that the NSA's dragnet collection of Americans' phone records has produced any uniquely valuable intelligence" (Bejesky, 2015, p. 397). This does not support the public safety claim, because despite the intrusive measures, law enforcement is seemingly unable to pursue substantial threats.

The threat of Jihadist terrorism is vastly overstated; locking these offenders in prison doesn't increase the nation's security (Downs & Manley, 2014). The government spends billions of dollars on attempting to prevent terrorism from killing an average of six people a year (Mosher & Gould, 2017). When examining the causes of death in the United States, one's chance of death by terrorism is remarkably small compared to others. Ironically, one is nearly six times more likely to die by the police than a terrorist attack (Mosher & Gould, 2017). Of course, this is just based on probability alone and does not take demographics into consideration, but the results put the danger into

perspective. Because the FBI doesn't release a report detailing the success and failures of their counterterrorism initiatives, we do not really have a way of evaluating success of their efforts (Mosher & Gould, 2017). The findings discussed in this section just make easier to determine whether the public safety claim is valid. Most empirical evidence suggests that it is not.

Advocates of current strategies assert that a large-scale attack on U.S. soil has not occurred since 9/11 (Aaronson, 2011). But the question is whether this is due to the strategies of law enforcement, or the fact that terrorism is statistically very rare. It is unknown if these defendants would have ever committed the crime on their own, but research suggests that it is very unlikely (Aaronson, 2011). Currently, there is little evidence that the nation is any safer with these intrusive, preventative strategies in place (Kamali, 2017). This reflects the underlying issue behind many counterterrorism strategies: although the government provokes criminal behavior, it will then punish defendants without affording them an appropriate level of legal protection. Given that research indicates that Americans are not "safer" as a result of these strategies, it increases the need for protection of innocent defendants.

The Entrapment Defense

Perhaps the most well-known attempt to provide defendants with this much-needed legal protection is the entrapment defense. The defense is a fairly new concept of criminal law, as it originated in the 20th century (Stevenson, 2005). Entrapment is an affirmative defense, meaning that the defendant must first provide some evidence that they were entrapped before allowing prosecution to refute the claim (Stevenson, 2005). Two landmark cases, *Sorrells v. United States*, 287 U.S. 435 (1932) and *Sherman v. United States*, 356 U.S. 369 (1958), signified the recognition of the entrapment as a defense of excuse. The cases offered a framework detailing two tests, the objective and subjective, to aid courts in determining whether the defendant should be exonerated by reason of entrapment. In many scholarly analyses of the court opinions, a common language trend emerges. Scholars have generally used words such as "lure," "induce," "irresistible," and "tempt" when describing their interpretation of entrapment (Hughes, 2004, p. 49). This reflects the current societal understanding of the defense as well.

The test used varies depending on the jurisdiction, and some even utilize a combination of the two (Stevenson, 2008). In the subjective test, the focus is on whether the defendant was predisposed to committing the crime and therefore had criminal intent (Hughes, 2004). The defendant must assert by preponderance of evidence that the government induced him to commit the crime (Dillof, 2004). If this is established, the government must then prove beyond a reasonable doubt that the defendant was predisposed (Dillof, 2004). This second part is much more difficult for the defendant because juries are far more likely to determine that the defendant was in fact "ready and willing" to commit the crime (Dillof, 2004, p. 833). The objective test instead focuses on whether government's conduct was a complete violation of due process because their tactics were so outrageous that it shocks the conscience (Norris, 2016). It does not consider the characteristics of the defendant but rather how the tactics might hypothetically alter the decisions of an ordinary person (Dillof, 2004).

Thus, the two competing views on entrapment are the subjective defendant characteristics versus objective police tactics. Though the language of these tests differs,

many argue that they are actually mirror images of each other and provide the same outcome regardless (Stevenson, 2008; Dillof, 2004). The number of entrapment cases that each jurisdiction handles is unrelated to the test used and is instead determined by police tactics (Stevenson, 2005). In virtually all jurisdictions, however, it is increasingly difficult to successfully argue entrapment. This is attributed to the “weak procedural posture that decreases likelihood of success” (Stevenson, 2005, p. 36). Because the doctrine is so vague, and each court is left to decipher it on their own without clear guidance from the Supreme Court, lawyers are hesitant to argue entrapment at all.

There are cases where the entrapment defense succeeds, but these exclusively involve lower-level crimes without any relation to terrorism. For example, in *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc), the entrapment defense was successful because the majority argued that the defendants were “foolish” with “no prayer of becoming money launderers without the government's aid” (Preis, 1999, p. 1870). The majority further explained that the defendants did not have any means to commit the crime themselves, so they were “harmless” (Preis, 1999, p. 1870). Because the defendants lacked the ability to commit a crime on their own, they did not rise to the level of culpability necessary for a conviction. Unfortunately, this reasoning is not applied to terrorism prosecutions. Terrorism is different than most other crimes, but it should not severely diminish one’s legal protections. The rule should be different due to the grave nature of the crime and the high stakes involved (Stevenson, 2008), but there is also much more liberty at stake in these cases.

Failure to Protect Defendants

While the entrapment defense is the solution offered by the Supreme Court to protect innocent defendants from intense police tactics, it systematically fails to provide any level of legal protection in terrorism prosecutions. Not a single defense counsel has successfully argued the entrapment defense in a terrorism prosecution (Norris & Grol-Prokopczyk, 2016). Entrapment cases fail because it is difficult to prove beyond a reasonable doubt that the defendant was not predisposed, and the government went beyond merely providing the opportunity (Norris, 2016). It seems that in terrorism prosecutions, “laughably incompetent criminals of little motivation and few philosophical opinions appear upon arrest as scheming ideological masterminds requiring immediate intervention, only to have those appearances dissipate over the months and years of prosecution that follow” (Laguardia, 2013, p. 175). Despite this occurrence, defendants are still found guilty, because they agree to a proposal that most would not (Field, 2017).

Even though the success of entrapment claims is nonexistent, research has demonstrated that many of the cases actually met the criteria for entrapment and should have been successful. Norris and Grol-Prokopczyk (2016) develop a series of indicators of entrapment and apply them to the terrorism cases that have arisen after 9/11. These indicators include: no prior terrorism offense, whether the government suggested the crime, the degree of informant pressure, if material incentives were present, the defendant’s reluctance, the level of government control over the events, whether the government furnished the means, and informant motivation. Each case was then scored based on the number of entrapment indicators; higher numbers reflect a greater likelihood that the offender was entrapped. The average number of indicators

across all terrorism cases is 5.3 (Norris & Grol-Prokopczyk, 2016). Even more disturbing is that 37% of the cases had over 7 indicators (Norris & Grol-Prokopczyk, 2016). One case even had 15 out of 20 indicators, yet the defense still failed (Norris & Grol-Prokopczyk, 2016). This may not be entirely accurate and individual facts of the case must be considered as well, but it gives some indication of the prevalence of entrapment. These indicators provide some evidence that these cases did not necessarily provide a significant threat. Given these circumstances, it seems impossible to imagine a case in which a defendant could succeed in arguing entrapment in a terrorist case; even the most promising cases inevitably fail (Laguardia, 2013).

The defendant's actual ability. There are many reasons why the defense fails in terrorism prosecutions. First, there is no consideration regarding whether the defendant posed a legitimate threat. In these cases, the actual threat deserves legal consideration; although it may not be enough for acquittal, it certainly may lessen their culpability (Laguardia, 2013). The question is whether the "inability to independently" engage in criminal activity should constitute a viable legal defense (Preis, 1999, p. 1871). Although I argue that it should, whether the individual could ever have succeeded as a criminal on his own accord is legally irrelevant. This is ironic because government is supposed to punish only those with a guilty mind who pose a legitimate threat to society (Preis, 1999). The government cannot criminalize thoughts alone; the *actus reus* must be present. Otherwise, everyone would face criminal charges by construing a crime only in their head with no intention of carrying it out. The fact that the doctrine does not mention the question of capability suggests that it is acceptable to punish moral character as opposed to actual actions (Carlon, 2007). This does not coincide with any theory of punishment because such individuals do not need to be deterred, incapacitated, or rehabilitated since they are not actual criminals that will harm society (Carlon, 2007).

Without making ability a requirement, law enforcement may create crimes at their will by coercing criminality (Preis, 1999, p. 1893). If ability was a legally relevant factor, it would still satisfy the purpose of entrapment doctrine and the goals of the government. However, the law recognizes that even incomplete attempt crimes are still culpable. In considering this, the impossibility doctrine is of use because it measures culpability of the defendant when the crime was impossible (Preis, 1999). Current entrapment defenses surrounding terrorism may closely resemble the concept of inherent impossibility: the defendant wanted to commit a crime but their method of achieving that objective would be questioned by most. This includes the example of someone trying to kill by using a voodoo doll (Preis, 1999). While they had intent, they were unable to calculate the appropriate level of action necessary to commit the act. It further assumes that if the person had the level of *mens rea* punishable by law, they would have taken steps towards a crime that made sense rather than using grossly miscalculated judgement. It would be unreasonable to assume that the person was actually dangerous because it is "so inherently unlikely to result in the harm intended" (Preis, 1999, p. 1899). In many of these terrorism cases, the defendants did not have the ability to commit the crime. Of course, this would still be a difficult hurdle to overcome in court, because the defendant's acts must be unreasonable and also absurd (Preis, 1999). If ability were considered, it would allow the most ludicrous defendants an opportunity for exoneration without compromising public safety. The failure to consider ability is an inherent flaw of the entrapment defense.

Cases such as the Cleveland Five demonstrate how actual ability is not given any legal consideration. This group consisted of five young, unemployed, and semi-homeless men, three with mental issues. They initially expressed a desire to take down bank signs to protest corporations (Norris, 2016). An FBI informant with a long criminal history consisting of fraud and bribery befriended them and convinced them to create a plan to blow up a bridge. This idea was created by the informant alone, and the men initially did not agree. Only after supplying them with alcohol, drugs, money, and jobs, did the informant succeed in persuading them to partake in the terrorist plot (Norris, 2016). These individuals were radicalized slightly, but there is no indication that they could have done this on their own. They did not have any desire to cause harm, and they most likely would not have been successful at committing the act anyways. They were all convicted and sentenced; the entrapment claim, of course, failed (Norris, 2016). Had ability been taken into account, the results may have been different.

Misunderstanding predisposition. In addition, there is a distorted view of the concept of predisposition which results in unequal application of the entrapment defense. Courts are provided with very little guidance and are left to their own interpretations. This confusion is illustrated through the statement: “if we ask, ‘why did he do it?’ the answer is, ‘because he was predisposed to do it,’ and if we ask, ‘why was he predisposed to do it?’ the answer is, ‘because he did it.’” (Norris & Grol-Prokopczyk, 2016, p. 626). The circular reasoning reflects how difficult it is to handle the question of predisposition. Nevertheless, on the surface level, predisposition is generally considered “preexisting criminal intent” (Hughes, 2004, p. 47). The law is designed only to punish those with a guilty mind in addition to a criminal act (Hughes, 2004). Yet current interpretation of predisposition considers other factors, making it far more than a question of the defendant’s state of mind. Predisposition is determined by considering extralegal factors including: the defendant character, past criminal history, who proposed the initial activity, whether profit was a factor, initial reluctance, and the nature of government techniques (Norris, 2016). This becomes a problem because a criminal record, for example, is not necessarily a predicate of predisposition. The goal is to separate unwary innocents from unwary criminals, yet this is determined without considering blameworthiness. Instead, the focus is on criminal background and past actions, which is not an indicator of one’s present criminal intent.

All terrorism defendants who have brought their entrapment cases to trial have been considered predisposed. However, the fact that most did not have any evidence of violent behavior calls their predisposition into question. A very severe issue is that mental weakness cannot be considered an indicator of predisposition (Laguardia, 2013). Yet even still, both mental and physical capabilities of the defendant are considered to determine positional predisposition, which refers to whether the defendant was initially in the position to engage in the criminal act on his own (Preis, 1999). Both the mental component and positional component are examined to determine criminal propensity (Dillof, 2004). The mental state refers to whether the defendant is ready and willing, while the positional component hypothesizes if the offender was likely in a position to commit the crime on their own (Dillof, 2004). Typically, both parts of predisposition are established in terrorism prosecutions. The issue is that courts and juries are not only confused, but they also allow the admittance of later actions of the defendant to determine predisposition as long as it is independent from government conduct. The

concept of predisposition is one of the many reasons why the entrapment defense fails defendants.

Jury usage is inappropriate. Most juries are unable to look past the catastrophic consequences that would have occurred had the defendant succeeded (Laguardia, 2013). They cannot grasp the fact that the defendants are incapable of such violence when they are faced with evidence of them committing acts supposedly in furtherance of terrorist ideologies (Laguardia, 2013). Judges also don't instruct juries to contemplate whether the defendants had the actual capacity to commit the crime (Laguardia, 2013). Their decisions to indict are indeed understandable. They are given instructions to either convict or acquit, without substantive judicial oversight (Laguardia, 2013). With a goal of prevention, the jury's decisions reflect our innate desire to punish terrorists harshly. The defendant's actual capacity for harm is irrelevant to jurors' analyses because they are blinded by the severe nature of terrorism. It is difficult to concoct an image of a more dangerous offender than one who is willing to harm large amounts of people.

Given these circumstances, the question of entrapment is not an appropriate task for the jury to consider. Instead, it should be a task for judges who are more familiar with the issues with law enforcement strategies. It is a difficult task for jurors to accept the defendant wrongdoing and claim not guilty due to entrapment (Peters et al., 2013). One study demonstrated that in sex offender sting operations, potential jurors are more likely to decrease guilt ratings when it was the undercover officer that initiated criminal activity (Peters et al., 2013). This outcome was correlated with the juror's due process or crime control orientation; agent solicitation decreased the perception of guilt when the juror had a due process view (Peters et al., 2013). A similar study has not been conducted in regards to terrorism. But given the current research, it is likely that agent solicitation would not decrease guilt in the eyes of the juror when faced with one charged with terrorism. Entrapment is a defense of excuse; defendants acknowledge that they committed the crime but claim that they aren't culpable (Peters et al., 2013). This question of intent is difficult for juries to grasp and even though studies suggest that they should grant the entrapment defense, juries still return a guilty verdict.

Level of dangerousness. With roots very early in American history, preemptive prosecution condones punishment due to perceived levels of dangerousness. While the law is supposed to protect innocents, it is also used to subdue ideas that the government views as potentially harmful. The current terrorism prosecutions reflect this idea as it concerns defendant's future acts and "potential for violence" (Downs & Manley, 2014, p. 5). Few could successfully argue that incarceration due to perceived dangerousness potential would be constitutional in the absence of a crime, but it is readily accepted in terrorism cases. Perhaps it is because the defendants still agreed to commit the act, and there is always the possibility that they could have succeeded on their own. It is impossible to be entirely certain that law enforcement prevented violence. But under the same rationale, it would be acceptable to punish anyone simply because there is a chance that they could harm another. This is punishing for dangerousness rather than an actual act. This refers to an important facet of law: "punishment for a crime can only proceed upon a finding of culpability, not merely a finding of dangerousness" (Preis, 1999, p. 1902). This conflicts with the entire process of the entrapment defense because it is essentially punishing solely based on one's perceived danger to the community.

Consequences of a failed defense. The entrapment defense intended to be a check on questionable police tactics, but it fails and instead protects these tactics. Because law enforcement is aware that their strategies will almost never result in a successful entrapment defense, they are more likely to use questionable tactics to serve their goals. The only risk is not public safety, but rather innocents who lack legal protection. This decreases the respect for the law and further harms the reputation of law enforcement (Dillof, 2004). Further, each purpose of punishment- retribution, deterrence, incapacitation, and rehabilitation- is threatened when entrapment defenses fail to protect defendants (Laguardia, 2013, p. 175). The retributive “eye for an eye” reasoning does not apply to these cases because they do not deserve punishment (Dillof, 2004). The deterrence claim is also invalid because true terrorists are not deterred by any threat of punishment, and specific deterrence does not apply because the defendant never would have committed the crime on his own in the first place. The only purpose of punishment that may be acceptable is incapacitation to prevent future crimes, but this reverts back to the dangerousness as a crime reasoning.

The failure of the entrapment defense is even more consequential because “once terrorism defendants have been indicted, their charge is virtually certain to stick” (Aaronson, 2011, p. 36). It is very likely that the defendant will not succeed in any entrapment claim. A direct consequence is that it often led the defendants to plead guilty to lessen their punishment as opposed to risking trial (Aaronson, 2011). Lawyers understand that the defense fails and therefore may pressure their client to plead guilty and avoid harsher punishment (Norris & Grol-Prokopczyk, 2016). A disturbing finding is that although 41% of defendants prosecuted did not belong to any terrorist organization, 66% pled guilty (Aaronson, 2011). Another study determined approximately half of the terrorism cases resulted in a guilty plea (Bejesky, 2015). This is not indicative of guilt, but of a system replete with inequality.

Another substantial issue is that terrorism enhancements significantly increase the defendant’s sentence. A study conducted in 2011 found that out of 585 terrorism prosecutions, 66 received a sentence greater than 15 years (Laguardia, 2013). Terrorism-related convictions quadruple the sentence, even when there is little connection to terrorism (Downs & Manley, 2014). The strong penalties were written with the image of a severe terrorist with the capacity to destroy the nation; the possibility of innocents being ensnared in government strategies was not given appropriate attention (Laguardia, 2013). The enhancements are excessive when considering that law enforcement does not catch true terrorists that pose a significant threat. True terrorists are willing to risk everything; there is no deterrence effect by increasing punishment. The harsh penalties do not prevent terrorism but instead harm the innocent as the government “plays on the weakness of an innocent party” (Laguardia, 2013, p. 183). Not only are they given more severe punishments after trial, but they also suffer pretrial consequences as well. For example, these defendants are also more likely to be placed in solitary confinement prior to trial due to the serious nature of their charge (Downs & Manley, 2014). Because they are unnecessarily punitive and provide no deterrence, the enhancements should be reduced.

Discussion

Counterterrorism Tactics and the Entrapment Defense

The growing trend in intrusive counterterrorism strategies reflects society's great fear of terrorism, typically reliant on Muslim stereotypes. Opinions and biases, rather than facts, often dictate law enforcement decisions. This unfortunately increases the risk of entrapment in the process. We must use caution when learning about terrorist sting operations through the media. On the surface, the defendant may look like a terrorist but when delving further, many issues arise. Some are teenagers, mentally ill, lonely, or poor. These populations may pose a criminal threat, but it also increases the consequences of intentionally encouraging criminal activity. The vulnerability of those populations targeted by the FBI threatens the integrity of the criminal justice system, specifically because they lack criminal intent. These individuals are simply persuaded to engage in an act due to the promise of attractive incentives or a compromised mental state.

These issues increase the need for legal protection. Yet, entrapment defenses fail, even when there is strong evidence to support the claim. Even judges themselves have acknowledged that there is a high likelihood that certain defendants have been entrapped, yet the defense fails nonetheless. Thus, this paper argues that the entrapment defense is entirely useless for terrorism defendants, despite those being the cases that should receive the most legal protection. The entrapment defense, in its current application, does not apply to terrorism cases even though it should due to the liberty at stake. Reform is necessary but unlikely, as it requires a case to be brought to the Supreme Court.

Moreover, in its current application, the entrapment defense is flawed and fails to afford terrorism defendants the appropriate level of legal protection. Regarding the law of entrapment, the totality of circumstances should be considered, as well as a combination of subjective and objective tests in order to evaluate government tactics first and then examine the defendant's mental state should the first test fail. The focus should be on the government tactics as well as the individual. The complicated nature of entrapment should not be a question for the jury but for a judge, and actual ability should be taken into consideration. This would reduce the tendency to punish for dangerousness. As terrorism prosecutions are likely to increase, it should be accompanied by a strict tailoring of the entrapment defense to reduce the prevalent inequalities of the justice system. The defense should be strengthened to provide courts more guidance and afford defendants better legal protection.

The FBI states that there is a massive threat of terrorism in the United States, yet it has failed to issue a report regarding how many terrorists attempts they have thwarted (Federal Bureau of Investigation, 2016). It does not offer a collective picture of the actual threat of terrorism, nor the type of individual or group that is successfully apprehended. This lack of transparency unfortunately hinders a comprehensive evaluation of their strategies, although most studies indicate that they are failing. Returning to the definition of terrorism, the action of the defendant must be in furtherance of a political message. Yet in most of these cases, the individuals who are prosecuted and labeled terrorists do not understand pro-terrorist views or desire to send any political message through their attempted attacks. Even if they could somehow still be classified as terrorists, the majority of individuals who sympathize with terrorist views never carry out an attack, or even plant to commit one (Norris & Grol-Prokopczyk, 2016).

Sting operations may hinder successful counterterrorism strategies by consuming time and resources (Norris, 2016). They may become so fixated on the success of these that they ignore other opportunities to catch an actual terrorist. Yet, these strategies are likely to continue because law enforcement is given legal cover. Everyone seemingly benefits from these prosecutions except the defendant. The informant is rewarded financially or reduced charges, the officer makes a good arrest, and DA appears to be fighting crime, which may aid in re-election (Carlon, 2007). However, the government is given the power to punish its citizens, and we expect a degree of fairness and safety in response (Carlon, 2007). The fact that this is not occurring exposes the inequalities of the justice system and supports the unfortunate truth that the government is “creating crimes to solve crimes, so they can claim a victory in the war on terror” (Aaronson, 2011).

The nature of counterterrorism strategies therefore seems to create “terrorists” out of ordinary citizens. Law enforcement takes someone who may be committing crimes, although completely lacking any relation to terrorism, and encourages them to commit those crimes in furtherance of terrorism. They urge them to share their profits with a terrorist group, buy weapons for them, or support the terrorist cause in a new crime (Downs & Manley, 2014). The ideas did not originate within the defendant themselves, but with the government. In many instances, the defendants were reluctant to commit the crime and had to be bribed with thousands of dollars or threatened to do so (Norris, 2016). Even more concerning is that many had mental issues and no prior plans of criminality, making them therefore incapable of committing an organized attack without the government providing every direction (Norris, 2016). “True” terrorists are nearly impossible to find due to the nature of their dark networks, so attention is therefore diverted to activists who are easy targets (Norris, 2016). This sends the message to the public that terrorism is being addressed. This is the wrong focus, because in the process, government critics are labeled dangerous terrorists (Norris, 2016). These strategies threaten autonomy and encourages wrongdoing in a deliberate test of character (Hughes, 2004). This reflects the underlying issue behind many counterterrorism strategies: the government will provoke criminal behavior and then punish without offering the defendant legal protections.

Counterterrorism Tactics and the Entrapment Defense

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Transitional Justice: The Key to Democracy, Development, and Sustainable Peace within Transitioning Societies in Latin America

BRIANNA WEISSMAN*

Transitional justice is a key player in international law. It is an important tool utilized by societies that are transitioning from repressive regimes to democracies. It has a long history that traces back to the post-World War II period and began to take official shape in the late 1980s through the 1990s. Transitional justice is not an institution. Rather, it is number of different measures that aim to achieve justice for those who have been subjected to gross human rights violations. Transitional justice can take place in the form of both judicial and non-judicial measures, including truth commissions, reparation programs, criminal prosecution, institutional reforms, and memorialization efforts.

