

Body politics: What's the state got to do with it?

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BODY POLITICS:
WHAT'S THE STATE GOT TO DO WITH IT?

Edited by

Jordan A. Pino

&

Konstantinos Karamanakis

BODY POLITICS

“Whether meant to or not, law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going.”

Mary Ann Glendon,
Former Ambassador to the Holy See

Body Politics:
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Jordan A. Pino
Konstantinos Karamanakis
Editors

Eagle Print Collegiate Press
Chestnut Hill

This book was prepared by students in the Political Science Honors Seminar, Body Politics (Fall, 2016) at Boston College, Chestnut Hill, Massachusetts.

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*This book is dedicated to
our mentors in the Boston College
Department of Political Science.*

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Editors' Preface

□ Growing up, our families screened movies and baked cookies from scratch on Saturday evenings when no one had plans to go out. We cherish our memories of those rare occasions when each of our families could be alone and at ease – just us, our parents, our siblings ... and the state.

States regulate the intimate affairs of their citizens in order to create societies wherein the predominant behaviors and relationships are compatible with the mission of the reigning regime. In the Soviet Union, for example, the Kremlin outlawed abortion in 1936 in order to grow the Soviet labor force and hasten industrialization; in Argentina, the Alfonsín Administration legalized divorce in 1987 so as to weaken the influence of the Catholic Church during the country's transition from dictatorship to democracy; and in the United States, Washington continues to reserve its most generous legal benefits for families to promote marriage and child-rearing. Because of legal restrictions and civic incentives, almost every decision one makes as a private citizen is influenced in some way by the state: indeed, even an activity as innocuous as baking with one's family at home is subject to a myriad of government-sponsored regulations designed to cultivate a productive and orderly society based on *its* conception of those terms.

Consider this example to its fullest, logical extent. Before a family can bake cookies, their ingredients must have passed inspection by the U.S. Food and Drug Administration. Their kitchen must have been constructed by a state-licensed contractor, and in accordance with local construction ordinances. Their home must have been sold to them by a state-licensed realtor, and the deed to that home transferred to them under the auspices of a notary public. Their source of income used to buy these necessities must have been reported to the state, and whatever portion of it the state may have chosen to seize for its own purposes must have been promptly surrendered. The parents in this family must have secured a marriage license – an impossible feat for same-sex and interracial couples in the United States not one generation ago – or have been otherwise awarded guardianship over their children. The children must have been assigned a sex by the state at birth, and may only self-identify with the five recognized racial categories on legal forms. If, at some point, the parents decide to seek a divorce or to terminate a pregnancy, it is the state's prerogative to honor such requests. And, if the children wish to join another family or set off on their own as emancipated minors, the state must also approve such arrangements. The list goes on and on.

It is easy to sympathize with Michel Foucault's assertion that the citizen is merely an element to be managed in relation to strategies of the economic and social administration of populations.

The impact of state regulations can vary. Nevertheless, whenever a government enacts a law, it signals to its constituents its preference for particular associations, lifestyles, and traits. Let us consider the issue of marital status: on the one hand, incentivizing marriage and child-bearing can help serve the interests of society by ensuring stable population growth and two-parent households, whose children are believed to “do better in life” as adults (Barone 2013). On the other hand, restricting marital and parental incentives to only this specific type of couple demeans all other types of couples. In the United States and the United Kingdom, for example, same-sex couples were once denied the right to marry because (among other reasons) these states did not have vested interests in such unions. Same-sex marriages neither furthered the objective of child-bearing – and thus threatened the state’s primary justification for matrimony – nor affirmed the popular moral standards of these societies at the time. Despite the willingness of the United States and the United Kingdom to grant the same legal benefits to same-sex couples granted to heterosexual couples in the form of civil unions, proponents of marriage equality recognized that any differentiation between union and matrimony would afford the commitment of same-sex couples less social worth than that afforded to traditional marriages. Indeed, to regulate in promotion of certain characteristics necessarily deems populations without those characteristics as undeserving of the social privileges and public value otherwise granted. These populations become “others” – enemies of the sovereign whose bodies and relationships must be physically micromanaged, or even eradicated, in order to neutralize the perceived threat their differences pose to the objectives of the regime.

Populations may become others when (1) their private choices interfere with a practical goal of a regime, as is the case in the above examples. Populations also become others when (2) their domination is deemed necessary for affirming the superiority of the enfranchised majority, or when (3) their eradication is considered necessary for the legitimacy and survival of the state. Perhaps these latter ‘otherizations’ are best exemplified by the human rights violations committed by the military dictatorships of Chile (1973-1990) and Argentina (1983-1989), and by the United States during its War on Terror. In all three instances, national leaders identified a population not compatible with the mission of the state: for the United States, these were Iraqis and Afghans suspected of terrorism, or sympathetic to terrorism or terrorists; for Chile and Argentina, these were leftists, and anyone sympathetic to socialism or socialists. Jihad and Marxism being antithetical to the mission of these regimes, the U.S., Chile, and Argentina exercised their powers to murder, torture, and disappear those who ascribed to such concepts.

The second scenario usually underscores the first and the third. Underlying a state’s perception of certain groups as threats to society is, oftentimes, a deep aversion for the characteristics *projected* onto these ‘otherized’ groups. Martha Nussbaum explains in her *From Disgust to Humanity* that those minorities whose inherent human characteristics are different from the inherent characteristics of a majority are often made to be objects of disgust – because a majority can easily distance itself from a minority, deny that minority full personhood, and thus project its fears and anxieties onto them. It is easy to see how disgust has fostered the categorization of others, and has encouraged the infliction of pain on the bodies of others. Gay men, and the anti-sodomy laws that accompanied their exclusion from the marriage contract, are one example. The experiences of the detainees of Abu Ghraib and Guantanamo provide another. Khalid Sheik Mohammad, the principal architect of the 9/11 attacks, for example, was water-boarded 183 times while detained at

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Guantanamo Prison. The disturbing frequency of this procedure suggests motives more malicious than necessary for intelligence-gathering, among American detention officers. Dozens of other suspected terrorists held at Guantanamo were force-fed only for the purpose of denying them autonomy over their bodies: indeed, many of these detainees had to be restrained during their forced-feeding, despite the procedure being medically unnecessary until a person is too weak to move. And, prisoners of Abu Ghraib describe being beaten, stripped naked, hooded, even raped at the hands of American and Iraqi officers charged with extracting actionable intelligence from suspected subversives (Shampa Biswas and Zahi Zalloua, 2011). Certainly, the officers enlisted to supervise these detainees sought to express their unlimited authority over a population upon whom they projected their post-9/11 fears and disappointments.

Exerting one's might on an 'otherized' body neutralizes the possible threat posed by its existence outside of captivity, and allows for the expression of one's own discomfort with human finitude through human force. For this reason, majorities will continue to cope with their shortcomings by projecting their fears and frustrations onto a minority population – as they always have. The otherization of a dispossessed minority will always inform the popular objectives of an enfranchised majority; that majority will always pressure the reigning regime to devote the full force of its capabilities in service to these objectives; and, that regime will almost always comply. Progress has been made to shed light on the process of 'otherization,' to recognize it for what it is – a Manichean distraction from one's own anxieties and imperfections – and to minimize its harmful effects. Indeed, in the past century alone, women, black, disabled, gay, and transgender Americans have secured the right to vote, work, marry, and identify in accordance with their personal values and ambitions. In the spirit of these achievements, and in recognition of the work that remains, *Body Politics* offers a comparative study of why societies choose to promote certain identities and associations over others, how states choose to manifest these preferences, and how 'otherized' communities gradually achieve legal equality and social acceptance.

The Structure of this Book

Part I offers an introductory survey of four distinct types of 'otherization.' Jordan Pino examines the transgender rights movement from the vantage point of the courthouse, and ultimately suggests that whatever legal course is taken must seek to achieve a right to gender identity autonomy. In the following chapter, Connor Tobin explores the movement for disability rights in Germany in comparison to Britain. He suggests that a country need not undergo a process of constitutional amendment in order to achieve a robust rights framework if a sufficient political advocacy network is established. Lauren Lin examines the long road to the criminalization of marital rape in the United States, a story in which a framework of two conflictual rights – to privacy and to equal protection – frustrated attempts to hold accountable spouses as perpetrators of sexual violence. Sylvia Waghorne argues in Chapter 5 that the Soviet Union extended and retracted the right of women to have an abortion according to its own state objectives. One of these, for instance, was to encourage women to join the Soviet labor force. In this way, Waghorne illuminates a central contention of Foucault's: that the citizens of a state are merely bodies to be managed according to its ends.

Part II considers the plight of displaced communities, and the various ways states respond to a displaced community within their borders. Kevin Sheridan examines the efforts of the member states of the European Union to address the ongoing Syrian refugee crisis in Chapter 6, and seeks to determine why some states, like Sweden, embrace refugees, while others, like Austria, ‘otherize’ them. In the following chapter, Cesar Garcia contrasts the sustainable efforts of Colombia, a strong state, to alleviate the suffering of its internally displaced peoples with the failing efforts of the Democratic Republic of the Congo, a weak state. Garcia concludes that the ability of a state to address this issue depends on its legitimacy and capabilities. Finally, Colleen Ward offers a complementary analysis of Colombia’s efforts to address its internally displaced communities, with an emphasis on displaced women. This chapter provides a historiographical analysis of how legislation paved the way for the political mobilization of displaced Colombian women.

Part III offers a compelling and complementary analysis of the negative and positive effects of government-mandated medical procedures. In Chapter 9, Konstantinos Karmanakis explores the benefits of state-sponsored vaccinations in the United States, and establishes the constitutional and scientific basis for the government’s authority to require immunization. This chapter concludes with an analysis of the non-religious reasons for the sudden adoption of religious exemptions to mandatory vaccines in 48 of the 50 states. In Chapters 10 and 11, Ashley Puk and Miriam George counter Karamanakis’ defense of state-sponsored medication with their chilling accounts of discriminatory medical practices in the United States. Chapter 10 demonstrates that minority racial groups are more adversely affected by government-funded medical research than participating whites, while Chapter 11 reveals a long history of the forced sterilization of black, Latina, and indigenous women in the United States. Both demonstrate how these discriminatory practices emerged from, and reinforced, the pre-existing otherization of racial minorities. Madison Armstrong offers a similar analysis in her chapter on South Africa’s efforts to forcibly sterilize HIV-Positive women. Armstrong argues that the stigma surrounding HIV/AIDS in South Africa colors the socio-political experience of those who contract it.

Part IV offers four cases that examine the relationships between political forces, dominant ideas, and the process of otherization. In Chapter 13, Katie Daniels discusses the *Abuelas de Plaza de Mayo* of Argentina in their search to learn more about the disappeared during the authoritarian years of the Alfonsín regime. She contrasts the *Abuelas’* interest in identifying and reuniting their grandchildren with their biological families, with their descendants’ ‘right to identify.’ In the following chapter, Jack Massih offers an alternative assessment of the “complicated” legacy of the Reagan Administration, specifically its response to the AIDS crisis. Massih explores the ideological foundation of the Administration’s response and argues that Reagan’s social conservatism should not be the only dimension that colors his (at least initially) inadequate policies. Thomas Hanley, in Chapter 15, considers the politicization of homophobia in Poland and Hungary, and offers an instructive examination of the role Russia has played in indirectly upending the European Union’s liberal-democratic project by influencing the former two countries’ social policies. In the final chapter – the artful conclusion of this book – Emily Murphy presents her own research as she examines states of emergency and their connection to governments’ capacity to ‘otherize’ foreign, ‘enemy combatants’ *qua* terrorists. Murphy explores a number of case studies and considers a rhetorical analysis; ultimately, she offers a chilling and cautionary warning – that the American people are in a constant state of fear,

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and thus, a continuous state of emergency, whereby individual rights will continue to be infringed upon for the “good” of the body politic.

* * *

We hope that you, the reader, will find the essays collected here to be both informative and stirring. Each contributor passionately displays his/her academic interests, and the editors appreciate their cooperation throughout the length of this publishing process. We are also grateful to Professor Jennie Purnell, and the Boston College Department of Political Science, for promoting an atmosphere of scholarship and collegiality. □

K. Karamanakis
& J.A. Pino

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Part I:
Vulnerable
Communities

Chapter 2:

Transgender Rights in Juridical Perspective

Jordan A. Pino

□ In March of 2016, the state of North Carolina passed House Bill 2, which restricted access to sex-segregated facilities in public educational institutions within the state to those of the same ‘biological sex’ (as determined by one’s birth certificate), among other provisions. It quickly became known as a perverse and discriminatory “bathroom bill” that targeted transgender individuals, infringing upon their equal rights. North Carolina’s bathroom bill specifically brought the transgender rights movement to the fore, after the previous summer’s victory for LGBT+ rights throughout the country in *Obergefell v. Hodges* 576 U.S. ___ (2015), which legalized same-sex marriage in every state.

Not long after H.B. 2, the U.S. Department of Justice and the state of North Carolina exchanged suits in separate filings about the legislation’s validity (although the state later dropped its suit amid another challenge by the ACLU). Quite simply, the DOJ contends that the state has contravened Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which it holds protect individuals from discrimination on the basis of *gender identity* (see: OAG 2016). The state of North Carolina claims that Titles VII and IX protect individuals from discrimination “because of sex,” which is consistent with the state’s ‘biological sex’ definition (see: Konkell and Hoey 2016). With the matter under current litigation, what can be certain is that H.B. 2 has re-animated discussion of the lived-experiences of transpeople in the United States, the injustices they often endure, and their movement for greater protections and equal rights.

This Comment engages this topic and asks the question of what legal avenues are available to the transgender rights movement and its advocates to claim greater protections for this group of people. Part II addresses what is meant by ‘transgender,’ and it examines the ways in which strict state conformity to biological sex and gender dichotomization adversely affect transpeople. The constellation of injustices suffered by this community is given some degree of enumeration. Part III reviews the case law with respect to protection from discrimination in the workplace and in educational institutions. This section focuses in on the evolution of Title VII and briefly Title IX pertaining to transgender rights, and it suggests reasons for hope that greater protections will soon be afforded, as well as some worrisome features of current political realities. Part IV considers other legal arguments that might enable transpeople to claim greater protections, principally by examining the “right to gender autonomy” as articulated by Weiss (2010). Part V concludes, suggesting

the strongest avenues for transgender rights advocates. Overall, this Comment argues that achieving greater rights for transpeople, especially with respect to non-discrimination in the workplace and in educational institutions, requires endorsing a right to *gender identity autonomy*, either through the courts, Congress, or (capriciously) administrative agencies.

II.

What is meant by the term ‘transgender’? It is worth beginning with the question of how we understand the term ‘gender.’ Jo Michael has drawn attention to the fact that many people think of the term ‘gender’ as the “politically correct” term for sex (Michael 2012, p. 91). However, the two have different meanings. ‘Gender’ is the array of social and behavioral expectations that society assigns to an individual in accordance with biological sex, which itself has constructed elements (*Ibid.*). Typically, sex is seen as natural and fixed – each person is either male or female. ‘Sex’ is rooted in identification based upon which reproductive system one has, in addition to other genetic or chromosomal criteria (Greenberg 2006, pp. 52-3). But, Shrage (2012) has drawn attention to the arbitrariness of biological sex assignment. Why should a medical official’s inspection of a newborn child’s genitals determine that child’s immutable sex, and therefore, gender (with all of those inherent behavioral expectations)? There is good evidence to suggest that immutability and dichotomization as general rules are wrongly-founded. As many as 1 in 1,500 births exhibit the diverse qualities of anatomical sex that frustrate classification as either male or female, e.g., ‘intersex’ individuals (see: Michael 2012, pp. 93-4). The point is, dichotomizations of sex and of gender have complicated the lives of those who do not easily identify within these boundaries. Those who fail to conform to the expectations of these social strictures are often viewed as “transgressors” who have broken the rules (*Ibid.*). So, ‘transgender’ individuals exist within this space. It is often remarked that the term ‘transgender’ is an “umbrella” term, which indicates the diversity of people and practices it incorporates (see: Currah 2006). This Comment understands transpeople in the context of those whose gender identity does *not* match their sex and gender given at birth. (Understanding transgender identity in this circumscribed way is done in an effort to limit the range of case law in need of consideration.) For example, transpeople often identify as male or female, but many identify as neither. Some transpeople identify as male internally, but express themselves predominantly as women, in stereotypically feminine manner. Some transition from one gender to another, often meaning by the process of undergoing ‘sex reassignment surgery’ or ‘gender confirmation surgery,’ but some never do. It is important to recognize that being transgender represents a slice of the natural diversity of human phenomena; it represents no pathological or negative instantiation in and of itself (Levasseur 2015, p. 952). Further discussion of the umbrella nature of the ‘transgender’ classification is beyond the scope of this Comment. Important going forward is that this Comment understands both sex and gender as socially constructed, and that transpeople by definition fail to conform to those typical social structures (see, further: Currah 2006; Greenberg 2006; Juang 2006).

Also, it is well-documented that transpeople are an at-risk population in the United States. From a young age, transpeople are likely to face social prejudice, especially in educational institutions. Often, this becomes discrimination and hostile pressures in the workplace. As a result, transpeople are disproportionately more likely to live in poverty,

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encounter violence, and commit suicide than the average American. According to the largest and most comprehensive survey of transgender-identifying people (6,450 participants) in the United States – the “National Transgender Discrimination Survey” – transpeople are four times more likely than the general population to live in a household earning less than \$10,000 per year (Grant et al. 2011, p. 2). In addition, 35 percent of respondents reported having been the victims of physical assault, and 41 percent of respondents reported having attempted to take their own lives (*Ibid.*). Just as alarmingly, 90 percent of respondents reported experiencing harassment, mistreatment, or discrimination in the workplace (*Ibid.*). Transpeople are indeed an at-risk population, and transphobia is a reality that characterizes their lived experiences.

As Shrage (2012) has described, transpeople encounter enormous pressures to *conform* to state-structured dichotomization of gender and various obstacles to gender identity autonomy. Government protocols in the United States make no provision for self-identification (or parents’ identification) of sex on a birth certificate, so transpeople’s ability to live out the gender with which they later identify is suppressed (Shrage 2012, p. 229). In a sense, the state commits two transgressions: one is circumscribing sex as binary, male or female; the other is presuming its immutability and suppressing one’s ability to change it at an official level. This becomes especially relevant, for instance, if one applies to a single-sex educational institution or if one is attempting to qualify for the provision of some federal or state program or service in which sex is an important characteristic. Because alteration of sex on birth certificates is frustrated by excessive obstacles, such as the requirements of surgical transition and medical certification (when sex is permitted to change at all), transpeople often encounter difficulty changing their sex-markers on other IDs, such as drivers’ licenses, passports, or Medicaid cards (Shrage 2012, pp. 229, 231-3). However, in the past five years many jurisdictions (including at the federal level) have taken steps to permit gender-marker changes and remove requirements for medically supervised transition (Levasseur 2015, pp. 959-60). For instance, the U.S. Department of State updated its policy in June of 2010 with respect to changing one’s gender on a passport, with some agencies following suit. Nevertheless, transpeople still face serious obstacles to the freedom of gender identity autonomy. For obtaining state IDs, there is no uniform process, so in some jurisdictions transpeople live an official lie with the wrong gender-marker on their IDs because they still have to show proof of surgical transition (Shrage 2012, p. 229). These draconian types of requirements are at odds with modern scientific analysis – sex and gender are not binary, only a “distorted . . . reading of molecular biology” would see sex in this way (Rosario 2009, p. 269; see, also: Cruz 2016, p. 6).

Additionally, transpeople often have limited legal recourse for the harms they endure in society. Currently, there are only 18 states (and the District of Columbia) that have laws prohibiting discrimination based on gender identity, and no federal law explicitly extends protections to those who face discrimination on account of their gender identity (see: National LGBTQ Task Force 2014). Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of sex” (as well as on other grounds), but how ‘sex’ is understood is still a matter of debate in the courts. The same can be said for educational institutions. As Part I introduced, how local school boards treat gender identity under Title IX sex-discrimination is tendentious. It remains unclear what schools must do to accommodate “reasonably” students whose gender identity does not match their biological sex, if they must accommodate them at all. To these two topics, this Comment now turns.

III.

As was mentioned above, 90 percent of respondents in a national survey reported having experienced harassment, mistreatment, or discrimination in the workplace on account of their gender identity (Grant et al. 2011, p. 2). In a report by the Transgender Law Center, nearly one out of every two respondents recounted having experienced gender identity discrimination specifically (Daley and Minter 2003). For transpeople, the workplace – where many people find their sources of self-sufficiency and dignity – is often the location of concomitant prejudice, adverse treatment, and grievance. It is important to note, however, that many employers are ‘transinclusive,’ especially today. In one 2006 cataloguing, over two-hundred firms had adopted their own internal non-discrimination policies that protect transgender employees (Broadus 2006, pp. 93-4). While documenting these success stories is helpful in providing hope to transpeople and their advocates, this only accentuates the fact that uniform legal protections do not yet exist. The status of federal non-discrimination protections for transgender employees is still unclear.

The first reported cases of transpeople claiming protection under federal sex discrimination statutes occurred in two 1975 lawsuits: one in California and one in New Jersey. Both plaintiffs argued that Title VII protected them from adverse treatment on account of their sex. The former lawsuit, *Voyles v. Ralph Davies Medical Center* 403 F. Supp. 456 (N.D. Cal. 1975), held that a hemodialysis technician – who lost her job after declaring to her employer, the hospital, that she was transgender and intended on transitioning from male to female – had no standing because Congress intended Title VII to protect women, not transpeople. Similarly, the court in *Grossman v. Bernards Township Board of Education* No. 74-1904 (D. N.J. 1975) held that “sex” must be given “its plain meaning” in the language of Title VII, when a teacher contended that she was fired because she underwent gender confirmation surgery (*Grossman* 1975, p. 9). The court dismissed the case and held that the teacher lost her job “not because of her status as a female, but rather because of her change in sex from the male to the female gender,” so Title VII did not apply (*Ibid.*). These two cases illustrate the principal legal hurdles that transgender plaintiffs have had to surmount in claiming Title VII protections: first, courts have seen no congressional intent to protect transpeople under federal sex discrimination laws; and second, courts have understood the ‘plain meaning’ of sex to be biologically based and immutable (see, further: Broadus 2006; Michael 2012; Levasseur 2015).

The watershed decision that altered courts’ understanding of Title VII sex discrimination occurred in 1989, when the Supreme Court ruled on *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989). In this case, the plaintiff, Ann Hopkins, argued that she was denied partnership at Price Waterhouse in 1982 due to the negative results of gendered stereotypes. Hopkins was the only woman under consideration for partnership, among eighty-eight candidates, and she was also the only one to have brought in a multi-million dollar government contract. Many of the partners and her superiors submitted letters praising her professional talents, yet she was passed up. Her supporters and detractors both claimed that she was inclined to aggressive behavior *for a woman*, and one partner even urged her to walk more femininely to improve her chances in the future (see: Broadus 2006, pp. 95-6). The Court was convinced that Hopkins’ failure to conform to the firm’s gendered stereotypes had adversely affected her partnership consideration, to which she was entitled recourse under Title VII. The important line from the opinion is the following: in “forbidding employers to discriminate against individuals because of their sex, Congress

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intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” (*Price Waterhouse* 1989, p. 251). The Court’s articulation of a theory of sex discrimination that made actionable failure to conform to gendered stereotypes had a significant impact on gender identity discrimination (Michael 2012, p. 99).

Consequently, courts encountered difficulty after *Price Waterhouse* to bar transgender plaintiffs from seeking recourse under Title VII (Broadus 2006, p. 96). If the law prohibits firms from discriminating against a woman, for instance, because of her “macho” personality, why should a transwoman not receive similar protection from the stereotypes of being (in)sufficiently feminine? After all, the Court held that employers are barred from insisting that “employees match the stereotypes associated with their group” (*Price Waterhouse* 1989, p. 251). Also in 1996, the Supreme Court delivered another important decision with respect to the evolution of employment discrimination protections for transpeople. In *Oncale v. Sundowner Offshore Oil Services, Inc.* 523 U.S. 75 (1998), the late Justice Scalia delivered a unanimous opinion that Title VII did not narrowly apply to forms of discrimination expressly considered by Congress at the time of the legislation’s passage (see: Broadus 2006, p. 96). The Court overturned the Fifth Circuit that had ruled that a male employee, who alleged he was physically assaulted by another employee, did not enjoy recourse under Title VII because it was too tangential to congressional intent (see: Michael 2012, pp. 99-100). The Court used the phrase “reasonably comparable evils” to permit standing for aggrieved male plaintiffs (*Oncale* 1998, p. 79). Why such a principle would not also apply to transpeople is a reasonable question that lower courts soon began to consider (see: Broadus 2006, pp. 96-7; Michael 2012, pp. 99-100).

As described above, courts in the 1970s and 1980s saw transpeople as legally nonexistent by ruling that Title VII did not protect them from discrimination: courts were “dismissing the experience as a choice or personal belief” (Levasseur 2015, pp. 972-3). This presupposition has underwritten countless court dismissals of trans individuals’ claims, but with the *Price Waterhouse* and *Oncale* decisions the tide soon turned. In 2000, the First Circuit held that a male who wore traditionally feminine attire had a course of action under Title VII, if he encountered discrimination on the basis that his “attire did not accord with his male gender”; the court herein relied on the *Price Waterhouse* theory of sex stereotyping (*Rosa v. Park W. Bank & Trust Co.* 214 F.3d 213 (1st Cir. 2000), p. 215; also, see: Broadus 2006, p. 97). Similarly, in a case involving a transgender inmate who had been assaulted by a guard, the Ninth Circuit held: transpeople “must be protected under federal sex discrimination laws” (Broadus 2006, p. 97; also, see: *Schwenk v. Hartford* 204 F.3d 1187 (9th Cir. 2000)). While these two cases unveiled the cracks in the wall of earlier interpretations of ‘sex’ in Title VII, it was not until the *Smith v. City of Salem* 378 F.3d 566 (6th Cir. 2004) decision that transpeople started to enjoy protections from workplace discrimination (Levasseur 2015, p. 975).

In *Smith*, a male-to-female (MTF) firefighter claimed that she had been fired on account of her gender identity. The Sixth Circuit, relying on *Price Waterhouse*, famously “eviscerated” earlier case law contrary to its changed jurisprudence: “a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity” (*Smith* 2004, p. 575). The Sixth Circuit affirmed the position at which it hinted, namely that transpeople are entitled to protection under Title VII, in a decision the following year (see: *Barnes v. City of Cincinnati* 401 F.3d 729 (6th Cir. 2005)). And the Sixth Circuit was not alone. As recently

as 2011, the Eleventh Circuit found in *Glenn v. Brumby* 663 F.3d 1312 (11th Cir. 2011) that a transgender woman, who was fired after she informed her employer (the Georgia State Assembly) of her intention to transition, had experienced sex discrimination actionable under Title VII because her non-conformity to her employer’s gendered stereotypes was the basis of her termination (see: Levasseur 2015, p. 976; Michael 2012, p. 102). What is clear, then, is that previous legal nonexistence is giving way to empowerment of transpeople in the workplace to claim freedom from discrimination under federal law (and state law, where available). However, the Supreme Court has yet to grant *certiorari* on these arguments pertaining to employment discrimination protections under Title VII, even while a division exists within the lower circuit courts (a common criterion for *cert.*, or judicial review) (see: Cruz 2016, p. 698). Trans plaintiffs remain in a tenuous position.

While some private plaintiffs’ progress on this issue may seem stalled, in recent years the Obama Administration has taken an activist approach to transgender rights, particularly with respect to employment discrimination protection. In July of 2014, President Obama signed Executive Order 13672, which amended previous executive orders to create a uniform policy for the federal government to prohibit discrimination based on gender identity. This has had the effect of barring federal contractors from discriminating against transgender employees (Konkel and Hoey 2016).

Also, the Equal Employment Opportunity Commission (EEOC) has been involved in creating a uniform, national standard of sex discrimination, strongly increasing protections for transpeople. In 2012, the EEOC heard *Macy v. Department of Justice* and ruled that discrimination against a transgender individual is discrimination “‘based on ... sex,’ and such discrimination therefore violates Title VII” (*Macy* 2012, p. 14). This case also relied on the *Price Waterhouse* sex stereotyping theory previously articulated. As recently as July of 2016, the EEOC has investigated claims against larger employers (such as Bojangles Restaurants, Inc. and Rent-A-Car East, Inc.) that allege employment discrimination. However, while the EEOC is entitled to deference as the agency charged with implementing Title VII, courts do not by necessity have to follow the EEOC’s reasoning due to the commission’s narrower jurisdiction (Grossman 2012).

It deserves mention here that without legislative action – either amending Title VII or enacting specific protections – the status of trans individuals’ freedom from employment discrimination nationally is in question, especially with the coming change of administrations between President Obama and President-elect Trump. The EEOC’s commissioner, for example, is appointed by the president. Swift actions by federal agencies and by the administration itself can be just as quickly reversed once President-elect Trump – the unpredictable Republican – has taken office in January of 2017.

As a result of juridical volatility and administrative capriciousness, Michael (2012) advocates enacting a modified Employment Non-Discrimination Act (ENDA). The first version of ENDA was passed in 1994 in an effort to prevent employers from discriminating on the basis of sexual orientation. Since 2009, all versions of ENDA introduced in the Congress have included language extending the original basis to gender identity. If enacted, the ENDA would enjoin all firms with at least 15 employees in all states to observe a non-discrimination policy with respect to gender identity (Michael 2012, pp. 108-10). Of course, this legal avenue for greater transgender rights has been disputed, and continues to be so, since Republicans maintain majorities in both the House of Representatives and the Senate after the 2016 Election. Despite its challenges, this avenue enjoys a number of

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advantages. Support for ENDA as a path for further protections would enjoy democratic legitimacy (an advantage the courts are perceived not to possess). Also, debate about the legislation would highlight “the role of the gender binary construct and associated expectations in discrimination against transpeople” (Michael 2012, pp. 109-10). In this way, enacting ENDA would serve to educate the public about the realities transpeople face throughout the country; debate in Congress would enable media attention and dialogue in legislators’ constituencies. ENDA would also avoid the problem of inconsistent application of protection between the bases of sex and of gender. Michael (2012) argues that specific legislative protection based on gender identity would prevent the risk of nonexistent, express protections from depriving the “umbrella” of transpeople from equal rights. In this view, inconsistent protection for transpeople is an eventuality if Title VII simply were amended (Michael 2012, pp. 107-8).

This Comment also briefly reviews transgender rights pertaining to Title IX, paying attention in particular to the recent development introduced at the beginning of Part I – North Carolina’s H.B. 2. Title IX of the 1972 Education Amendments states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (OCR 2015). The legislation is particularly important for the range of rules that local school boards must comply with in order to qualify for federal funds, or – of much more importance since *Franklin v. Gwinnett County Public Schools* 503 U.S. 60 (1992) permitted private courses of action – to prevent expensive lawsuits. Recent “guidance” was sent out to schools in May of 2016 in the form of a ‘Dear Colleague Letter’ (DCL) from the Office for Civil Rights (OCR), which included extensive “suggestions” pertaining to students’ protection from discrimination on account of their gender identity. According to the letter, for example, public schools should permit students to access sex-segregated facilities (such as multiple-occupancy bathrooms and locker rooms) in accordance with each student’s gender identity. This guidance (in addition to a similar DCL of January 2015) was non-binding, but courts tend to defer to administrative expertise in understanding disputants’ claims (this is known as the *Auer* doctrine; see: *Auer v. Robbins* 519 U.S. 452 (1997)). So, OCR’s 2016 DCL gives an indication of the direction in which the litigation of the DOJ and the state of North Carolina might go. However, this is far from certain.

Under review currently is the Fourth Circuit’s decision in *G.G. ex rel. Grimm v. Gloucester County School Board* No. 15-2056 (4th Cir. April 2016), which according to the Supreme Court’s grant of *cert.* also means that administrative deference consistent with *Auer* is under review (see: <https://www.supremecourt.gov/qp/16-00273qp.pdf>). In *Grimm*, the District Court held that G.G., a transgender boy, had not been discriminated against under Title IX when his school prevented him from using the boys’ restroom (the school had offered him unisex, single-restroom use instead) (see: Hajjar 2016). The Fourth Circuit reversed the lower court’s decision and remanded it for further consideration because the “district court did not accord appropriate deference to the relevant Department of Education regulations,” referring to the January 2015 DCL urging local schools to treat students in accordance with their gender identity, not their ‘biological sex’ (*Grimm* 2016, p. 5). Since the Supreme Court granted the appeal *cert.*, it will now take up the matter and decide whether or not a local school board must grant deference to an un-published, non-binding administrative DCL, consistent with the *Auer* doctrine. Also, it will give an

indication about whether or not students have a claim under Title IX to freedom from discrimination based on gender identity (and what this means). A decision by the Court on Title IX discrimination with respect to gender identity would portend a similar result for Title VII. Given the composition of the currently divided eight-member Court, a conclusive opinion on this matter is unlikely.

IV.

After having reviewed the evolution of transgender rights advocates’ claims to equal protection from workplace discrimination under Title VII, and after having addressed the most recent development of such claims to protection from discrimination in educational institutions under Title IX, this Comment now turns to another legal avenue as articulated by Weiss (2010). Elsewhere, Weiss has suggested that “gender autonomy” can be viewed as a fundamental right enshrined in the U.S. Constitution on a substantive due process basis to self-determination and self-identification of one’s gender (see: Weiss 2001, pp. 153-4, 167, 171). However, since the *Lawrence v. Texas* 539 U.S. 558 (2003) decision, the Court has “devaluated” this avenue for transgender rights advocates (Weiss 2010, p. 2). Instead, the Court has made a ‘rational basis’ standard possible for the ‘right of gender autonomy.’ This entails challenging laws that contravene transgender plaintiffs’ right to self-determine and -identify their gender by demonstrating that such laws lack legitimate aims of the state or have an “insufficient rational nexus to the law” (*Ibid.*). A right to gender autonomy involves the views that sex and gender are conflated inappropriately, that human gender can be characterized as variant, and that gender autonomy has long social and legal traditions historically (Weiss 2001; 2010).

In 2003, the *Lawrence* decision overturned the precedent of *Bowers v. Hardwick* 478 U.S. 186 (1986), which had upheld a Georgia statute that criminalized “homosexual sodomy.” In *Lawrence*, the Court articulated an implied ‘fundamental right’ to the liberty to engage in personal relationships, of which sexual relationships and acts are a part, by finding such a right within the substantive ‘right to privacy’ (Weiss 2010, p. 13). The Court denied a legitimate state interest in moral regulations of same-sex sex acts, detailing such regulations as merely “born of animosity” (Weiss 2010, p. 14). Importantly, on the broader reading of *Lawrence*, “anything that is a matter of personal autonomy under an emerging social consensus is a fundamental liberty... there is no legitimate state interest in regulating anything unless it does demonstrable harm to third parties” (Weiss 2010, p. 14). This is J.S. Mill’s ‘harm principle’ at work. However, Weiss suggests that this reading of *Lawrence* is actually too simplistic, as the Court’s decision is ambiguous in many places (Weiss 2010, p. 13). For instance, Justice Scalia’s dissent made clear that the Court seemed to imply that it endorsed a fundamental right to same-sex sex acts (something Justice Scalia was unwilling to do) and a ‘strict scrutiny’ standard of review (Weiss 2010, p. 15). Instead, the majority opinion can more aptly be read as urging a ‘rational basis’ standard of review, so a fundamental right to gender autonomy cannot come from *Lawrence* (Weiss 2010, p. 29). Further, as Weiss mentions, to the extent that same-sex sex acts were denied status as a fundamental right, the *Lawrence* Court actually left this element of *Bowers* in place (Weiss 2010, p. 15).

The two poles of ‘strict scrutiny’ and ‘rational basis’ review both are likely to lead to a losing argument given the Court’s opinion in *Lawrence* (Weiss 2010, p. 38). As Weiss

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argues, the two readings contain positions that are difficult to defend for an advocate of a right to gender autonomy: one is that gender autonomy is a *fundamental* right, and the other is that even if it is not, the state's interests in regulating gender are illegitimate (Weiss 2010, pp. 27-8). Rather than taking up these positions, Weiss argues that transgender advocates should consider an overlooked element of the doctrine of substantive due process – focusing in on the relationship between the law and the state interest (it must be rationally related) (*Ibid*, p. 29). This is different from 'rational basis' review in that it relies on the Court's earlier *Romer v. Evans* 517 U.S. 620 (1996) decision, which held that state laws singling out homosexuals are "born of animosity," and so invalid due to their *insufficient rational relationship to the enumerated state objective itself* (see: Weiss 2010, pp. 35-8). Therefore, laws contravening 'gender autonomy' that rest on grounds *irrelevant* to achieving the state interest may be challenged. This is understood as "minimal scrutiny with bite," and it provides an approach for transgender advocates to challenge the eight categories of laws Weiss details (such as "laws requiring or permitting sex discrimination in private settings, such as employment...") (see: Weiss 2010, pp. 3-5, 38).

This Comment addresses this approach here to suggest an avenue for litigants to achieve greater protections for transpeople in the courts. As detailed above, the directions of Titles VII and IX seem to be moving towards protection from discrimination on the basis of gender identity in the workplace and in educational institutions, but this is hardly guaranteed. While an ENDA that specifically protects transpeople from discrimination would be the most profound improvement for transgender rights advocates, contemporary political realities seem to indicate that this democratic alternative is precluded from near future legislative action. Instead, advocates should focus on demonstrating to the courts the insufficient rational nexus to the law of various anti-gender autonomy positions that both states and the federal government uphold, thereby side-stepping the problem of articulating a 'fundamental right,' while establishing precedent equally as pervasive. "Minimal scrutiny with bite" would also enable the DOJ and the ACLU in their cases against the state of North Carolina to convince the court that H.B. 2 is clearly "born of animosity" and rests on grounds wholly irrelevant to a compelling state interest.

V.

In review, a few points emerge. Transpeople and their advocates can claim equal rights by pursuing various legal avenues, most notably by adjudication. While the lower courts are split on whether Title VII includes protection based on gender identity, advocates would be advised to pursue Weiss' (2010) strategy of "minimal scrutiny with bite" to expose when discrimination is clearly "born of animosity" and irrationally related to a compelling state objective. Nevertheless, congressional action is needed, as the jurisprudence in this regard is volatile and the Supreme Court has yet to consider this topic specifically. Transpeople and their advocates would be advised to put pressure on lawmakers to enact an express non-discrimination statute that protects employees from discrimination based on their gender identity. Such legislation would best be modeled after the 1994 ENDA, which protects employees from discrimination on account of their sexual orientation. Congressional authorization would not only lead to court uniformity on employment non-discrimination opinions, but also it would bring this topic into the "public sphere," where dialogue can educate and the legislation can become legitimized. Transgender rights must come from the juridical, political, and social spaces.

What is surprising, however, is that the Supreme Court *has* taken up gender identity and Title IX, which presents a more complicated and more recently contested territory. The *Grimm* case may offer clarity with respect to the extent of deference to administrative agencies as well as how gender identity factors into protection “because of sex,” but all of this remains uncertain. In addition, the 2016 election casts doubt on the legacy of the Obama Administration. It may be soon that previous DCL “guidelines” evaporate with new White House leadership. In such case, North Carolina’s H.B. 2 may be upheld. While contemporary political realities are without question worrisome to transpeople, advocates must remember that a right to *gender identity autonomy* can be claimed through many forums, by many arguments; they should take heed. □

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Chapter 3:

The Development and Success of Disability Rights in Germany

Connor Tobin

□ Disability has always existed, however, it is only recently that much attention has been paid to the state's interaction with its disabled citizens and the importance that policy has on shaping disabled culture as well as the distinct lives of those with disabilities. The term disability is a broad one, encompassing hundreds of different conditions, which can be anywhere from short-term to lifelong. It is therefore unsurprising that states usually approach disability with broad definitions and solutions, which in turn has the effect of overlooking many of the problems and necessities of the disabled. This chapter highlights one country, Germany, for its policy successes and societal improvements that have remarkably benefitted Germans with disabilities in a way not seen in comparable countries. The effects of the American model of disability rights and the pre-existing medical model of disability in post-war Germany will be explored to show how the nascent German disability rights movement fought to obtain equal human rights for the disabled while maintaining the necessary welfare protections for such individuals. This had the effect of securing increased accessibility for the German population while ensuring that physical and mental impairments did not push disabled Germans into poverty. This paradigm shift from the sole medical model to the dual rights and medical model occurred during the turn of the 21st century and was subsequently tested by the austerity measures which were enacted across Europe after the global economic crisis of 2008. This chapter will conclude with a comparison of the effects of austerity on German disability benefits and on English disability benefits to prove how the actions of the German disability movement in the 1990s improved the lives of the disabled by intertwining the social welfare and human rights model.

It is first instrumental to define disability and to explore the theoretical frameworks through which governments attempt to interact with disabled citizens. Disability is different than impairment and should be viewed as a social construct rather than an objective scientific fact (Gooding 1994, p. 1). There is no natural binary that places individuals into either the abled or disabled groupings. Rather, disability exists along a spectrum with each individual containing differing levels of ability. As for the social part, one is only disabled in society given the set of societal standards that confront him or her.