The implementation of transitional justice measures has played a significant role in Latin America. Many transitional justice measures were pioneered in Latin America. The question of “whether trials of leaders in the style of Nuremberg could be successfully followed in the Americas” was first asked in Argentina (Teitel, 2003, p. 75). In response to this question, truth commissions were first utilized in Argentina. Truth commissions typically succeeded in Latin America. They were best used “where the predecessor regime disappeared persons or repressed information about its persecution policy” (Teitel, 2003, p. 79).

Latin America is the region that has the longest history of practicing transitional justice measures, such as truth commissions and human rights trials. These measures have proved to play a pivotal role in Latin American countries transitioning from repressive military governments, where impunity reigned, to democracies. The case studies of Chile, Argentina, Guatemala, and Colombia demonstrate the importance of transitional justice measures to the advancement of democracy, respect for human rights, and the creation of sustainable peace.

The history of transitional justice

There is no clear point in history where transitional justice emerged. However, there is a consensus that the term gained recognition and meaning in the late 1980s through the 1990s. The field of transitional justice is defined as “an international web of individuals and institutions whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy” (Arthur, 2009, p. 324). Transitional justice is the brainchild of people from different backgrounds. These include policymakers, legal scholars, journalists, lawyers, human rights activists, and comparative politics experts.

An important milestone in the formation of transitional justice was the 1988 Aspen Institute Conference, which “sought to clarify the political, moral, and legal challenges that those seeking justice for state crimes faced in the democratic transitions in the 1980s” (Arthur, 2009, p. 349).

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Conference participants discussed, among other issues, international law obligations to punish human rights violators, whether states have a minimal obligation to reveal past violations, and how a society should deal with addressing human rights abuses carried out by armed forces.

Alice Henkin, the conference's organizer, noted in the Conference Report that participants agreed that there was no general obligation under customary international law to punish human rights violators (Arthur, 2009, p. 352), but there was an obligation for states to establish the truth regarding past violations. There was much debate among attendees regarding the role of discretion and prudence. Some argued that political judgement held importance in developing transitional justice policies, others became frustrated with such an idea. Lastly, it was decided that there should be a specific set of measures for dealing with human rights abuses by the military.

The field of transitional justice was furthered in 1995 with the publication of Neil Kritz's *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Kritz set forth a definition of transitional justice, proclaiming that it was "something undertaken by 'emerging democracies'—states that had undergone a change of regime" (Arthur, 2009, p. 331). The book recalled the experiences of countries such as Chile, Czechoslovakia, and Belgium as they successfully transitioned from repressive regimes to democracies. Telling these stories was thought to benefit countries who were going through the process themselves.

Timothy Gorton Ash, in his review of Kritz's work for *The New York Review of Books*, argued that "no word or phrase existed in English that captured the full range of all [of transitional justices'] attending processes" (Arthur, 2009, p.332). He asserted that historians are the only group capable of serving justice to the past. Ash's critique revealed what had been missing from Kritz's book: the 1980s German *Historikerstreit* (historians' debate). At the time, the historians' debate was "a sophisticated, and highly public, conflict about how to interpret the Nazi era and the Holocaust" (Arthur, 2009, p. 332). More importantly, it aimed to decide both how and when "the memory of such events might be 'overcome' or 'mastered,' and a more positive image of German history accepted" (Arthur, 2009, p. 332). Kritz's proposed term, by contrast, was associated with short-term political problems that could be solved in a transitional period.

Transitional justice has been practiced far before the term was officially coined. Ruti Teitel, a professor of comparative law at New York Law School, breaks down the evolution of transitional justice in three phases. The first phase took place in the postwar period, following World Wars I and II; the second phase took place following the Cold War; and the third phase is referred to as the 'steady-state' phase, and is what we are currently in. Each phase is unique and builds upon the others to develop what is now known as transitional justice.

The first phase of transitional justice is the postwar phase. It "encompasses the post-World War II model of justice," but "the history begins earlier in the century, following World War I" (Teitel, 2003, p.72). This phase is characterized by international involvement in judicial proceedings and assertion of the rule of law. Justice came in the form of national trials and monetary sanctions, both of which were criticized. After World War I, there were unsuccessful national trials, such as the Leipzig War Crimes Trials. Additionally, monetary sanctions against Germany are posited as a leading cause for their involvement in World War II.

Following World War II, transitional justice was approached differently. As the post-World War I national trials had been unsuccessful, the focus shifted towards “international criminal accountability for the Reich’s leadership”. This “turn to international criminal law and the extension of its applicability beyond the state to the individual” was a breakthrough for transitional justice (Teitel, 2003, pp. 72-73).

The second phase is referred to as the post-Cold War period. This phase began with the triumph of the United States over the Soviet Union and the “attendant proliferation of political democratization and modernization” (Teitel, 2003, p. 75). At this point, leaders were wary to host trials such as the Nuremberg Trials, in fear that they may not be successful. For the most part, international involvement was minimal in this phase. This was intentional, as it would prove the competency of new regimes.

The post-Cold War phase can be characterized by truth commissions and restorative justice. Truth commissions served to “investigate, document, and report upon human rights abuses within a country over a specified period of time” and were desirable for their “ability to offer a broader historical perspective” compared to trials (Teitel, 2003, pp. 78-79). In the postwar phase, transitional justice efforts had the goal of asserting the rule of law. In this phase, the goal shifted to fostering peace within transitioning societies. The actors in this phase also changed. Political and legal actors shifted to actors with moral authority, such as human rights groups. Legal action was no longer the main goal.

By the late 1990s, “there were persistent calls for apologies, reparations [and] memoirs ... all related to past suffering and wrongdoing” (Teitel, 2003, p. 85). The international community had previously adopted the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. In this phase, it became clear that transitional justice would not be time sensitive. Here, the question of state sovereignty and jurisdiction were commonly raised. It was argued that transitioning societies may not be competent to hold their own trial or truth commissions, despite the benefits of doing so.

The third and final phase is referred to as “steady-state transitional justice” (Teitel, 2003, p. 89). This phase is characterized by the normalization of transitional justice. We see the creation of the International Criminal Court and a turn back to international involvement. The ICC has the lofty responsibility of prosecuting “war crimes, genocide, and crimes against humanity as a routine matter under international law” (Teitel, 2003, p. 90). The goal of this phase remains to advance human rights protections while still asserting the rule of law.

Transitional justice methods

Transitional justice measures take different forms, both judicial and non-judicial, including criminal prosecutions, truth commissions, reparation programs, institutional reforms, and memorialization efforts. Each of these measures has the ability to contribute restorative justice or retributive justice to societies undergoing transitions. When implemented properly, these mechanisms are useful to victims seeking democracy, development, and peace within their societies.

Criminal prosecutions

Criminal prosecutions are one of the most commonly used and understood transitional justice measures. Criminal prosecutions can develop the rule of law, put an end to impunity, and act as a deterrent for future crimes. Evidence collected during criminal prosecutions also helps to create accurate historical records of atrocities, making them difficult to deny. Most importantly, criminal prosecutions can aid in the development of stable institutions for newly transitioning societies.

Criminal prosecutions as a transitional justice measure are most commonly held for three crimes: war crimes, genocide, and crimes against humanity. War crimes are serious violations of international humanitarian law, such as mutilation, torture, sexual slavery, unlawful confinement, and unjustified destruction of property. These laws are codified in treaties such as the Geneva Conventions of 1949 and the Rome Statutes. Genocide, defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, encompasses acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” (Article II). These acts can include inflicting severe mental or bodily harm, killing, and attempting to prevent births. Crimes against humanity can also occur during both armed conflict or a time of peace. Crimes against humanity are most commonly directed towards civilian populations by state actors. The founding statutes of institutions such as the International Criminal Court and some international criminal tribunals lay out the framework of what constitutes a crime against humanity: extermination, torture, rape, forced disappearances, and murder all constitute crimes against humanity.

Criminal prosecutions can take place in a number of different courts, including domestic courts, hybrid courts, and institutions such as the International Criminal Court (ICC). Domestic courts are the most beneficial venues for criminal prosecutions as a transitional justice mechanism. The use of domestic courts “helps to ensure that parties understand the law, witnesses have easy access to the courts, and public awareness is maximized” (US Department of State, 2016a). This is not an easy task, as many societies going through transitions most often do not have the resources to effectively hold prosecutions. Latin America has an extensive history of successfully using domestic courts for criminal prosecutions.

Hybrid courts “combine domestic and international elements,” “may be staffed by a mix of international and domestic judges, prosecutors, and court officials, and they may apply elements of both international and domestic law” (US Department of State, 2016a). Hybrid courts are usually created within the affected country, which allows the society in question to remain in charge, while assistance from international actors can be provided where it is needed.

Lastly, criminal prosecutions can be held at the International Criminal Court. The Rome Statute created the ICC and gave it power to “investigate and adjudicate cases of individuals accused of responsibility for war crimes, crimes against humanity, and genocide” (US Department of State, 2016a). There are a few limitations on the ICC. The Court only has jurisdiction over crimes that occurred after its creation on July 1, 2002, and only over countries that are parties to the Rome Statute. Currently, there are 123 state parties to the Rome Statute. The ICC is also a court of last resort, meaning countries should only turn to the ICC if authorities are either unwilling, or unable to carry out prosecutions domestically. The ICC lacks a police force, so when warrants are issued, countries are responsible for capturing and turning over criminals, which is

often difficult to accomplish. Despite these challenges, the ICC has delved into cases in places such as Kenya, Sudan, and Libya.

There are a number of things to consider when using criminal prosecutions as a transitional justice measure. Prosecutions must remain impartial and independent. This is often difficult for domestic trials because many of the legal actors may have been involved in the conflict themselves. Due process is another important factor in these trials. One of the main purposes of prosecutions are to “reinforce the norm that each person, regardless of his or her position, is subject to the rule of law and benefits from legal protections” (US Department of State, 2016a). The assurance of due process can be difficult for domestic courts and in transitioning societies with weak traditions of due process. Criminal prosecutions can also require extensive amounts of resources. Often times countries are not able to provide these resources, which include time, money, judges, prosecutors, and investigators. Despite many obstacles, criminal prosecutions can be a very helpful tool to transitioning societies. They can aid in the development of the rule of law in countries while helping victims gain justice.

Truth commissions

Truth commissions are one of the oldest and most effective transitional justice mechanisms. They are a non-judicial measure “designed to investigate and report on past situations involving large-scale and often systematic atrocities” (US Department of State, 2016d). Truth commissions can either be put together by the state where the atrocities took place, or by the United Nations. They are generally made up of a combination of international and national actors, and have been utilized by over 30 countries around the world.

Their main goal is to “collect statements from a broad array of stakeholders including victims, witnesses, and perpetrators” (US Department of State, 2016d). They try to identify any possible patterns within the abuse and discover the causes of such violence. At the end of the truth commission, a public report is issued which provides recommendations for ways in which future abuses can be avoided and sustainable peace and stability can be achieved.

There are many advantages to using truth commissions, such as their focus on victims. Unlike prosecutions, truth commissions do not focus on punishment. Instead, they provide a safe place for victims to have their stories heard. Victims can come forward confidently because “truth commissions can be given the authority to engage with victims under conditions of anonymity and confidentiality” (US Department of State, 2016d). Truth commissions also have the ability to provide an accurate historical record of the events that occurred.

There are a few guiding principles for truth commissions. First, a truth commission “should be designed and implemented in a way that demonstrates that it is free from political manipulation, treats all sides fairly, and is open to public scrutiny” (US Department of State, 2016d). The process should be as transparent as possible, and findings and recommendations should be made public. Second, during the development and operation of the truth commission, it is essential that a number of groups are included. These groups include women, children, victims, and other smaller, more marginalized groups. Their involvement increases participation and knowledge of the process. Lastly, truth commissions are most effective when paired with other transitional justice measures. They are only able to provide recommendations on how a

society should proceed, but it is up to the people to prosecute criminals and provide for victims.

Reparations

Reparations, also commonly referred to as reparative justice, is another commonly used transitional justice measure. Reparation programs focus on acknowledging the needs of victims or redress, and seek to address “the consequences as well as the cause of violations in material and symbolic ways” (US Department of State, 2016c). Reparations are the most meaningful way for justice to be given to victims, but they are also usually given last priority.

There are a number of different types of reparations. The first type is restitution. The goal of restitution is to restore the victim to their original status, prior to the violation. Examples include returning property or jobs which may have been taken. Monetary compensation is another form of reparation. Compensation is often provided to those who have suffered both mental or physical injury and require medical services. Rehabilitation is a form of reparation which “seeks to mend the harm suffered, usually through medical and psychological care as well as legal or social services” (US Department of State, 2016c). Satisfaction is a type of reparation which includes official recognition of the harm done and suffering caused. This can take the form of a public apology, memorials, or conducting searches for missing persons.

On December 16, 2005 the U.N. General Assembly adopted and proclaimed the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. According to this document, “the party responsibly for the violation or abuse is primarily responsible for providing reparation.” Challenges associated with reparations include ensuring that each victim is addressed fairly and their needs are met, making sure victims are given the opportunity to fairly participate, and dealing with disparities such as class and gender.

Institutional reforms

Institutions such as the judiciary and armed forces, including police and military, are generally a main perpetrator of human rights violations and sources of repression. Reforming such institutions is a vital transitional justice measure to ensure violations will not take place in the future. The International Center for Transitional Justice defines institutional reforms as “the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents” (ICTJ).

Institutions should be restructured to increase both legitimacy and integrity. The implementation of oversight bodies should ensure accountability to (civilian) governance within different state institutions. Institutional reforms can also include the creation of new legal frameworks, primarily constitutional amendments or international human rights treaties. Providing education to employees of these institutions on different human rights standards is another way in which transitioning societies can reform their institutions.

Perhaps one of the most important examples of institutional reforms is the process of lustration and vetting. Lustration is defined by the United States Department of State as “a policy put in place by post-conflict or post-authoritarian governments to

remove from public institutions personnel who have been implicated in activities that call into questions their integrity and professionalism.” Vetting is the process which implements lustration policies. A thorough vetting process will generally include examination of “current personnel while also developing screening procedures to prevent the future recruitment of personnel implicated in abuses” (US Department of State, 2016b).

Institutional reforms are an important key to transitioning societies. Processes such as structural reform, implementing oversight bodies, and lustration and vetting are often overlooked. However, they are some of the most essential processes in ensuring non-recurrence of grave human rights abuses and atrocities.

Memorialization efforts

The use of memorialization has become an increasingly popular transitional justice mechanism. Memorials can include monuments, museums and other historic sites. Societies transitioning out of oppressive regimes where human rights abuses occurred “see public memorialization as central to justice, reconciliation, truth-telling, reparation, and coming to grips with the past” (Brett et al, 2007, p. 1). Victims of violence believe that “memorialization initiatives were the second most important form of state reparation after financial compensation” (Brett et al, 2007, p.2). Memorial sites serve as forums for conversations which allow citizens to learn about their societies’ past. Memorials can come in a number of different forms. Different memorialization efforts can include museums, architectural work, other forms of art, and mass graves where ceremonies to honor victims are held. Construction of these memorials is often initiated by the government at fault as an effort to prove that they acknowledge the past and their wrongdoings.

There is no single transitional justice measure that can best help a society transition from a repressive regime to a democracy. Each measure, including criminal prosecutions, truth commissions, reparation programs, institutional reforms and memorialization efforts, is most effective when implemented together with others. If successful, these measures have the ability to bring about restorative and/or retributive justice to societies who have been subjected to mass human rights violations.

The issue of impunity

The issue of impunity looms heavily over Latin America and poses a severe threat to the success of transitional justice measures. Impunity is often defined as “freedom from accountability or punishment for state crimes or abuses of power,” and is often considered “a fundamental cornerstone of [a] state’s terrorist machinery” (McSherry and Mejia, 1999, p. 1). After military regimes were pushed out by new leaders seeking democracy and order, impunity often became institutionalized. This was commonly done through legislation such as amnesties, executive decrees and executive pardons. Efforts to counter impunity have been implemented, but impunity remains an issue in achieving complete transitional justice goals.

It was initially feared that undertaking the prosecution of war criminals within Latin America would be too difficult, and that simple forgiveness by victims would be the only way for societies to be able to move on. At the same time, powerful national and international groups were pushing to end the reign of impunity. During the period following the Cold War, “a new balance of forces was developing in the international

arena, more conducive to liberal democratic and human rights and more hostile to military regimes” (McSherry and Mejia, 1999, p. 4). In the late 1980s, the United Nations began to take interest in the issue of impunity. At the same time in Latin America, tribunals were being held to raise awareness of the issue. Latin America took a huge step in November 1989 when “a Permanent People’s Tribunal on Impunity for Crimes Against Humanity in Latin America was held in Bogotá, with delegates from many countries, to present a picture of Latin America as a whole” (McSherry and Mejia, 1999, p. 6).

Despite being recognized as a major human rights issue by 1990, impunity continued to reign throughout Latin America. The existence of impunity within societies undergoing transition has a psychological impact on survivors of authoritarian regimes. Surviving victims of violence are forced to remain neighbors with the people who mercilessly killed their mothers, fathers, brothers, and sisters right in front of them. Villages are often made up of “approximately 1,000 people, most of whom are related in one way or another, these men were known and continued to be the authorities of the village[s]” (Zur, 1994, p. 15). People were exposed to mangled, tortured bodies, knowing that the people responsible were walking freely.

The impact is even worse for survivors who do not know who the perpetrators are. These survivors are left constantly questioning what has become of their loved ones. This uncertainty often prevents people from mourning the loss of their loved ones. Victims are left with “an awareness of their own powerlessness; the lack of power stems from the all-embracing might of the powerful which is stabilized in various social strata and supported by the situation of impunity in which they operate” (Zur, 1994, p. 15).

Dr. Paz Rojas, a doctor who works with the Corporation for the Promotion and Defense of Human Rights of the People, has done extensive research on this subject. He has observed in victims of such violence that there is an “appearance of psychosomatic diseases, psychotic decompensations, neuropsychological alternations, such as problems in the process of development and learning in children and psycho-organic disorders in adults” (Rojas, 1999, p. 19). He observes that a victim’s whole perception of the world around them can be significantly altered. Within his studies, “90% had no history of serious diseases and were in good health up to the time of their detention” (Rojas, 1999, p. 19). He refers to this study of impunity and crimes as ‘the study of the ailments of the soul.’

Dr. Rojas asserts that the two pillars which support the reign of impunity are a lack of justice and absence of truth, and “these two absences pervert the highest mental functions” (Rojas, 1999, p. 20). This lack of truth and justice, two predominant values in human beings, shifts morality greatly, affecting how people think and interact with others. In many of his patients, communication is nearly impossible. Many victims were no longer able to enjoy any economic, social, or cultural rights. Many victims expressed “that they did not any longer feel like a whole person with rights” (Rojas, 1999, p. 27).

Impunity in Latin America

Just as Latin America has led the way with implementing transitional justice measures, it has also allowed impunity to reign. Following Argentina’s ‘Dirty War,’ a presidential pardon and multiple amnesty laws provided impunity to members of the armed forces who were responsible for human rights violations. It became clear that impunity would be present in Argentina when the ‘Full Stop’ law was passed by former

President Alfonsín in 1986. The law worked to halt all trials of members of the armed forces. In 1987 he passed the 'Due Obedience' law which "created the irrebuttable presumption of 'due obedience' for certain ranks of the security personnel below senior command rank who committed such acts ... from 1976-1983" (Crawford, 1990, p. 18).

It was not until 2005 that Argentina's Supreme Court overturned the "two amnesty laws [which] had blocked the prosecutions of crimes committed under the country's military dictatorship" (Human Rights Watch, 2005). Earlier, in 2003, Argentina's Congress passed a law which annulled both the 'Full Stop' law as well as the 'Due Obedience' law. While these advances were incredibly significant to the advancement of justice in Argentina, there are still instances where war criminals are not being tried for their crimes. So, while impunity is no longer the 'norm,' it is still prevalent.

Guatemala is another Latin American country where impunity prevails. Following the end of the country's 36-year conflict, impunity prevented the delivery of justice. In the early 2000s, the government of Guatemala sought assistance in establishing the International Commission Against Impunity in Guatemala (CICIG). The aim of the Commission is to "investigate illegal security groups and clandestine security organizations in Guatemala—criminal groups believed to have infiltrated state institutions, fostering impunity and undermining democratic gains in Guatemala since the end of the country's armed conflict in the 1990s." In early January of 2019, the government made a decision to end CICIG, deeply threatening the possibility of justice in the country.

Chile, ravaged by armed conflict for almost 20 years, had also had an amnesty law put into action during Pinochet's rule. The 1978 law "prevented courts from prosecuting military officials involved in the torture and killings of thousands of Chileans during the first five years of Pinochet's dictatorship" (ICTJ, 2014). Judges in Chile have not been following the law since 1998, but it still exists as codified law and is therefore still valid. Chile has made progress and as of 2013, "courts have convicted around 260 people from the Pinochet era for human rights violations, 60 of whom are currently serving sentences" (ICTJ, 2014). Despite not being used, the law has been debated greatly in parliament and still exists.

Colombia still faces ongoing human rights abuses and subsequent widespread impunity. It has been reported by Human Rights Watch monitors "that virtually 100% of all crimes involving human rights violations go unpunished" in Colombia (Giraldo, 1999, p. 31). There has been a significant increase in international pressure for this to change. In Colombia's peace deal with FARC, there are sentences for crimes against humanity which "range between five and eight years and prison time can be excluded if the accused person fully cooperates" in investigations (Betancur-Restrepo and Grasten, 2019). Attempts to bring cases in front of the ICC have taken place, but the Court has no jurisdiction over war crimes committed by FARC before November 2009, which is when the most severe abuses occurred. Until changes are made to the peace deal, impunity will continue to protect perpetrators of brutal human rights abuses in Colombia.

Argentina

Argentina is a country with a deep and unique transitional justice history. Between 1930 and 1983, Argentina experienced short periods of weak democracy and six *coups d'état* and periods of military rule. In 1976, Argentina was undergoing what

became known as the “Dirty War,” carried out by their military dictatorship, which resulted in more than 30,000 deaths.

The 1976 coup was unique compared to earlier coups. It was led by General Jorge Videla, with the assistance of Leopoldo Galtieri, and served to overthrow the government led by Isabel Perón. The military put together “The Act of National Reorganization,” also known as the “Proseco.” This document laid out “a series of clearly defined political, social and economic objectives and strategies to be pursued by the regime,” including the “restoration of ‘proper moral values,’ national security, economic efficiency, and ‘authentic representative democracy’” (Pion-Berlin, 2004, p. 57).

Videla aimed to defend Argentina against leftist groups of any kind. Anyone whose values and ideas undermined his government was seen as a threat to Argentina. Journalists, scholars, intellectuals, union leaders, and certain politicians, all fell in this category. During the war, those who opposed the government were kidnapped and brought to detention centers where they were subject to gross human rights violations including rape, torture, beatings, and murder. These centers operated in secrecy, mainly as torture centers.

There are a number of documented forms of torture that occurred in these centers. ‘Softening up’ were sessions which generally included beatings in attempts to push those in question to cooperate. The use of electric shocks applied to various parts of the body including the temples, gums, teeth, ears, genitals, and breasts, became known as ‘the grill.’ ‘Wet submarino’ was the act of submerging the victim’s head in water until they were on the brink of drowning, while ‘dry submarino’ was the act of placing a bag over the victim’s head until they were on the brink of suffocation. Burying victims so that only their head was showing and then refusing them food or water was another common practice on the desaparecidos, a common term used to refer to those who disappeared.

The 2008 documentary *Our Disappeared (Nuestros Desaparecidos)*, directed by Juan Mandelbaum, reflects the impact on three generations of Argentinians. The film follows Mandelbaum, who was born and raised in Argentina, as he explores his country’s dark and troubled past. The film reveals stories of passionate young adults fighting for change who are kidnapped and brutally murdered, leaving behind parents and children desperate for answers and justice.

In 1983, Argentina’s military regime collapsed when Raúl Alfonsín won the 1983 presidential election with more than 50-percent of the vote. Alfonsín, the cofounder of the Permanent Assembly for Human Rights, brought hope to Argentina. Prior to entering politics, Alfonsín worked as a human rights attorney and “took a courageous stand by criticizing the junta that ruled Argentina from 1976 to 1983” (Kraul, 2019). Alfonsín took office during a time when Argentina was plagued with copious debts and no democratic institutions.

During Alfonsín’s first week in office, he created Argentina’s first truth commission. The Commission, called the National Commission on the Disappeared (*Comisión Nacional Sobre la Desaparición de Personas*) lasted nine months, from December 16, 1983 to September 20, 1984. The mandate of the Commission “was to investigate the disappearances of people between 1976 and 1983 and uncover the facts involved in those cases, including the locations of the bodies” (United States Institute of Peace, 1983). The Commission was made up of thirteen commissioners, ten appointed by President Alfonsín and three elected by Argentina’s legislative Chamber of Deputies

(United States Institute of Peace, 1983). The Commission took over 7,000 statements, with 1,500 statements coming directly from survivors.

The Commission issued a few conclusions regarding the events under investigation. First, the Commission reported “8,960 disappearances during the 1976-1983 military rule.” Secondly, the Commission concluded that “disappearances, torture, secret detention, and the disposal of bodies in unknown sites were systematic practices.” The Commission also found that “all the disappeared people were killed, and the lack of information provided about these people was the intentional strategy by the government to prevent cohesiveness among survivors.” Lastly, the Commission concluded that “the repressive practices of the military were planned and ordered by the highest levels of military command,” and “military documentation that could have proven responsibility within the chain-of-command” was ordered to be destroyed (United States Institute of Peace, 1983). The Commission offered multiple recommendations on how Argentina should proceed to address such grave human rights abuses, such as establishing reparations programs for families of disappeared persons, prosecutions and follow-up investigations concerning missing persons, and implementing human rights education programs and judicial reforms.

Argentina also undertook some prosecutions. In December 1983, just three days after Alfonsín’s inauguration, he ordered Argentina’s highest military court to “try the members of the first three juntas for crimes against human rights such as illegal deprivation of liberty, torture, and homicide” (Speck, 1987, p. 500). In early October 1984, a civilian court referred to as the Cámara took jurisdiction over the case and the trial began. The prosecution presented their evidence in open hearings on April 22, in which they presented the “most representative 700 cases” (Speck, 1987, p. 502). Defendant arguments centered around the idea that “the state of internal war in which the country found itself necessitated and justified a suspension of all constitutional guarantees” (Speck, 1987, p. 503). Other defendants argued that they were simply following orders.

The court chose not to issue guilt collectively, but rather on an individual basis. The opinion of the court was given on December 9, 1985. Videla and Massera were each sentenced to life in prison; lower ranking officers including “Agosti, Viola, and Lambruschini were sentenced to prison for four and a half, seventeen, and eight years, respectively” (Speck, 1987, p. 503). The written opinion of the court was thousands of pages and carefully highlighted facts from each of the 700 cases presented by the prosecution.

Trials continue to be held for former military officials in Argentina. In August 2016, “an Argentine federal court [convicted 38] former military officials for their roles in kidnapping, torturing, and killing several hungry victims during a period of military dictatorship four decades ago” (Gilbert, 2016). Of the 38 defendants convicted, 28 were sentenced to life imprisonment, while the rest were sentenced to anywhere between two and a half to 21 years. The trials involved “716 victims and testimony from hundreds of witnesses over nearly four years” (Gilbert, 2016). In 2017, another 29 people were given life sentences “in a trial involving some 800 cases of kidnapping, torture and murder during the 1976-1983 dictatorship” (Stauffer, 2017). Argentina’s Attorney General’s Office reported that as of 2017, 2,971 people had been charged, 818 convicted, and 99 acquitted of crimes committed during the 1976-1983 period.

Following the military rule, Argentina also went through a few different reforms. The National Commission for the Right to Identity was created in 1992. This committee aimed to uncover identities of children who had been disappeared during the 'Dirty War,' and included "the Association of Grandmothers of the Plaza de Mayo (Abuelas) and their attorneys, [and] state prosecutors" (Brett, 2001). The committee has been able to uncover the identities of 71 children. Two years later, in 1994, "Argentina reformed its constitution to enhance democracy and to raise international treaties ratified by the Congress to the status of constitutional law" (United States Institute of Peace, 1983). These constitutional reforms work to ensure full enjoyment of human rights in Argentina.

Following the conclusion of the truth commission, it was recommended that reparations be issued. In order to be permitted to receive reparations, "victims had to prove that they had been detained without trial between 1976 and 1979" (United States Institute of Peace, 1983). This was very difficult, as the military had not cooperated in providing documentation to prove this requirement. \$3 billion USD was made available in 2004 to serve as reparations to victims who were unlawfully detained in Argentina.

Argentina is one example of a Latin American country that has worked extensively to implement transitional justice mechanisms. Immediately following his election, Alfonsín worked tirelessly to advance democracy in Argentina. Their efforts have not gone unrewarded. As of 2017, Human Rights Watch reported that "125 people who were illegally taken from their parents as children during the 1976-1983 dictatorship had been located" and reunited with surviving family members. Despite the extensive amount of cases, Argentine officials have worked to uncover the horrors of the last Junta and bring closure to families of victims and society as a whole.

Guatemala

Between 1960 and 1996, Guatemala was ravaged by a civil war between leftist rebel groups, predominantly Ladino peasants and Maya indigenous people, and the government. The war stemmed from the desire to "alleviate the extreme poverty, political exclusion and inequality between rich and poor" (Ball et al, 1999, p. 19). This 36-year war has become known as one of the most brutal conflicts in Latin America's history, one in which "more than 200,000 people were killed—most of them indigenous, more than half a million were driven from their homes, and many more were raped and tortured" (Bracken, 2016).

The conflict officially began on November 13, 1960, "when discontented army officers, many of them trained in the United States, attempted a *coup d'état* against the corrupt and unpopular government of General Miguel Ydígoras Fuentes" (Ball et al, 1999, p. 13). Between 1960 and 1968, violence within Guatemala rapidly increased. In the early 1960s, police repression and political protest had become common, but by 1966, "the military was involved in a widespread attack on an armed guerilla movement and its civilian supporters" (Ball et al, 1999, p. 14).

The army began to bomb villages occupied largely by Ladino populations, where guerrilla operations had been carried out. Thousands of civilians were brutally murdered and disappeared between 1966 and 1968. During this period, it is estimated that anywhere between "2,800 and 8,000 Guatemalans were killed" (Ball et al, 1999, p. 16). In 1970, Colonel Carlos Arana Osorio was elected president and almost immediately

declared a state of siege, suspending all constitutional guarantees through February 1972.

In September 1972, Arana's government captured top leaders within Guatemala's communist party, tortured them, and threw their bodies into the Pacific Ocean. Throughout Arana's rule, death squad killings remained routine. By 1975, the number of killings and disappearances had reached a low, but by February 1976, the number began to rise again as Guatemala experienced rapid economic expansion. This triggered an "intensifying campaign of selective killing of labor activists and other militants." Amnesty International reported that in August 1977, 61 murders "appeared to be the work of paramilitary death squads" (Ball et al, 1999, p. 21).

In 1978, General Romeo Lucas García was named President. Upon assuming office, he chose to raise the prices of many common goods and services, intensifying the conflict. Anyone who opposed the government during this time was put on a death list published by ESA, the Secret Anticommunist Army. Many on the list were brutally murdered, some by machine guns in public places. García's government had a clear message: "it would silence anyone who dared speak against it and do so with complete impunity" (Ball et al, 1999, p. 21).

The 1980s became known as the most brutal period in Guatemala. On January 31, 1980, protestors occupied the Spanish Embassy in an attempt to reveal to the world the brutality of the Guatemalan government. Rather than attempting to negotiate with protestors, the police sent the embassy up in flames. Guatemalan police "refused to unblock the door or let firemen control the blaze," and subsequently thirty-nine people were burned alive (Ball et al, 1999, p. 23). Following this event, state violence continued to worsen. It is recorded that in 1982 alone, nearly 18,000 murders carried out by state officials had occurred. By 1983, Guatemala had become nearly completely militarized.

It was not until late 1989 that human rights concerns were raised. Nonetheless, large scale human rights abuses continued to take place. However, the military no longer committed the vast majority of murders and disappearances, rather, "army loyalists in the civil patrols acted against neighbors who challenged the army's hegemony or the local patrol's authority" (Ball et al, 1999, p. 32). In 1994, the United Nations stepped in to demilitarize the country and ensure compliance with human rights standards. A final peace agreement was signed in 1996.

The Guatemalan Commission for Historical Clarification took place between 1997 and 1999. The decision to establish it was laid out in the Oslo Agreement of June 23, 1994. The mandate of the two-year commission was to "clarify human rights violations related to the thirty-six year internal conflict from 1960 to the United Nation's brokered peace agreement of 1996, and to foster tolerance and preserve memory of the victims" (United States Institute of Peace, 1997). The Commission conducted a total of 7,200 interviews over the course of two years.

The makeup of the Commission was unique, having only three commissioners, one of them a foreigner. Christian Tomuschat, a German law professor, was the foreign commissioner of the Commission for Historical Clarification and served as the chair of the Commission. The use of a foreigner as a commissioner was new, yet desirable because a foreigner could not be suspected of pursuing political objectives, therefore, "a mixed composition seem[ed] to constitute a well-balanced model" (Tomuschat, 2001, p. 238). Otilian Lux de Coti and Edgar Alfredo Balsells Tojo were the two other commissioners appointed by Tomuschat. The final report of the Commission was

entitled *Guatemala: Memory of Silence* and was issued on February 25, 1999. The report was initially released in Spanish to representatives of the Guatemalan government, the Guatemalan National Revolutionary Unity, and the U.N. Secretary General (United States Institute of Peace, 1997). An English version of the report can be found on the American Association for the Advancement of Science website.

The Commission came to a number of different conclusions. First, the Commission concluded that “repressive practices were perpetrated by institutions within the state, in particular the judiciary, and were not simply a response of the armed forces,” and that “agents of the state committed acts of genocide against groups of Mayan people” (United States Institute of Peace, 1997). The Commission concluded that over 200,000 people were killed, 83-percent of the victims were Mayan and 17-percent were Ladino (United States Institute of Peace, 1997). 93-percent of the violations documented were perpetrated by paramilitary groups and state forces, and 3-percent were the result of insurgent actions. Lastly, the Commission found that the rate of killings and human rights abuses peaked between 1978 and 1982 (United States Institute of Peace, 1997).

The Commission concluded with three recommendations for the government: reparations mainly in the form of memorialization, the return of land to Mayans, and financial assistance. Another recommendation given was for structural reforms to the judiciary and military, and for Guatemala to further attempt to strengthen the democratic process. This Commission did not call for any prosecution of perpetrators within its report. Criminal prosecutions have not been easy in Guatemala. In 2010, some trials of former military officials began, but the strength of Guatemala’s military and the general weakness of legal institutions have led to the extensive use of amnesties, thus impunity.

In 1996, the Guatemalan Congress passed the Law of National Reconciliation, invalidating a 1986 amnesty law that guaranteed immunity from prosecution for all crimes committed between 1983 and 1986 (Burt, 2018, p. 33). The 1986 law did not, however, provide amnesty for crimes such as disappearances, genocide, torture, and other international crimes against humanity. Despite this, impunity was still all too prevalent.

Where domestic courts failed, the Inter-American Court of Human Rights stepped up. In 2004, the Court “found the Guatemalan State responsible for the massacre and ordered it to investigate, prosecute and punish the perpetrators” (Burt, 2018, p. 34). Spanish courts also became involved in the prosecutions of Guatemalan war criminals. In 1999, charges were brought against eight government officials from Guatemala. The case remained inactive for nearly six years “when the Spanish Constitutional Court ruled in favor of Spanish jurisdiction in the Guatemalan genocide case” (Burt, 2018, p. 34). A verdict was not reached, but pressure on Guatemala intensified.

The International Commission Against Impunity (CICIG) was created in 2007. CICIG established new procedures to select the attorney general and senior judges, and helped create a specialized court system, the High Risk Tribunals, to adjudicate complex criminal cases (Burt, 2018, p. 34). All of these advancements led to the strengthening of Guatemala’s judiciary.

One of Guatemala’s most well-known war criminal cases was that of Rios Montt. The trial began on March 19, 2013. Less than two months later, Montt was found guilty

of crimes against humanity and genocide. This trial “marked the first time a former head of state was prosecuted in domestic court for the crime of genocide” (Burt, 2018, p. 37). Nearly 100 victims and families testified in this case. The legitimacy of the trial was questioned, and the president of Guatemala at the time, Otto Perez Molina, denied the occurrence of a genocide in Guatemala. A little over a week after the verdict in Montt’s trial was handed down, “the Constitutional Court, arguing procedural violations, partially suspended the genocide proceedings, effectively undoing the verdict” (Burt, 2018, p. 38).

It was not until 2016 that prosecution efforts in Guatemala began again. Less than a week into the year, “the Attorney General’s Office arrested 18 senior military officers on charges of criminal responsibility for dozens of cases of enforced disappearances and massacres committed between 1981 and 1988” (Burt, 2018, p. 39). One significant case since then has been the Sepur Zarco sexual violence case. On February 26, 2016, “two former senior military officers [were found] guilty of crimes against humanity in a case involving murder, sexual violence, sexual slavery and other atrocities committed at the Sepur Zarco army base” (Burt, 2018, p. 40). They were sentenced to 120 to 240 years imprisonment.

As of February 2019, Guatemala is at a crossroads. Congress is swaying towards amending the National Reconciliation Law of 1996. Doing so would “terminate all ongoing proceedings against grave crimes committed during the country’s civil war, free all military officials and guerrilla leaders already convicted for these grave crimes, and bar all future investigations into such crimes” (Burt and Estrada, 2019). The passing of such legislation deeply threatens Guatemalan society, especially victims of the war, and those who have come forward to testify against those prosecuted. Backing out of CICIG also poses a severe threat to justice.

Guatemala has been slow to adopt many institutional reforms. In 2016 the *National Dialogue towards Justice Reform in Guatemala* was developed. The goal was to launch “reforms of the Constitution and ordinary laws, in order to guarantee judicial independence, access to justice and institutional strengthening” (Human Rights Office of the High Commissioner, 2016). On October 5, 2016, the reform package, which included 25 constitutional amendments, was presented to the Guatemalan Congress (Beltran, 2016).

As a country, Guatemala has done little to help victims, therefore many memorialization efforts are carried out by victims’ groups themselves. Across the country, communities “have constructed local memorial spaces to commemorate the victims of massacres and enforced disappearance” (Burt, 2018, p. 40). Certain communities have also developed oral history traditions. Communities came together to create the Monument for Peace and Tolerance, located near the site of the Panzos massacre of 1978. Other memorials include the Kaji Tulam Memory Museum, which “depicts the internal armed conflict from the perspective of victims;” and the exhibit *Why Are We the Way We Are?*, which “aims to encourage visitors to challenge their own assumptions and stereotypes as a way of dismantling the racism and discrimination that has characterized Guatemala since Independence” (Burt, 2018, p. 41).

Together, these initiatives have successfully helped communities in a number of ways. Each one has “served to document and to denounce the atrocities committed, to dignify and honor the victims, to recover the histories of heroism and resistance of the survivors, and to promote community organization and the rebuilding of social fabric”

(Burt, 2018, p. 41). These memorials effectively educate younger generations on the atrocities committed and often spark initiatives for justice and reparations.

Following the conclusion of the 36-year conflict, thousands were left tortured, abused, and murdered. The country carried out multiple transitional justice measures. Their Commission for Historical Clarification revealed the atrocities carried out during the war to the world; initiatives have been made for institutional reforms; criminal prosecutions have shut down impunity to a certain extent; and memorialization has helped to educate younger generations and has ensured that victims are not forgotten. Despite these efforts, the fate of Guatemala remains uncertain as the military continues to have a strong hold on the government.

Chile

The 1973 Chilean coup d'état marked the beginning of a brutal conflict. Dr. Salvador Allende took office as President in 1970. His administration was met with opposition, largely from middle-class and business-class sectors. Soon, those who opposed Allende's administration determined that "the government of Allende was incompatible with the survival of freedom and private enterprise in Chile, and that the only way to avoid their extinction was to overthrow the government" (Loveman, 1986, p. 1). Following the 1973 coup by the Chilean military, supported by the United States, Chile became a military dictatorship under Augusto Pinochet. During his rule, it is estimated that more than 3,000 Chileans were executed or "disappeared," while up to a 100,000 were tortured (The Center for Justice & Accountability).

Pinochet's goal "was to transform Chilean political institutions and to restructure both Chile's society and its economy" (Loveman, 1986, p. 2). The standard of living in Chile for the middle and lower classes rapidly declined. Nearly every aspect of the new military government was met with opposition. The first groups to oppose the military regime were resistance groups formed in workplaces, prisons, factories, and homes. As the military continued to carry out human rights abuses, opposition grew stronger. The new government had no tolerance for opposition and dealt with those who expressed opposition through disappearances, murder, imprisonment, and exile.

Only days following the coup, armed forces set out to detain any suspected leftists. They began at the State Technical University where hundreds were detained at Chile Stadium. Here, they were exposed to brutal treatment. Detainees were starved and many were interrogated and tortured. Others were killed, their bodies disposed of in secret. In 1973, anyone suspected of opposing the military regime was targeted by a military death squad called the 'Caravan of Death.' The Caravan used military bases throughout the country, torturing and executing at least 75 political prisoners (The Center for Justice & Accountability).

In 1981, a new constitution was introduced by the military government. This new constitution prohibited any group which "advocated doctrines which served to undermine the family, which promoted violence, or which adopted a conception of society, state or juridical order of a totalitarian character or which was based on class conflict" (Loveman, 1986, p. 2). The new constitution placed an emphasis on national security, a responsibility placed on the shoulders of the armed forces, and introduced an eight-year, renewable presidential term.

Eleven parties came together in 1984 to sign an accord which demanded presidential elections be held before 1989. On December 14, 1989, elections were held

for the first time in Chile since the 1970s. Pinochet was defeated and became a senator, a role prescribed to him in his 1981 constitution. In 1998, British authorities detained Pinochet following Spain's request for his extradition in connection with the torture of Spanish citizens in Chile during his rule. After his capture, documents were released which revealed information regarding some of the most brutal human rights atrocities during Pinochet's regime. This included details of Operation Colombo and the disappearance of more than 100 Chilean leftists in 1975, and Operation Condor and the coordinated efforts of several South American military governments to eliminate opponents in the 1970s and 1980s (Encyclopedia Britannica).

In 2000, Pinochet was released by the British after it was determined that he was physically unfit to stand trial. He returned to Chile, expecting to be protected by immunity. However, the Appellate Court stripped Pinochet of his immunity by a vote of thirteen to nine (Pion-Berlin, 1985, p. 484). After being ordered to once again stand trial in 59 cases of kidnapping, murder, and torture, "the Chilean Supreme Court ruled him mentally and physically unable to answer them" (Read, 2018). Pinochet passed away in 2006, without facing any charges.

The Chilean government finds itself now racing to prosecute Pinochet-era war criminals, as many are beginning to pass away. Since the end of the conflict, "there have been 1,149 convictions handed down for dictatorship-era human rights crimes" (Slattery, 2015). However, prosecutions are difficult to conduct because of the 1978 amnesty law passed by Pinochet during his presidency, still in force.

In 2004, Chile's armed forces assumed blame for the grave human rights abuses committed during the Pinochet era. This move by the armed forces was seen as a ploy to ensure immunity for all violators. Chile's Supreme Court President Sergio Munoz has tirelessly worked to reverse widespread impunity in Chile since he has taken office in 2014. In 2017, Chile's High Court "sentenced 33 former intelligence agents for the disappearance of five political activists in 1987" (BBC, 2017). Prosecutions of Pinochet era human rights abusers remain underway.

Following the Pinochet dictatorship, Patricio Aylwin assumed office as the president of Chile. Almost immediately after assuming office, Aylwin established a truth commission, which operated from May 1990 to February 1991. The mandate of the Rettig Commission was to "document human rights abuses resulting in death or disappearance during the years of military rule, from September 11, 1973 to March 11, 1990" (United States Institute of Peace, 1990). In total, the Commission was able to document 3,428 cases of grave human rights abuses in Chile during the Pinochet regime. The Commission was made up of eight commissioners selected by Aylwin. Raul Rettig chaired the Rettig Commission.

The Commission handed down a few conclusions and recommendations in its report, released in February 1991. The Commission concluded that "most forced disappearances committed by the government took place between 1974 and August 1977 as planned and coordinated strategy of the government" (United States Institute of Peace, 1990). It also concluded that the National Intelligence Directorate played a very significant role when it came to political repression during the rule of the military government. The Commission recommended reparation programs for victims who testified before the Commission, noting that these reparations "should include symbolic measures as well as significant legal, financial, medical and administrative assistance"

(United States Institute of Peace, 1990). The Commission further recommended that Chile adopt human rights legislation and create an ombudsman's office.

In 2003, Chile's president Ricardo Lagos created a second truth commission to address Pinochet-era human rights abuses. The Rettig Commission was limited in the sense that it was only mandated to investigate crimes which resulted in death or disappearance. The Valech Commission operated from September 2003 through June 1, 2005. It was mandated "to document abuses of civil rights or politically motivated torture that took place between September 11, 1973 and March 10, 1990 by agents of the state and by people in their service" (United States Institute of Peace, 2003).

The Commission handed down a 1,200-page report which included testimony from 27,255 victims. The report concluded that "torture and detention were used as a tool of political control by State authorities and perpetuated by decrees and laws that protected repressive behavior," and that torture carried out by paramilitary police and armed forces became a generalized practice (United States Institute of Peace, 2003). This Commission also recommended reparation programs and the provision of "individualized material reparations, pensions, educational and health benefits, as well as collective symbolic measures" for victims (United States Institute of Peace, 2003).

Following the recommendation of the Rettig Commission, a reparation program referred to as the National Corporation for Reparation and Reconciliation was created. This allows for victims who are named in the report to receive financial support, "totaling approximately 16 million USD each year" (United States Institute of Peace, 1990). Following the Valech Commission, 28,459 victims are being provided "lifelong governmental compensation ... and free education, housing and health care" (United States Institute of Peace, 2003).