If a fully mobile individual and a wheelchair-bound individual approach an elevated building with stairs, but no wheelchair ramp, the former is abled whereas the latter is disabled. If there is a wheelchair ramp with an appropriate gradient, then both are fully able to get into the building, even though the wheelchair bound individual remains physically impaired. It is therefore the onus of society to create accessibility if its objective is to treat all members equally and to reduce the burdens of physical and mental impairment. That being said, for sake of simplicity the terms disabled and disability will be used in this chapter to refer to individuals with physical and mental impairments who are relatively less abled than other individuals.

There are two main frameworks through which states can interact with people with disabilities. The first is the medical model, in which people with disabilities are treated as burdens to the state who need care and social welfare. The practical application of this framework has oftentimes led to a paternalistic system of governance in which the disabled are treated as wards of the state and afforded meager amounts of accommodation and autonomy, as was the case in West Germany between 1945 and 1992 (Heyer 2006, pp. 86-87). In the medical model, disability becomes linked to the notion that all disabled persons are unable to work and that they need to be fully dependent on the government and their families (Gooding 1994, p. 15). The second framework is the civil rights model, which focuses on engendering equality and accessibility into the lives of the disabled. The downside to this framework is that in practice social services and income protections for the disabled are oftentimes not given the proper attention or funding they merit. This has been a staunch criticism of the American disability model, which provides accessibility and accommodation while neglecting the need for basic social services (Heyer 2006, p. 98). An ideal model would be one that provides both the safety net of social welfare and the objectives of increased accessibility and accommodation. This improvement occurred in Germany when the long-lasting medical model incorporated the positive qualities of the American rights model without shedding its income protections.

The German Medical Model of Disability

Attention to disability and the state’s role vis-à-vis the disabled first gained prominence after World War I, when the German government experienced a tremendous influx of wounded veterans returning to Germany. Veterans, who were esteemed by the state for their service, formed organizations and quickly gained political clout, which they used to lobby the government for benefits and protections. Civilian disability groups also began sprouting up in the wake of the larger, more prominent veteran organizations; however, they were dwarfed by the size and power of their conservative military peers (Heyer 2006, p. 89). Because of their relative weakness, civilian disability organizations never gained the political power they needed to advocate for anti-discrimination measures and for protections for people with disabilities. During the Nazi regime, veteran groups became exalted whereas civilians with disabilities were horrifically persecuted. The state murdered 300,000 disabled German civilians during the Holocaust (Köbsell 2006, p. 2), an obvious sign that the interwar period yielded no progress for disability rights and that the civilian disability groups were insignificant to the German state.

After World War II, Germany found itself with 1.5 million citizens who were disabled from the aftermath of both the war and the Holocaust (Stolleis 2014, p. 177). Civilian

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disability groups started to become more prominent than veteran groups in West Germany because of the occupying forces' prohibition of organizations that only consisted of veterans. This caused larger veterans organizations, such as the Association of Veterans and War Survivors (VdK), to incorporate civilians and civilian disability into their structure (Heyer 2006, p. 92). Meanwhile, civilian disability groups increased in size and scope due to higher post-war demand and the restrictions placed on veterans-only groups.

Among these civilian groups were the famous social clubs for people with disabilities, the first being "Club 68", which was founded in 1968. These clubs were originally dedicated to the promotion of leisure for the disabled as well as education of the public on matters of disability. However, inadequate transportation and access to meeting places caused the groups to transition their efforts to lobbying for accessibility measures (Köbsell 2006, p. 3). In this case, the barriers to organization and political actualization ironically sparked increased efforts to organize and lobby for greater accessibility. This time period also saw the rise of the "crip movement", which aimed to create organizations and groups that actively excluded able-bodied individuals. The purpose of this exclusion was to highlight the discrimination that the disabled felt while also ensuring that the social organizations would be run by disabled people (Köbsell 2006, pp. 4-5). This caused a greater number of organizations to be headed by people with disabilities and focused attention on both charity and advocacy, instead of just charity.

While social organizations were being stymied by lack of access to meeting places and public buildings, the welfare institutions created to distribute benefits were increasing in size. These institutions were adept at ensuring that social welfare was given to people with disabilities, however they did nothing to stop the disabled from being segregated and dependent on their families and the state. Disabled rights activists rallied against what Katharina Heyer describes as the "parallel track" that the disabled had to take: they were cared for by the state, but were always placed apart from society. This caused disabled activists "to challenge their segregation- which they saw not as the natural consequence of their disabilities, but rather the result of a *disablist* society" (Heyer 2006, p. 95).

In 1981, the UN's International Year of Disabled Persons, tensions between the disabled and the federal government reached an all-time high. While the German government formally endorsed the UN's goal of equality and societal integration for the disabled, it did nothing to actually implement its objectives. Instead, the state continued to increase welfare funding while ignoring the plea from the disabled to be able to participate in society. This led to multiple high-profile protests in which disability activists disrupted government events. In one instance, activists chained themselves to a stage to prevent the West German President, Karl Carstens, from delivering a speech addressing disability and its role in the welfare state (Heyer 2006, p. 96). While these measures were highly visible, they did little to actually change the government's treatment of the disabled. This is because the proper implementation of human rights from a transnational source requires societal, political, and legal internalization (Koh 2003, p. 1502). Protests were insufficient in normalizing and legally codifying the language and application of disability rights. More internalization of rights needed to occur, however, the necessary conditions for the application of the UN's goals wouldn't come about until the 1990s, when the country began the reunification process.

Incorporating Disability Rights into German Society

The shift towards greater accessibility in the 1990s occurred because of two factors: the tourism of disabled Germans to America and the process of constitutional revision that was needed due to the reunification of East and West Germany. The passage of the Americans with Disabilities Act (ADA) had a powerful impact on the evolution of German disability rights because disabled Germans traveling to America got to see the implementation of the civil rights model and the widespread accessibility it provided. German disability rights advocates flocked to trailblazing locations such as California and Oregon to experience the way in which those with disabilities could have a better life due to greater accessibility. Disabled German students studying abroad in America reported much better social lives than the ones they had in Germany due to university accommodations as well as the ease in which they could navigate social venues such as bars and movie theaters (Heyer 2006, p. 98). These individual experiences reinvigorated the disability rights movement back in Germany. Even more important was the fact that this trans-Atlantic tourism increased societal internalization of disability rights by showing German citizens that such aims were achievable and realistic. This was materialized in the formation of the Initiative for Equality of the Disabled, a broad coalition of disability groups that aimed to have the German government pass ADA-inspired legislature (Köbsell 2006, p. 9). American disability tourism and the emergence of a concrete policy goal helped create an issue network from a social movement.

The redrafting of the German constitution, known as the Basic Law, in 1992 provided the opportunity to increase legal internalization and redefine how the state was to view citizens with disabilities. The Initiative for Equality of the Disabled was granted a hearing in front of the Constitutional Commission during which the coalition argued for adoption of language similar to that of the ADA and the Canadian Charter of Rights and Freedoms. The Commission, which was dominated by members of the conservative ruling coalition, voted against the incorporation of such rights and initially refused to mention the disabled in Germany’s new constitution (Heyer 2006, p. 101). The Initiative for Equality responded by putting pressure on politicians who refused to include an anti-discrimination measure in the Basic Law and began lobbying the Bundestag to reject its current draft. The 1994 parliamentary elections were predicted to be tight, which worried the ruling conservative coalition, who began to see the disability movement as a significant voting bloc. The elections ultimately proved to be the pivotal point in the codification of civil rights for the disabled; Chancellor Helmut Kohl reversed his opinion on the incorporation of disability rights, instead choosing to support the antidiscrimination language. This swayed the Constitutional Commission to include the rights of the disabled into Article 3 of the constitution, thus cementing the government’s duty to accommodate those with disabilities (Heyer 2006, p. 102).

While legal codification of rights is an important step towards greater inclusion, it does not necessarily mean that the rights of the disabled are automatically accommodated for in society. To address this issue, the charity Aktion Sorgenkind (translated as Operation Problem Child) partnered with disability organizations across Germany to start an awareness campaign called Operation Basic Law. The result of the campaign ended up being greater societal internalization of the rights of the disabled because it revealed to the public the language of disability rights, the challenges facing the disabled, and ways that governments could fix the problem. The campaign used two methods to raise awareness.

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One method was a large-scale approach that focused on advertisement and the media to affect not only the public, but also the government (Köbsell 2006, p. 9). The other was a grassroots campaign, which aimed at disseminating pamphlets, posters, and gear to individuals who could then share and post these materials with their communities. Operation Basic Law gave out informative and thought-provoking stickers that could be placed on entranceways, businesses, and buildings that were not accessible for or welcoming of the disabled (Heyer 2006, p. 105). It is important that this happened at both the grass-roots and macro level, since the implementation of human rights works best when both a top-down and bottom-up approach are employed (Sooahoo and Stolz 2008, p. 475). Constitutional reform solidified anti-discrimination disability protections, however, systemic problems for people with disabilities still remained: the two most essential being segregation from society and self-determination.

Disability Rights in Germany after Constitutional Reform

A powerful blow against the progress of the disability rights movement came in 1996, when the Federal Constitutional Court ruled that a wheelchair-bound teenager seeking to attend a public school did not have the constitutional right to do so. The court reasoned that the school did not need to be burdened by the student and that the installation of wheelchair ramps, handicap bathrooms, and other accessibility measures would be financially onerous to the school. This was seen as proof by disability rights activists that the anti-discrimination amendment to Article 3 was insufficient at protecting the rights of the disabled and that new laws would need to be passed in order to promote desegregation (Deneger 2003, p. 166). Aktion Sorgenkind, now renamed Aktion Mensch (Operation Human Being) to reflect the growing consensus that the disabled should be treated as human individuals instead of social burdens, launched a second campaign to promote an equality law (Köbsell 2006, p. 9). A coalition between the Social Democrats and the Green Party gained a majority over the conservative faction in the 1998 elections. One of the stipulations in their coalition agreement was the expansion of political citizenship for the disabled. Due to this, the Aktion Mensch campaign focused on reminding the government of its promise and reminding society of the continuing challenges facing those with disabilities (Heyer 2006, pp. 114-115).

The culmination of the Aktion Mensch Campaign and the election of the Centre-left coalition led to the passage of the Act on the Equalization of Disabled Persons in 2002. The passage of this law was symbolically important because disabled lawyers were the ones who helped craft the legislation. As for the act's material effect, it guaranteed disability accommodation at voting sites, recognized German sign language, mandated accessibility to federal buildings and public transportation, created a disability ombudsman, and acknowledged the double discrimination faced by women with disabilities (Deneger 2006, p. 6). This law was much more encompassing than the Basic Law's antidiscrimination clause and it addressed many of the demands that disability activists had been advocating for during the later part of the 20th century. It also marked greater legal and political internalization of disability rights discourse and implementation. 21 years after the UN's Year of Disabled Persons, due to greater societal, political, and legal internalization, the German state finally implemented laws that protected and benefited the disabled.

The Equalizing Act was also passed around the same time as the Rehabilitation Law of 2001, which promoted both equal rights as well as social welfare for the disabled. It stipulated that programs to lower unemployment for the disabled were to be structured so as to include disabled workers into the normal labor market, and not into segregated labor positions. The law also sets employment quotas to integrate the disabled into the general workforce (Deneger 2006, p. 7). The passage of both these laws reflects a synthesis of the medical and civil rights model which has allowed the German state to properly protect its disabled citizens in the 21st century.

The development of disability policy in Germany shows that the civil rights model can be espoused without losing the welfare benefits of the medical model. As of 2015, disabled Germans can apply for a disability pension, have their medical costs covered by the national healthcare system, are given a housing stipend, receive subsidies for home care, and are guaranteed free public transportation and discounted taxi fares so as to promote greater integration. Additionally, extra protections are given to children with disabilities and their families (Connolly 2015). While it is beneficial to view what the welfare state promises, it is even better to see how it delivers, especially during economic downturn, when the state is motivated to cut programs. The next section will examine how the hybrid German disability model fared the austerity measures that ensued after the 2008 global economic recession.

Comparing Britain and Germany

In examining the German case it is best to provide a comparison with a similar country to elucidate how welfare benefits and social services were maintained or changed amidst the larger wave of austerity measures enacted after 2008. Britain serves as an excellent comparison because of the similar economic and demographic conditions between both countries. In 2007, the GDP per capita of Germany was 41,219 USD while the GDP per capita of Britain was 43,734 USD (World Bank 2016). Total social transfers in 2007 consisted of 11% of GDP in Germany and 12.2% of GDP in Britain (European Commission 2015, Tables 2B & 29B). In 2007, disability benefits accounted for 8% of all social benefits in the Germany and 7.6% of all social benefits in Britain (Eurostat 2016). Both countries were ruled by conservative governments that announced drastic budget cuts: an €80 billion cut for Germany and an £83 billion cut for the United Kingdom (Pietras nd). In 2011, the overall percentage of citizens who were disabled was measured at 16.9% for Germany and 17.8% for the Britain (Eurostat Disability Statistics 2015). It is therefore clear that a comparison of both countries will show how differences in political frameworks and social movement organization affected disability welfare, given similar economic and demographic trends.

It is essential to give a brief outline of how disability rights developed in Britain and how it differed from the German experience. British disability organizations never gained the political clout that they did in Germany. Even though 20th century Britain had a similar medical model to that of the West German government, the lack of effective British disability organizations made it so that welfare programs were never secured in the same way. The weakness of British disability organizations is due to the fact that British tax law prohibits charitable organizations from engaging in political activity; many disability organizations have a charitable component and are therefore precluded from the political

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process (Barnes and Mercer 2001, 14). This means that campaigns such as Operation Basic Law could never take place in the British political sphere. Disabled Britons also face disenfranchisement because of their status and are often not allowed to register to vote. On top of that, many polling places are inaccessible and lack sufficient measures to accommodate the disabled (Barnes and Mercer 2001, p. 12). Disabled Britons face larger obstacles than their German counterparts who have voting poll accessibility protected under the Equalizing Law.

Britain has taken some measures towards the civil rights model of disability; however, this had been done at the expense of the welfare system. The Disability Discrimination Act of 1995 contained no measures to protect the existing welfare system, leading many to believe that social services were being exchanged for civil rights (Barnes and Mercer 2001, p. 19). People with disabilities in Britain face greater restrictions toward political expression and are not covered by the same types of laws that benefit disabled Germans. One would therefore expect to see the effects of austerity being more limited in Germany than in Britain.

Weathering the Storm: Austerity and Disability

The British government has drastically cut disability benefits whereas the German government has not. The Welfare Reform Act of 2012 hollowed out the British welfare system by eliminating the Severe Disabled Allowance and the Lone Parents Income Support, cutting 20% from the Disability Living Allowance, and restricting access to the Employment and Support Allowance (Hauben et al. 2012, pp. 78-81). All of these programs were aimed at helping the disabled and their family members. In Germany, significant cuts to social services did not occur as part of the broader public expenditure cuts (Hauben et al. 2012, p. 32). These cuts to income support programs are especially detrimental to British citizens with learning disabilities since they have a low likelihood of obtaining an occupation in general (EASPD 2010, p. 13). And for British citizens with mobility constraints, the reduction of the Disability Living Allowance meant lost access to specially equipped personal vehicles provided for by the Motability Scheme (Power 2016). This represented a loss of the freedoms and normalcy that cars provide. The United Nations estimated that 13,900 disabled individuals lost their cars due to the British government's budget cuts (United Nations 2016, p. 20).

Many European countries have found a way of making cuts indirectly by refusing to adjust disability benefits to account for inflation. This has the effect of reducing the real purchasing power of the benefits. A similar situation would be if a manager refused to give a cost-of-living raise to an employee. While the employee's nominal salary remains unaffected, inflation decreases the amount of goods and services he can purchase; meanwhile the manager decreases costs by not adjusting the salary for inflation. The British government avoided paying £5.8 billion in public benefits by changing the way the price index was calculated. In Germany however, this maneuver is illegal based on the safeguard clause, which prohibits adjustments in the price index from affecting the real value of social welfare (Hauben et al. 2012, p. 74). Because of this, there exists much greater income security for the disabled in Germany than there does in Britain.

There are other ways in which austerity measures can be detrimental to the disabled. Large cuts to the public social services in Britain have led to a decrease in the number of

staff in the health services industry. Germany however, has seen no substantial change in staffing levels (Hauben et al. 2012, pp. 34-35). Britain has closed at least 29 workshops for the disabled in response to budget cuts (Hauben et al. 2012, p. 61), however no such measures were taken in Germany since workshops for the disabled are protected under the Federal Social Code (EASDA 2010, p. 8). Additionally, the British government phased out the Independent Living Fund, which helped people with disabilities achieve self-determination and personal autonomy. Parliament, in a moment of self-awareness, acknowledged that its actions in closing both the Independent Living Fund and the Disability Living Allowance had violated the principles of the UN Convention on the Rights of People with Disabilities (UNCRPD) (House of Lords 2011, p. 29). In fact, the United Nations eventually sent an inquiry team to England to investigate alleged violations of the convention.

The United Nations launched an inquiry through the Committee of the Rights of Persons with Disabilities in April of 2013 after multiple disability organizations reported that the British government failed to adhere to the principles it pledged to uphold. In October of 2015, the committee sent in investigators to collect data and interview government officials, members of disability organizations, and British citizens with disabilities. The inquiry found that the Welfare Reform Act of 2012 and the closure of the Independent Living Fund constituted a breach of the British government’s domestic and international commitments (United Nations 2016, p. 15). The austerity measures enacted by the British government violated its pledge to promote independent living for the disabled since the budget cuts had the effect of increasing dependence and institutionalization for the disabled. The data that the investigators collected also showed that the government knew in advance that its consolidation of the Disability Living Allowance would cause 620,000 citizens to lose their coverage (United Nations 2016, pp. 17-19). Based on the results of the investigators’ findings, the Committee argued that “persons with disabilities have not been properly considered as right-holders and entitled to benefits with regard to their right to social protection” (United Nations 2016, p. 16). It is therefore evident that the British government rejected both the medical model and the civil rights model of disability by drastically reducing benefits as well as independent living measures and integration programs. Meanwhile, no complaint-based investigations have been launched into Germany’s compliance with the UNCRPD (Butler 2015).

Given the similar economic and demographic characteristics of Britain and Germany before the crisis, it appears that the difference in outcomes during austerity is directly attributable to the way in which the respective political systems interact with the disabled. In Britain, disability organizations are usually led by the non-disabled and are restricted from political action if they have a charitable component. Additionally, many British citizens with disabilities have become disenfranchised due to lack of protections and inaccessibility, meaning that they have substantially less political power and are not seen by the government as an influential voting bloc that should be given attention. This weak political climate is juxtaposed to the robust system of disability politics which has emerged from half a century of struggle in Germany, where disability benefits and rights are codified in a way that does not allow the state to restrict welfare and civil rights.

Disability is a multi-faceted issue that extends into many fields besides politics. However, states play a key role in shaping how disability is viewed in society and greatly affect the lives of the disabled. The evolution of the disability movement in Germany shows

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how active participation in the political process begets change and progress in the quest for civil rights and equal treatment. A country does not need to undergo the exact same processes that Germany did in order to establish a robust disability rights framework. While constitutional amendment was a key factor in the German case, it was merely representative of a broader movement of societal, political, and legal internalization of disability rights. The goals of integration, independence, accessibility, and accommodation were all achieved by the disability rights movement and were maintained through the period of austerity following 2008. Germany serves as solid example for having achieved a correct balance between the medical and civil rights models of disability. Its comparison to Britain shows how progress can be rolled back and rights infringed upon when relevant political actors are excluded from the political system and when rights are not codified. If the human rights of the disabled are to be respected, then states must make an active effort to incorporate them into the political sphere and ensure that they have increased access to society. □

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Chapter 4:

The Criminalization of Marital Rape:

A Story of Progress and Pushback

Lauren Lin

□ In 1793 Eleanor Pettit accused her husband of committing a “sodomitical, detestable, and abominable sin” toward her (Block 2006, p. 79). As sodomy is illegal regardless of consent or marriage, the courts agreed to take this case, a case that came closest to dealing with marital rape during that time. Even with an indisputably criminal offense, however, no court nor lawyer at the time knew how to handle a case of sodomy within a marriage; as a result, the superior courts where sodomy cases were usually tried tossed it back down to local courts (Ibid., p. 80). This inability to properly process a case where a woman is oppressed by a man is a continuous theme that will be present throughout the history of the marital rape exemption.

The marital rape exemption is often simply three words: “not a spouse,” or in other cases, “not a wife” (McMahon 2005, p. 8).¹ It provided legal immunity to husbands for cases of rape and sexual assault, and perpetuated the idea of women’s inferiority to men. This inferiority became the reigning precedent after the publication of one 18th-century jurist’s treatise, and combined with that time period’s view of women as property, created a lasting defense of this exemption up until the late 20th century. Even after all fifty states had criminalized marital rape to a certain extent in 1993, there remained exceptions and loopholes; in 2003, over twenty-six states still provided some type of marital immunity (Anderson 2003, p. 1468). This meant that either the law was significantly more forgiving for marital rape offenses as opposed to stranger rape offenses, or that there were conditions under which the marital rape exemption still existed; some states only removed the exemption for cases involving the use of force (Ibid.).

The fight against the exemption lasted for over 200 years, but the exemption resisted reform until the late 20th century. Feminists in the late 1800s fought for rights to their own bodies, for changes to their role within marriages; changes in the 20th century also

1. Examples of variations of this phrasing can be found in the Alabama Code of 1977, which defined the term “female” in rape cases as “any female who is not married to the actor.” In the Kansas Code of 1980, rape was defined as “intercourse committed by a man with a woman not his wife” (quoted in Pracher 1981, 719).

necessitated discussions on women’s evolving place in society and home. At every turn, this exemption seemed to be invincible to any criticism. Despite arguments by feminists concerning bodily autonomy, developments in women’s role in society, domestic violence, and the constitution, defenders of the marital rape exemption continued to push back. This debate has created a pervasive and damaging ideology lasting through present day.

The story of marital rape’s criminalization became one of consistent pushback upon progress. Most attempts at reform were ultimately refuted by seemingly equally valid counterarguments; the need to balance two constitutional rights, the right to privacy and the right to equal protection, created a troublesome conflict. By understanding the reasons behind the arguments of both the attackers and defenders of the marital rape exemption, it becomes clear why the process to criminalize not only took so many years, but resulted in changes to rape law that ultimately left married women unprotected.

Foundations to the Marital Rape Exemption

The foundation to most defenses of marital rape can be traced back to English jurist Matthew Hale’s 1736 treatise. In it, he asserted without reference to any legal precedent or authority that when a woman agrees to marry a man, she gives the man a part of herself that she can never take back (Hasday 2000, p. 12).² This made marital rape a physical impossibility, as without a divorce there would always be consent. The irrevocable notion of consent is similar to if a man did something criminal to his own property, such as theft; the concept of stealing one’s own property makes little logical sense (Anderson 2003, p. 1476). This conception of marriage created a dynamic where a husband had the “right of sexual access to his wife,” and the wife was “bestowed an obligation...to submit” (Hasday 2000, p. 13). These ideas of women essentially being the property of their husbands is the most used, yet least factually supported, argument defending the exemption.³

Hale’s unsubstantiated claims were made into legal precedent in the 1857 case *Commonwealth v. Fogerty*, where the marital rape exemption was first recognized (Garcia and McManimon 2011, p. 70). The court relied almost entirely on Hale’s conception of the impossibility of marital rape in its decision, citing no other empirical evidence and thereby making Hale the highest authority on marital rape law. “Marriage to the victim” became “a defense to a charge of rape” (Ross 2015, p. 21).⁴

In addition to Hale’s ideology and the court cases, the creation of public and private spheres a few years after *Fogerty* excluded the government from marital rape issues until

2. Another English jurist, William Blackstone, noted: “...by marriage, the husband and wife are one person in law...The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband” (Pracher 1981, p. 717). Both Hale and Blackstone suggest that women lose autonomy over their own lives, especially their bodies, in a marital contract. This also suggests the idea that when a man and a woman are married, they become one single unit no longer comprised of individuals.

3. The importance of marriage was emphasized through what the courts considered punishable offenses in the late 1700s. Men were punished not for the rape of their wife, but for the coercion of a woman into a forced marriage. This emphasizes the importance given to marriage and the marital contract, and how little importance is given to what happens after (Pracher 1981, p. 725).

4. Shortly after the *Fogerty* case, a notable case in Texas occurred that restated Hale’s concept of marital immunity for rape and framed the idea as a usable piece of evidence, further setting the precedent that persisted until the late 20th century (*Frazier v. State* 1905).

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women began to enter the public sphere in the late 1900s. The private sphere at the time equated to the woman's sphere, and any governmental intrusion "upon the woman's sphere constituted an illegitimate public invasion of the private sphere," (Harvard Law Review 1986, p. 1258). This would go against the constitutional right to privacy. Under this theory, there could not be any legal reform on marital rape law without undermining women's right to privacy. To respect the division of spheres, the government left the issue of marital rape up to the household. Ironically, this attempt to ensure the right to privacy by allowing the marital rape exemption ended up infringing upon women's privacy even more, creating policies that violated women's rights to their own bodies, a basic and fundamental constitutional right (Ibid., p. 1263).

Early Feminist Activism

The first major push against marital rape was in the 1850s when organized feminists included it on their agenda (Hasday 2000, p. 2). These feminists approached marital rape with various arguments, but ultimately were unable to create legal change against the exemption or even societal change surrounding the issue. While this was in some part due to the incredible influence of Hale's ideas, it also has to do with the feminists' misdirected attention. Feminists placed too much focus on getting women out of a situation where marital rape occurred, and not enough on the social and economic barriers that kept women in those marriages. The two main arguments of the movement concerned a woman's role in marriage and the argument of motherhood.

The marriage argument was inseparable from the argument for the autonomy over one's own body, and these two ideas merged to create one cohesive argument targeting a "husband's legal right of sexual access" (Ibid., p. 18). Elizabeth Cady Stanton, a prominent feminist in the late 19th century, first put the issue of marital rape into the context of marriage despite feeling that the world was not yet ready to talk about marital relations (Ibid., p. 20). She argued that a woman's "right to control her person" was "foundational" for any discussion of equality, especially women's rights (Ibid., p. 21). This fight for autonomy challenged the conventional role of a wife in marriage: becoming the husband's property. Lucy Stone, another leader on the discussion, even asked Stanton to present on a "wife's right to her own body" (emphasis added), again narrowing in on the rights of women within marriage (Ibid., p. 22).⁵

Connected to the argument of bodily autonomy is the notion of controlling motherhood: early feminists claimed that a woman's large and essential role in taking care of children meant that she should be the one to decide whether the couple were to have a child (Ibid., p. 21). This was an incredibly gendered argument that contradicted the notion of equality feminists were aiming for, but the idea of women raising children was so prominent in society that feminists decided to bandwagon off the argument, prioritizing bodily autonomy over overall equality (Ibid., p. 19). Involuntary childbearing was another type of oppression against women, and a potential result of marital rape. Marital rape was wrapped into the developing movement against involuntary motherhood (Ross 2015, p. 40). Due to

5. Judges and lawyers had a difficult time explaining the difference between a wife's sexual obligation to her husband and a prostitute's monetary obligation to her customer. The reason was because a prostitute exchanged sexual services for money, and wives traded sexual compliance for socio-economic support. As a result, feminists called marriage "legalized prostitution" (Hadsay 2000, p. 24).

the fact that contraceptives were largely unavailable in the 19th century, feminists claimed that forced childbearing put the woman’s bodily integrity on the line, denying her the right to privacy and choice over “one of the most personal and intimate of all human interactions” (Harvard Law Review 1986, p. 1263). Despite these arguments, however, there was little legal change.

The Unsuccessful End of a Hard-Fought Battle

Though feminists presented valid yet controversial arguments for women to gain more control over their bodies, the Women’s Rights Movement resulted in very little legal change for marital rape. When women attained the right to vote, the movement ended, but marital law saw only a slightly more liberalized divorce law.⁶ The reason for the lack of success was due to three reasons. First, feminists were “not alert to sources of inequality” both within and outside the household that kept women in their marriages because they had turned their attention to questions of bodily autonomy instead (Hadsay 2000, p. 17). In reality, discussing autonomy was a luxury for those not trapped in a marriage for financial support. Second, feminists around this time were faced with the obstacle that the public viewed marriage from an idealistic point of view. This harmonious conception of marriage proved to be a formidable obstacle against reforming marital rape law because if lawmakers were to admit there needed to be reform, it would suggest that there was something wrong with an institution defined by “harmony and intimacy” (Harvard Law Review 1986, p. 1268). Lastly, the passage of the 19th Amendment resulted in the end of the Women’s Rights Movement, which also brought a temporary end to the discussion of the marital rape exemption.

By not targeting the root cause of women’s inability to leave their marriages, feminists were unable to resolve the issue of marital rape, let alone eliminate the marital rape exemption. The women in these troublesome marriages, often not the white upper middle class women who were active feminists, faced endless obstacles in trying to find work or another means of financial support (Ross 2015, p. 61); they were therefore forced to stay with their husbands, falling back into the narrative of a marital contract and belonging to the husband. Furthermore, mothers were unlikely to leave their children or put them in danger, further solidifying the entrapment (Harvard Law Review 1986, p. 35).

Before the 1960s, the concept of the family ideal was very much prevalent in all debates over women’s rights; it not only meant that marriage was centered on unity, it also ensured that the government had as little to do with the issue as possible. Women were “trapped by the family ideal,” of having a two-parent household and multiple children (Garcia and McManimon 2011, p. 72). This societal construction of what a family should look like was so grounded in society that feminists consistently received pushback from courts for threatening the norm. Another implication of the family ideal was that the man was the head of the household, which included in the title the right to force his wife to have sex with him whenever he wants. A woman was essentially told to “sacrifice her individuality for the sake of the family unit” (Ibid.).

6. For example, a court in Connecticut ruled in 1845 that a woman named Emeline Shaw could divorce her husband due to cruelty. He had forced her to have sex despite clear evidence that doing so would put her health in danger (Hadsay 2000, p. 34).

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This concept of having the government keep out of marriage lasted all the way until the late 1900s. In the 1961 Supreme Court case *Poe v. Ullman*, the Court continued to uphold the idea that the government should stay out of the private sphere. The government felt that because it had “acknowledged a marriage and the intimacies inherent in it,” it had no right to regulate those intimacies (Pracher 1981, p. 754).⁷ Even beyond merely staying out of the private sphere, the courts issued decisions that actively thwarted women from disrupting this presumed unity of marriage. In a 1921 Alabama case, a woman who left her husband as a result of rape was actually accused of “abandon[ing] her home without cause” and disturbing marital unity; she therefore lost custody of her child and could not collect alimony (*Anonymous* 1921).

The passage of the 19th Amendment marked the end of this phase of feminist activism, which also halted discussions of the marital rape exemption. The moment feminist activist decided upon the importance of obtaining the right to vote, it became the ultimate and essentially only goal (Ibid., p. 8). Certain feminists who acknowledged the inequality within a marriage were willing to bypass the issue to attain the vote. In fact, once women received the right to vote in 1919, the “debate over marital rape dwindled” (Ibid., p. 37). There was no longer any motivation to fight for change because in the eyes of a large portion of feminists, the battle had been won. Feminists then drifted out of the spotlight until the 1970s, when a reemergence of the feminist battle against the marital rape exemption appeared.

Developments in the Late 20th Century

The revival of the feminist movement was a result of the creation of a place for women outside the household, which included increased participation in politics as well as social activism. Helped by the 19th Amendment, women grew more willing and able to participate in politics.⁸ A radical feminist newsletter called *off our backs* noted that Maryland’s eventual criminalization of marital rape was likely a result of an increase in the number of female state legislators in the House and Senate: forty-one of 188 total members were female. This growth in representation “made the passage of the bill a top priority for [that] year’s sessions” (“Idaho: marital rape” 1989). From the 1970s to 2002, the number of women state legislators nationwide grew from five percent to twenty-two percent (McMahon 2005, p. 17). Women also began to pursue careers in law (Ryan 1995, p. 973).

Another reason for the revival of the feminist movement is advances in technology. These developments allowed for the faster and wider circulation of literature and media. Works by leading feminists Simone de Beauvoir and Kate Millett were more easily distributed (Ross 2015, p. 49), and publications such as the *Women’s Rights Law Reporter* that gave voice to women in the legal field had a much higher viewership (Ryan 1995, p. 973). The creation of oral contraceptives also “gave way to greater sexual autonomy” (Ross

7. *People v. Brown* is another well-cited case that describes the marital rape exemption as the most suitable balance for the government between being involved and uninvolved on the issue of marriage. It also further specifies the validity of this exemption, stating that the “preservation of family relationships” depends on the distinction between spouses and strangers (*People v. Brown* 1981).

8. Changes in attitude also made a difference for policies. As women began to get more involved in the workforce, leaving the private sphere and entering the public, the perception of what a woman was began to shift. Facing this reality, legislators became more open to passing policies that recognized the rights of women within the public sphere (McMahon 2005, p. 16).

2015, p. 48). This autonomy led to a greater sense of sexual independence, which set “the groundwork for the anti-rape movement and discussions about marital rape” (Ibid., p. 49).

A Cause of Change: Domestic Violence

As domestic violence grew to be a major issue in the late 1900s, the marital rape exemption also came back into discussion. The main reason why domestic violence and the marital rape exemption were so intertwined is through the similar conception of women; as a result, legal reform in one department was able to carry over to the other. Both marital rape and domestic violence found their origins in the assumption that a woman is controlled by her husband once the pair enter a marital contract. Legal requirements of the 17th to 19th centuries enforced this marriage dynamic. During that time period, a husband was “socially and legally liable for the crimes of his wife and children” (Garcia and McManimon 2011, p. 67). This led to the conclusion that the husband could do what needed to be done to discipline his family. This is where the idea of the “rule of thumb” first came into being, as the law permitted the husband to beat his wife with a rod or switch whose circumference was not larger than the base of his thumb (Ibid.). In fact, from 1633 to 1802, courts only persecuted twelve cases of domestic violence. Trivial treatment of domestic violence meant that sexual assault did not have the opportunity to be included in the larger context of violence toward wives (Ross 2015, p. 61). Once women began to take a stand against violence in the 1970s, however, sexual assault was at last included in the “system of domination that affects women as a class” (Ibid.).

With such an inseparable connection, the movement against domestic violence and the one against the marital rape exemption both benefitted as legal reform began to take shape. In the 1970s, domestic violence began to gain a foothold in the courts, witnessing a series of successful changes as laws were passed in various states that dealt strictly with domestic violence. In 1970 New York police officers could at last make warrantless arrests, creating the possibility of arresting suspected domestic violence perpetrators without having directly witnessed the act (Ibid., p. 65). Then in 1977, Oregon became the first state to pass legislation that made it mandatory to arrest domestic violence abusers (Garcia and McManimon 2011, p. 74). This meant that whereas in the past officers could choose to ignore certain calls because they did not want to handle them, now they were required to confront domestic violence abuses. Two years later, President Jimmy Carter established the Office of Domestic Violence, reflecting for one of the first times action taken on the federal level (Garcia and McManimon 2011, p. 74).

The connection between domestic violence and marital rape continued to be important even after the criminalization of marital rape. Without evidence of a history of domestic violence, cases of marital rape were unlikely to be successful or even tried by the courts. Officers would often refuse to take on cases where there was no physical evidence of consistent domestic abuse because they understood the case would not be successful (Spohn and Tellis 2014, p. 203). The reason this was the case could be attributed once again to the notion of the marital contract. A marriage seemed to give “implied authorization” for sexual offenses (McMahon 2005, p. 13); therefore, the only method to get a case prosecuted was to tie it to violence or force. The victim needed violence to support the claim. These two concepts, marital rape and domestic violence, were inextricably linked to yield actual results for the victims.

A Series of Promising yet Discouraging Court Cases

Alongside discussions of women's autonomy and domestic violence, another movement was occurring simultaneously, a court case movement. In the late 1970s, a series of Supreme Court and State Court cases were decided that created a legal precedent about women's rights to their own body, a notion that became undeniable in state decisions to criminalize marital rape. These court cases added upon the already growing fire of giving women back their right of privacy, taking the right to govern their own bodies away from their husbands. However, these cases also had disadvantageous effects by reinforcing the separate spheres ideology, again contributing to the ongoing narrative of the marital rape exemption as a case of progress meets pushback.

The most critical case in this discussion is the 1972 Supreme Court case *Eisenstadt v. Baird*, where the court voiced the existence of an individual within a marriage. In the opinion, Justice Brennan noted, "Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup" (*Eisenstadt v. Baird* 1972). This completely overturned the idea from the 18th century that a woman becomes a man's property once the two enter into marriage. Because the case ruled that a marriage is composed of individuals, it meant that differentiating between married and unmarried persons would be against the Equal Protection Clause of the 14th Amendment (*Ibid.*).

The second Supreme Court case to endorse this position of individuality was the 1975 case *Planned Parenthood of Central Missouri v. Danforth*. It ruled that the requirement of married women to get written approval from their husbands for an abortion was unconstitutional, citing both *Eisenstadt* and *Roe v. Wade* to cement the woman's right to choose for her own body (*Planned Parenthood v. Danforth* 1975). These two cases both influenced the eventual criminalization of marital rape due to their emphasis on the woman's autonomy, an argument that 19th-century feminists fought for so hard to no avail.

However, these two cases also carried with them the more fundamental idea that the government should respect the privacy of its individuals. Whether it be with contraceptives or abortions, *Eisenstadt* and *Danforth* both set the precedent that the idea of separate spheres is very much still in existence. This result, unlike the progressive view of individuality, had adverse effects on the fight against the marital rape exemption because it enforced the idea that the government should stay outside the realm of the private sphere. This friction between the acceptance of women as individuals and the removal of the government from personal affairs created a tension that potentially explains why marital rape exemptions still pervade today. Regardless of the fact that the exemption had been removed to some degree in all fifty states, there are still states where husband offenders are not equally liable on all kinds of sexual offenses as strangers (Siegel 1995, p. 353). The influential notion of husbands having control over their wives, combined with the court cases that deemed the government should remain outside the private realm, have created a dichotomy of results, where progress has been made but not enough to protect most married women in the United States.

Two state-level cases added other dimensions to the pool of legal arguments against the marital rape exemption. The first was a 1977 New Jersey case, *State v. Smith*, which not only argued that rape "humiliates the woman," but also urged for the application of this

decision on married couples as well (*State v. Smith* 1977). Ruled in 1977, this made New Jersey one of the first states to directly address the marital rape exemption in a court setting. The other case, *People v. Liberta*, used the Equal Protection Clause to deem the marital rape exemption unconstitutional. Judge Wachtler of the New York Court of Appeals stated in his opinion that though the clause allowed for certain types of distinctions, “there is no rational basis for distinguishing between marital rape and nonmarital rape.” He claimed that marital rape exemptions were based upon “archaic notions” and were therefore “unable to withstand even the slightest scrutiny” (*People v. Liberta* 1984).⁹

Criminalized Today, but to What Extent?

The marital rape exemption as it exists today varies greatly from state to state. The concept of marital immunity continues to live on, with many states offering exceptions or lighter punishments. As of 2003, only seventeen states removed every type of exemption by equating marital rape to stranger rape (Garcia and McManimon 2011, p. 29). The number has since increased through continuous reform of penal codes within states; now thirty-seven states treat marital rape without exemptions (Byrne 2015). That leaves, however, more than a dozen states that currently have exemptions for marital rape: for example, husbands can be immune to charges of marital rape if the rape was not done by “force or threat of force.” The assumption is that without physical force, the crime was not serious enough to be charged (McMahon 2005, p. 13).

Specifying that the marital rape exemption only excludes rape by “force or threat of force” once again shows the necessity of combining this movement with that of domestic violence. The justice system does not view sexual offenses by a husband as “harmful enough...to criminalize,” making the presence of violence a prerequisite for prosecution (Anderson 2003, p. 1496). In Idaho, for example, a husband can only be committed of rape if he uses or threatens to use force against his wife (Ibid., p. 1468). In Michigan, the prosecution has the responsibility of proving the spouse used force for the court to find him guilty (Ibid.). These examples show how despite the 200-year movement against the marital rape exemption, the idealistic harmony of marriage ultimately still carries significant weight. The existence of this notion of harmony requires something deemed serious enough to ruin it for certain states to permit an end to the exemption.¹⁰

9. Reference to the Equal Protection Clause brings out an interesting fact, which is that the marital rape exemption was evidently unconstitutional, even just on paper, and yet was not ruled unconstitutional until the 1980s. This further emphasizes the fact that the dichotomous nature of the marital rape exemption, balancing the right of privacy with the right to equal protection, was a source of major difficulty for reformers. When looking at the marital rape exemption on paper, there are very clear signs that it is not constitutional. For one, it produces bad effects strictly for women due to the nature of marital rape, which means that the exemption targets one specific group (West 1994, p. 54). This kind of disproportionate leaning is unconstitutional, as seen with other laws that target based upon categorizations such as race and economic status. Furthermore, even if the marital rape exemption were set to be gender-neutral on paper, the consequences of it still result in women being targeted disproportionately (Ibid., p. 59).