In 2007, Chile's president Michelle Bachelet announced the creation of the Museum of Memory and Human Rights, in Santiago. The mission of the museum, as laid out on their website, is to "allow dignity for victims and their families, stimulate reflection and debate and to promote respect and tolerance in order that these events never happen again" (Museodelmemoria.cl). The museum features artifacts from Pinochet's dictatorship.

Chile was slow to implement institutional reforms. This was because the institutions in need of reform—the military, judiciary, and legislature—remained loyal to Pinochet even after his downfall. Change was initiated with the abolishment of a national holiday which honored the September 11, 1973 coup. Soon after, changes to the Pinochet-era constitution were made. This long reform process "resulted in amendments that allow the president to fire the armed forces' commanders" (United States Institute of Peace, 1990). Additionally, the National Security Council was no longer able to hold any power aside from advisory powers.

Chile is one example of a country which unfortunately still faces wide-spread impunity, making the advancement of human rights rather difficult. Despite this, the country has made significant progress in their attempts to bring justice to victims of Pinochet-era violence. Multiple truth commissions have brought to light the atrocities committed by armed forces; reparation programs have provided victims with housing, education, and money; and reforms have helped the country shift away from its military past. Chile is a country which still has a long way to go, but has made significant progress in their efforts to restore respect for human rights.

Colombia

Colombia has been plagued by an armed conflict that arguably began in the 1940s and continues to this day. Originally, Colombia's civil war, a period known as *La Violencia*, lasted from 1948 through 1957. The two groups involved were the "two economic, social and political elites organized under the Liberal and Conservative parties" (Garcia-Godos and Lid, 2010, p. 490). A peace agreement was reached by the two parties in 1957 for power to be shared among the groups for the next 16 years. The new bipartisan regime became known as the National Front. Shortly after, in 1964, "the war [was] re-ignited [by an anti-regime insurgency] and continues to this day" (Garcia-Godos and Lid, 2010, p. 490).

The main groups involved in the conflict are communist guerrilla groups including the Revolutionary Armed Forces of Colombia (FARC), Army of National Liberation (ELN), and the Populist Liberation Army (EPL). A year after the start of the conflict, the government enabled the creation of new irregular forces through Decree 3398, basically legalizing the formation of private self-defense or paramilitary groups (Garcia-Godos and Lid, 2010, p. 492). In 1989, this was reversed. Shortly after, violence carried out by FARC and ELN began to skyrocket.

The two groups have long histories of violence and human rights abuses. As of 2007, the armed conflict has resulted in an "estimated total of 674,000 homicides," including 51,000 civilians, 6,000 forcibly disappeared, 51,500 kidnapped, and at least 11,000 tortured (Garcia-Godos and Lid, 2010, pp. 490-491). In 2002, FARC was responsible for kidnapping Ingrid Betancourt, a presidential candidate. Betancourt was held "along with three U.S. military contractors until 2008, when Colombian forces rescued them and twelve other hostages" (Felter and Renwick, 2017). In 2001, FARC was responsible for the assassination of a culture minister. In 2002, the group was found responsible for hijacking a commercial flight.

These violent groups, as well as other right-wing paramilitary groups, quickly became involved in Colombia's growing drug trade. It is estimated that in the early 2000s, "Colombia supplied as much as 90 percent of the world's cocaine, and the production, taxation, and trafficking of illicit narcotic provided the FARC with much of its revenue" (Felter and Renwick, 2017). This involvement soon led to violent conflicts over territory. ELN did not become involved in drug trafficking until 2015.

After five years of negotiation, Colombia's government and FARC came together to sign a peace agreement. The two came together in Havana, Cuba, with the intention to "end the armed conflict and build stable and lasting peace" (Institute for Integrated Peace, 2018). Peace talks with ELN have been ongoing since February 2017, with very little success. Despite any agreements, Colombia is still in an incredibly fragile state. Armed conflict remains ongoing in many areas once controlled by FARC, "as armed groups are attempting to take control over strategic areas, natural resources and important drug routes" (Jenssen, 2018). Violence continues to grow throughout the country and the government is doing very little to stop it, leading "to a 36-percent increase in internally displaced people in the first half of 2017," a figure which continues to grow (Jenssen, 2018). There have been nearly 90 murders of human rights activists and local leaders since 2017, and many Colombians admit to feeling less safe following the peace talks than they did before.

The case of Colombia is unique because it is one where transitional justice measures have begun to take shape despite the ongoing conflict. In 2005, Colombia

passed the Justice and Peace Law, also commonly referred to as Law 975. The law established a framework for peace while also respecting the rights of victims to truth, justice, and reparations, and established Colombia's truth commission (The Center for Justice & Accountability, Colombia). It also introduced the "requirement of retributive justice in terms of imprisonment and recognizing the role of the victims and their rights in the peace process" (Garcia-Godos and Lid, 2010). The legislation also requires the government to preserve the memory of the armed conflict and its victims.

Law 975 provided a basic outline of institutions and their roles in the peace process. Colombia's Truth and Reconciliation Commission is such an institution. The law also required the establishment of the National Unit for Justice and Peace (UNFJP), with a mandate to "ensure that the demobilized paramilitaries fulfil their obligations with regard to confessions, and to carry out criminal investigations, in addition to having the main responsibility for collecting and systematizing reports of abuses" (Garcia-Godos and Lid, 2010, p. 499). Other important institutions laid out in Law 975 include the High Court of Judicial Districts, and the Public Defense Office, which oversees the rights of the accused.

In 2016, the Colombian government and FARC came together in an attempt to end the war. A June ceasefire and agreement, which arranged disarmament, was signed by the two parties, and three months later, FARC and the government came together to finally put an end to a conflict that had lasted more than 50 years. Colombians, however, were not happy with the peace agreement. They found the provisions of the agreement too lenient on FARC, and voted against the peace deal in a subsequent national referendum on the peace deal. A new deal was proposed, to include "reparations for victims which will come from FARC's assets and money" (Lopez and Capelouto, 2016). Other aspects included that "FARC rebels [would] be expected to provide exhaustive information about any drug trafficking they may have been involved in," and a 10-year time limit was set for the implementation of transitional justice measures (BBC, 2016). The new peace deal, which regulates the Special Jurisdiction for Peace tribunal, was approved in late November 2016.

In June 2018, Colombia elected Ivan Duque as president. Duque ran his campaign for presidency primarily on his opposition to the 2016 peace deal. He stated that "people who have not turned in assets or weapons will be brought to justice," and "people who have committed crimes like kidnapping and narco-trafficking will no longer...be granted amnesty" (Wymouth, 2018). In Duque's opinion, the peace deal was too lenient with FARC commanders accused of atrocities (Murphy and Vargas, 2019). As news of the President's plans to amend the peace deal surfaced, former rebels expressed the dangers of doing so. Many think that this move will further aggravate armed conflict within Colombia. As of April 9, 2019, the lower house rejected Duque's proposed changes to the peace deal.

At the center of Colombia's current transitional justice efforts lies the Special Jurisdiction for Peace (JEP). The JEP was first laid out within the peace deal of 2016 and was described as the most contentious issue of the peace process (Harper and Sonneland, 2018). The JEP was officially instituted in March 2018, and contains different branches that investigate and try perpetrators of violence and human rights abuses during the war. The JEP is organized in a rather complex matter. Cases start in the smaller chambers, including the truth chamber, amnesty chamber, and sentencing chamber. In the first chamber, applicants are provided a platform to come forward

about their actions, “and depending on the severity of their crime, they may be referred to receive amnesty or limited sanctions” (Ballesteros, 2017). While this is happening, the Investigatory Unit researches where rebels had committed crimes and are not confessing, and works to bring those people to trial. If they are found guilty, they are given “the opportunity to tell the truth in the smaller chambers before their case heads to the Peace Tribunal” (Ballesteros, 2017). Once a case reaches the final step, the Peace Tribunal, all people involved are given the opportunity to appeal.

Colombia’s first truth commission, also a part of the peace deal, officially convened on May 8, 2018. The Commission “will operate for three years during which it must submit reports every six months” (BBC, 2018). The purpose of the Commission is to clarify what took place during the armed conflict and provide reparations to victims of the brutality. The evidence collected by the Commission cannot be used in the criminal proceedings in hopes that people would “provide more truthful testimonies of their crimes if they knew their testimony could not be used against them in court” (Ballesteros, 2017).

Another significant transitional justice effort implemented in Colombia with the help of the International Commission on Missing Persons is the Search Unit for Missing Persons. The Search Unit “was formally established through a Constitutional Amendment adopted by the Colombian Congress on 13 March 2017” (International Commission on Missing Persons, 2017). The Unit is responsible for finding “between 45,000 and 90,000 victims” (Gill, 2018). As of January 23, 2018, the Search Unit had not made any progress due to lack of funds and possibly a lack of political will.

The case of Colombia is certainly unique. Colombia is a country still ravaged by violence despite numerous peace deals being drafted and passed. A number of different transitional justice measures have been implemented in an attempt to bring justice to victims of the more than 50-year war, including the Search Unit for Missing Persons and The Commission for the Clarification of Truth, Coexistence, and Non-Repetition. The fate of these measures is uncertain as Ivan Duque, the current President of Colombia, is working against the 2016 peace deal which laid out all of these measures.

Conclusion: a comparative study of transitional justice in Latin America

Each country that undergoes a transition from a repressive regime to a democracy will handle their transition differently. While the measures they implement may be similar in nature, they will remain unique in certain ways. The acceptance of these measures by the public will also vary by country. Additionally, the success of these measures is bound to differ throughout every country. These differences are prevalent when comparing the transitions of Argentina, Guatemala, Colombia, and Chile.

In terms of truth commissions, Argentina and Guatemala each utilized one truth commission, while Chile had two. As of now, Colombia is implementing one truth commission, but it is unclear whether or not they will hold any more in the future. The makeup of these commissions also varies by country. The number of commissioners varies depending on the size of the commission. Additionally, commissions differ on the nationality of their commissioners. Some commissions will have mostly natives of the country serve as commissioners, while others will have a majority of foreigners working in the commission.

Truth commissions also vary in the time frames they cover. It would be very difficult for commissions to cover the entirety of conflict in some cases, so they often

focus on specific years. However, the truth commissions held in Argentina, Guatemala, and Chile covered the span of each country's conflict in its entirety. Argentina's commission covered the years 1976 to 1983, which was the time frame of the country's 'dirty war.' Guatemala's commission covered the years 1962 to 1996, covering the entirety of the country's 36-year war. Both of Chile's commissions covered the years 1973 to 1990, which spanned the rule of Pinochet. Colombia's truth commission also aims to cover the entirety of its internal armed conflict.

Subject matter covered in truth commissions also differs among countries. Argentina's truth commission was mandated to solely investigate the disappearances of people and the details of these disappearances. Guatemala's truth commission had a broader goal of clarifying all violations of human rights, fostering tolerance and preserving the memory of the victims (United States Institute of Peace, 1997). Chile's Rettig Commission was only able to investigate abuses that resulted in either disappearance or death. Chile's Valech Commission documented "abuses of civil rights or politically motivated torture ... by agents of the state and by people in their service" (United States Institute of Peace, 2003). Colombia's ongoing commission seeks to clarify abuses and events that occurred during the country's internal conflict.

Despite these differences among truth commissions, all of the commissions mentioned above helped to successfully contribute to a future of democracy and sustainable peace. The Argentina commission provided a platform for 7,000 stories to be heard and for the provision of reparation programs for victims. Guatemala's commission provided a platform for 7,200 stories to be told while helping kick start memorialization efforts and land restitution programs for natives. Chile's Rettig Commission documented 3,428 victim testimonies, and the Valech Commission documented testimonies given by 27,255 victims. Both of these commissions helped to create different reparation programs within Chile. Colombia's ongoing commission is working to clarify different abuses which have occurred over the last 50 years.

Prosecution of war criminals and human rights abusers varies greatly among these countries. In some countries it has been harder than in others due to impunity. Argentina is still prosecuting war criminals to this day. As of 2017, over 2,000 people have been charged with crimes that took place during the war. Argentina successfully overturned amnesty laws, which allowed them to continue prosecutions. Guatemala, on the other hand, has struggled with criminal prosecutions. The country recently backed out of CICIG, which worked to eradicate impunity and is also potentially going to amend the National Reconciliation Law of 1996, which would end all ongoing trials and free all persons currently in jail for crimes committed during the war. Chile has ignored Pinochet-era impunity laws and has worked tirelessly to prosecute war criminals. It is difficult to tell whether or not Colombia will successfully prosecute war criminals, as the promise of impunity is a central idea in their peace deal with FARC.

Reparations have appeared in these countries in a number of different shapes. In 2004, Argentina was granted \$3 billion USD for the victims. This was much easier said than done, however, as victims were required to provide documentation that they were detained without trial. In Guatemala, reparations came in the form of memorialization. Different communities within Guatemala have constructed different traditions to commemorate the disappeared. Chile had a combination of both of these. After the conclusion of their truth commissions, nearly 30,000 victims were provided with governmental compensation for the rest of their lives. The government also erected the

Museum of Memory and Human Rights to preserve the memory of those lost during conflict. Colombia has yet to provide reparation programs to victims.

Each country has had different experiences when it comes to reforms. Argentina was able to reform its constitution, promote democracy and human rights throughout the country. Guatemala has been very slow to reform their institutions despite efforts to amend the constitution in 2016. Chile was also slow to reform their institutions because the institutions which required reform remained loyal to Pinochet. Small reforms such as allowing the president to fire armed forces' commanders and bar the National Security Council from holding power aside from advisory powers, were implemented. Colombia has yet to implement institutional reforms.

Transitional justice is used around the world. It comes in a number of different forms and is a key player within international law. There are a number of different transitional justice measures including truth commissions, reparation programs, criminal prosecutions, and memorialization efforts. These measures have been implemented extensively throughout Latin America and have helped countries such as Argentina, Guatemala, Chile, and Colombia to make the transition from repressive regimes to democracy.

Since the implementation of transitional justice measures, Argentina has made great strides toward democracy, free from domestic armed conflict. In 2015, Argentina made history by electing Mauricio Macri as president. This is Argentina's first president who has been democratically elected since 1916 and is neither a Peronist, nor a radical. Guatemala has also made great steps towards strengthening their democracy through transitional justice. Despite high waves of impunity, in the past ten years Guatemala has "seen a former dictator found guilty of genocide; high-ranking military officials sentenced to lengthy prison terms for their roles in mass atrocities; and indigenous women winning cases against members of the military who sexually enslaved them and robbed them of their land" (Mattingly, 2019). Chile continues to prosecute war criminals and works to ensure that the memory of victims of Pinochet's era are not forgotten. The country continues to hold democratic elections, which had been incredibly rare in the past. Colombia is still involved in a deeply rooted internal conflict, but their present initiatives in transitional justice look promising.

Truth commissions in these countries have provided platforms for thousands of victims to come forward and tell their stories. This allows victims a sense of closure by allowing their story to be told and subsequently shared with the world. Criminal prosecutions put an end to impunity and act as a deterrent for future crimes. They provide a potential for victims to feel safer, knowing their abusers are in jail or facing punishment. Reparation programs, including memorialization, allow for victims and their families to come to terms with the past and to make sure their history is never to be forgotten. Memorials also allow for continuous conversation about the past for future generations. Reforms provide institutions a second chance to advance the human rights protections and democracy. When implemented together, all of these transitional justice measures serve as a channel for the advancement of democracy, development, and sustainable peace within Argentina, Guatemala, Chile, and Colombia.

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**Fear of the Other Race:
Decades of Institutional Racism, Unfair Legislation, and Hatred
JAKE LUPPINO***

Introduction: Origins of Discrimination

In 1619, in the British colony of Jamestown, Virginia, slavery was introduced to the British North American colonies. It would soon then become familiarized into many of the colonies that were in favor of “cheap labor”. While 1619 seems like many centuries ago, the lasting effects of slavery are still very much alive. The majority of slaves were African Americans who were bought and sold by white slave owners. Throughout the period of 1619-1865, African Americans were treated as second class citizens; calling them citizens might be too generous of a phrase. In the eyes of slave owners, they were seen as objects.

After the ratification of United States Constitution in 1788, struggles continued between federalists and anti-federalists, thus the Bill of Rights, which guaranteed freedom and rights to the States was ratified in 1791. It was not until the 1860’s when African Americans were considered to be protected by the United States Constitution. It took approximately seventy-seven years to officially recognize African Americans as an “equal”. The United States did so by ratifying the 13th Amendment in 1865, which abolished slavery, and the 14th Amendment in 1868, guaranteeing equal protect under the laws for citizens in the United States (*Fourteenth Amendment*, n.d.). Unfortunately for African Americans and other minorities, once they became recognized under our Constitution, matters only got worse.

Prior to the Civil War (1861-1865), four million slaves arrived upon U.S. soil. The slave owner possessed all rights over the slave; enshrined in law: “The master may sell him, dispose of his person, his industry, and his labor; [the slave] can do nothing, possess nothing, or acquire anything but what must belong to his master” (Costly, n.d.). The law allowed the slave owner to dictate the working hours of the slave and the beatings they would receive if they were not pleased with the work. The law explicitly recognized the dehumanization of slaves in early America. Slaves worked from sun up to sun down in agricultural fields that mainly produced sugar, rice, corn, and cotton. In 1793, when the cotton gin was invented, cotton was the heart of the market and so, more cotton fields were harvested. As a result, more slaves were needed for the labor. Slaves as young as six were introduced into the brutal working conditions. Failure to comply would result in punishment.

Before, during, and after “work”, slaves were treated unfairly in many regards. For starters, when slaves were bought or sold and put onto a ship, they were put into very condensed spaces; spaces so tight, that they could barely breathe. They had shackles around their neck, hands, and sometimes ankles. These brutal conditions would often result in slaves dying before they even arrived. When slaves failed to comply with an order given by the master, they were punished. The type of punishment they received depended on the mood of the slave owner as he had many different options on how he could punish. There was branding, whipping, rubbing pepper or salt onto wounds, sexual assault, mutilation, and execution (*8 Most*, 2018).

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Masters often stalked and raped female slaves. Masters forced them into sexual acts; failure to do so would result in brutal beatings. The master-slave relationships caused tension between the mistress and slave. While the slave was forced into sex with the master, the mistress was only allowed to take her frustration out on the slave leading to further beatings for the slave. Also, children born from rape by the master resulted in those children being sold into slavery because they were to be considered African American. Many families were broken up by this. When slaves were not working in the home of their master or in the fields, they were living in the “quarters”. The quarters were small cabins filled with slaves and were cold during the winter and warm during the summer. The lack of care given to slaves led to sickness: “Sickness was common and the infant death rate doubled that of white babies” (Costly, n.d.).

The white master created customs and rules by which the slaves would live; these became the “slave codes”. The slave codes entailed all things that were not acceptable for a slave to do. For instance, slaves were forbidden to learn how to read and write. Later on, during the Jim Crow era, this played a very important role as slaves were banned from voting because they are illiterate. Slaves were unable to own or sell items unless they had a permit (which was never granted to them), were unable to travel without a permit, and they were subject to a curfew every night (Costly, n.d.).

The severe brutality that slaves had to endure during slavery allowed southerners to use that to their advantage when the 13th Amendment abolished slavery. While they fought for their freedom in the Civil War and ended up triumphant, the Jim Crow era followed. Between the 1870s-1950s, African Americans living in the South suffered under Jim Crow laws. Jim Crow segregated black people in the United States. The reasoning behind Jim Crow was that the African American was inferior, the ideology remaining from many years of slavery.

The enactment of Jim Crow in the South was another attempt of the white male being in control of the African American male. This is illustrated through the many laws that were passed during the Jim Crow Era. One of them pertained to voting rights for African Americans. In 1870, the 15th Amendment was ratified: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.” The voting laws that were passed in response to these included literacy tests, poll tax, and the grandfather clause. For example, in Mississippi, applicants were required to, “transcribe and interpret a section of the state constitution and write an essay on the responsibilities on citizenship” (*Literacy Tests*, 2018). Also included on the exam were questions that were decided by registration officials, which had no definitive answer; reason being is because the officials also interpreted the answers. In other words, they were the ones who decided which individuals passed the exam and which individuals failed. Keep in mind, that throughout slavery, it was forbidden for a slave to learn how to read and write. The poll tax was a \$1.50-\$1.75 tax that was too be paid in order to register to vote. During this time, this was considered a large amount of money and was not affordable by many poor people in the country.

Jim Crow was successful in its attempt to segregate the whites from the blacks and increase the hatred for the African American male. The privileged position of the white male was enhanced during the eighty years of Jim Crow by putting laws into place that separated the blacks from the whites. Schools, jobs, bus rides, etc. all had “whites only” and “blacks only” signs. While the idea of exclusion was challenged many times, the law

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of segregation held supreme. This idea can be illustrated through the case of *Plessy v. Ferguson*, 163 US 537 (1896). The famous ruling of “separate but equal” came from this case in which Plessy bought a train ticket where whites were only allowed to sit and Plessy was one-eighth black. He was arrested and, in court, his lawyers argued on behalf of the 14th Amendment. The Supreme Court ruled in favor of the state claiming that as long as the railroad was in state boundaries, they were allowed to segregate (*Plessy*, 1896). Once again, the underlying issue was the law recognized segregation and allowed it although it was in contradiction with the Constitution. This alludes to the ideology of the black man being inferior to the white male. Essentially setting up a norm that would become customary in the many years to follow the Jim Crow era, which established that discrimination and stereotyping was allowed and in fact, encouraged.

One way in which it was encouraged occurred through the actions of the Ku Klux Klan. The Ku Klux Klan was a hate group that would terrorize African American communities. Black schools were vandalized and destroyed and black citizens were attacked at night (History.com Editors, 2018). The Ku Klux Klan wanted to strike fear in African Americans. They would often put a cross on their front yard and light it on fire. Their members would dress in all white signifying the power of the white people. When they captured African Americans, they would brutally torture them. They used one of the methods that was present in slavery, which was mutilation. Prior to lynching, they were mutilated. The Ku Klux Klan barely faced any repercussions for their actions. During the Jim Crow era, the primary method of display that whites used in order to emphasize their power was through lynchings. The whites used lynching as a fear tactic in response to the freed slaves taking away jobs from the whites:

From 1882-1968, 4,743 lynchings occurred in the United States. Of these people that were lynched, 3,446 were black. The blacks lynched account for 72.7% of the people lynched. These numbers seem large, but it is known that not all of the lynchings were ever recorded. Out of the 4,743 people lynched only 1,297 white people were lynched. That is only 27.3%. Many of the whites lynched were lynched for helping the black or being anti lynching and even for domestic crimes (*History of Lynchings*, 2020).

Often times, there were lynching parties where people would gather and celebrate the lynching of another human being. Looking back at these cruel and harsh techniques that were deployed in order to remain as the dominant race, Southerners were willing to do whatever it took to strike fear into the African Americans.