10. Even until 2002, there were eight states where marital immunity could be applied if the husband drugged the wife before sexually assaulting her. The eight states were as follows: Connecticut, Hawaii, Maryland, Michigan, Minnesota, Mississippi, Rhode Island, and Tennessee. Further, nine other states also offered marital immunity if no drugging was involved, but the wife was found unconscious due to reasons such as alcohol consumption. Those nine states were the following: Alaska, Arizona, Idaho, Iowa, Louisiana, Nevada, Ohio, Oklahoma, South Carolina, Virginia, and Washington. In Louisiana, marital immunity was

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Conclusion

The fact that marital rape still occurs and is not fully prosecuted in the same way as stranger rape shows how the inferior perception of married women still pervades in society. Hale's theory of signing onto a marital contract has not completely been rooted out of the legal and social systems of society. The hope of the government to maintain the image of marriage as one of "privacy and harmony" ultimately harms the married women who get undermined by the system (Harvard Law Review 1986, p. 1260). The laws regarding marital rape are now essentially a "modern version of Hale's theory" (Ibid.).

Through these arguments the story seems to reveal that there was more against the criminalization of marital rape than there was for it. Long-held theories of women's inferiority within a marriage and within society, coupled with the constant back and forth between activists and the law, contributed to a slow, arduous, and incomplete process of criminalization. It explains why there are so many exceptions in today's marital rape law—states who only grudgingly criminalized the act found ways to keep the essential inequality toward women while appearing on paper to have adhered to the wants of feminist advocates. □

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not applied if the husband drugged the wife, but it was applied if he found someone else to do it (Anderson 2003, p. 1469).

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Chapter 5:

Restriction through Rights:

Abortion in the Soviet Union

Sylvia Waghorne

□ When discussing the relationship between an individual and the state, rights are an important element of the conversation. Understanding what is expected of and what citizens are entitled to is a necessary component of the bigger picture of one's role within the state. What exactly, however, is a 'right' in the political context? When one thinks of rights in the United States, one thinks of the ability to express something that is morally and inherently owed to us as human beings. Rights generally further individual autonomy, and the civil government is seen as having a duty to protect the enumerated as well as the implied rights of individuals. Obtaining new rights often requires effort, but the rights themselves are viewed as are something the people are owed, even if it is not always easy to get the government to recognize them.

The concept of rights, however, is not uniform across all states or societies. By focusing specifically on abortion laws in the Soviet Union, this paper will explore how the conceptualization of rights within Soviet society affected women, and the potential of rights to be a limiting force on the body rather than a liberating one. After giving a brief history of abortion policies leading up to the 1950s and a synopsis on the Soviet perception of rights, this paper will focus on the later half of the Soviet era to show the various ways the state used abortion policy to further control the female body for state aims. The right to abortion was not an end in itself, concerned with the question of women's 'right to choose,' but rather a means through which the state carried out its objectives. Furthermore, the problems that arise when there is a discrepancy between how citizens view their rights and priorities and how the state views them will be addressed. Soviet women ultimately suffered more harm, and state objectives were not met, due to the failure of the state to recognize and deliver what Soviet women actually needed. The essay will then turn to post-Soviet Russia in order to discuss the lasting effects of Soviet policies on abortion in the region, arguing that while progress has been made in women's reproductive health and autonomy, the state is still held back by beliefs and practices of the past. Until female reproductive health is treated as an end in and of itself, rather than a means by which the state can carry out objectives, women will continue to lack the necessary knowledge, treatments, and options needed to advance women's reproductive health and freedom.

Historical Overview of Abortion Law

Throughout Russia’s history, stances on abortion have varied dramatically over time. One constant that has remained, however, is that abortion legislation has historically been founded not on the principle of women’s rights or desires, but on the goals and ideals of the state. Abortion laws have been a means through which to obtain national objectives and reflect societal beliefs, rather than an end in their own right. Before 1920, abortion was strictly opposed in Tsarist Russia, and was thus illegal. Under the Criminal code of 1885, abortion had been treated as a premeditated act of murder, and both doctor and patient could be held criminally liable (Goldman 1993, pp. 255-56). Despite laws against abortion, however, countless Russian women sought out risky, illegal abortions to terminate their pregnancies—some methods were as crude as drinking bleach or other poisonous mixtures (Ibid., p. 254). In order to limit the number of illegal abortions, the post-revolution government decriminalized abortion in November of 1920, making Soviet Russia the first country in the world to provide free, legal abortion.

Women did not play a role in creation of the law and were considered only in the context that protecting reproductive health was important for the workforce—both in keeping women in work and for supplying future labor. The decree reflected that abortion was an evil despite decriminalization, and reinforced patriarchal beliefs about motherhood as a duty to society. According to Wendy Goldman (1993), the 1920s discussions on abortion were not framed in the terms of individual rights—the concept of women’s reproductive rights were yet to be fully developed, and the right of a fetus was not something yet considered (p. 257). Rather, the prevailing idea at the time was that economic and material circumstances caused women to seek out abortions. Once those circumstances improved, women would be more willing to fulfill their duty to society as child bearers. Until then, abortion needed to be legal to combat the health risks posed by illegal abortion. Throughout the 1920s and ‘30s, effective contraception was desperately desired but seldom available or discussed by the state, leaving women to depend on ineffective methods or abortion for birth control (Goldman 1993; Savage 1988).

The Soviet birth rate dropped in the early 1930s, causing the Soviet Union to adopt pronatalist measures and prohibit abortion on social grounds (Berent 1970, p. 280). It was argued that the state had eliminated the socioeconomic issues that had necessitated abortion, and therefore abortion was no longer needed. Abortion was thus recriminalized (with a few health-related exceptions) under Stalin in 1936. Likewise, the 1936 decree argued that the fundamental duty and responsibility of Soviet women was to bear children and raise Soviet citizens. Women could be punished with a fine for obtaining abortions, and doctors who performed them could be imprisoned (Savage 1988, pp. 1047-51). The mid-1930s also saw the passage of legislation that made divorce more difficult, and in 1941 a law was passed that taxed childless citizens and categorized citizens by their reproductive contribution to the state (Randall 2011, p. 25). Stalin had no problem exercising force over the citizenry in overt ways, and these laws were a way to directly control and encourage desired reproductive behaviors. Despite the state’s efforts and beliefs that abortions were no longer needed, however, illegal abortions occurred in large numbers throughout the ‘30s into the early ‘50s. As a result, abortion was decriminalized for a final time in 1955, and it continues to be legal and publically funded in Russia today. The 1955 Decree enabled Soviet women to receive legal abortions only if performed by a physician in a state hospital within the first 12-weeks of pregnancy, or later if needed to save the mother’s life. After

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the decriminalization, abortion would become the primary form of birth control for Soviet women. By 1967, there would be 400 abortions per 100 births, suggesting that the average Soviet woman would receive nine abortions in her lifetime (Savage 1988, p. 1055). Although abortion rates in Russia have been declining since the early 1990s, the rates in the former Soviet countries continue to be some of the highest in the world today (Denisov and Sakevich 2015).

Rights in the Soviet Context

Before discussing the specific abortion policies and practices that followed the decriminalization of abortion in 1955, it is necessary to understand the context in which said policies were adopted. The conceptualization of rights and the role of the individual within the Soviet Union were quite different than they are in the United States. The ‘right’ to an abortion in the Soviet Union, as far as the state was concerned, did not have the same meaning that the right to an abortion might have elsewhere. As Mark Savage (1988) explained, rights (*pravas*) in the U.S.S.R were not an expression of inherently owed entitlements, but rather were creations of the state. Rights were created at certain times under certain circumstances to fit the changing needs of the socialist state, and they could be taken away when the state deemed fit (Ibid., p. 1034). Society, more so than any individual, needed to be the ultimate benefactor of any rights awarded to the citizenry. Members of the Soviet Union were expected to adopt a ‘communist morality,’ a mindset and code of conduct that upheld the notion that putting society first was the greatest good. Those who followed communist morality subordinated personal life to societal interest. Happiness itself became a collective feeling, found not in the personal but in the communal (Field 1993). Khrushchev stated in front of the Congress in 1959:

“It is necessary to develop in Soviet people communist morality, at the basis of which lies devotion to communism and implacability towards its enemies, consciousness of societal duty, active participation in the labor for the benefit of society, voluntary observance of the rules of human common living, comradely mutual aid, honesty and truthfulness, intolerance towards the destroyers of social order” (Field 1993, p. 33).

Socialist values were meant to permeate into every aspect of life and take precedent above all else.

Even family life was conceived of in collective terms rather than as a private matter. According to Salvatore Imbrogno (1986), the family was merely another vessel through which state aims could be achieved, rather than an independent unit that had inherent value outside of its societal purpose (p. 170). Familial roles and obligations, therefore, were also considered by the state to be within the government’s jurisdiction. Child bearing was seen as a particularly important state interest in the post-war period of the 1940s and ‘50s when the Soviet Union was trying to recover from the over 20 million military and civilian lives lost during World War II. Controlling population was seen as a legitimate goal of the state, and even as the Soviet Union legalized abortion, the goal remained to recover and increase soviet population size (Heer 1967). Bearing children thus was seen not as a personal matter by the state, but rather as a duty to be fulfilled—an attitude reflected heavily by the state during both the 1936 criminalization of abortion and the 1955 decriminalization.

1955 and Onward: Restriction through Rights

It is with the above conceptualization of rights and private life that the Soviet state adopted their abortion policies. These beliefs played a large role in the 1955 decriminalization of abortion and the pro-natalist policies that followed. According to Amy Randall (2011), the government wanted to avoid decriminalizing abortion, but government reports brought the danger of clandestine abortions back into the limelight, with approximately 4,000 annual deaths being attributed to underground abortions, as well as numerous other reproductive health hazards (p. 14). Ultimately, “anxiety about the illegal procedure’s negative effects on women’s health contributed to the decision to re-legalize abortion” (Ibid.). A new element, however, was that the state also purported that the legislation was meant to give the “emancipated” Soviet woman more control over her reproduction (Field 1996, p. 115). The state, therefore, presented dual justification for the legalization of abortion: to combat illegal abortion and to uphold socialist doctrine (Heer 1965, p. 76). Since the beginning of the Bolshevik revolution, there had existed an ideal that women in a socialist society would experience a freedom unheard of in capitalist societies. These liberal ideals, however, did not often extend to the concept of motherhood in practice (Goldman 1993). In reality, Soviet abortion policy did everything it could to control a woman’s reproductive health. According to Michele Rivkin-Fish (1999), “Far from establishing a woman’s rights to autonomy and individual decision making over her body, the legalization of abortion was explicitly intended to facilitate its eradication” (p. 801). In fact, these early ideals of gender equality were later considered misguided by the Soviet state, and the policies that furthered female emancipation such as bringing women into the workforce and making divorce easier were blamed for exacerbating the population crisis of the early 1970s (Rivkin-Fish 1999, p. 804).

Nikita Khrushchev, who led the Soviet Union after Stalin, explicitly stated the pro-natalist interests of the state to increase the population. In 1955, Khrushchev maintained, “If about 100 million people were added to our 200 million, even that would not be enough” (see: Heer 1965, p. 77). More people meant more labor and more power. Thus, the Soviet Union found itself in an odd contradiction of being both pro-natalist and having legal abortion on the books. The state legalized abortion not out of approval, however, but because it wanted to gain more control over reproductive health. The hope was that legal abortions would be better for women’s reproductive health in the long run, thus allowing women to have more children in the future. The language of the 1955 law condemned all abortion and was put into effect in conjunction with a massive anti-abortion campaign that sought to ‘educate’ women on the dangers of receiving one. The state granted women the right to choose whether they wanted an abortion, but made “it clear that there was only one correct choice.” (Field 1996, p. 116). The state would still try to be in control, but through subtler forms of manipulation such as guilt and fear rather than the outright nature of the Stalin years.

The campaign emphasized the risks abortions, legal or otherwise, posed to fertility and familial happiness. The government’s message was that a woman who had an abortion would likely never be able to have children again, and thus would live a meaningless, childless life. It was stated in anti-abortion propaganda that women who had them could lose their sex drives, youthful appearances, and their husbands—who would abandon their now infertile wives. Those who opted to have abortions were characterized as selfish women going against both their nature and the interests of the state (Savage 1988; Rivkin-

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Fish 1999; Randall 2011). Books, movies, radio programs, and journals that detailed the hazards of abortion were produced and promulgated across Russia and the rest of the Soviet Union. One such example is a health pamphlet that stated, “abortion is a drama, and not infrequently a serious tragedy, particularly for young women in the prime of life and health,” and that women who choose abortion “ruin their health in some cases for many years and at other times forever, becoming invalids or even paying with their life” (Randall 2011, p. 19). Such materials often presented inconsistent or untrue data, and portrayed abortion as a complicated, dangerous procedure that posed long-term risks despite the fact that contemporary, international studies indicated that medicalized abortions were fairly low-risk, benign procedures. Another example detailed by Rivkin-Fish (1999) was the displaying of graphic photos of aborted fetuses by a clinic in St. Petersburg with the explicit intention of discouraging abortion (p. 809).

Laws and policies would also make the state a vital part of the decision to have an abortion, thus giving the state more sway over reproduction. The framing of reproductive health, abortion, and contraception as complex issues necessitated the help of expert guidance—fear was used deliberately to get women to rely on the state to decide her reproductive health rather than on her own. The rhetoric of the campaign also emphasized the father’s role in deterring a woman from obtaining an abortion, further limiting female autonomy. Some medical personnel even required a meeting with the husband before performing an abortion, which discouraged some women from following through (Randall 2011, pp. 27-31). Additionally, women could only obtain legal abortions from a state hospital, and such visits were not treated as personal or private discussions between a woman and her doctor—the state was actively involved in the process. For example, in order for a woman to receive an abortion, regulations from 1962 required an official document stating the woman received an abortion to be kept on hospital record—discretion was not a possibility. Likewise, it was required that a woman’s employer be made aware of her abortion through a certificate of disability from the hospital stating she received the procedure, as this was the only way she could get time off of work (Savage 1988, p. 1059). There was also a required hospital stay, typically three days long, that caused working women to miss additional work days (Cooper 1989). Later laws required that a midwife counsel every woman seeking an abortion. Her approval was needed in order for the abortion to take place, further limiting a woman’s control over her reproduction. The midwives were obligated to do everything in their power to convince women not to have abortions, and they could withhold approval or require more sessions that occurred past the 12-week window (Savage 1988, p. 1061). Privacy or discretion was simply not possible when obtaining a legal abortion.

In theory, all Soviet women had the right to have an abortion, but the obstacles and bureaucratic red tape that a woman needed to overcome in order to have an abortion thus limited her “right.” The state aimed to have as few women as possible obtain abortions, and thus put policies in place to achieve that end. As Mark Savage (1988) stated, “A woman has no human or natural right to decide whether she will have an abortion; instead, she enjoys such a right only when the state grants it” (p. 1107). Further still, many Soviet women chose not to exercise their right to a legal abortion in a state hospital because of the cruelty many experienced. Described by one commentator as climbing onto the “obstetrical execution block,” the experience for many women in Soviet hospitals was that of humiliation and pain (Cooper 1989). Legal abortions were provided in assembly line like

fashion and often without anesthetic. Women were often treated cruelly or with indifference, and abortions were sometimes botched and performed multiple times (Cooper 1989; Savage 1988; Randall 2011). In some instances, women reported only receiving anesthesia after paying the doctor an unofficial fee (Savage 1988, p. 1062). To receive better care, quicker treatment, or simply more discretion, many women opted to pay for illegal abortions in hospitals after hours or in private facilities. Exact numbers are difficult to ascertain, but one study found that 70 percent of women in the city and 90 percent of women living in rural areas in the Soviet Union terminated their first pregnancy illegally (Savage 1988, p. 1062).

Overcoming Obstacles: Why Women still had Abortions

The information, attitudes, and practices of the Soviet government regarding abortion and contraception all worked to discourage women from seeking abortions. Meanwhile, motherhood was encouraged through government benefits such as free or subsidized child-care facilities and family allowances. Mothers of large families were given homage and rewarded monetarily for having many children (Berent 1970, p. 285). The government gave women the right to abortion in practice, but used fear-inducing, coercive methods to discourage women from abortions and to have more control over female reproductive health. Despite the government’s best efforts, however, Soviet women still had both legal and illegal abortions at extremely high rates. According to Dr. Boris M. Petrikovsky and Dr. Bente Hoegsberg, it was not unusual for a Soviet woman to have 10 or more abortions in her lifetime (“Abortion Control, and the Silent Treatment” 1990).

One major reason that government initiatives failed to stop women from having abortions en masse was that the average Soviet woman did not view her reproductive health as the state did. The state framed a woman’s reproductive choices as an interest of the state, but women continued to view their own reproductive health on an individual basis. A survey conducted in 1959 found that women elected to have abortions predominately for social and personal reasons such as unwillingness to have a child, inadequate living space, lack of a partner, or lack of resources (Heer 1965; Savage 1989). The survey also found that an “overwhelming majority” of those having abortion were married women and women who worked (Heer 1965, p. 80). The benefits provided by the government that were meant to eliminate the need to choose between work and motherhood, such as free, collective child care facilities, never meet the expressed need and were inadequate incentive for women to have more children. Likewise, material benefits such as large-family allowances were modest in comparison to the cost of raising a child (Berent 1970, p. 286). Surveys taken from 1958 to 1960 indicated that 80 to 90 percent of Soviet women considered one to two children to be the ideal family size, despite government pressure to have large families (Berent 1970, p. 284). Sociological studies done in the 1980s found that Soviet men and women did not consider having a baby as the ultimate bliss in marriage notwithstanding the government narrative to the contrary, and women polled were found to want no more than one child (Imbrogono 1986, p. 174). Countless Soviet women obtained abortions in contrast to the goals of the state, demonstrating that at least some Soviet women did not believe a societal duty as a child bearer purported by the state superseded personal needs or preferences (Savage 1988, p. 1113).

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Women did not choose abortions because of a strong preference for the method, however, but rather it became the de facto method out of necessity. According to Victor Agadjanian (2002), “the procedure involved another encounter with an impersonal and neglectful public health bureaucracy and often humiliating and painful treatments in public hospitals, polyclinics, and women's consultancies...women saw abortion as just one of many inconveniences of life in Soviet society” (p. 238). Women wanted to be educated and have available, reliable contraception, but the state frequently failed on both accounts. Sexual health material devoted little time to birth control methods alternative to abortion, and when contraception was discussed, the information was often incomplete or incorrect. As discussed previously, the information in education material about reproductive health was not always reliable, sometimes deliberately so. Regushevskaya et al. (2009) cited a government document from 1974 that included roughly 30 possible risks associated with oral contraceptive use, including cancer. Most of these risks were not listed in the medical recommendations of other countries, and many have been proven to be false (Ibid., p. 51). Information about birth control was also often frustratingly vague, and much like abortion, was portrayed as a complicated issue that needed expert guidance (Rivkin-Fish 1999, p. 804).

It was not just the citizenry, but also sometimes the medical personnel themselves that did not have accurate information, leaving women without another important resource of knowledge. A survey of Russian gynecologists in the early 1990s, over half of whom had been working in the field for over a decade, found that only 55 percent had been trained in family planning. Further still, only about half of the physicians knew how birth control pills worked, and over 60 percent felt their patients were uninformed about available contraception (Visser et al. 1993). With little family planning services available, women were often forced to rely on friends and social circles for advice on birth control due to the lack of information coming from the state. As a result, many women were left with the perception that contraception was dangerous, unreliable, or too difficult to obtain and instead they continued to rely on abortion as birth control.

Additionally, in many instances reliable contraception *was* difficult to obtain. Soviet propaganda promoted contraception as an alternative to abortion in some instances, but in reality contraception was not adequately provided. The government monopolized the production, importation, and distribution of medicines, affecting the availability of some birth control methods. For example, oral contraceptives were banned entirely in 1974 by the Soviet Ministry of Health, and were not widely available until the late 1980s (Regushevskaya et al. 2009; Rivkin-Fish 1999). Condoms were only produced domestically and were perceived to be low quality (Rivkin-Fish 2009, p. 804). Unsure of its reliability and unable to obtain it, many women simply chose to use no form of birth control and relied on abortion instead.

After the Fall: The Soviet Legacy

Today, Russia and most of Eastern Europe continue to have some of the highest abortion rates in the world. According to the Guttmacher Institute, there were 44 abortions per 1,000 women of childbearing age in Eastern Europe from 2010-2014, compared to 18 per 1,000 in Western Europe (“Induced Abortion Worldwide” 2016). In 2012, the rate of abortion in Russia was 2 to 4 times higher than in Belgium, Germany, the Netherlands and

Switzerland (Denisov and Sakevich 2015, p. 53). The failure of the Soviet state to provide adequate and correct information on contraception created a lasting legacy of mistrust in birth control methods, and the availability of reliable contraception continues to be an issue for many Eastern European women. Consequently, abortion continues to be relied on for birth control by many women in former Soviet countries. Studies in the mid-1990s found that many Russian women were aware of contraceptive methods, but that there was a lack of comprehensive knowledge or use of those methods. Another study of former Soviet countries found that into the 1990s, only an estimated 25 percent of women of reproductive age in a steady sexual relationship used reliable contraceptive methods, compared to 75 percent of western European women (Regushevskaya et al. 2009, pp. 51-2). Lack of access to and understanding of alternatives leaves abortion as the seemingly only option for many.

The prejudices and misinformation regarding abortion likewise continue to be perpetuated to some degree today, demonstrating the state still wishes to influence women’s decisions. In 2007, an order by the Ministry of Health and Social Development of the Russian Federation stated that women seeking abortions should be aware of the long-term consequences of abortion, such as infertility, ectopic pregnancy, and neuropsychiatric disorders—despite medical evidence that these outcomes are highly unlikely if an abortion is done properly (Denisov and Sakevich 2015, p. 62). It was even proposed in a draft bill in May of 2015 that abortions be banned in private clinics and no longer covered by the national insurance system to further discourage abortion (Parogni 2016). Attempts to establish sex education in schools has been difficult due to opposition from politicians, medical workers, parents, and the Russian Orthodox Church—closing off a potential avenue for correcting misconceptions (Regushevskaya et al. 2009, p. 57). Abortion methods, too, remain stuck in the past as a majority of abortions in Ministry of Health facilities are still preformed by surgical curettage, a method that is less safe than alternatives and is recognized as by the World Health Organization as obsolete (Ibid).

By looking at reproductive health trends in Russian youth, however, there is an indication that as information has become more readily available over time and reliable contraception more accessible due to both domestic and international efforts, new generations of women are depending less on abortion than their Soviet predecessors. According to Denisov and Sakevich (2015), young Russian women have seen a rapid decline in abortion rates—women under 20 currently have fewer induced abortions than in France, Great Britain, or Sweden (p. 50). Although the greatest decrease was seen in young women, abortion rates dropped for all age groups between 1991 and 2012 (Ibid., p. 56). A study on women in Russia and the former Soviet state of Kazakhstan revealed that younger women were significantly more likely to disapprove of abortion, and significantly less likely to have an abortion—this is likely due to the increased promotion of contraception and shifting attitudes away from abortion in society and the state (Agadjanian 2002). A reliance on illegal abortion has also diminished in Russia. The number of illegal abortions recorded in official statistics dropped from 10,157 cases in 1992 to 264 cases in 2012. Likewise, the number of illegal abortions in adolescent girls aged 15-19 saw a 144-fold decline. The reduction in abortion, legal and illegal, has been accompanied with a significant decline in risk of death from abortion (Denisov and Sakevich 2015, p. 60).

Russia and other former Soviet states have the unusual obstacle of needing to overcome decades of misinformation and manipulative policies regarding women’s reproductive health that contributed to the dependency on abortion in the Soviet era. Current trends

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indicate, however, that fulfillment of women's desire for information and contraceptives decreases abortion and benefits female reproductive health. As Denisov and Sakevich (2015) argue, "the rapid decline in abortions among young women is encouraging: the 'abortion culture,' if it existed, is passing away among post-Soviet generations" (p. 56). In order to continue this transition, the Russian state must make abortion services safer, follow modern medical standards, and make information regarding safe contraception and alternatives more readily available (Ibid., p. 65).

Conclusion

The recognition of rights, whether one considers rights to be inherent or created, is nevertheless a tool of the state that can be used in ways that are either positive or detrimental to its citizenry. Throughout the Soviet era, abortion rights were used as a tool of the state to control female reproductive health through policies and propaganda that advanced the state goal of increasing the birth rate. Fear, guilt, obstacles, and incentives were all implemented to encourage women to forego abortion. Women were expected to view their reproductive choices as a matter of societal interest rather than of personal preference, and those who made the wrong choice were considered to be selfish or unnatural. The "right" to an abortion was not meant to be a liberating force in the lives of women, but rather a way to limit illegal abortions and further control women's reproductive decisions.

Rights, therefore, do not always serve the purpose of furthering autonomy, but rather can be used by the state to control or coerce in service of a state aim. According to Savage (1988), the state used abortion rights not to advance female rights, but to affect demographic ends, health ends, moral ends, economic ends, political ends, and ideological ends (p. 1105). The sheer number of women having abortions throughout the Soviet Union indicated that state goals did not line up with women's actual needs, however, with a majority of Soviet women choosing to have abortions for personal reasons despite the wishes of the state. An inability of the state to recognize and address the needs of women with regards to reproductive health knowledge and contraception left women with abortion as their only option. The abortion culture fostered by the actions of the Soviet state continues to affect women today in former Soviet countries. It has taken decades, but slowly attitudes are shifting as women become more knowledgeable of, and able to obtain, reliable birth control methods. Current abortion rates among youths in Russia indicate that the reliance on abortion is finally becoming a thing of the past. Some attitudes and practices of the Soviet era regarding abortion and contraception still persist, however, having adverse affects on female health and autonomy. Reproductive health policy must be treated as a tool *for* women rather than an instrument by which they can be manipulated if the current positive trends are to continue. □

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Part II:
Displaced Persons

Chapter 6:

The EU Identity Crisis

Kevin Sheridan

□ The ongoing effect of the refugee crisis in Europe has caused EU nations to confront difficult immigration policy decisions as they aim to properly address the influx of political refugees entering the region seeking asylum. These individuals have been provided a right to asylum in the EU by the Geneva Convention due to their human liberties being threatened by violence and political oppression in their homelands. In light of the recent unrest in the Middle East, particularly in the nations of Syria, Afghanistan, and Iraq; refugees have inundated many member states of the EU, forcing these nations' governments to "find a middle ground between 'we must' and 'we can't'" when deciding on their migrant policies (Traub 2016).

These member states must confront the difficult task of balancing their countervailing political responsibilities of meeting their Western liberal humanitarian obligations, codified in both domestic and EU legislation, and protecting the public good within their communities through ensuring economic vitality and domestic safety. A few states have launched heroic efforts like that of Sweden and have made tremendous sacrifices in their attempts to alleviate the EU's refugee crisis while maintaining this balance. However, many states like Austria and Hungary have been less forthcoming with assistance. Unfortunately, an outbreak of populist political movements driven by an illiberal nationalist fervor to maintain cultural unity may be offsetting many nations' balance of political responsibilities. Post-World War II Europe and the EU in particular arose "as a community of shared values;" however, "the refugee crisis has forced Europeans to choose between the moral universalism they profess and the ancient identities they have inherited." The refugee crisis has placed a tremendous pressure on nations to meet their humanitarian obligations as EU member states, while rising nationalist sentiment across the region has posed a direct challenge to the very liberal principles holding the fabric of this international community together. Due to Sweden typically lacking much right-wing political culture, the influence of its recent nationalist movement has been less significant, yet the state continues to struggle to meet its obligations in light of its heavy humanitarian burden. Tied more closely to nationalism, Austria and Hungary have experienced more influential movements that have led to both the shrugging of international responsibility and infringement on humanitarian rights (Traub 2016).

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Through its institution in 1999 and later reformation in light of the recent crisis, the EU has worked to establish a Common European Asylum System (CEAS) to promote the uniform adherence of all member states to their humanitarian obligation of protecting the rights of refugees. This system aims to achieve the EU's goal of providing international protection and guidance to all interested migrants "who qualify as refugees due to a well-founded fear of persecution." The right to asylum or subsidiary protection and implicit prohibition of refoulement for those who meet the necessary criteria is based on the EU Charter of Fundamental Rights grounded in specificities of the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol. Although the charter created the responsibility among all member states to accept refugees, a common criteria used to "assess on a case-by-case basis whether an applicant for international protection is a refugee within the meaning of article 1(a) of the Geneva Convention" or if an applicant is "eligible for subsidiary protection" did not exist until Directive 2011/95/EU was added to the CEAS in 2011. Applicant criteria for refugee status includes the following: a well-founded fear of persecution, grounds of persecution related to race, religion, nationality, political opinion or social group; a causal link between these grounds and persecution, and the classification of this persecution as a form of either mental or physical abuse. Additionally, subsidiary protection may be granted if the applicant does not qualify for refugee status but faces "a real risk of suffering serious harm if returned to his/her country of origin" (Library of Congress 2016). In addition to providing these common criteria for determining who is in need of international protection, this reform also ensures that each state will provide a minimum level of benefits for these individuals (Office Journal of the European Union 2011).

In addition to this directive that addressed the "lack of uniform standards among the member states in assessing the asylum applications" additional reforms of the CEAS in light of the recent crisis have included the improvement of applicant reception facilities in many states and the specification of the rules of the Dublin Regulation. Indeed, these reforms have worked to create more "common standards" and encourage "stronger cooperation by EU member states to ensure that asylum seekers are treated fairly and equally wherever they seek protection." Although these measures have gone a long way towards ensuring that states are uniformly upholding the liberal humanitarian values of the EU, these nations have still found ways to protect their domestic interests from the burden of these international mandates in various ways. Many states have turned to instituting temporary border checks, violating the provisions of the Schengen Treaty, as well as both setting limits on the number of applications received in a particular time period and opting to issue temporary over permanent protection status to accepted applicants. Such measures are sometimes justified to protect national interests in states like Sweden that have become economically crippled by their refugee burden; however, it has become increasingly common for a state's restrictions to be too heavy-handed. In many cases, it has become commonplace for nationalist rhetoric to unjustifiably restrict a nation's ability to fulfill its humanitarian duty as a member of the EU. Indeed, many states have imposed these restrictions despite having capacity to accept more refugee applications. Moreover, CEAS legislation and reform have set the EU in the right direction for dealing with this crisis by promoting the assumption of mutual responsibility; however, the necessary cooperation of all member states has been difficult to orchestrate as the crisis continues to contribute to political disagreements and fuel divisive nationalist sentiment. Many EU nations maintain

overly restrictive refugee policies regardless of their ability to take in more asylum seekers, placing unnecessary burdens on the border states affected by the Dublin Regulation and on the more generous nations trying to assist them (Library of Congress 2016).

The EU Justice and Home Affairs Council has attempted to spurn an effort to solve the crisis by uniting member states under a unified humanitarian cause by adopting a temporary relocation plan in September of 2015. This plan designs a “mandatory distribution scheme based on the following proportional criteria: 40% on the size of the jurisdiction’s population, 40% on GDP, 10% on past acceptance of asylum applications, and 10% on the unemployment rate.” The EU is seeking to alleviate the burdens of Italy and Greece. Being the border states most refugees first enter, these states have been disproportionately affected by the crisis due to the Dublin Regulation, which places the responsibility for an asylum claim on “the first Member State in which the application for international protection was lodged.” Also, this plan seems to take into consideration some of the more practical domestic concerns member states may have about taking in more refugees, particularly the economic welfare burden, by distributing the responsibility in a manner that is supposedly feasible for each nation. Particularly, states deemed to have further capacity for taking in more refugees would receive a certain percentage of the 160,000 refugees to be relocated from Italy and Greece. However, progress on this relocation effort has been slow and objected to by a few nations. Hungary has gone as far as to file a lawsuit against the EU in reaction to the policy. Lack of cooperation from member states has been the greatest hindrance to the progress of this plan. States’ unwillingness to take a larger amount of transfers at once, maintenance of lengthy application processes, lack of effort to provide alternative safe and legal routes to Europe, and, sometimes, direct violation of the CEAS illustrate a contentment to forfeit the EU’s collective humanitarian responsibilities for the sake of national interests (Library of Congress 2016).

In the second quarter of 2016, other member states were forced to take on more of the refugee burden while Sweden, Austria, and Hungary adopted more restrictive migrant policies. The EU received 305,700 refugee applications, an increase of 40% from the second quarter last year. The EU member states were able to make 234,400 first instance decisions, of which 59% of these were positive in that applicants were granted protection status. Hungary received 14,900 despite a 54% decrease in due to its new restrictive migrant policies. Sweden and Austria have experienced a decrease in asylum applications compared to last year as well with drops of 69% and 38% respectively due to their new migrant laws. Germany was forced to take on a larger burden in its reception of 186,700 first time applicants, 61% of all EU applications, and issuance of 117,800 first instance decisions. The effects of these restrictions have also forced application numbers to increase in the already inundated southern EU nations of Greece and Italy burdened by their obligations under the Dublin Regulation (Eurostat 2016).

Traditionally, Sweden has been the nation with the most welcoming refugee policies in the EU and has gone beyond the requirements of the CEAS to assist asylum seekers. This generous policy was substantiated by the nation’s inclusive Aliens Act, which provided asylum not only to those who qualified for refugee and subsidiary protection status, but to those in need of other protection as well. This third category covered migrants who were not fleeing due to a risk of personal persecution, but were instead seeking protection due to external or internal military conflict or the effects of a natural disaster (Library of Congress 2016). Sweden’s commitment to liberal humanitarian values had become

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paramount within its political culture in that the majority of its citizens, vowing their loyalty to the political left, believed that welcoming refugees was a key component to building a better nation and its “social democratic model was unthinkable without the commitment to accepting them” (Traub 2016). The state was eager to welcome these migrants into its extensive social programs before refugee status was even granted by providing applicants with “free housing and monetary support while their application [was] pending” (Library of Congress 2016). However, it was these generous benefits coupled with an unprecedented influx of migrants that began to create unmanageable economic burdens and put the welfare system of the state at risk. In November of 2015, the state admitted that a line needed to be drawn when the Swedish Civil Contingencies Agency reported “that there was a risk to the health and life of the people in Sweden because health providers, the police, and the like could not keep up” (Library of Congress 2016).

Recently, Sweden has had to add many refugee restrictions due to the financial burden of the 160,000 refugees this nation received in 2015, the largest number of applicants per capita in the EU. This nation had to violate the EU Schengen agreement of free movement throughout member state borders on November 12, 2015, when it “implemented temporary border controls” that would only allow those with government-issued identification into the country. Soon after, on November 24, 2015, government officials created a policy to further deter asylum seekers from traveling to Sweden by only giving permanent residence permits to asylum seekers qualifying as quota refugees. Sweden issued its most restrictive policies after a parliament vote on July 21, 2016, when the nation began to substitute permanent residence permits for temporary ones, for asylum seekers arriving after November 24, 2015, and entirely removed its more lenient third asylum classification. Sweden excuses these restrictive policies by representing itself as a nation whose generosity had begun to tip its scale of political responsibilities too far toward its international obligations at the expense of the public good of its citizens. The EU has agreed with the necessity of these restrictions in its recognition of Sweden as a nation requiring regional assistance when, on December 15, 2015, it was “announced that Sweden was exempted from its obligations under the relocation scheme.” Thus, Sweden is not held responsible for assisting the border states, although it still voluntarily accepts 1,900 quota refugees to aid the relocation effort. In addition to this generous assistance, Sweden has made efforts to support the refugee population it already has by taking measures like raising municipal taxes, creating low-wage jobs, and building temporary housing. However, the state is still looking to the EU for further support. In light of Brussels’ recognition of the Sweden’s daunting burden, the state has requested a reduction in its monetary contribution to the union and refugee relocation assistance for a portion of its asylum population. In the meantime, the state is looking to deport those that have remained in the country after their applications had been rejected to further relieve the burden on their welfare system (Library of Congress 2016).

In a reaction to the crisis, populist politics have expanded in Sweden as the right-wing nationalist Sweden Democrat party has gained more support for their anti-immigrant agenda. The political leaders of this party have engaged in a mission to preserve cultural unity by inciting fear that “an increasingly multicultural Sweden is in danger of losing its identity” (Traub 2016). Such a sentiment has earned this party a lot of criticism in the political sphere as it is at odds with the nation’s traditional ideology of encouraging integration and celebrating diversity. However, the movement is undeniably gaining

traction among the public feeling the effects of the crisis, and the party has been able to demonstrate more political clout as a result. The Sweden Democrats winning 12.9 percent of the vote in 2014, earning 49 of 349 seats in Parliament are hopeful about being able to exert their influence on the governance of a shaky minority coalition with increasing anti-immigration sentiment among the populous (Election Resources 2014). This is a significant improvement for this party after only after earning 5.7 percent of the vote and 20 seats in 2010 (Election Resources 2010). Public opinion is also undeniably shifting as polls demonstrated that citizens who felt Sweden was taking in too many refugees increased from 29 percent in October 2015 to 41 percent in November later that year (Traub 2016). Although right-wing movements are expanding in Sweden, their influence is still rather weak in such a liberal society with a lack of right-wing political influence in its history. Moreover, nationalist interests have not expanded to the point of challenging the state’s political liberal culture and the EU’s collective crisis management effort as of yet. Instead, the nation’s more restrictive refugee policies seem to be calculated and necessary measures to relieve the pressure on this nation’s welfare state that has been crippled by Sweden’s assumption of an unequal burden within the EU community. These claims are substantiated through the EU’s implicit recognition of this member state as needing assistance and the Swedish government’s lack of rhetorically stirring up nationalist sentiment to gain support for its policies. However, recent election results and swaying public opinion polls in light of this crisis demonstrate that this sentiment may be gradually forming among the populous nevertheless and may hold more significant political influence in the near future.

Austria is a nation with a political history in which the far-right has consistently had influence as a third party. Consequently, the increase in nationalism in light of the recent refugee crisis appears to be having a significant impact on this nation’s political climate as the results of recent elections have seen the far-right Freedom Party gain significant representation and increasingly stringent refugee policies have been issued. Thus, it appears that nationalist fervor in Austria, may pose a more immediate risk in preventing this member state from meeting its humanitarian obligation in the refugee crisis. In the country’s most recent presidential election on May 22, 2016, the Freedom Party’s candidate Norbert Hofer, after winning the first-round election with 36 percent of the vote, contested his loss in the final round of elections before a constitutional judge after losing by less than one percent of the popular vote (Election Guide 2016). The court decided to overturn these second-round election results and ruled in favor of a rerun on December 4th. Alexander Van der Bellen, backed by the more moderate Green Party would win this election by a thin margin of 53.3 percent of the popular vote to Hofer’s 46.7 percent (Smale 2016). Despite the loss, this election held tremendous weight for a nation that, in response to recent popular opinion, has been issuing policies focused on maintaining its national identity rather than strengthening its cooperation with the EU. The overturning of the first election results serves as a type of symbolic victory for Austria’s nationalist movement in that the Freedom Party has emerged as the leading partisan force and pushed forward into public debate its core themes: “general hostility toward Islam and immigration, reclaiming Christian roots within Europe, and populist but not secessionist Euroscepticism” (Brett 2016).

In addition to the possibility of the far-right taking the presidency, the Freedom Party took 40 of the 183 seats of the National Council as well. This party garnered 20.55 percent of the popular vote and placed third among all parties in these recent 2014 National Council

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elections, up from the 17.54 percent and accompanying 34 seats it received in the previous election (Election Guide 2016). The increasing popularity of the Freedom Party has, thus, become substantiated by these results and can be attributed to its promotion of anti-refugee sentiment that resonated with a significant portion of voters that were concerned about the refugee crisis during the 2014 campaign. Spreading this sentiment, especially against Muslim migrants from the Arab world has been a recent trend for this party, which, during the 2006 National Council elections adopted slogans like “‘Daham statt islam’ (at home instead of Islam)” (Aigner 2008, p. 92). The party certainly has a history of promoting anti-migrant sentiment and implicit cultural/ethnic hegemony. The FPÖ has some indirect ties to German fascist supporters due to its previous promotion of Pan-German nationalism after the state’s war-time occupation, but has since shifted to a uniquely Austrian nationalist agenda (Aigner 2008, p. 90). Although this party was never extremist, its former ideology “attracted many former Nazis” who believed that “Austrians should think of themselves as belonging to a greater German cultural community” (Library of Congress 2016). Moreover, although the party’s platform is acknowledged as legitimate in Austrian politics and has gained a wide support base, the FPÖ remains an outlet for a rising extremism among the population.