The sad truth behind the thousands of lynchings as well as the disenfranchisement laws were ruled out of fear. The whites feared the African Americans; they feared that once the African Americans became free, they would take over the world. They would replace them in their jobs and start to build a world of their own. When the tiniest glimpse of that fear became a reality, their fear then turned into anger. That anger then turned into the suffering of thousands of African Americans at the hands of the Southern States. Jim Crow taught us that it is always darkest before dawn; essentially meaning, that before something can get better, it has to become worse than it originally was. African Americans have endured many evil decades within the United States of America and the beginnings can all be traced back to slavery and Jim Crow where the African American male was stigmatized and categorized into a dangerous individual.

The reality of the situation is that when African Americans entered this country on a ship in shackles, their first steps were not even their own. The many whippings and lynchings they had to endure only enhanced their strength. The hatred they dealt with when the Civil War was over only enhanced their resiliency. African Americans have showed an enormous amount of courage in tough times and yet are seen as a threat to the American public. It is all because of fear; fear conquers the weak and anger corrupts the mind. When you put those two things together, you set up a formula for hatred that is still present in the United States. The fear of the African American is still prevalent in today's America. It is present in our criminal justice system through the many injustices that have been served to African American communities. It is present in our prison systems, where the majority of the percentage of the African American population is rotting in a prison cell that the state is benefitting off of. The ideology of the dangerous black male has made this country millions of dollars and has been used as a sale pitch to convince the American public that certain policies such as the War on Drugs and Stop and Frisk are necessary.

Throughout this paper, I will highlight and illustrate the inequalities that have plagued the African American communities for centuries. I will also make the argument that Jim Crow still exists today in the United States; its presence just appears in a less obvious manner. The main focus of this paper will be racial inequalities, specifically in the criminal justice system. I plan on using Critical Race Theory and the Black Lives Matter Movement as a foundation to help show the prejudices that exist in our institutions. Critical Race Theory provides a basis for understanding that violence against black people stems from a larger narrative. This ideology of white supremacy has spread through all aspects of human institutions. Penetration of white supremacy throughout institutions has prevented African Americans from realizing their full equal rights (Aymer, 2016, p. 369). Black Lives Matter will help illustrate how within the criminal justice system, there are extreme differences in how white on black crime is treated, specifically when police officers are involved. Since 2005, among thousands of police shootings that have taken place, only fifty-four officers have been charged (Kindy & Kelly, 2015).

According to the NAACP, "though African Americans and Hispanics make up approximately 32% of the US population, they comprised 56% of all incarcerated people in 2015." The War on Drugs had its initiative of being tough on crime, which resulted in stricter punishments for those who committed drug offenses. While all races have a similar drug usage rate, it was African Americans who have suffered the most arrests. In 2016, of the 81,900 prisoners that got sentenced to a prison sentence for a drug offense, 31,000 of those prisoners were African Americans. In comparison, 17,700 of those prisoners were white. In 2016, of the 63,900 African Americans who got sentenced to prison, 48.5% were those of a drug offense. In comparison, of the 47,300 whites who received a prison sentence, 37.5% were those of a drug offense (Carson, n.d.).

Dr. Martin Luther King Jr. once said, "injustice anywhere is a threat to justice everywhere". Prior to my attendance at Ramapo College of New Jersey, I had no knowledge of the friction that existed between police departments and African American communities. That was partially due to the fact that in high school, we did not focus on prevalent issues, such as Black Lives Matter. As Dr. King eludes to in his quote of injustices being a threat to everybody, I came to the realization that what happened in Ferguson, Missouri was not a one-time occurrence, it was in fact becoming a norm around the United States and I was completely clueless about it. In a case study done by the Washington Post, in which they reviewed 54 cases of police officers who used deadly force,

of the 54 officers, 43 were white and 33 of the victims were African American (Kindy & Kelly, 2015). I came to the realization that the injustices that occurred throughout the United States had an impact on me. The deeper meaning of Dr. King's quote is that we are all interconnected. Regardless of our race, religion, or ethnicity, we are all humans and all want peace. It is my obligation as an American to stand up for what I believe in. Due to the interconnectedness that we all have with one another, it is time we come together and put an end to the misfortunes that minority communities have had to endure. It is time we put an end to the unfairness that exists in our criminal justice system.

I: War on Drugs: Legislative Influence & the Creation of the Prison Business

On June 17, 1971, President Nixon declared drug abuse as, "public enemy number one." He added, "in order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive" (Barber, 2016) war. Thus, the war on drugs was declared and the United States was entering another area of racial discrimination that was empowered by the President of the United States. While drugs were becoming an epidemic to the American public, the assumption and myths about drug abuse was actually declining at the time of the "war". While Jim Crow disappeared in the 1950's, the systematic racism that it set up was only enhanced thereafter.

"American prison and jail populations tripled between 1980 and 1993, primarily due to increased numbers of drug convictions and longer sentences for drug offenders" (Tonry, 1994, p. 25). President Nixon pitched the idea of a war on drugs to the American public and they were sold primarily out of fear. Fear has been something that has dictated the motives of the American public for centuries. Fear of another race or fear of uncertainty; the war on drugs was an empowering message and conveyed a stronger message to families as they did not want their children to die from drug overdose. Nixon appealed to his audience by putting drugs on a pedestal and making it his mission to prevent people from using and dying from drugs. But, an argument can be made that this implementation of the war on drugs had a different directive behind it. While there is no argument against drugs being a problem for the public, the initiative of this war could have been to harm the minority communities. One might ask why in a world where we have a Constitution that guarantees all these freedoms and rights, why would someone want to target a particular group unfairly? Well, looking at the track record of America at that current point of time, which was in the 1980's, all they knew how to do was disenfranchise particular groups.

WAR ON DRUGS

The War on Drugs objective was to reduce drug use and trafficking. Our government went through great extremities in order to reach this objective: "the doubling of arrests in the 1980s, combined with harsher penalties, more than doubled the police, jail, prosecution, and court case flows and costs associated with drugs" (Tonry, 1994, p. 26). While it makes sense that our law enforcement needed to get bigger and our courts needed to prepare for more drug cases, it was all for nothing because the war on drugs ultimately had no positive effect on society. In reality, prior to the war even starting, drug use, particularly, cocaine, was on the decline. You may ask, what was the result of this war? The answer is quite simple, increased prison populations:

Decades of stable incarceration ended suddenly in the mid-1970's, as the U.S. prison population soared from about 300,000 to 1.6 million inmates, and the incarceration rate from 100 per 100,000 to over 500 per 100,000. The incarceration boom is unprecedented in American history, and unseen anywhere else in the world (Pfaff, 2015, p. 173).

Looking at it more in-depth, between 1980 and 1992, the increase in prisoners for drug offenses alone took a major spike as well:

Drug offenders constituted 22 percent of admissions in 1980, 39 percent in 1988, and 42 percent in 1990. In 1980, 25 percent (4,912) federal prisoners were drug offenders; by 1991, 56 percent (30,754) were drug offenders; and by 1992, 59 percent were offenders. Guarding, housing, feeding, and caring for all these prisoners costs a great deal. Typical estimates of the average annual cost of holding on prisoner range from \$20,000 to \$30,000 (Tonry, 1994 , p. 26).

When looking at the dramatic increase as well as the cost per inmate, the naked eye can see that our government was dedicating a lot of money towards imprisonment due to the war on drugs.

President Nixon declared the war, and President Regan and Bush put forth their efforts in continuing the war. The racial group that was mostly impacted by this war was the same racial group that had to deal with the evilness of slavery and the unfairness behind Jim Crow: African Americans. When Jim Crow ended, African Americans throughout the United States were hopeful for a brighter future. For all the tough times they had to endure, they were expecting some help in return from the government in an effort to make their America a better America. Unfortunately, the War on Drugs only hindered their efforts; the War on Drugs resulted in more discrimination against African Americans. They were considered the ones who were using coke and introduced crack. In the eyes of the American public, they were “public enemy number one.” The evidence to back this up, the drugs that were mainly targeted were the ones that were most commonly found in minority communities: “the drugs primarily targeted by the War – cocaine and more recently crack – are notoriously used and distributed in the inner cities” (Tonry, 1994, p. 52). The money that was being poured into the police department to develop larger narcotic forces was so that they could infiltrate the urban neighborhoods.

Urban neighborhoods made the police look better because they would typically make more arrests there than they would in a white-collar neighborhood. That is the main reason as to why they were always lurking around the poorer areas; so, their statistics would look better: “A primary reason, therefore, for the relatively higher rate of drug arrests in disorganized minority communities than elsewhere is that they are easier to make” (Tonry, 1994, p. 53). The sad reality of the situation is that the image painted of an African American as a drug addict was not quite true. In fact, white people used more drugs than African Americans. The only difference is that whites were not targeted or observed nearly as closely as blacks were. In terms of who drank the most alcohol and used the most drugs based on race, the whites led in nearly every category. For example, in terms of alcohol usage, 85.2% whites claimed they did compared to only 76.6% of blacks. In terms of cocaine usage, 11.7% whites claimed they did compared to only 10.0%

of blacks (Tonry, 1994, p. 57). Again, this discrepancy makes it seem odder as to the African American prison population was dramatically increasing. As a matter of fact, it validates the argument even further that African Americans were the primary targets during the war on drugs: “between 1985 and 1989 the number of black arrests more than doubled, from 210,298 to 452,574. The number of white arrests grew by only 27 percent” (Tonry, 1994, pp. 54-55).

Another important element about the War on Drugs is recidivism. The term recidivism means, the tendency of a convicted criminal to reoffend. Between the years of 2000-2012, there were many repeat offenders for drugs. For example, for two-time offenders, out of the 265,587 admitted to prison, 49,449 were for repeat drug offenses. For three-time offenders, out of the 129,354 admitted to prison, 22,202 were for repeat drug offenses. The total amount of admissions between the years of 2000-2012 was 2,755,790 and 513,505 were repeat drug offenders (Pfaff, 2015, p. 193). This data signifies two important elements. First, repeat drug offenders cycle through our prison systems; in the data found, there were as many as five-time repeat drug offenders. This could potentially lend to a drug issue that we have in the United States. But, it actually trends toward a different direction, which is now known as the “new” Jim Crow. Essentially, recidivism rates are higher or seem higher for repeat drug offenders because of their environments when they are released from prison. The NAACP reports, “a criminal record can reduce the likelihood of a callback or job offer by nearly 50 percent. The negative impact of a criminal record is twice as large for African American applicants.” Keep in mind, a minor drug offense, such as possession of marijuana can result in someone receiving a criminal record. The second important implication given to us from the War on Drugs is that drugs are not the primary issue in America. As the data stated above shows, for the total admissions of 2,755,790, more than half of the prisoners were in jail for offenses besides drugs. This tells us that the War on Drugs was not successful, but yet proposes the question as to why do we still spend so much on prisons? The NAACP reports, “Spending on prisons and jails has increased at triple the rate of spending on Pre-K-12 public education in the last thirty years.”

PRIVATE PRISONS

The answer is simple: economics. Our prison systems are run by private companies; not all, but most are. “Private companies run prisons for both the federal government and 29 states” (Trilling, 2018). Due to the substantial increase of prisoners dating back to the 1980s, the prison business was seen as entity to earn money. The U.S. Department of Justice provide statistics that show in 2016, the prison population included 1,506,757 people. 189,192 people were held in Federal prisons and the other 1,317,565 were held in State prisons. As mentioned earlier, with private companies running these prisons, they are able to benefit off the crimes committed by other people. In fact, they provide incentives to arrest and incarcerate.

In an American Civil Liberties Union article, David Shapiro maps out the “tough on crime” stance that was introduced during the War on Drugs era and how certain sentencing structures kept people in prison for a longer time. Three laws that he discusses are: mandatory minimum sentencing laws, truth in sentencing laws, and three strike laws:

Mandatory minimum sentencing laws: Such laws impose long sentences and prevent judges from exercising discretion to impose more lenient punishments, where appropriate, based on the circumstances of the crime and the defendant's individual characteristics.

Truth in sentencing laws: Such laws sharply curtail probation and parole eligibility, requiring inmates to remain in prison long after they have been rehabilitated.

Three-Strike laws: such laws subject defendants convicted of three crimes to extremely long sentences. In one case heard by the U.S. Supreme Court, a man charged with stealing golf clubs received a sentence of 25 years to life under a three strike law.

As discussed, it is visible that the promotion of longer sentences has contributed to social policies being implemented that do so with private facilities feeding off it. A direct correlation can be made between the two based off data provided by the American Civil Liberties Union. In 1990, the average amount of prisoners in private facilities was 7,771. In 2009, the average amount of prisoners in private facilities was 129,336, which equates to a 1664% increase between the years of 1990-2009 (Shapiro, 2011, p. 12).

Private prisons make millions of dollars based off how many people they imprison. Money dictates all; our prison systems have turned into competition. Private prisons now compete with State facilities in an attempt to imprison more people. Private prisons need to get a contract from the government in order to launch their facility within that State and if profits seem to be involved, the state is on board. It is important to note that by obtaining these contracts with the government, they are receiving taxpayers' dollars which result in large amounts of revenues for the private companies. In 2010, the two most dominant private companies, Corrections Corporation of America and GEO Group had revenues of nearly \$3 billion dollars (Shapiro, 2011, p. 13). As citizens of the United States, when we think of our three branches of government, we think of checks and balances. We hope that one keeps the other in check so that we can avoid conflict of interest or a potential abuse of power. Our legislatures are being pressured into passing tougher laws and have complied with these requests from privation companies so that our prison systems fill up and the private companies receive their revenue. That is not what the law is about. Our legislatures are supposed to serve the American people and provide a fair chance for them to succeed in life; not hinder their chances at opportunity. The one racial group that has had to deal with consequences of these unfair laws have been African Americans. African Americans have the largest percentage of their population in prison compared to the percentage of other racial groups. The question is then why? Why African Americans? Well, they have been treated unfairly ever since they stepped off the ship that brought them here.

Our government feels no sympathy towards them. In fact, our government makes matters worse by implementing legislation that directly targets these groups. The laws that were mentioned earlier (mandatory minimum sentencing, truth in sentencing and three strike laws) all came from private sectors that work with the private prisons. David Shapiro explains:

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ALEC has pushed legislation that benefits private prison companies by promoting policies that result in mass incarceration. In the 1990s, ALEC championed – and according to one report by an advocacy group, succeeded in enacting in 27 states – ‘truth in sentencing’ and ‘three strikes’ legislation. Such laws were certain to increase prison populations and the amount of taxpayer money funneled into prisons (Shapiro, 2011, p. 15).

Lo and behold, when the policies were implemented the prison populations dramatically increased and the private prisons got their money. The laws that were introduced laid the foundation for what was to be expanded upon in the years to come. Three Strike laws go against our constitution, but yet our government implemented this policy into effect because of the monetary gains that were to come from it. What is fairness if all our government cares about is money? What about the living conditions of urban areas, and school systems within urban areas? Why not dedicate more money to the institutions that actually need it? On the receiving end of all of this are African Americans who have been systemically targeted. After slavery was abolished, the African American male was painted as a dangerous figure and our government used that to their advantage in putting together policies that were approved out of fear in order to disenfranchise that particular racial group. It started with Jim Crow in the south and then spread into the Northern states when the War on Drugs was declared by President Nixon. The privatization of prisons has certainly not helped as they have only enhanced the incentives of raiding urban neighborhoods for drugs.

Private prisons become popular in local communities as they promise to invest back into the community with the profit they make. Their sales pitch is filled with false hope that societies buy. The two dominant private companies that are involved in the private prison industry have promised communities that they will help build up economic development in the community, help business enterprises, create more revenue for the town, and create more jobs for the “hardworking” citizens. Research shows the contrary: “empirical study...found that although new prisons create jobs, these benefits do not aid the host county to any substantial degree since local residents are not necessarily in a position to be hired for these jobs” (Shapiro, 2011, p. 21).

The public is sold on false hope; the reality of the situation is that the private companies are the ones who gain the most monetary gains. Private prisons receive money per prisoner on a daily basis; that is why it makes sense it for them to work on promoting policies that enable stricter penalties and harsher sentences. “For the past two decades, a CCA executive has been a member of the council’s (task force that) produced more than 85 model bills and resolutions that required tougher criminal sentencing...and promoted prison privatization” (Shapiro, 2011, p. 15). The prison systems are set up in a way to provide incentives for everyone. For the community, it will create revenue and jobs. It will also diminish crime rates as they are willing to impose legislation that is tough on crime. For the private prison, they take criminals off the street and earn their own revenue. In the end, the only people who actually benefit are the private prisons. Jobs are not always created, revenue is not always dispersed back into the communities and policies that are implemented unfairly target the disadvantaged.

THREE STRIKE LAWS & STOP AND FRISK

The disadvantaged have to deal with the rippling effects of these unfair policies that have been implemented. Incentives to arrest have been strictly due to the increase of the privatization of prisons. The monetary gains outweigh the fairness that we are supposed to have in our criminal justice system. This can further be illustrated through other policies that have been introduced such as Stop and Frisk, Three Strike laws, which all fall back to the War on Drugs.

In 1968, we are introduced to Stop and Frisk when the case of *Terry v. Ohio*, 392 U.S. 1 (1968), was brought to the Supreme Court. Detective McFadden conducted a pat down on three men one night in Cleveland, Ohio when he suspected that they were going to rob a store. Detective McFadden observed the men as they would walk past the store 24 times and each time would be followed up by a meeting of the three men; Detective McFadden grew suspicious of the three men and ordered them inside the store. He then conducted a pat down and found a pistol on one of the men (*Terry*, 1968). The case was brought to Supreme Court on the grounds that Detective McFadden had violated the Fourth Amendment while conducting his search, and thus, the weapons shall not be admitted into evidence. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (Fourth Amendment, 2017).

Ultimately, in the major opinion written by Justice Warren, he states that the police officer acted appropriately in conducting his search even though he did not have a search warrant.

The landmark case of *Terry v. Ohio*, 392 U.S. 1 (1968), provided police officers with crucial information in how they would be able to conduct stop and frisk when not being granted a warrant. The foundation of stop and frisk is based upon speculation and the two words, “probable cause,” and according to Justice Warren, police officers are allowed to conduct stop and frisk pat downs without a warrant under the following conditions:

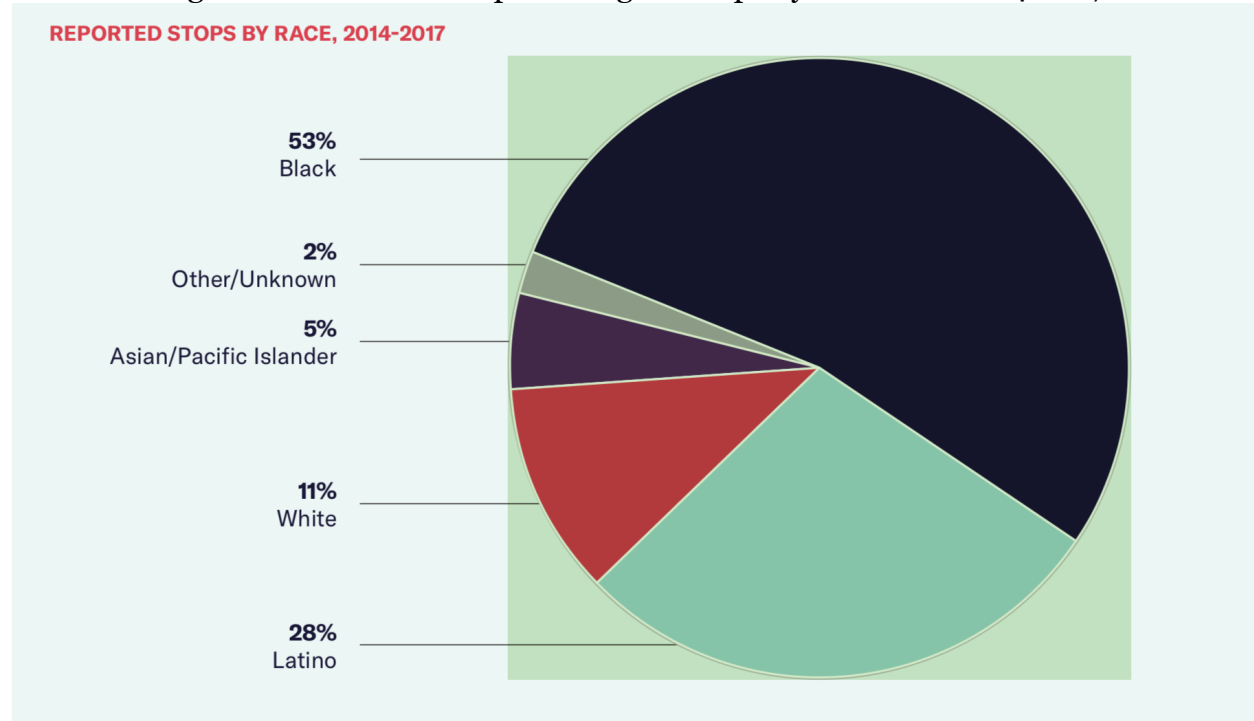
Where a reasonably prudent officer is warranted in the circumstances of a given case in believing that his safety or that of others is endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual for crime or the absolute certainty that the individual is armed (*Terry*, 1968, pp. 20-27).

An issue that often comes up in discussing stop and frisk in relation to the Fourth Amendment is when and how can an officer determine whether or not he or she may conduct a pat down without a warrant. This lends into areas of making assumptions based off race, location, etc. which then lends to racial profiling, which is a whole another issue. Justice Warren states that the circumstances must be based off the exigencies of the situation. In other words, it all depends on how urgent the situation is; if the officer truly

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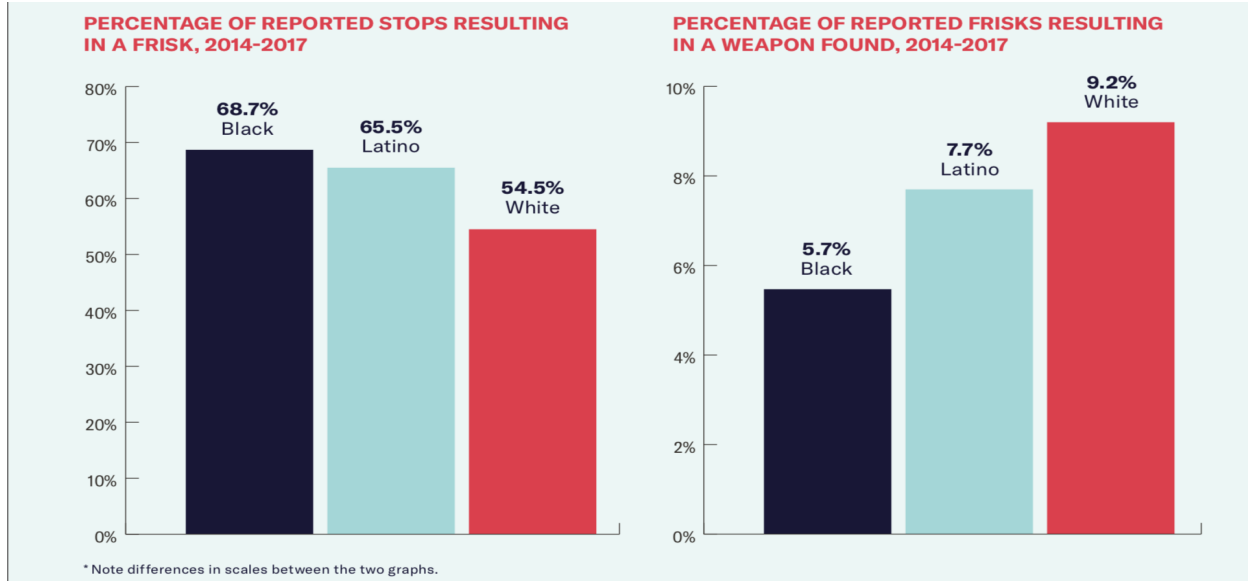
feels there is a threat and does not have time to maintain a court mandated warrant, then he or she may take reasonable action against that individual.