A right-ward shift in political sentiment has been demonstrated by the nation’s extreme changes in refugee policy in recent months. Austria has been burdened with asylum claims due to its shared borders with Italy and Hungary, member states that have been inundated with refugees. In addition, unprocessed migrants have been traveling through Austrian territory in pursuit of reaching the German border. Over the past twelve months, 83,080 asylum applications have been filed in Austria, which have placed a great burden on the nation’s economy and welfare state (Eurostat 2016). Thus, the government has responded with more restrictive policies to reduce the amount applicants. However, these measures have been noticeably proportionally larger in comparison to many of its EU neighbors suffering similar burdens. Over the last twelve months, Austria has received significantly fewer applications per capita than Germany and, yet, has instituted policies that pale in comparison to any of its northern neighbor. The Austrian Chancellor Werner Faymann has reversed his nation’s refugee policy more quickly than any other EU nation, as it has abandoned supporting the policies of its German ally. Instead, Faymann seems to have adapted to the attitudes of his citizens by siding with the rightward shifting sentiment of the nation’s political climate.

On April 27, 2016, the Austrian parliament succeeded in passing some of the most stringent legislation restricting the right to asylum in the entire EU. The new amendment allows the leadership to declare a state of emergency over migration if it is deemed that “special measures for the maintenance of public order and the safeguarding of internal security” are in order due to “the event of significant arrivals of migrants and asylum seekers at Austria’s borders” (Human Rights Watch 2016). Such a policy allows Austria to close its borders to refugees whenever it chooses, earning the nation much criticism from international leaders and the EU alike. Austria had earned scorn from the international community earlier in 2016, when, in February, it passed legislation designed to “limit the number of refugees who could apply for asylum at the Austrian border to 80 a day” (Human Rights Watch 2016). In addition, this piece of legislation capped migrants traveling through Austria to the German border at 3,200 a day. These measures prompted immediate response from the EU migration commissioner who viewed them as violations to both the Geneva

Convention and the EU’s Charter on Fundamental Human Rights. Such a condemnation suggests that Austria had somewhat flouted its obligation to humanitarian values as a member of the EU. Additionally, the nation’s leadership has continually expressed its discontent towards the EU’s proportional resettlement scheme despite its tacit consent to participate. The nation’s foreign minister had commented that “The distribution of refugees by EU quotas doesn’t function, because many countries are not ready to receive a high number of asylum seekers” (*RT News* 2016). It seems that Austria will continue to ask questions about its EU obligations in this crisis as its nationalist public sentiment continues to spread. However, because the Freedom Party has not yet been able to gain majority control of the government, Austria will remain a reluctant participant in the EU’s collective effort to alleviate this crisis. Even so, Austria has, in many instances shrugged on its responsibility to assist forcing an unequal burden on more generous states like Germany and Sweden. Instead, this nation is allowing growing nationalist sentiment to tip the scale of its political responsibilities towards its domestic interests.

Over the course of the recent refugee crisis, the nation of Hungary has gained the most attention from NGOs, foreign nations, and international bodies alike due to its application of some of the staunchest border restrictions in the EU and countless violations of humanitarian rights. It is not surprising that the political culture of this member state has also had the strongest “tendency towards populist politics” in the entire union over recent history and has experienced a strengthening “hegemony of the political right.” In addition to this nation’s political culture having a strong affiliation with the far-right historically, Prime Minister Victor Orbán’s right-wing populist FIDESZ party has held majority power in parliament since 2010 and the associated neo-fascist Jobbik party has gained significant support in parliament since this time as well. FIDESZ was able to gain 52.9% of the popular vote in 2010, giving it the two-thirds majority necessary to run the government, while Jobbik received the third largest percent of the popular vote with 15.9%. The power of this populist political movement was only further solidified in the most recent 2014 parliamentary elections in which FIDESZ maintained its majority rule and Jobbik maintained control of the third party position and earned further popular support. The parties earned 44.1 and 20.4 percent of the vote respectively. These parties have utilized their alliance in the Hungarian government to create a “hegemonic-antagonistic ‘right-wing’” centered on the affinities of both organizations towards “extremist, nationalist ideological touchstones and support for a state-authoritarian approach to problem solving” (Becker 2010, pp. 29-40).

Since rising to power these parties have focused on stirring up nationalist sentiment and promoting ancient stereotypes to strengthen their support base. Orbán’s government has instituted an annual day of National Unity and an ethno-centric citizenship act “entitling members of Hungarian minorities” in neighboring states “to a Hungarian passport even though they cannot demonstrate permanent residence in Hungary.” Both actions were prompted by a deliberate intention to stir up support for Hungarian cultural unity by utilizing the population’s resentment towards the contentious 1920 Treaty of Trianon in which the country lost two-thirds of its original territory and many of its citizens were forced to settle as ethnic minorities in neighboring states. In addition to the passing of this legislation, the Orbán government has sought to influence the political beliefs of the populous by encouraging the dissemination of fascist-influenced rhetoric through media outlets. This media campaign has allowed the government to tap into “pre-communist and

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communist constancies of racism and exclusion.” However, these ancient xenophobic sentiments that once promoted the marginalization of Jewish and Gypsy minorities, is utilized today to garner support for the government’s exclusionary policies towards the region’s most recent influx of ethnic outsiders, Islamic Arab refugees (Becker 2010, pp. 29-40).

Although Hungary’s asylum laws may appear to be rather liberal in that they go beyond minimum CEAS requirements by providing a third category of protection known as tolerated status in addition to refugee and subsidiary protection, the proper application of this refugee framework has rendered it ineffective (Hungarian Helsinki Committee 2016). Hungary’s stringent asylum restrictions began on September 15, 2015, when the nation officially closed its southern border with Serbia and its border with Croatia a few months later due to a recent influx of migrants seeking to enter the Schengen by migrating into this state (Amnesty International 2016). Because of its location on the EU border, Hungary had become inundated with 108,085 applications in that quarter alone and took in 26.1 percent of all EU refugee requests (Eurostat 2015). These border closings were not immediately viewed as problematic in the eyes of the EU in that their closing did not violate the Schengen agreement. However, these restrictive policies began to worsen in early 2016, when on March 9th, “the government announced the introduction of a new state of emergency due to ‘mass immigration’,” and began to promote its immigration program of militarization, criminalization, and isolation known as “Schengen 2.0” (Amnesty International 2016). Essentially, this plan increased border security with patrol officers and border fences, made any undocumented crossing of the border a criminal offence, and used application caps and legal loopholes in refugee policy to severely limit the amount of refugees admitted into the state. Such strict policies are substantiated by the fact that Hungary only reviewed 1,030 of its 14,900 applications in the second quarter of 2016, and just accepted 105 of 1,030 total applications during this time period, a ten percent rate of recognition (Eurostat 2016).

As part of its migrant law amendments in September of 2015, Hungary has set up two transit zones on its Serbian border, the only border migrants are legally allowed to cross, in order to process the refugee applications and cap these asylum candidates at 15 per zone each day. However, as statistics suggest, most of these applications are not accepted due to Hungary’s decree in July of 2015 that dedicated all EU and EU applicants as safe third countries. This ruling allows Hungary “to assess whether an asylum-seeker may be returned to a country other than the country of origin.” Essentially, this decree claims that asylum seekers’ rights are protected in Serbia; therefore, Hungary is assuming the right to forgo the judgement of each claim in light of EU refugee criteria on a case-by-case basis, and, instead, collectively consider claims *prima facie* inadmissible. Such a ruling creates an accelerated application review procedure in which the asylum seekers can be legally returned to Serbian territory. The use of this mechanism usually favors families and its application to “male or (visibly) non-vulnerable asylum-seekers is discriminatory” in that men unaccompanied by their families are largely given blanket inadmissibility rulings that allow the border patrol to dismiss their case without going through the proper application review process. Moreover, the decree is extremely problematic in that it directly challenges the EU’s uniform standard for assessing all asylum applications under the CEAS and the nation’s obligation of non-refoulement. Thus, these inadmissibility decisions have garnered criticism from the international community and the Hungarian Supreme Court

alike. However, the latter withdrew its opinion against this practice in March of 2016. Additionally, the international community and NGOs do not even agree that Serbia is a safe third nation. Amnesty International asserts, “Serbia’s Asylum Law remains only partially implemented and fails to guarantee access to international protection to even prima facie refugees” (Amnesty International 2016). In agreement with this judgement, the United Nations High Commission for Human Rights’ current guidance is that “Serbia should not be considered a safe third country and urges states not to return people to Serbia (Human Rights Watch 2016).

These transit zone caps have created temporary migrant villages of hundreds of asylum-seekers that suffer from lack of resources as Hungarian officials have largely ignored the humanitarian disasters occurring within the nation’s territory. In addition, the nation has frequently not respected the asylum decision maximum time period of 60 days, forcing the border patrol to hold many applicants in detention indefinitely (Hungarian Helsinki Committee 2016). Amnesty International estimates that as many as 700 of the 1200 registered asylum-seekers still in Hungary currently remain in asylum detention. In the eyes of the Hungarian government, the area in and just outside its transit zones are given special status that “exempt this part of its territory from its jurisdiction and from the application of its human rights obligations.” Such ignorance towards the rights of refugees in these zones in addition to the extremely low recognition rate of asylum seekers has led many to attempt to cross this border illegally. In response, Hungary issued an amendment to its asylum law, criminalizing the irregular crossing of its borders after closing them in September of 2015. On July 5, 2016, Hungary strengthened its patrol of these crossings by instituting the “push-back law” which allows “the police to apprehend and push back any foreign national found to be irregularly in the country, within 8 km from the state border.” As of August of 2016, 2,841 migrants were found guilty of irregular crossing of border. Most of these individuals face expulsion for up to two years, three were sent to prison, and 41 were given suspended prison sentences (Amnesty International 2016).

Amnesty International has noted that these push-backs that forcibly return individuals to Serbia do not uphold “any of the guarantees required by international and EU law.” Particularly, this criminalization of the irregular crossings allows the state to skip the application review process, which neglects the provision of a safeguard against refoulement and an individual assessment of risk upon return of each migrant. In addition to these push-backs, there have been an overwhelming number of reports of excessive force used by border police. Although Hungary has denied these actions, the UNHCR has collected over 100 cases of evidence of excessive force. If these claims are validated, Hungary would be in violation of the UN convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and the European Convention on Human Rights (Amnesty International 2016).

Although the UN has been fairly vocal in its condemnation of these restrictions and a number of cases against Hungary are pending before the European Court of Human Rights on asylum issues, the EU has remained modest in its public criticism of Hungary and the nation’s role in preventing an effective effort of mutual cooperation of member states during this refugee crisis. The EU has gone as far as to launch formal infringement proceedings against the country on December 10, 2015, due to its perception of “some elements of the amended asylum and criminal laws to be incompatible with EU laws.” However, these proceedings have not been concluded to date so this nation is yet to be held

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accountable of its abdication of international responsibility through EU sanctions. Condemnation from this organization has mostly been voiced from the member states independently as the court systems of many nations have ruled against returns of migrants to Hungary by means of the Dublin Regulation. So far Finland, Germany, and Sweden have all suspended transfers out of fear that these migrants will not be given a chance to establish their refoulement claims before being transferred into Serbia. Moreover, absent of any action taken by leadership in Brussels, efforts by member states to protect the humanitarian liberties of refugees will only lead to further divisiveness in the region and the breakdown of the EU's joint asylum framework (Amnesty International 2016).

It has become evident that these restrictive migrant policies and perceived human rights violations are a product of the Hungarian government's right-wing political agenda that has only intensified in response to the recent refugee crisis. Such evidence can be seen in the government's recent media campaign to stir up public support for a referendum to veto the recent EU relocation plan. In reaction to being asked by the EU to assist in this plan by taking 1,294 relocation quota asylum-seekers, the Hungarian government issued its October 2 national referendum (Human Rights Watch 2016). This was not exactly the government's latest attempt to abdicate its responsibility in this plan after previously challenging its legality before the Court of Justice of the European Union. Instead, the referendum attempted to gage public opinion on how closely aligned citizens thought Hungary's future goals were with those of the EU when it asked voters whether they "want the EU to be able to prescribe, even without the agreement of the National Assembly, the mandatory settlement of non-citizens to Hungary?" After passing a plethora of laws and amendments clearly aimed to promote national unity through the exclusion of the foreigners that challenged it, the Orbán government was looking to see if it could move forward with more drastic strategies that would inevitably distance the nation further from the EU (Amnesty International 2016).

Although the referendum did not pass, Orbán unsuccessfully tried to influence the result by stirring up nationalist and xenophobic sentiment through a media campaign. Using racially charged rhetoric, the government released pamphlets making unsubstantiated claims linking increased migration to terrorism. Additionally, billboards were erected that were designed to scare citizens with messages like, "Did you know that since the beginning of the immigration crisis the harassment of women has risen sharply in Europe?" (Human Rights Watch 2016). Moreover, it seems clear enough that the Hungarian government's past and planned future restrictive policies towards migrants are rooted in an illiberal nationalist desire to preserve cultural/ethnic unity rather than practical goals like ensuring the well-being of the nation's economy and welfare state due to its launching of a campaign designed to manipulate the emotions of voters. Using this type of purely rhetorical strategy to gain support for his nationalist goals is not unusual for Prime Minister Orbán who has often referred to asylum-seekers as "poison" in his public statements. Moreover, the FIDESZ far-right political party has been able to utilize its control of the government, play upon the historical political sentiments of its populous, and the social effects of the recent refugee crisis to further its nationalist goals at the expense of it's the nation's international humanitarian obligations (Amnesty International 2016).

There has been an undeniable trend of far-right populist movements expanding in EU nations that have been burdened with their humanitarian obligations during this recent refugee crisis. However, member states have responded to these burdens in different ways

depending on the role far-right politics have play in their political cultures. Moreover, the recent refugee crisis has made populations more responsive to far-right political movements in their nations, and the degree of this responsiveness seems to be correlated with how active these movements have been in these nations historically. Due to its overwhelmingly left-of-center political culture, Sweden has managed contain its nationalist movement in a manner that has allowed it to properly balance their domestic and international political responsibilities. Although somewhat restrictive, Sweden’s new refugee policies appear apt for a nation whose generosity had begun to tip the scale of political responsibilities too far toward its international obligations at the expense of the public good of its citizens. Conversely, in nations like Austria and Hungary where far-right political movements have always been fairly active, nationalist sentiments have led to exceeding stringent refugee restrictions that border on human rights violations. The presence ruling far-right political power, has allowed for especially egregious violations in the case of Turkey. Such policy should not be acceptable for members of the EU in that it is at odds with the founding principles of this union and corrosive to Brussels’ plan to solve the crisis through actions of mutual responsibility. If the EU is to solve this current crisis, the member states must do it together and recognize that the liberal values that this international union represents is greater than the national identities they seek to protect. □

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Chapter 7:

Improving the Long-Term Circumstances of Internally Displaced Persons: State Strength as the Determinant Factor

Cesar Garcia

□ In both the cases of Colombia and the Democratic Republic of the Congo, internally displaced persons represent significant humanitarian crises demanding resolutions. While Colombia's 6,270,000 IDPs have encountered shifting responses by the state ranging from immediate and reactive policies to more enduring initiatives, the DRC's 1,500,000 internally displaced have not benefited from much more than the basic provision of humanitarian assistance (IDMC 2015). Due to the Colombian state's ability to avoid state failure and then gradually strengthen its capabilities, it has been able to make significant and promising gains in fighting its IDP crisis. On the other hand, the Democratic Republic of the Congo's state failure has left it largely inept at advancing the conditions of its displaced population. It is the differing strengths and capabilities of states, as exemplified by these two cases, which determine improvements in the long-term circumstances of internally displaced persons. First through a detailed analysis of the Colombian state's gradual strengthening and shifting policies to address IDPs, I will highlight the possibilities for sustainable efforts in a capable state. Following this, I will introduce the case of the DRC as a contrasting scenario where state failure has not allowed for meaningful efforts to address internal displacement.

A characterization of the modern nation-state as strong, weak, or failed depends primarily on the state's ability to provide public goods, most critically security, to its citizens. It is the state's capacity to protect its populace from both external and internal violence, as well as its provision of additional political goods such as civic freedoms and access to health care and education, which allow one to measure a state's level of strength. While strong states neither experience sustained internal violence, nor the struggle to distribute political goods that ensues, weak states perform more poorly as violent situations intensify and can descend to failure once they become wholly unable to carry out these key functions. Symptoms of weakness are visible in gaps in the disbursement of public goods, deteriorating infrastructure, shrinking economic performance, and prevalent corruption. Failed states, moreover, are those that lingered in weakness and eventually became

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consumed by internal violence. In these cases, the fighting, likely between the government and rebel groups, is enduring. Authority over regions of the state is lost; outside of urban centers the provision of public goods is largely non-existent; criminal activity is rampant; and the economy flounders (Rotberg 2003, pp. 1-8).

In this context, it is clear that Colombia teetered dangerously close to failure during the armed conflicts, flourishing drug trade, and economic decline of the 1990s and early 2000s, which together both exacerbated and highlighted the state's lack of capacity. Despite Colombia's relatively long history of political and economic success in Latin America, the above factors combined to place considerations of state failure well within reason. By 2004, the insurgencies of the Revolutionary Armed Forces of Colombia (FARC) and National Liberation Army (ELN), as well as the paramilitaries under the United Self-Defense Forces of Colombia (AUC), totaled approximately 30,000 fighters, controlled vast portions of territory, and directed indiscriminate violence against the state and its citizens. The illegal drug trade, in many instances under the direct control of the armed groups, generated significant income for the insurgencies and paramilitaries and contributed further violence. Throughout this tumultuous period, the degeneration of the state's institutions was marked. Colombia lacked the means and willingness to successfully combat the rebels and control the violence, with the state frequently on weaker footing than the armed groups given the stagnant economy and the groups' access to drug income. The ongoing conflicts and loss of territory also stymied the state's provision of public goods and its ability to protect peoples' property and land. Undoubtedly, the most conspicuous indicator of approaching state failure in Colombia was the state's inability to protect its citizens from violence (Shifter and Jawahar 2004, pp. 143-46).

A strong reassertion of the state, in line with a commitment to prevent Colombia's descent into state failure and protect its citizenry, followed the 2002 election of President Álvaro Uribe. Through his "Democratic Security" policy, Uribe explicitly aimed to increase the authority of the state by placing security forces in direct confrontation with the illegal armed groups. This was an effort meant to provide greater protection, consolidate territory, and force the combatants to negotiate for peace. Ultimately, it was also hoped that the successful neutralization of rebel groups would allow for the return of state services, development projects, and local democracy to afflicted areas (Shifter and Jawahar 2004, p. 144). In practice, President Uribe carried out his policy by increasing the funding and reach of the security forces, as well as by emphasizing their improved professionalism. Security spending as a share of annual GDP, which was 2.2% in 1994, continued its upward trend under Uribe to reach a peak of 4% in 2009. While in 2002 there were 110,123 officers in the National Police and 203,283 soldiers in the military, by 2010 these numbers had increased to 158,824 and 283,004 respectively. With regards to human rights, from 2007 to 2009 extrajudicial killings by the Army fell from 199 to 19 and from 2005 to 2009 the same metric in the National Police fell from 53 to 16 (Homes and Gutiérrez de Piñeres 2014, pp. 380-87). The president's approach made a significant impact in combatting Colombia's high levels of violence. Human rights violations committed by the insurgencies decreased by approximately 70% during Uribe's presidency, while those of the paramilitaries fell by about 55%. Additionally, the country's general homicide rate continued on a downward trend, falling nearly 50% from 1993 to 2008 (Homes and Gutiérrez de Piñeres 2012, pp. 375-77).

Although critically important, security improvements alone were not enough to escape state failure. Increased state capacity and effectiveness were also products of President Uribe's counter violence efforts. The Index of Life Conditions, which broadly measures poverty levels using factors such as the availability of public services and education levels, is one indicator of this. It increased from 76.6 in 1997 to 78.8 in 2005. More specifically, the disbursement of social security to qualifying citizens increased from 53.7% to 74.1% during this period. Levels of education also experienced a boost between 1996 and 2005, with people over the age of 15 increasing their average years of schooling from 6.8 to 7.9. Furthermore, the integrity of Colombia's national institutions provides an important measure of their improved effectiveness. Taking into account levels of transparency and corruption, the mean score of the nation's institutions in the *Corporación Transparencia por Colombia* index increased from 62.6 in 2003 to 75.3 in 2009 (Homes and Gutiérrez de Piñeres 2012, pp. 382-85).

Given these successes it is clear that the Colombian state during the administration of President Álvaro Uribe experienced a dramatic strengthening relative to the turbulent years that preceded his time in office. Resulting from his efforts, particularly in the area of internal security, Colombia avoided state failure and maintained the capacity to protect its citizens. Despite this, however, the crisis of internal displacement that grew in severity in the 1990s due to heightened fighting between the insurgencies, paramilitaries and government forces continued throughout the Uribe years of 2002 to 2010. According to the Internal Displacement Monitoring Centre, the number of conflict-displaced persons in Colombia reached 6,270,000 by 2015 (IDMC 2015). Defined by the United Nations' Guiding Principles on Internal Displacement (OCHA 2001, p. 1), the displaced are, "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict...and who have not crossed an internationally recognized State border."