Data shows that in 2017, in New York City, police officers had quotas where they had to search a specific number of black people, hence, racially profiling them. In 2017, 11,629 people were stop and frisked by the police. Of those 11,629 people, 7,833 (67%) people were innocent, 6,595 (57%) people were black, 3,567 were Latino (31%), and 977 (8%) people were white (Dunn et al., 2019). As the data shows, 67% of people who were frisked were in fact innocent. An inference from the data can be made that police officers were racially profiling African Americans during their stop and frisk. The data backs it up. The following chart illustrates the percentage of stops by race from 2014-2017:



Source: New York Civil Liberties Union

As shown, more than half the people targeted were African Americans. The second largest category was another minority: Latino. The following chart illustrates how many people were stopped versus how many people were found guilty:

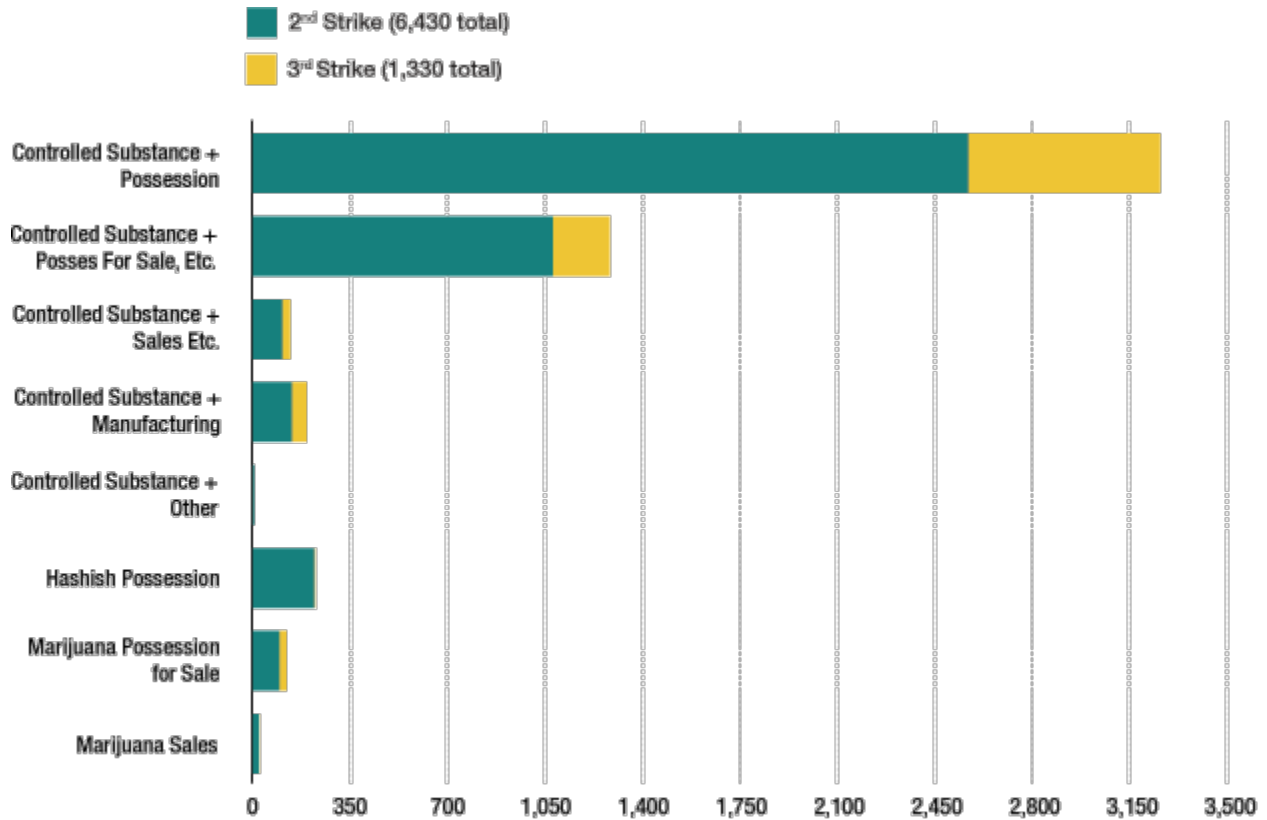


Source: *New York Civil Liberties Union*

As illustrated in the *Terry v. Ohio* case, police officers are given specific instructions on how and when it is allowed to conduct Stop and Frisk. In New York City, Stop and Frisk policies were implemented which allowed officers to decide at their own discretion and it resulted in them raiding urban neighborhoods and conducting a large number of searches on people in an attempt to find drugs and weapons. This idea of raiding urban neighborhoods and conducting searches on the disadvantaged trying to find drugs sounds familiar doesn't it? Well, that's because of the War on Drugs and the ripple effects it has had on our criminal justice system and our biased opinions towards the correlation between drug usage and urban neighborhoods.

Three Strike Laws have also caused many people to spend life in prison for minor criminal offenses, many of who for using drugs. In an attempt to deter crime, three strike laws, which are laws that impose a life sentence for almost any criminal offense, if the defendant had two prior convictions for crimes defined as serious or violent (*Three Strikes*, n.d.). The correlation of so-called drug usage in urban neighborhoods along with high policing in those areas have caused many people to spend life in prison for minor drug offenses. Not all states have three strike laws, but the ones that do are as follows: Arizona, Arkansas, California, Connecticut, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. Over 20 states carry these laws that can be viewed as unconstitutional. The following chart displays how many people in the State of California are spending in prison in relation to drugs on three strike laws in 2009:

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Source: State of California, Department of Corrections and Rehabilitation

While drug offenses are serious crimes, people should not spend life in prison as a result of being convicted for a third time. To even think that possession of marijuana can result in life imprisonment is beyond absurd.

On a larger scale, drug convictions account for a majority of the prison population. The following table displays how many offenders for the use of drugs as well as other crimes are in prison:

Offenses	Totals	Number			Percent for Category		
		White	Black	Hispanic	White	Black	Hispanic
All	1,362,028	468,529	518,763	289,429	34.4%	38.1%	21.2%
Violent	725,000	231,800	286,400	164,200	32.0%	39.5%	22.7%
Property	249,500	110,800	76,300	41,900	44.4%	30.6%	16.8%
Drug	237,000	69,500	105,600	47,800	29.3%	44.6%	20.2%
Other	150,400	56,400	50,500	35,600	37.5%	33.6%	23.7%

Source: NPS

As displayed through the data, African Americans have largest percentage of prisoners for drugs. A part of this is because of the laws that have been implemented into our legal system; three strike laws being one of them.

The truth is that three strike laws actually do not deter crime whether it is something minor as drugs or something as serious as violent crimes. The reason people engage in illegal activity is partly due to the fact that they think they can get away with it. Statistics show that this in fact true: According to the American Bar Association, “out of the approximately 34 million serious crimes committed each year in the U.S., only 3 million result in arrests” (*10 Reasons*, n.d.). Three Strike Laws also increase the burden on taxpayers: the cost of imprisoning a young offender costs about \$20,000 per year, that total nearly triples as it costs nearly \$60,000 per year to imprison an older offender (*10 Reasons*, n.d.). Again, this lends into the fact of how serious are the crimes being committed? If it is drugs, it really a reasonable response to increase taxes just to send a drug user to prison for life? We could be dedicating that money towards other institutions, such as public education that will in fact, keep children off the streets. Lastly, three strike laws go against constitutional principles, such as let the punishment fit the crime. Our Eight Amendment states, “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (*10 Reasons*, n.d.). Does sending someone to life in prison for possession of marijuana seem congruent with one another? Absolutely not.

II.) The New Jim Crow

Al Sharpton once stated, “We have defeated Jim Crow, but now we have to deal with his son, James Crow Jr., esquire.” When he refers to “we”, he is referring to African Americans. During the 1870’s-1950’s, African Americans living in the South were introduced to Jim Crow laws, which essentially was the practice of segregating blacks from whites. This was done as a direct result of slavery and the ideologies that stemmed along with it. The most important one being, that blacks were seen as inferiors to white, and since the Civil War had ended and slavery was abolished, state officials had to do their best from preventing blacks from reaching their potential. In essence, not allowing them to have a say in the community by “legally” disenfranchising them from voting or by allowing discrimination in schooling and in the workplace, that would ultimately keep the white male superior. When Jim Crow was finally abolished, the hope was that we were heading towards equality. Equality in community, equality in school, equality in the workplace, etc. But, the cycle of disenfranchising African Americans continued and landed on a new turn: The War on Drugs.

When slavery was abolished, we were introduced to Jim Crow. When Jim Crow laws were abolished, we were introduced to the War on Drugs. The commonality between Jim Crow and the War on Drugs was that they were socially accepted out of fear. When slavery was abolished, whites feared blacks would take their positions in power and so, they separated and treated them unfairly. The same applies in the War on Drugs; it just took a different form. The tactic behind the War on Drugs was not to publicly display hatred towards African Americans as the Jim Crow campaign did. In fact, President Nixon was targeting “drugs” because he knew that would appeal to the emotions of the American public. But, everyone knew that “public enemy number one” was African Americans as they have always been public enemy number one from the moment they stepped off the ship where they were shackled to each other and brought to the mining fields of the powerful white slave owner. The impact that that the War on Drugs has had on African American communities is very similar to the one that Jim Crow did. The old Jim Crow

legally discriminated against and separated African Americans from the white community. The New Jim Crow essentially does the same, and it does so with the help of mass incarceration. In this chapter, we will examine Modern America and Modern Jim Crow and make correlations between the old and the new. That includes discussing drug usage, social policy, and mass incarceration to highlight how African Americans are once again being “legally” discriminated against and disenfranchised from mainstream society.

Police Power

As discussed in one of the earlier chapters, Stop & Frisk granted many powers to the police. While we have the fourth amendment that protects citizens from unreasonable searches and seizures, we were also introduced in *Terry v. Ohio*, 392 U.S. 1 (1968), a ruling that granted police more powers. As Michelle Alexander, discusses in her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, the ruling that came from the Terry case granted police more powers in the “game.” In relation to the War on Drugs, Alexander discusses the “Rules of the Game,” in which little legal restrictions were put on police. This, of course led to many police officers racially profiling citizens who they “believed” had drugs on them. Again, the primary target was African Americans and by having little legal restricts, they were able to draw “suspicion” based off skin color, which I should note, is completely unconstitutional. Justice Stevens in his dissenting opinion in the case of *California v. Acevedo*, 500 US 565 (1991), discusses a trend he notices in the “warrantless” cases that deal with narcotics:

In the year [from 1982 to 1991], the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner. All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search or seizure. In the meantime, the flow or narcotics cases through the courts has steadily and dramatically increased. No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal solidier in the Executive’s fight against crime (Alexander, 2012, p. 62).

As a result of the War on Drugs, all constitutionally protected civil liberties have been undermined. The element of fear that was used by Nixon caught the public’s attention and used it in an attempt to work around the law to disenfranchise blacks.

Another example of this can be seen in the Terrance Bostick case. A common tactic that police would engage in would be to sweep buses in the interstate or intrastate travel. They would enter the buses and ask people for identification as well as asking them if they could search their bag. In the case of Terrance Bostick, he was a 28-year-old African American who had been sleeping in the back of a Greyhound bus when the police entered. When the officers entered the bus, they noticed Bostick, asked him for his identification and asked if they could search his bag. Bostick, knowing that he had cocaine in his bag, complied with the police because he did not think he had the right not to. As a result, he was arrested (Alexander, 2012, p. 64). This was one of the first cases where the Florida Supreme Court would not allow the Fourth Amendment to interfere with the War on Drugs and how searches were done:

The evidence in this case has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who had temporary power in Government...This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet, in Broward County, Florida, these police officers approach every person on board buses and trains and check identification, tickets, ask to search luggage – all in the name of voluntary cooperation with law enforcement (Alexander, 2012, p. 65).

The Florida Supreme Court reversed the decision ultimately claiming that the police illegally obtained the cocaine from Bostick. But, the United States Supreme Court reversed the decision. Once again, we are brought into a situation where the highest power of our judicial system is granting police additional powers that are in fact, unconstitutional, and it is all due to the War on Drugs. They came to the ruling that Bostick's encounter with the police was voluntary and he granted consent to the police to search his bag and so, his bag was not seized. But, the U.S. Supreme Court did not mention that the police did not tell Bostick that he could leave at any time or refuse any questions if he wanted. The raiding of the buses reminds me of Stop and Frisk in the sense that they are both supposedly meant to confiscate more drugs and make the public safer. But, in reality, they both racially profiled and ended up illegally searching innocent people. "One officer was able to search over three thousand bags in a nine-month period employing these techniques...in one case, a sweep of one hundred buses resulted in only seven arrests" (Alexander, 2012, p. 64).

The War on Drugs went from community policing to military policing and it all began when President Nixon convinced Congress to pass the Military Cooperation with Law Enforcement Act, which encouraged the military to give local state, and federal police access to military bases, intelligence, research, weaponry, etc. (Alexander, 2012, p. 77). This legislation that was put into place was considered a "huge exception" to the Posse Comitatus Act, which was a Civil War law prohibiting the military from civilian policing. When Nixon declared the War on Drugs, local governments were being provided money to improve their police departments. For the most part, the money that was given was put into Special Weapons and Tactics, or SWAT Teams. Based off the sound of it, special weapons and tactics does not sound pleasant. In fact, when SWAT teams would raid neighborhoods, they would often cause trauma to many of the civilians living in that particular area. For example, take the case of Alberta Spruill, who was a 57-year-old woman who lived in Harlem. Based on a tip, there was a drug dealer who lived in her building and the SWAT team was planning on raiding the apartment. Little did they know, the actual drug dealer was arrested four days prior to the raid they engaged in on Spruill's apartment. When the SWAT team entered her apartment, it caused her to go into cardiac arrest, which resulted in her death two hours later (Alexander, 2012, p. 76).

The use of SWAT teams was becoming very popular during the War on Drugs, as they were meant to clean the streets and get rid of the drug dealers:

By the early 1980s, there were three thousand annual SWAT deployments, by 1996 there were thirty thousand, and by 2001 there were forty thousand. The escalation of military force was quite dramatic in cities throughout the

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United States. In the city of Minneapolis, Minnesota, for example, its SWAT team was deployed on no-knock warrants thirty-five times in 1986, but in 1996 that same team was deployed for drug raids more than seven hundred times (Alexander, 2012, p. 75).

The majority of the sweeps that took place were of course in the urban neighborhoods because it was believed that majority of the drug dealers resided there. Also, police departments were given incentives to arrest people for drugs: “Each arrest, in theory, would net a given city or county about \$153 in state and federal funding” (Alexander, 2012, p. 78). This sounds often familiar to the private prison business industry, where there are monetary gains for each prisoner obtained. Isn't it ironic that it becomes popular during the mass incarceration era?

While, there is no argument against that the fact that drug dealers were living in those areas, an argument can be made that there were an equal or more amount of drug dealers living in the wealthier areas. The most common area for a drug raid is in the lower income areas because those are the primary targets in this so-called war. The racial aspect of all this is masked due to the fact that they were actually arresting people. But, it cannot be ignored that there is a correlation between disenfranchisement and the war on drugs, specifically, due to the fact that police were mainly targeting African Americans. For example, in 2002, there were 19.5 million people who illicitly used drugs, in which 1.5 million people got arrested and 175,000 people were admitted to prison for a drug offense (Alexander, 2012, p. 104). The disparity that then becomes visible based off those 2002 numbers is that police are using their discretion only in lower income areas. The reality is, all races have a similar drug usage rate, it's just the “black man” is actually frisked while the white man is not. Former executive director of the National Center for Institutions and Alternatives, Jerome Miller, explains:

There are certain code words that allow you never to have to say race, but everybody knows that's what you mean and crime is one of those...So when we talk about locking up more and more people, what we're really talking about is locking up more and more black men (Alexander, 2012, p. 105).

This, in essence directly connects to the old Jim Crow because during that era, it was legal to separate and discriminate against. In the modern era, and during the war on Drugs, our own Supreme court was legally granting police more power in how they go about determining who they are going to search and where they are going to raid. To restate Justice Stevens, “that this Court has become a loyal soldier in the Executive's fight against crime.”

Modern America

“Today a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living free in Mississippi at the height of Jim Crow” (Alexander, 2012, p. 141). The era of mass incarceration has stigmatized black men similarly to how slavery and Jim Crow did. The rhetoric used in the War on Drugs convinced the public that the crack users were public enemy number one. The politicians believed that most crack users and dealers were black and they made it their top priority to sweep the streets. This was done by declaring a war on drugs and considering drug

usage as well as distribution a threat to national security. This in turn, led to many policies being implemented into law that allowed for harsher punishment for drug offenses as well as welcoming racial profiling in drug raids or basic street frisks. The lasting effect it has had on minority communities, particularly black males is now what I refer to as Modern America, the era of mass incarceration. As discussed earlier, prison businesses incentivized the arrest of many people and the War on Drugs encouraged stricter treatment of drug offenses. The two go hand in hand and grant our government financial benefits as well as disenfranchising blacks; something we have become quite good at.

During slavery, what it meant to be black was to feel as though you were an object and did not have ownership of any possessions or even of your own self. During Jim Crow, what it meant to be black was to fear that your life could be taken away at any given point in time and know that no repercussions would be given to the white male who engaged in those actions. In modern America, what it means to be black is to be imprisoned. Today, the consequences of being a prisoner are harsher than those that African Americans had to endure during both slavery and Jim Crow. During slavery and Jim Crow, blacks were seen as inferior subjects; they did not have a voice nor any rights to fall upon if they were to be discriminated against. Today, we have a Constitution that protects all U.S. citizens regardless of their race and yet, we still find ourselves in a similar situation where blacks are being discriminated against.

In America today, instead of using racial slurs to describe African Americans, we instead use another term. That term is derived from the unfair legislation that has been passed from the war on drugs; law that targeted a specific group, which results in imprisonment. That term is criminal. The term criminal when referring to African American criminals has a negative connotation:

When we say someone was treated like a criminal, what we mean to say is that he or she was treated as less human, like a shameful creature. Hundreds of years ago, our nation put those considered less than human in shackles; less than one hundred years ago, we relegated them to the other side of town; today we put them in cages. Once released, they find that a heavy and cruel hand has been laid upon them (Alexander, 2012, p. 141).

What it means to be a black man today is to walk around your own neighborhood and fear that the police are going to stop you because of the color of your skin. Our criminal justice system came up with the notion, “innocent until proven guilty”, but, in the case of black males who walk around their own house, they are already seen as guilty.

When found guilty of a minor drug offense, they enter the cycle in which they are forced into committing another crime that results in them going back to their “cage”, where many people feel that belong. Punishment can have many different meanings to it depending on who is defining it, but our prison systems do not serve as punishment or rehabilitation; they serve as place holders for a particular race. When someone is released from prison, it is nearly impossible for them to fit back into mainstream society because of the fact that they have been convicted of a crime. As Michelle Alexander refers to it, they are “boxed” in. Alexander is referring to the box on an application that asks whether you have been convicted of a crime. When checking the box labeled as “yes”, it results in many people not receiving a job interview or a loan. “Nearly every state allows private employers to discriminate on the basis of past criminal convictions” (Alexander, 2012, p.

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149). The ones who are most affected by this racially, are black people: “Black men convicted of felonies are least likely to receive job offers of any demographic group, and suburban employers are the most unwilling to hire them” (Alexander, 2012, p. 151). It only results in them being forced back into a society where they are not accepted, but still have to provide for themselves and their families.

It becomes very challenging for them to provide for themselves or even take a step in the right direction in trying to redeem themselves in mainstream society because of how our law is structured. Most black males who are being released from prison who have a child they need to take care of, struggle greatly in trying to provide for them due to the Temporary Assistance for Needy Family Program (TANF), which permanently bars individuals with drug-related felony convictions from receiving federally funded public assistance. It also has a five-year lifetime limit on benefits and requires welfare recipients, including those who have young children and lack child, to work in order to receive benefits (Alexander, 2012, p. 157). It is systemically set up to disenfranchise blacks and then force them back into prison when they are freed. Breaking down the TANF, the key words in the permanent ban on receiving federally funded public assistance is “drug-related felony convictions”. When the War on Drugs was declared, politicians overemphasized how dangerous drugs were becoming and so, it led to massive consequences for those who used and distributed. To think that even a minor drug offense such as possession of 10 grams of marijuana could potentially result in this is absolutely absurd. Secondly, the five-year lifetime limit is set up where it leads to failure. As mentioned in the paragraph above, finding a job after release from prison is very difficult and when there is pressure to secure a job so that you do not lose benefits, it results in people doing whatever it takes to provide an income for their family.

Parallels between Old Jim Crow & New Jim Crow

“More black men are imprisoned today than at any other moment in our nation’s history. More are disenfranchised today than in 1870, the year the Fifteenth Amendment was ratified prohibiting the laws that explicitly deny the right to vote on the basis of race” (Alexander, 2012, p. 180). The new Jim Crow is similar to the old in the sense that the disenfranchisement of the black man is done so legally. During the old Jim Crow, it was written in law that it was legal to segregate and hate upon the other race. Today, while we have a constitution that guarantees the rights to every citizen in this country, disenfranchisement still occurs through law, otherwise known as criminal records. A criminal record today is more powerful than hatred in the South during Jim Crow in the sense that it is masked behind law rather than being done so out of hatred. Our law and our society believe that those who commit crimes and are a threat to society should be imprisoned for a long time that is proportional the crime that has been committed. If that were the case, then why have three strike laws that clearly violate the principle of the punishment must fit the crime committed? Most importantly, why is it that in the new social policies that are being implemented or ones that have been implemented already, are having a negative impact mainly on African Americans? Well, slavery and Jim Crow set the precedent, and today, the New Jim Crow is appearing in a different shape and form, but closely resembles the one that haunted many African Americans living in the South during the 1870’s-1950’s.

In discussing the numerous social policies that were implemented as a direct result of the War on Drugs, many blacks were introduced into the criminal justice system. As

Alexander refers to it, this is known as the “roundup stage” and is the first of three stages that black encounter during the New Jim Crow. The second stage, known as “formal control” resembles the old Jim Crow in the sense that this is where the government uses their power to keep blacks confined. In the old Jim Crow, it was segregating them in schools, buses, jobs, housing, etc. Today, they are thrown in cages serving lengthy sentences for a minor offense:

Once convicted, due to the drug war’s harsh sentencing laws, drug offenders in the United States spend more time under the criminal justice system’s formal control – in jail or prison, on probation or parole – than drug offenders anywhere else in the world. While under formal control, virtually every aspect of one’s life is regulated and monitored by the system, and any form of resistance or disobedience is subject to swift sanction (Alexander, 2012, p. 186).

This allows the state to keep track of inmates when they are out on probation and gives them the ability to sanction them for minor violations. For those who are released from prison and are deemed, “free”, they then encounter “invisible punishment”, which is the third stage. The crucial element in the new Jim Crow is the criminal record and the lasting impacts it has on an individual. Our society believes that when spending time in prison, the offender will learn about their mistake and if and when they are released back into society, they will be a contributor to our capitalistic society. But, the truth is, mainstream society only accepts certain races who have criminal records. Of course, whites who have minor offenses on their criminal record are deemed as the “exception” and will be granted a second chance at life. Blacks, on the other hand who have minor drug violations are seen “serious threats” to society and should be treated in such a manner. Prior to prison, not only do they have to deal with racial obstacles in terms of being frisked by the police or finding a job, but after prison, those obstacles become daunting as they are now legally allowed to be discriminated against.

The invisible punishment stage is one that most closely resembles the old Jim Crow in the sense that it allows legal discrimination. Legal discrimination is not done so on racial bounds, but rather based off the box that was talked about earlier in this chapter. If one has a criminal record, then most private employers are allowed to discriminate against. Evidently, it is blacks who find themselves having a harder time than whites who have criminal records. Nonetheless, a criminal record for a minor drug offense has detrimental effects on an individual. Particularly, one who is living off federal funding and needs to maintain a job in order to consistently receive that funding. Alexander explains:

These sanctions are imposed by operation of law rather than decisions of a sentencing judge, yet they often have a greater on one’s life course than the months or years one actually spends behind bars. These laws operate collectively to ensure that the vast majority of convicted offenders will never integrate into mainstream, white society (Alexander, 2012. p. 186).

“White society” is welcoming of whites who have criminal records and who have committed heinous offenses. Due to the ideologies employed during slavery, blacks have been casted as “threats.”

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During the Jim Crow era, the appeal of segregating whites from blacks was for the poor and working-class whites; it was a successful political attempt that promised whites with blacks out of the picture, the economy will be more stable in terms of maintaining jobs. The vulnerable white population did not know any better and so they pushed for Jim Crow, which was really the white elite using their power to exploit blacks. Exploiting blacks by segregating and discriminating against; doing so in a way that never guaranteed them freedom in the South. Fast forward to a century later and a similar political attempt is being made by President Nixon when declaring the War on Drugs. The appeal was once again to the poor and working-class whites and it was done through fear. Not only the fear of drugs and the issues that creates for the American public, but fear that was present during Jim Crow; they simply wanted to disenfranchise blacks again because they feared they would take their place in mainstream society. Alexander explains the commonality between the two:

In the early years of Jim Crow, conservative white elites competed with each other by passing ever more stringent and oppressive Jim Crow legislation. A century later, politicians in the early years of the drug war competed with each other to prove who could be tougher on crime by passing ever harsher drug laws (Alexander, 2012, p. 191).

Both resulted in whites believing that if blacks can be “put back in their place,” there will be economic restructure because it is the blacks who are causing the problems. Rather than addressing the real problems of the economy and our political leaders, the blame was put on a group that was a vulnerable target.

The most obvious parallel between the old and new is legalized discrimination; a topic that has been heavily discussed throughout this chapter. Racial discrimination is present in today’s society as it was during Jim Crow. In the era of mass incarceration, without discrimination, our prisons would be nearly empty. But, it is because of Jim Crow that our prisoners are filled with blacks. While we do have a constitution that protects the liberties of United States citizens, we also have a history that is dovetailed with hatred and discrimination towards blacks. That hatred has nearly infiltrated every critical aspect of society. Most importantly, politicians who essentially help run the United States. Our politicians, along with our legislators help decide what gets imported to law and they felt it was necessary to punish those who use drugs. The War on Drugs has resulted in legalized discrimination, similarly to how Jim Crow resulted in segregation and not allowing blacks to attend white schools, or get on white trains. Today, the felons are discriminated against similarly to how blacks were during Jim Crow:

During Jim Crow, it was legal to deny housing on the basis of race, through restrictive covenants and other exclusionary practices. Today, discrimination against felons, criminal suspects, and their families is routine among public and private landlords alike. Rather than racially restrictive covenants, we have restrictive lease agreements, barring the new undesirables (Alexander, 2012, p. 144).

On the surface, it seems reasonable that a landlord would not have a criminal living in his or her building. But, it is not reasonable to evict someone out of their apartment because

they were caught with 5 grams of marijuana. Nor is it reasonable to decline someone a job interview because of their criminal record that is mainly filled with minor drug offenses. Most employers do not even know what is entailed on the criminal record, once they see that the yes box is checked, they have the right to discriminate against. By doing so, they are keeping blacks out of mainstream society.

Another parallel that is worthy of noting is political disenfranchisement. Our 15th Amendment states, “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” But yet, during Jim Crow, legislation passed numerous laws into action that was directly aimed towards blacks. Laws such as polling taxes, literacy tests, grandfather clauses, and felon disenfranchisement laws. These laws were seen as “race-neutral” and so they did not violate the 15th Amendment at the time (Alexander, 2012, p. 192). But, it was blacks who were poor and who could not pay the tax to vote. It was blacks who were illiterate because it was illegal to teach them how to read and write during slavery. It was blacks whose ancestors were slaves, which prevented them from voting due to the grandfather clause. It was clear that people did not want blacks to have a voice. Fast forward to today and we see a similar situation in that felons are not allowed to vote. “Forty-eight states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense. Only two states – Maine and Vermont – permit inmates to vote. The vast majority of states continue to withhold the right to vote when prisoners are released on parole” (Alexander, 2012, p. 158). When we ask ourselves who are felons in this country that are targeted due to unfair legislation? What a surprise, it is blacks. “Slavery defined what it meant to be black [a slave], and Jim Crow defined what it meant to be black [a second-class citizen]. Today mass incarceration defines the meaning of blackness in America: black people, especially black men, are criminals. That is what it means to be “black” (Alexander, 2012, p. 197).

III.) Black Lives Matter

A demand for justice has been called upon by Alicia Garza, Opal Tometi, and Patrisse Cullors and thousands of other Americans around the country. Those three women are the creators of the campaign that has become known as the Black Lives Matter movement. “Black Lives Matter is an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise” (*Herstory*, n.d.). Over the past three years, African American communities have had to sit and watch their people be victims of police brutality. As a result, a large amount of distrust has escalated between law enforcement and African American communities. Since 2005, among the thousands of police shootings that have taken place, only 54 officers have been charged (Kindy & Kelly, 2015). Our criminal justice system has deprived African Americans of their basic human rights and dignity by not treating them fairly. The Black Lives Matter movement is a movement that is trying to end this unfair treatment and it starts with serving justice. After the killing of the Trayvon Martin, the African American community put their foot down and turned a hashtag into a momentous movement. Black Lives Matter is a movement that represents the injustice that has been served to African Americans. The movement is about how black people are intentionally left powerless at the hands of the state; how black lives are deprived of their basic human rights and dignity

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(*About Us*, n.d.). This movement acknowledges and represents numerous things, but the one message that has been consistent throughout the campaign is restorative justice.

The underlying issue of distrust has stemmed from the police killings in which the suspect was unarmed. We have come to know of these actions as police brutality and they seem to be aimed directly at African American communities. African Americans are unsure of when to trust the police because of the fear that has been instilled in them. The fear has arisen within the African American communities because of the use of excessive force that has been acted on against people of color. More importantly, they are crying out for justice because it is rare that an officer is held accountable for their actions. Things that should be taken into consideration when discussing the justification of excessive force is how the person was handling the arrest. In other words, were they resisting and attempting to escape? Also, the severity of the crime; did they just commit murder or were they just minding their own business as an innocent bystander? The question at stake with police brutality is that was the police officer justifiably in using deadly force? Courts feel as if they were because they feel the victim posed a threat merely based off the fact that he/she is black. This ideology is represented in the cases of Travon Martin, Michael Brown, Eric Garner and Stephon Clark.

Travon Martin

On February 26, 2012, George Zimmerman would engage in a violent act that would end up dividing the whole country apart along the lines of race. Zimmerman is a white male of Hispanic decent and was a neighborhood watch captain in the gated community located in Sanford, Florida. Trayvon Martin was 17 years old and was wearing a hood while walking to his father's house. Zimmerman, who was located in his SUV as always while patrolling the neighborhood, noticed Martin and decided to call 911 to report that he saw a suspicious person. After being instructed by the 911 operator not to confront Martin, Zimmerman got out of the SUV and did so anyway. This eventually led to a scuffle breaking out amongst the two, which resulted in Zimmerman shooting and killing Martin (Brown, 2013). In the next coming days after this night, the majority of the talks surrounding this case evolved around the question of what makes a person dangerous. Does a young black teenager wearing a hood constitute and give validation to Zimmerman's actions? The larger question that divided the country was, was the judgement made solely based on the fact that he was black?

Brown (2013), "On July 13, 2013, a jury consisting of six women acquitted Zimmerman of the charge of second degree murder or the lesser charge of manslaughter." While Zimmerman was satisfied with the ruling, the family and friends of Trayvon Martin were heart-broken. Not only did they just lose a son and a friend, but they felt as if his life was not taken into consideration within a court of law. Martin was engaging in an innocent act when wrongly confronted by Zimmerman. Brown (2013), "I think George Zimmerman is a man whose heart was in the right place." It is fair to say that the juror who said this would have felt differently if it were her son who was killed in this exchange. The one contributing factor that set George Zimmerman free was the race of Trayvon Martin. The key element that played a role in the jury's decision was that it was a young black teenager who was lurking around a gated community with a hood on. So, based off this case, is it safe to say that all young black teenagers who are in gated communities with hoods on are threats? Could there just be the slightest possibility that they have family in this neighborhood? More importantly, if Trayvon Martin were a white boy with a hood

on, would Zimmerman have even called 911? The significance of this case was the impact it left on the African American communities. It outraged them because the criminal justice system practically deemed their lives meaningless when Zimmerman was acquitted, Brown (2013), “the Zimmerman verdict is the latest in a long line of reminders that far too many whites believe that blacks, in general, and black males, in particular, are dangerous, thus constituting the faces of crime in contemporary America.”

After the acquittal of George Zimmerman, protesters took their feelings to the streets. Protest took place in more than 100 cities across the United States. For the most part, the protests were kept peaceful except in Los Angeles and San Francisco, where protesters were arrested for being violent (Williams, 2013). One of the cities that held a march was New York City and due to the significance of the case, Jay Z and Beyoncé engaged in the protest which brought more attention to the issue. The protests were so rapid and happened all over the country that President Obama addressed the protesters urging them to remain calm as he felt that the United States was a “post-racial society” (Williams, 2013). One of the major successes of this protest was the fact that it was emotion based. While it is very unfortunate that a life had to be lost in order for this issue to gain national attention, it must be seen as a blessing as well. Both of Trayvon’s parents took place in the march. His mother, Sybrina Fulton spoke in New York City and his father, Tracy Martin organized the march in Miami. In very emotional based speeches, both of Martins parents won over the crowd of thousands and thousands of U.S. citizens.

Michael Brown

The Trayvon Martin case was the ice breaker for African American communities to truly express how they feel. They now had validation behind their claims against the police. With the national attention that was brought to the Martin case and the protest that followed thereafter, the U.S. people were becoming more aware of this epidemic. The ideology that African Americans felt which was that they are seen as a threat by law enforcement no matter what the circumstances are were evident in the Martin case and in the case of Michael Brown. Michael Brown was 18 years old when shot and killed by police officer Darren Wilson. Brown was with his friend Dorian Johnson when going to a liquor store. Surveillance shows Brown stealing something and as a result, a call to the police was made. While officer Darren Wilson was driving, he saw two young black men walking along the sidewalk, one of them (Brown, 2013), fit the description the dispatcher had given and so, officer Wilson told them to step along to the sidewalk. While talking to both young men, an altercation occurred between officer Wilson and Brown. There have been two sides to this story, where police say Brown was reaching for the officer’s gun and vice versa. Dorian Johnson was a witness to the whole situation and gave us insight on what really happened, “the officer grabbed Brown and warned him, ‘I’ll shoot you’, before doing so. After Brown ran away injured (we have reason to believe he was shot in the thumb), he ‘was giving up in the sense of raising his arms and being subdued’” (Jonsson, 2014). Typically, when someone puts their hands up in the sky, it is an indicator that they are surrendering. But, the officer did not see it that way, instead, officer Wilson pointed his gun at him and shot him multiple times in the chest and then, “stood over him and shot after the victim had fell on the ground” (Jonsson, 2014). The issue at stake once again is, was the officer justifiable in using deadly force?

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African American communities disagreed as their movement for justice grew larger. One of the reasons why it expanded vastly around the United States was because of the attention that was brought to this particular case. Debates were sparked about whether or not Brown actually had put his hands up in the air signifying that he was surrendering. Certain people felt that Officer Wilson was justifiable in using his force, while others felt that he was too excessive. The debates that occurred were very emotional based, which led to violent protests in Ferguson, Missouri where the incident took place. Jonsson (2014), “The appearance of injustice, however, sparked two days of protests, rallies, riots, and looting, including the burning of a QuikTrip convenience store.” Immediately following this protest, people started to call the protesters “thugs,” which created further divide between the Black Lives Matter movement and people who disagreed with this movement, typically whites (Jonsson, 2014). While Gandhi and Dr. King would disapprove of these violent methods, it worked in the sense that it brought more attention to it. While it was receiving negative attention on the new stations, it was getting praised on social media outlets, specifically, Twitter.

The Black Lives Matter movement expanded as people from Florida and St. Louis were connecting through social media when tweeting #BlackLivesMatter. Debby (2016), “before Michael Brown’s shooting in early August 2014, it was only used a total of 48 times a day across Twitter...Come August, though the hashtag was used more than 52,000 times.” On November 25, the day Darren Wilson was acquitted, within the first twenty hours of that day, the hashtag was used about 10,000 times. Later in the day, it was used 92,784 times (Debby, 2016). It is imperative that in a campaign of this magnitude when a group is trying to bring about change, that not only do they gain the attention of the state they are protesting in but gain national attention and regardless of how Black Lives Matter went about in their protesting mechanisms, they did an excellent job in gaining the attention they needed in order for this movement to grow. Unfortunately, one of the reasons their movement kept growing was because of the fact that African Americans kept getting killed by police officers in different states. Another marquee name that Black Lives Matter protested was the killing of Eric Garner.

Eric Garner

Eric Garner was a 43-year-old man who engaged in illegal activity by selling untaxed cigarettes. When being confronted by two police officers and fully cooperating, a video was released which showed NYPD officer Daniel Pantaleo put Garner in a chokehold that brought him to the ground and resulted in him losing his life. The chokehold that was performed on Mr. Garner was banned by the NYPD. As officer Pantaleo had Garner in the chokehold, it is shown in the video that multiple times, Eric Garner repeatedly said that he could not breathe. Although there was material evidence of Garner stating that he cannot breathe and Officer Pantaleo using an illegal chokehold and not letting up, he still managed to avoid prison time. Apuzzo et al. (2016), “Officer Pantaleo’s testimony helped persuade a state grand jury on Staten Island not to bring charges in December 2014”. Once again, the theme of the Black Lives Matter came to life when the court diminished another African American life by acquitting Officer Pantaleo. Apuzzo et al. (2016), “Officer Pantaleo was stripped of his badge and gun two days after Mr. Garner’s death, and has remained on desk duty”. That example along with the others illustrates that no officers are being reprimanded for their wrongful acts.

This sparked more nationwide protests, resulting in the Black Lives Matter movement to gain more people supporting their message. The largest one was held in New York City. They called it the “Millions March NYC”, where between 25,000-30,000 people took part in the march. Organizers of the march said that nearly 50,000 people took place in the march (Fuller & Phillips, 2013). This was one of the most successful protests that the Black Lives Matter movement engaged in. Not only did no one get arrested because they were peaceful, but it such a large crowd that at one point, they had to shut down the Brooklyn Bridge. The march went on for 4 hours while people chanted the three infamous words that were Garner’s last words, “I can’t breathe” (Fuller & Philips, 2013). Also, for the first time in a long time, we started to see professional athletes protest the issue as well. Professional basketball players Kyrie Irving, LeBron James, Derrick Rose, Kobe Bryant, along with plenty of others all wore black shirts with white lettering that read, “I can’t breathe” during their pregame warmups and also on the bench when they were not in the game. This brought even more national attention to the issue because sports fans who were unaware of the Garner case became aware of what happened when they saw the athletes wearing these shirts.

Stephon Clark

The death of 22-year-old Stephon Clark also caused major outcry in the national basketball association. On a Sunday March 18, 2018 in Sacramento, California, the police were called with a possible report of a robbery. Police stated that the description of the individual was a 6-foot-1, thin wearing a black hoodie and pants. When they saw Clark, they felt as if he fit the description. Also, police said that the helicopter which was observing everyone from higher ground saw the suspect pick up a toolbar and break a window into a home. After he did that, the helicopter observed the man running and looking into other cars. Finally, the police on the ground were able to locate him (Levenson & Park, 2018). Camera’s observed the suspect cutting through backyards and jumping over fences in order to escape the police, but when the police arrived on the front yard at Clark’s grandmothers’ house, they gave the suspect commands to stop and show his hands (Levenson & Park, 2018).

According to the police, “the man turned and advanced toward the officers while holding an object” (Levenson & Park, 2018). As a result, this caused the officers to open fire on Clark; firing 20 shots, with most hitting Clark. After shooting at him 20 times, the officers then arrested him and began lifesaving efforts. The two officers who engaged in using deadly force have been placed on paid administrative leave. One officer was with the Sacramento police for two years, while the other was with them for four years. Prior to the Sacramento police department, they were a part of another agency for four years (Levenson & Park, 2018). After the shooting, police canvassed the scene and found three vehicles with damage done to them and a glass door shattered, which deputies in the helicopter say they saw Clark break. But, the only thing they found near Clark was a cell phone (Levenson & Park, 2018). It was mentioned that he had a toolbar and possibly had a gun, but it turned that out he was only carrying a cell phone. The saddest part of it all is that his grandmother heard the gunshots in her backyard that ended up killing her grandson.

In the case of Stephon Clark, the officers who were on foot and chasing him had body cams on, but their encounter with Clark only lasted a minute. But, it is very difficult to see what is actually happening due to the fact that this took place after 9 p.m. All that

can be heard are the police officers directing Clark to put his hands up and then one of the officer's screams, "Gun, gun, gun", which led to them opening fire (Levenson & Park, 2018). The protests that ensued after the death of Clark were one of the first that led to a private organization stepping in and helping spread the message of police brutality. This was partly done in fact because the protesters were protesting outside of the Golden 1 Center in Sacramento, California which is where the Sacramento Kings play. The Kings are a professional team in the National Basketball Association and protesters were preventing fans from entering the arena without having heard about Clark. The Kings stepped in and partnered with Black Lives Matter in an attempt to open up a fund that will help younger children in the area.

Code of Blue

The severity of this issue between our criminal justice system and African American communities will not take a day to fix. Perhaps, it will never be fixed. The relationship between the two will only resolve over time if there is change. One way to promote change and to change social policy is by protesting and the African American communities have done a good job so far as the Black Lives Matter movement has grown significantly over the past five years. An important aspect to keep in mind throughout all of this is the "code of blue." The code of blue is basically a code that is instilled within police departments where officers always have each other's back. This is a very interesting aspect of this issue because even if an officer is wrong, he or she will feel they were right in their actions and their partners will agree with them. Going along with that, if an officer does stand up and squeal on an officer who was excessive in using force, that officer will most likely lose their job. One step in the right direction in stopping this divide between the African American communities and the police is justice. As Dr. King once said, "An injustice anywhere is a threat to justice everywhere". As we have seen throughout the cases mentioned in this paper, the common theme is that each police officer was deemed justifiable in using deadly force, even though the facts say otherwise.

One reason as to why this common theme of cops "getting off the hook" is well described by Georgia Ferrell, who is a police officer and whose son was shot and killed by a police officer: "Society has put it into our heads that the officer is always right" (Kindy & Kelly, 2015). In a court of law, when a police officer is testifying it is going to be hard for the jurors to believe that he/she is lying because we are trained to think of police as always right; after all, they are here to protect and serve their communities. But, as shown throughout this chapter, the jury can be blind to the other facts of the case because they always believe the officers. While there are police who do engage in using deadly force and are justifiable in doing so, when comparing that to the police who wrongfully use deadly force, the number of police who are wrong outweigh the ones who are right.

Opposing Perspectives

Which leads into the issue of people assuming that Black Lives Matter is a protest against all police officers. Throughout the debates, it sparked a new hashtag, "BlueLivesMatter. Also, whites who were protesting against the Black Lives Matter movement created the hashtag, #WhiteLivesMatter. Similarly, to other major campaigns that took place in the United States, discourse occurs becoming of the opposing perspectives. Taylor (1998), "Professor Delgado points out an important distinction between the viewpoints of blacks and whites...Whites don't see their viewpoints as a

matter of perspective. They see it as the truth” (p. 122). One of the things that Dr. Martin Luther King Jr discussed when he was in charge of the Civil Rights Movement, was education. He wanted people who were going to join the movement to be educated on the subject so that they really knew what they were fighting for. In the case of Black Lives Matter, when rallies take place in a major city, the leaders of the marches know what they are protesting against. For example, in the case of Trayvon Martin, protesters taped Skittle bags over their mouths. One reason as to why they did that was because Martin had bought a pack of Skittles from 7/11 before his confrontation with Zimmerman. There are two sides to every story; BLM feels strongly about police brutality and excessive force, while white moderates and political leaders feel as if they are protesting against all police officers.

“To love and desire freedom and justice for ourselves is a prerequisite for wanting the same for others” (*Guiding Principles*, n.d.). This quote sums up the purpose of this movement. The whole reason as to why this campaign was started was because African Americans wanted equal treatment. More specifically, equal treatment when it comes to the law. Just as Dr. Martin Luther King Jr sought out equal treatment in terms of rights for African Americans during the Civil Rights Movement. So many questions arise in the African American communities when someone is killed. In the case of Trayvon Martin, why did Zimmerman even see him as a threat? Zimmerman never even saw his face. All he saw was an African American wearing a hoodie in a gated community. In the case of Michael Brown, why did Officer Wilson decide to pull the trigger after Brown raised his arms in the air? On top of that, why did he continue to shoot him when he fell to the ground? In the case of Eric Garner, why did the officer use an illegal chokehold? Was it because that Garner was a large man and there was no other way to get him down? Did he even have to put him in the chokehold? Lastly, in the case of Stephon Clark, why did they shoot a young man who has two children 20 times and then arrest him afterwards? Point being is that while we can have discussion and debate on what actually occurred, the facts are the facts and they can not be denied. Former Los Angeles Police Department officer Greg Mayer asked the question that many African Americans want an answer to: “What tactics are the officers engaging in before they go in and use force on someone?” In the cases mentioned throughout this chapter, it is evident that the indicator for the police is the color of someone’s skin. To be fair while analyzing these cases, it is only right that we put ourselves in the shoes of the police officer. But, as mentioned above, in the cases mentioned throughout this chapter, it seems the amount of force being used is excessive.

A possible solution to this epidemic would be to engage in new police training. But, even if that is done, the larger issue is not erased: the stereotypes of African Americans. Professor Ciccariello-Maker of Drexel gave a statement about the police and how they view young black people, “They’re people we’re all trained to see as mortal threats already, always potentially guilty”. This stems to the larger narrative of the culture that is present in police departments. Based off the actions of officers from all over the United States, it would not be wrong to say that there is a cultural phenomenon that is causing this issue of targeting African Americans. How do we eliminate this culture? One way to do it would be to clean house in all police departments where these killings take place, but we know that is unrealistic. A simpler and more effective way, would be the law. Law is supposed to be a deterrent; you see one person commit a crime, they do the time and you fear doing the time so you stay away from breaking the law. In the case of police brutality, when an officer is rarely getting punished for the crimes they have committed, what’s going to

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prevent it from happening again? Hypothetically (and we have to say hypothetically because not enough officers get convicted when they go on trial), if more and more officers were to get convicted, it would lead to a decline in the amount of times police brutality occurs.

In America, the land of the free and the home of the brave, the African American people are not free at all. They are trapped in a category that has stigmatized them dating all the way back to slavery. In turn, its persuaded legal scholars that the police should see them as threats. After all, our pledge of allegiance states, “I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one nation, indivisible, with liberty and justice for all” (*The Pledge*, n.d.), so why not give liberty and justice to all? Black Lives Matter is just the beginning of change in America; their relentless efforts in trying to spread awareness may not be successful to this current day, but over time, their voices will be heard and justice will begin to be served on a consistent basis. America is not about living in the past, nor present. America is about moving forward and making a better future for everyone.

IV.) Conclusion: Paving the Way Forward

While we cannot erase the past, we can make a better future for everyone. Bryan Stevenson discusses our history as a country and our stubbornness in not accepting responsibility for slavery or the consequences that blacks had to suffer afterwards. He goes on to say that our inability to accept responsibility and apologize to those who have suffered at the hands of radical elite whites is what causes these harsh penalties for minor drug offenses and other policies that have been implemented that result in targeting minority communities. It is common for someone to make a mistake, but to also learn from that mistake as well. Our historical trajectory as a country would indicate that we have not learned from any of our mistakes. Rather, we have made worse and worse ones as times have gone by. In a world where many people think societies are becoming more accepting and racial tension is dwindling, the reality of the situation is that the ghosts from slavery and Jim Crow are still lingering around our criminal justice system. Dr. Martin Luther King Jr was brave enough to take a stand against the inequalities he lived through and it cost him his life. But, he did promote change and got certain policies implemented that brought more equality towards minorities. Today, the Black Live Matters movement is promoting change and is demanding justice for the innocent lives that have been taken away at the hands of armed police officers. We need more courageous people to take a stand and have their voice heard.

One way in which we can promote more social change in America is through our education systems. By devoting more resources towards inner city schools, we will be able to increase the level of education, which will increase the amount of interest these children have in their school. Time after time, we see situations where inner-city schools have high dropout rates due to inadequate teaching. Also, by investing more money into educational systems, we will keep more children in school and out of the streets. Take New York for example, they spend the most money per student in the country. But, those dollars are not distributed in proportional amounts. “Needy” schools deserve more funding due to the simple fact that they are lagging behind other schools. 2018 statistics show that in New York elementary and middle schools, the lowest need schools receive \$15,204 while

the highest need schools receive \$15,740. There is a \$536 difference between the two, which means 4% more of the money goes to higher needed schools. For high schools, lowest need schools receive \$17,410 while the highest need schools receive \$18,732. There is a \$1,322 difference between the two, which means 8% more of the money goes to higher needed schools (Zimmerman, 2018). While there is no arguing that higher needed schools are receiving more money, an argument can be made that they should be receiving more money. Although it is undecided on how much more money should be dedicated to the higher needed schools, it is worthy to note that at least some discussions of more financial resources being devoted to those schools should be talked about in the government.

In 2018, professional basketball player, LeBron James, opened up his own school in Akron, Ohio. Being that LeBron James grew up in the city of Akron, he understands the struggle that certain kids endure. He understands that he is very rare in the sense that he “made it” in America. LeBron, who is one of the wealthiest athletes in America, decided to give back to his community so he can provide more opportunities for little kids to become successful in America. The school is currently open for third and fourth graders who are at risk and James hopes to expand the range all the way up until eighth grade. Students who attend the schools receive the following: free tuition, free uniforms, free breakfast, lunch and snacks, free transportation within two miles, a free bicycle and helmet, access to a food pantry for their family, and guaranteed tuition for all graduates to the University of Akron (Perano & Muaddi, 2018). Also, parents of the students who attend this receive benefits: “parents of students will receive access to job placement services and help acquiring their GED’s” (Perano & Muaddi, 2018). By creating this school and giving back to his community, James shows that greed will not conquer his soul. He is someone who understands the struggle of what it is like to grow up in an inner city where the schools are poor and crime rates are high. According to James, he wants to build a school where kids can feel comfortable going to and have a place where kids can feel that someone cares about them and their future.

Lending into opening schools as well as investing more money into schools, after the death of Stephon Clark, a private organization got involved in partnering with Black Lives Matter in an attempt to keep children safer. On a Tuesday night, in which the Kings were set to face off against the Dallas Mavericks at the Golden 1 Center (where the Kings play), protesters arrived outside and blocked the entrance into the arena. They shouted things like, “You ain’t seeing no game tonight...join us or go home!” (Boren, 2018). The protesters were determined to make a statement and bring awareness to this situation. Because of their protest on that night, not too many fans showed up; in a 17,608 seated arena, a couple hundred protesters prevented over 12,000 people from entering (Boren, 2018). This was not the first time the protesters caused a lockdown. The week before, when the Hawks were set to play the Kings, protesters caused a lockdown which prevented the game from starting on time. It caused a lot of confusion but the Sacramento Kings reported that it was a peaceful protest, but they locked the doors to assure the safety of their fans just in case things turned violent (Boren, 2018). Lastly, on a Saturday, when the Celtics and Kings showed off, during the warm ups both team wore shirts that stated, “Accountability. We Are One” on the front and “#StephonClark” on the back (Boren, 2018). As a direct result of these protests, the Sacramento Kings organization partnered with Black Lives Matter and another Sacramento-based collation called Build Black. “Build Black is aimed at investing in and broadening educational opportunities for black young men and underserved members of the community” (Cacciola, 2018). The Black

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Lives Matter movement is starting to take a step in the right direction as we see more teams partnering with them and building up funds.

Similar to opening schools or providing more money towards school, I also feel that it is important to provide some funding for out of school activities. Growing up, whenever I was not in school and was not at home, I was at a park shooting hoops with friends or hanging out at the local community center. By building a park or potentially opening up a community center that has basketball courts and other areas for children to hang out, it provides an outlet from the streets. In inner city neighborhoods, after school hours for most kids is them hanging around in areas where crime rates are high. If we were to provide them with a playground, we will be keeping them out of trouble and putting them on a path towards success. As displayed throughout this paper, our laws are not kind to drug offenders, no matter how minor the offense is. Our system needs to protect those who we have discriminated against. In reality, our system is set up to fail these innocent children.

The harsh sentencing structures of our current laws against drug can use some adjusting. It is critical that we reform some of our drug policies. Just examining some of the laws that are included in this paper, if we were to reform some of those policies and finally move on from the war on drugs, we would condense our prison populations and keep more people in mainstream society. For example, three strike laws sentence people to life in prison for committing three felonies. Keep in mind that drug offenses are considered to be felonies. In California, the Three Strikes Project represents individual who are in a position of potentially facing life in prison due to the three strike laws. As we know, the social policies that were supposed to be “tough on crime” specifically targeted minority communities: “Over 45 percent of inmates serving life sentences under the Three Strike laws are African American” (*Three Strikes*, n.d.). Those who fought against the three strike laws in California were successful in that it led to some reform. In 2012, voters supported the Three Strike Reform Act, which eliminated life sentences for non-serious, non-violent crimes and allowed those who received a third strike for something minor to petition in court for a reduced sentence. In the eight months of enactment, over 1,000 prisoners were released (*Three Strikes*, n.d.).

It is also important to focus on how our criminal justice system views African American suspects as well as victims. The Black Lives Matter Movement has exposed a truth about American courtrooms and how African Americans are viewed. We have come to believe that someone’s skin color can simply offer a justifiable reason for a police officer to be suspicious. In the cases discussed in this paper, all the officers/neighborhood watch captains suffered minor consequences. Some, even suffered none. Those who engage in killing unarmed black men should serve the consequences. They should be put in prison and not back into the streets. The Black Lives Matter Movement also exposed a harsh truth about cultures that are present within police departments. Embedded in the culture is the ideology of what a black man represents and how an officer should respond to a situation where they are dealing with a black man. It has become clear that there needs to be better police training. It has become very clear in the past couple years that officers need to become friendly within their communities. They need to represent themselves as people who are here to help and not hurt. Officers need to engage in friendly policing and not aggressive policing. Weapons do not need to be drawn because someone is black. Rather than escalating the situation, we need to focus on training that deescalates situations because that will lead to less death.

We live in a country where people believe they have freedoms and liberties that cannot be infringed upon. But, we find ourselves living in a country that is haunted by its past. We find ourselves living in a country that has not learned from its mistakes. Arrogance leads to blindness, and blindness leads to colorblindness. We do not want to live in a world where we are colorblind. Rather, we want to live in a world that embraces each other for the color of our skins and recognizes that although we may look different, that does not mean we are inherently differently; that does not mean one skin color needs to be superior to others. It simply means that we must all be accepting of others and respect each other regardless of our differences. We are living in a world that is constantly changing, all we can do is hope that things will get better, because without hope, life is meaningless. As Martin Luther King Jr. once said, “we must accept finite disappointment, but never lose infinite hope.”

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Sexual Harassment on College Campuses: The Insufficiency of Title IX **Taylor Puluse***

Title IX's claim for effective protection of victims is significantly limited as it actively prevents restitutive justice for victims of sexual harassment. The four standards of institutional liability and the preemptions in § 1983 pose monumental hurdles for victims seeking relief for the injustices they have experienced. The Supreme Court of the United States prohibits sexual harassment victims from filing claims against and seeking restitution from both individuals and educational institutions. In addition to the harsh standards of liability that Title IX mandates, the US Department of Education's Office for Civil Rights (OCR) disproportionately prioritizes institutional review over victim's claims. Further, victims are forced to wait years before relief is provided. Essentially, the procedural limitations of Title IX suggest a clear need for structural reform to give victims of sexual harassment the right to restitutive justice and effective protection against sexual harassment.

Recognizing the Issues

To fully understand the insufficiency of Title IX, one must first understand how Title IX fails to provide effective protection to victims of sexual harassment. *Bruneau v. South Kortright Central School District* (1996) reveals the true procedural shortcomings of Title IX. Eve Bruneau was a young girl sexually harassed (with incidents of unwanted touching) by her male classmates. When Bruneau's mother reported the harassment to school officials, they did not take any action to combat the behavior and the harassment continued. When Eve's mother tried to transfer Eve out of the toxic environment and move her to another school, the transfer request was denied. Eve's parents brought a suit claiming protection under Title IX and filed claims under § 1983 against South Kortright Central School District. The claims under § 1983 were denied as the Court felt that Title IX subsumed the § 1983 claims. The case concluded in favor of the school district as the jury felt that the school was not institutionally liable for the harassment Eve experienced. Eve Bruneau received no restitutive relief and was left with nothing but the empty promise of Title IX (*Bruneau v. South Kortright Central School District*, 1996).

Sexual harassment cases plague both male and female students nationwide on college and university campuses. Title IX was passed by Congress in 1972 to create statutes protecting victims from gender based discrimination in educational institutions. Title IX has extensive range and power, as it holds mandates over 3,600 colleges and universities who receive federal funding (Cherner-Ranft, 2003). Current issues are now arising as poor enforcement of Title IX is actively allowing for soaring numbers of sexual harassment cases to go unpenalized. Title IX's narrow liability drastically flips the statute's original aims as it establishes better protection for educational institutions than victims of sexual harassment. Ultimately, Title IX detracts punishment to harassers, and therefore, results in substantial losses for victims.

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Insufficiency of Title IX

The failure to provide restitutive justice for victims makes it clear that Title IX's capacity and ideals are not entirely fulfilled. Whether the situation is because patriarchal power structures are intertwined within the legal system, or the fact that sexual harassment cases are not taken as seriously as they should be, Title IX presents a clear need for restructuring. Title IX is limited by weakened standards of liability and the preemptions in § 1983, which significantly degenerate Title IX's sufficiency. Moreover, the narrow liability accompanying Title IX prevents restitutive justice by providing sexual harassment victims little to no recourse when dealing with educational institutions and their harassers. This paper will demonstrate how the narrow liability corresponding with Title IX actively prevents proper restitution for victims of sexual harassment. Additionally, this paper will discuss the issue in which the US Department of Education's Office for Civil Rights (OCR) concentration on educational institution's systematic reforms significantly inhibits effective protection for victims of sexual harassment. This commentary examines the presence of sexual harassment on college campuses, elaborates on the impact that sexual harassment has on its victims, and addresses the deterioration of the educational environment in which the harassment occurs.

Sexual Harassment on College Campuses

The American Association of University Women defines sexual harassment as any, Unwelcome sexual advances, requests for sexual favors, direct or indirect threats or bribes for sexual activity, sexual innuendos and comments, sexually suggestive jokes, unwelcome touching or brushing against a person, pervasive displays of materials with sexually illicit or graphic content, and attempted or completed sexual assault (Beavers and Halabi, 2017, 558).

Sexual harassment is a serious offense that leaves victims with lasting detrimental effects on their physical and mental health, as it carries a devastating emotional impact. Sexual harassment holds a prevalent stigma in which victims feel dishonored and outcasted from their social groupings. The harassment alters the mindset of victims, as many face self-blame, coupled with feelings of shame, denial, guilt, and embarrassment (Beavers, 2017). Victims of sexual harassment also develop major hesitations about reporting incidents. Victims commonly misconceive that people will not believe their story since most incidents leave little to no evidence to support the victim's claims.

Moreover, sexual harassment considerably impacts the educational environment. Victims of sexual harassment experience extensive behavioral changes and it impacts their academic experience. Meghan Cherner-Ranft observes

Regardless of whether the sexual harassment experienced is physical or nonphysical, following such incidents students often talk less in class, stay home and skip school, find it hard to concentrate in school, and experience a loss of appetite and inability to sleep (2003; 1896).

Sexual harassment acts as a strong obstacle for victims to achieve their educational goals. Campus sexual harassment cases establish the educational institution as a place of danger, where victims feel they relive their experiences by being in the environment in which the incident occurred (Cherner-Ranft: 2003; 1896). In some cases, victims drop out of universities and abandon their academic pursuits (Petersen and Ortiz,

2016). Therefore, Title IX recognizes that the loss of educational benefits is a significant injury that should be restituted by law (Cullitan, 2010).

College campuses and universities have an abundance of sexual harassment cases that go unreported and overlooked. According to the article “Official Campus Statistics for Sexual Violence Mislead” by Jennifer Freyd, one out of five women will experience some form of sexual violence in their college career (2014). The discrepancies in such cases of sexual harassment centralize around the fact that the reporting rates show no correspondence with the actual harassment rates. Victims already possess strong hesitations when reporting their traumas, and then face an even harsher reality when their reports are met by institutional oppositions. Freyd states in reference to institutional opposition,

Colleges and universities have a perverse incentive to discourage sexually victimized students from reporting assault, due to the reputational hit colleges experience if their reported rates of violence are higher than those of their competitors (2014).

In this manner, the discrepancies in reporting rates suggest that universities with higher rates of reported sexual harassment offer more protection to students rather than universities with lower rates (Freyd, 2014). Universities with higher rates at least recognize that sexual harassment that is occurring on their campuses rather than covering the incident to save reputation.

Title IX

Title IX was enacted in 1972 as a measure to protect against sexual harassment and encourage equal treatment of both sexes in educational institutions. Title IX provides

No person in the United States shall, on the basis of sex, be excluded from participations in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance (Cherner-Ranft, 2003; 1897).

Title IX maintains its power by withholding and regulating federal funding from educational institutions that have proven to discriminate on the basis of sex. The U.S. Department of Education's Office for Civil Rights (OCR) monitors and delegates sexual discrimination cases that fall under Title IX.

Since sexual harassment is a form of sex discrimination, it is unreservedly forbidden under Title IX. Sexual harassment in educational institutions is denounced “as a form of disparate treatment that impedes access to an equitable education” (Cherner-Ranft, 2003; 1896). More importantly, Title IX proposes two essential goals within its statutes. The first statutory aim of Title IX is to “avoid the use of federal resources to support discriminatory practices” (Peterson, 2016; 2135). The second statutory aim is “to provide individual citizens effective protection against those practices” (Peterson, 2016; 2135). The OCR is also entrusted to oversee institutional policies to provide effective protection to individuals.

Realizing the Need for Relief for Victims

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In the landmark court case of *Cannon v. University of Chicago*, the Supreme Court established a private right for victims of sexual harassment to seek restitution under Title IX. In *Cannon*, a female student seeking entrance into medical schools claimed that she was denied admission because of her gender. Following an investigation, the Supreme Court found that she was denied admission into the programs because of her sex and the medical school decision violated the complainant's Title IX rights. This specific Supreme Court decision was monumental, as it provided sexual harassment victims with more autonomy and agency (Cherner-Ranft, 2003). Cherner-Ranft states, in reference to the case, "The Supreme Court changed the landscape of Title IX jurisprudence in holding that Title IX allowed a plaintiff to bring a private suit against a discriminating institution because it produced a practical way of redressing a specific incident of sex discrimination" (2003; 1903).

The court case *Franklin v. Gwinnett County Public Schools* (1992) further strengthened Title IX's relevance and autonomy of victims. In *Franklin v. Gwinnett County Public Schools*, the Court ruled that a victim has a right to receive monetary damages under the statute of Title IX. The case involved a high school student who filed a Title IX action lawsuit after being sexually harassed by a sports coach/ teacher at her high school. The student alleged that the school administrators had knowledge of the sexual harassment and took no action against her sexual harasser. The Supreme Court decided that monetary damages were available under Title IX as it assured "effective compensatory and remedial options" for plaintiffs. *Cannon v. University of Chicago* and *Franklin v. Gwinnett County Public Schools* established the precedent that victims can receive restitution for the harassment they have experienced. Despite the fact of such progression, the Court later entered standards of "institutional liability" to coexist within the statutes of Title IX, which reasserted crippling hurdles for victims of sexual harassment (Cherner-Ranft, 2003).

Title IX's Insufficiency

In order to hold an educational institution accountable under Title IX's statutes, lawsuits must prove four main standards of liability. The first standard of liability refers to whether the educational institution is a recipient of federal funding. The second standard of liability regards whether sexual discrimination is severe enough to devalue the victim's educational experience. The third standard considers whether an official of the institution has knowledge of the situation and took corrective measures to respond to the victim's complaints. The fourth standard deals with whether or not the institution's response to the discrimination amounts to deliberate indifference. Deliberate indifference concerns whether or not the institution makes use of the knowledge of the occurring sexual harassment and formally addresses the misconduct with no apathy (Cullitan, 2018). Proving deliberate indifference is the most inconsistent standard that victims must satisfy. The victims' struggle to substantiate the standards listed above is what originally sparked Title IX's narrowing liability.

The second issue concerns the preemptions in § 1983 that add to the narrow liability of Title IX. Since Title IX strictly deals with institutions who receive federal funding, victim's claims and relief against sexual harasser/s is limited to § 1983. The Supreme Court ruled that plaintiffs cannot file claims against both institutions and individuals since Title IX subsumes claims under § 1983. The limitation of § 1983 greatly adjusts the manner of accountability for individuals and institutions, and is a

barrier for victims. Title IX is intended to provide “effective protection” for victims, however it is evidently clear that Title IX lacks remedial action against individuals who actively participated in the sexual discrimination (Cherner-Ranft, 2003). Thus, the present disparities regarding Title IX forces victims to choose between seeking restitution from individuals or the institution, but never from both.

The third issue concerning Title IX is that OCR primarily focuses on institutional compliance and does not prioritize relief for victims. The structural reforms require a thorough review of the institution’s policies on sexual harassment to assure compliance, necessary for the continuation of federal funding. However, the process is lengthy, sometimes lasting as long as 2100 days (Peterson, 2016). The lengthy procedures go against Title IX’s aim for effective protection from sexual harassment as victims are either no longer students of the institution, or forced off the campus due to the effects of the sexual harassment on their academic performance.

Further, the OCR takes such a long time to provide relief primarily due to the failure to emphasize the requirements and limitations of Title IX (Bagenstos, 2015). The office is swamped with complaints that hold no institutional liability and hence, burdened with the duty to filter complainants that might not even constitute a claim under Title IX. The OCR claims that the influx of complaints from institutions and university students who claim that they have “been made uncomfortable” in their educational environment does not amount to the severity of sexual discrimination cases that should fall under Title IX (Bagenstos, 2015). Since the victim’s complaints are addressed after institutional review, this strategy fails to provide timely relief to victims.

What Can Be Done?

The multiple issues at hand correspond directly with the prevention of remedial relief for victims of sexual harassment. Addressing the issue of narrow liability encompassing institutions and sexual harassers holds a simple solution. The reforms should further focus on a more effective equilibrium between systematic reform and providing timely relief to victims.

The Court must recognize that sexual harassment has detrimental effects on the educational performance of the victim and the educational environment. Stricter obligations, holding both the institution and perpetrator responsible, is necessary to address the severity of the sexual harassment cases. The preempts of § 1983 should not be allowed to interfere with the victim’s restitution as victims have a right to seek relief from their discriminators and from the institution that allowed the discrimination to occur. Title IX claims should not subsume § 1983 claims as the harassment is enabled by both individuals and institutions. Increasing the standards of protection and encouraging direct communication from the OCR to complainants will provide restitutive justice to deserving victims. Further, investigations should be completed within a specific time period. Victims should not be forced to wait for systematic issues to be fixed before gaining relief for their trauma. Systemic reforms should be implemented after the victims is provided with reparations for their trauma. The OCR must provide effective protection; therefore, victims should be given direct relief once an institution is deemed liable for sexual discrimination. The requirements and limitations of Title IX should be publicly emphasized by the OCR to reduce the influx of cases that do not fall under the statute’s standards. The OCR should be required to

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establish a more proportionate approach that places victim's concerns ahead of systematic reforms.

Conclusively, Title IX was instituted to protect men and women against sexual discrimination in federally funded educational institutions. The weakened status of Title IX creates insufficient protection by ineffectively providing victims with restitution for the harassment they experienced. The narrow liability of institutions combined with the preempts of § 1983 create immense impediments for victims to overcome in order to receive proper justice. It is unjust for a student to be obligated to wait for their educational institution's response to be able to file a case under Title IX. The issue at hand is complex in that the standards of Title IX actively prevent restitutive justice, which goes against what Title IX was originally intended to do, to prevent gender based discrimination. To fully accomplish the statutory aims of Title IX, the OCR must restructure standards to promote an equal balance between systemic reforms and provide proper relief to victims in a timely manner. Effective protection will never be entirely successful under Title IX unless victims can receive restitutive justice for their suffering from both their educational institution and those who participated in the harassment.

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