In Colombia, many of these individuals were uprooted from the rural areas of the country where armed conflicts were most prevalent, specifically the Pacific Coast departments. As many as 6.8 million hectares of land belonging to IDPs were estimated to have been lost by 2012, forcing about 80% of this group to take residence in the country's urban centers. The majority of IDPs in Colombia are Afro-Colombians or indigenous peoples that live in poverty or extreme poverty situations. With great likelihood they are also women and children (Højen 2015). As such, they are a vulnerable population often facing human rights violations that include the severing of familial and social ties and inaccessibility to basic goods like food and shelter (Goldman 2009, p. 61). They also experience a loss of identity as a result of their forced removal from their original communities and are no longer able to fully exercise their political and civil rights as citizens of the state. Over time, these conditions can gain permanence in the lives of IDPs if they are not adequately attended to (Pécaut 2000, pp. 92-96).

During the administration of President Uribe, Colombia addressed the conditions of its internally displaced persons through a focus on immediate and reactive solutions. The capability of the state to carry out such a crucial function during this period of conflict was a testament to its resilience and growing strength. Relying primarily on the distribution of public goods and services, many times in conjunction with intergovernmental and non-governmental organizations, the state led important efforts to secure the livelihoods of

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those uprooted by conflict. Particularly after a 2004 decision by Colombia's Constitutional Court, which deemed the state's humanitarian efforts up to that point to be unconstitutional, aid to IDPs substantially improved. Over the five years that followed, approximately 80% of those individuals registered on the national internal displacement register received a minimum of three months of basic goods and services. Overwhelmingly, this outreach was directed towards the most concentrated areas of IDP relocation such as the urban center of Bogotá. To allow for this, the state in this period increased its annual budget for IDP assistance from \$80 million to \$400 million (Fadnes and Horst 2009, pp. 114-15).

One specific area of need targeted by the Colombian state, in collaboration with the United Nations Population Fund, was the sexual and reproductive health of internally displaced adolescents. Living in IDP communities often times plagued by instances of sexual and domestic violence, as well as conditions of poverty, this vulnerable group required immediate attention from the state. The gravity of this situation was signaled by the fact that in 2000, 30% of internally displaced females under the age of 20 were pregnant. In 2003, the state first indicated its intent to focus on this issue through the articulation of its National Sexual and Reproductive Health Policy. Then in 2005, the Ministry of Health and Social Protection followed suit by declaring the sexual and reproductive health of vulnerable adolescents an urgent matter. The UNFPA followed the lead of the government's NSRH Policy in order to ensure the implementation of direct health services and funding by the state. One specific program, carried out in eight IDP communities throughout four municipalities, proved to be very successful and entailed a series of sexual and reproductive health workshops. Through artistic and cultural activities, adolescents were given the opportunity to learn more about their bodies and topics ranging from domestic violence and unwanted pregnancy to love and friendship. Closing reflections showed that this program not only allowed for education and a regaining of collective identities and dignity, but also enabled participating adolescents to become better integrated within their local communities (Bosmans, Gonzales, Brems and Temmerman 2012, pp. 618-24).

The state's efforts to address the immediate needs of its internally displaced persons was also evident in its 2007 Pilot Program, which sought to institute development assistance prior to reparations in regions heavily affected by violence. Taking place throughout 10 of the country's departments, these projects aimed to initiate a human rights-based approach to transitional justice that would stabilize regions for the later implementation of reparations plans. In partnership with international development agencies such as USAID, many areas that had been without basic goods and services for up to a number of decades due to recurrent violence received considerable attention. In El Salado, the site of a horrific massacre carried out by the AUC in 2000, the most comprehensive pilot project to rebuild infrastructure and provide humanitarian assistance was undertaken by a number of state and non-state actors. Their involvement both addressed the specific needs of this community and represented an attempt to achieve reconciliation. Furthermore, in La Libertad in Sucre a clear deficiency was the state's prolonged inability to reach the community with social services. In response, its pilot project led to the construction of health and water sanitation facilities, as well as the beginning of education initiatives (Firchow 2013, pp. 51-57).

The provision of humanitarian aid to internally displaced persons during the presidency of Uribe was not only state-led, but also involved the state's willingness to follow the lead

of and receiving significant support from intergovernmental and nongovernmental organizations. It took until the 1990s for attention to turn towards the struggles of IDPs around the world and in Colombia (Goldman 2009, p. 61). Prior to the Guiding Principles of 1998, which laid out the responsibilities of governments to uphold human rights and humanitarian law with respect to the displaced, the Office of the United Nations High Commissioner for Human Rights initiated a presence throughout Colombia with the purpose of providing the government with analyses of the on-the-ground human rights situation. This allowed the state to then devise and introduce policies focused on the protection of IDPs' human rights. Amid increased fighting and rising IDP numbers in 2002, the Office of the High Commissioner for Refugees introduced the Humanitarian Plan of Action to the state along with 11 other UN agencies. With the aim of bolstering the state's institutions, as well as its IDP policies, the HPA outlined 5 areas of focus over a three-year period. Many of these areas involved partnership efforts, displacement prevention, access to basic goods and services, and reconstruction. The HPA's components were also refined as they were successively implemented in the Magdalena Medio region and Choco and Valle del Cauca departments (Mcghee 2003, pp. 844-45).

Intergovernmental and nongovernmental organizations, most prolifically the United Nations and World Food Program, also began to provide direct funding and aid to the Colombian state at this time. While in 2003 an estimated \$6 million was required for the UN to conduct its program in the country, the World Food Program in the same year utilized a \$2 million contribution from the United States to begin a three-year program to feed 375,000 individuals (Mcghee 2003, p. 847). These labors began a concern for IDPs in Colombia that has continued to this day, as the UNHCR currently assists over 600,000 people in the country. Together with NGOs and the government, it advocates for the rights of IDPs and provides guidance on achieving sustainable solutions to the crisis (UNRIC 2016, p. 3). The government has especially relied on the World Food Program to advance its development and post-conflict strategies. The WFP is uniquely capable of reaching remote areas of the country given the disbursement of its offices throughout Colombia and has proven vital to advancing many of the government's priorities. Since 2009, the state has provided the WFP with \$42 million to ensure the food security of its IDPs. Additionally, as part of its 2015 Protracted Relief and Recovery Operation the organization plans to invest \$61 million to reach approximately 660,000 IDPs (WFP 2016).

When President Juan Manuel Santos came to office in 2010, he inherited a strengthened state capable of moving beyond short-term responses to Colombia's crisis of internal displacement. Rather than maintaining a singular focus on the provision of basic goods and services to IDPs, the state began to take important steps towards a more durable solution. This new strategy appears to suggest a tentatively optimistic future for IDPs in Colombia, and highlights the possibilities accompanying increased state capacity. The first major step taken by the Santos Administration came in 2011 with its passage of the Victims and Land Restitution Law. This legislation added to an already robust legal framework for the protection of IDPs in Colombia, which additionally featured Law 387 passed in 1997 and the 2005 Law of Peace and Justice. Law 387 was the first juridical recognition of the state's responsibility to address its internal displacement crisis. It aimed to touch on all phases of displacement that the state could direct its efforts towards, ranging from the protection of individuals from displacement to IDPs' right to return home (Fadnes and Horst 2009, p. 114). The Law of Peace and Justice, for its part, focused on the demobilization of

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paramilitaries under the AUC umbrella and the implementation of transitional justice initiatives. Through the creation of the National Commission for Reparation and Reconciliation, the government sought to recover state institutions and restore the rights of citizens in pacified areas. Furthermore, the Historical Memory Group was established in order to recognize the truth behind the conflict with the paramilitaries and the violations of victims' human rights (Rettberg 2014, p. 20). Nevertheless, it was not until the 2011 Victims and Land Restitution Law that Colombia's legal framework yielded tangible results through a more comprehensive approach.

Building on the 2005 Law of Peace and Justice, the 2011 Victims Law involved a strategy of first providing assistance to IDPs and then carrying out reparation policies, similar to what the 2007 Pilot Program intended. It was broader in scope, however, offering assistance to the 16% of the population it viewed as victims of the conflict dating back to 1985, regardless of the culpable party. Amidst continued fighting against the insurgencies that remained active, particularly the FARC, the law created a Unit for Attention and Comprehensive Reparations for Victims that included IDPs as 85% of its registered victims (Dixon 2015, pp. 93-94). By initially offering assistance, the Victims Unit ensured that IDPs' immediate needs and basic standards of living were met prior to the reparation process. These measures involved development projects, subsidies, and the provision of basic goods and services. Ultimately, the purpose of this was to stabilize the humanitarian situation and lay the groundwork for the success of the policies that followed (Dixon 2015, pp. 88-90).

One salient example of the first phase of this strategy was the state's Free Housing Program that began in 2012. This was a response to the large presence of internally displaced persons in urban areas, as well as their dismal living conditions. Many resided, and continue to reside, in ramshackle settlements at the peripheries of major cities. Through this program, the state began constructing 400,000 units of fully subsidized housing on land granted to it by municipal and departmental governments. Each unit formed part of a larger compound and neighborhood meant to house 3,000 to 15,000 people. As of 2015, the state had spent \$9.4 million on its Free Housing Program and about 100,000 households had benefitted from the subsidized residencies. One likely source of this success was that the state followed the desire of the majority of IDPs to stay in urban areas where they considered their future educational and employment opportunities to be strongest. Also, IDPs viewed the state-provided housing as a dramatic improvement from their previous living conditions. Approximately 900,000 internally displaced households were on the waitlist for the Free Housing Program in 2015 (Silwa and Wiig 2016, pp. 11-16).

With initiatives such as the Free Housing Program in place, the state could then begin the more robust second component of its strategy. Reparations to IDPs in Colombia have taken the form of payments, rehabilitation, land restitution, and promises of non-repetition. They have also signaled the state's willingness to assume responsibility for the situations of its internally displaced regardless of the true perpetrator of violence. Up to 2015, the government had compensated 473,257 victims. Furthermore, the Victims Unit began registering IDPs and in turn offering them "letters of dignity" that acknowledged the human rights violations committed against them and the full protection of the state granted to them as citizens (Dixon 2015, pp. 94-97). Notably, the state's Land Restitution Program offered to return IDPs to their lands of origin if they so wished. Although not as popular as the Free Housing Program, it allowed the internally displaced an opportunity to reengage their prior

ways of life and once again take residence in their home properties and communities. While the government beginning in 2011 set aside \$29 million for this policy, the international community supplemented this amount with donations totaling about \$200 million. By June 2015, 73,000 claims for land restitution had been filed (Silwa and Wiig 2016, pp. 12-16).

Without a doubt, the most critical step taken by the Colombian state under President Santos towards an enduring solution to the internal displacement crisis has been its sustained efforts to negotiate peace with the FARC. In November 2012, the government entered peace talks with the guerilla group in an attempt to move Colombia closer to stability and end the source of so much internal displacement. With the FARC being the last major illegal armed group active in the country, as well as the most visible during the prolonged conflict, this determination for peace signaled the possibility for Colombia to enter a new phase of reconciliation and state-building. Among the key components agreed upon by the two parties were the possibilities for political participation by the FARC, the assimilation of former guerilla soldiers into society, and narcotics and development policies. Also included were the important issues of reparations for victims of the conflict and the consequences to be levied upon soldiers found to have committed human rights violations. While the FARC admitted its portion of guilt in the conflict, the negotiations additionally aimed to establish a truth commission as well as institutions committed to protecting a lasting peace (Gutierrez 2016, pp. 4-5). In June 2016, this process finally came to fruition, on these terms, with the signing of a ceasefire between the two parties.

Upholding his promise to put the peace deal to the popular vote for final approval, President Santos carried out a referendum on the issue on October 2, 2016. Surprisingly, Colombians rejected the peace terms, reached after nearly five years of negotiations, by a margin of less than 0.5%. Likely due to the "No" campaign championed by former president Uribe, in addition to a rampant hatred and mistrust of the FARC throughout the country, the two parties were forced to return to the negotiation table. The state, wholeheartedly committed to achieving peace, sought to readdress issues of particular concern to the population. In the new peace accord arrived at on November 12, 2016, these changes are evident. The FARC is now required to give up all of its illegally acquired assets, which are to then be returned to the victims of the conflict. Also, the new agreement better articulates the process of transitional justice that will follow the deal's approval. The Special Jurisdiction for Peace tasked with guaranteeing the right to justice of victims will remain in effect for up to 10 years. Moreover, solely national judges will decide the cases against the guerillas. Protections of private property are further strengthened and greater pains are taken to limit the country's narcotics trade (Santos 2016).

Signaling the state's unwavering intent to secure the passage of this revised peace accord, its approval was left to the Colombian Congress rather than the citizenry. On November 30, 2016, the Colombian Congress approved these amended terms, marking a breakthrough that promises to bring a period of greater peace, transitional justice, and reparations to Colombia (Casey 2016). Difficulties will persist even with the approval of this new peace accord, however. Violent conflicts with emerging paramilitary groups continue and the crisis of internal displacement still demands a full resolution. Also, the issue of funding an expected \$90 billion of reforms introduced by the agreement over the following decade remains (Gutierrez 2016, pp. 4-5). Nevertheless, the autonomous role taken by the Colombian state in this peace process emphasizes its ability to advance past merely short-term solutions to its IDP crisis. With reparations and lessened conflict, the

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state's commitment to improving the long-term circumstances of its internally displaced persons is evident.

In stark contrast to the strengthened state of Colombia, the case of the Democratic Republic of the Congo demonstrates that failed states are wholly incapable of moving beyond a limited focus on keeping their IDP populations alive. In the DRC, efforts towards the improvement of its vulnerable population's long-term circumstances are nonexistent. While under the leadership of President Uribe Colombia was able to avoid state failure, the Democratic Republic of the Congo was unable to overcome a series of internal conflicts that crippled its capacity. Beginning with the First Congo War from 1996 to 1997, which ousted the dictator Joseph-Desiré Mobutu from office, the DRC experienced a chronic cycle of violence that continues to this day. In 1996, it was a foreign invasion from the east by Rwandan militants that first destabilized the state politically and spawned a struggle for power that led to the Second Congo War. This second conflict lasted until 2002, by which point in time it had led to 5 million deaths and the introduction of lasting themes of violence in the country (Herbst and Mills 2013, p. 79). The failure of the Pretoria Agreement, which officially ended the Second War, became clear with the outbreak of what could be considered the Third Congo War in 2003 (Kongolo and Zamberia 2016, 186). This conflict continues to this day and is characterized by fighting between the military of the Democratic Republic of the Congo (FADRC) and the Democratic Forces for the Liberation of Rwanda (FDLR) in the east, as well as a struggle between numerous rebel groups over access to mineral resources throughout the country (White 2014, p. 5).

During this ongoing conflict, the Congolese state has been utterly incapable of protecting its citizens from violence - the defining mark of state failure. Considering that in practice the reach of the state doesn't extend beyond the urban centers, 75 million people are largely left to fend for themselves. On one hand, this allows the country's many insurgencies to move forward as they please (Herbst and Mills 2013, p. 79). Particularly in the east, their activities include the indiscriminate murder, raping, kidnapping, and child recruitment of civilians, as well as the pillaging of their communities (White 2014, p. 5). On the other hand, civilians are left entirely insecure as they face continued attacks and human rights abuses. Regional and ethnic divisions often exacerbate the levels of violence directed at citizens, which leaves some groups more vulnerable than others (Kongolo and Zamberia 2016, p. 189). Also, the state itself has been the perpetrator of violent acts. Given the lack of professionalism and respect for human rights institutionalized in the military, this is unsurprising (Herbst and Mills 2013, p. 80).

The Democratic Republic of the Congo's failure has also been evident in its poor provision of public goods and services to citizens. The state's public education system is one such example. As of 2010, more than 5 million children were not receiving any levels of schooling due to the effect of violent conflicts and displacement on access to education. In the area of health care, about 70% of the population currently lacks meaningful access. This is the combined result of the continued violence, the nonexistence of outlets for care, and insurmountable distances from rural to urban areas. Dilapidated infrastructure in the form of crumbling roads and limited communication structures only compounds this situation. In response to the state's virtual nonexistence, international organizations and civil society groups have taken the lead in assisting suffering populations. In 2007, the International Rescue Committee began to carry out emergency education programs meant to bolster the resiliency of schools and provide training to new teachers. Nongovernmental

and religious organizations have made efforts to improve the state's health situation. By 2005, about half of the DRC's health institutions were privately managed and by 2011 the IRC had granted access to medical care to 4.2 million people (Kongolo and Zameria 2016, pp. 196-200).

Over nearly two decades of conflicts, the number of internally displaced persons in the DRC has totaled 1,500,000 people (IDMC). Most of this population is located in the country's eastern region, primarily the 5 provinces of North Kivu, South Kivu, Katanga, Orientale, and Maniema where the brunt of conflicts continue (White 2014, p. 5). Whereas the Colombian state's response to its crisis of internal displacement during the Uribe years primarily involved the provision of immediate humanitarian assistance, oftentimes in partnership with international organizations, in the Democratic Republic of the Congo the failed state has rarely been capable of directing its own funds, goods, or services to afflicted areas. Instead, international organizations have taken on this responsibility. From 2004 to 2014, the international community contributed annual funds ranging from \$225 million to \$740 million to humanitarian aid efforts in the DRC (Brookings 2014, p. 17). The United Nations Organization Mission in the DRC, which has been in place since 1999, has led international efforts to provide a breadth of political, military, and humanitarian assistance services to the state. Its primary mission has been the protection of IDPs living in camps where they are most vulnerable, as well as the provision of aid to address their most basic needs. The UNHCR has also worked with Congo's National Committee for Refugees to manage the largest IDP camps in the province of North Kivu (White 2014, pp. 10-12).

Although the continued work of international organizations in the Democratic Republic of the Congo has undoubtedly helped to save the lives of countless internally displaced persons and to lessen their suffering, it has also cultivated a high level of dependency based solely on the delivery of short-term assistance. While in Colombia the state was always a primary actor in the delivery of public goods and services, the Congolese state's overt reliance on international efforts has only served to reinforce its failure. When international organizations appear to be better equipped to address the needs of IDPs than the state, individuals undoubtedly assign greater legitimacy to these non-state entities (Daley 2013, p. 899). More pernicious, however, is the negation of citizenship and state responsibility that occurs as a result of an overwhelming reliance on the international community. In the DRC the state has failed to uphold its obligation to assist its citizens and feels less inclined to do so in the future given the assurance that international intervention will occur when necessary (Daley 2013, pp. 893-95).

Lacking any of the significant measures to strengthen the state or to confront armed rebels that took place in Colombia under President Uribe, the Congolese state has not progressed much beyond short-term responses to the needs of its internally displaced persons. Rather than the state eventually gaining the autonomy to develop a robust judicial framework, engage in peacebuilding processes, or deliver comprehensive reparations, as was the case in Colombia following the election of President Santos, Congo's labors in these areas have either been weak or altogether absent. The Congolese state has not directly passed legislation to hold itself responsible for providing assistance to IDPs. In July 2014 it did ratify the African Union Convention for the Protection and Assistance of IDPs, suggesting greater commitment to this issue. If precedent is any indication, however, it is unlikely this will bring about substantial changes. Since the DRC's earlier signing of the Pact on Security in 2006, which bound the states of the Great Lakes Region to a

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commitment to the security of their citizens, few tangible efforts have been advanced. Furthermore, as the 2002 Pretoria Agreement showed, the state's attempts at peace have been insufficient. Another attempt in February 2013 through the Peace, Security, and Cooperation Framework for DRC and the Region bound the government to more comprehensive attempts at security reform and efforts to stabilize and reintegrate IDPs. This has had little effect, however, because the will of the state and implementation of changes at the local level have lagged (White 2014, pp. 9-11).

The lack of reparations instituted by the state due to the unsuccessful pacification of territory in the east is most salient in the living situations of the internally displaced. Without ongoing comprehensive repatriation or land restitution efforts as in Colombia, the Democratic Republic of the Congo's IDPs are unable to escape the cycle of vulnerability that plagues them. It is estimated that approximately 75 percent of IDPs in the Democratic Republic of the Congo live in host communities, with the other 25 percent residing in settlements and camps (White 2014, pp. 6-7). Within these host communities, IDPs live with friends, family, or strangers willing to provide shelter out of kindness, solidarity, or mutual benefits. Over short periods of time, this relationship may prove positive and may even result in the deepening of social ties. In the longer term, however, the waning of resources and increased pressures on host families can lead to insecurity. The internally displaced may choose to move elsewhere, likely to a camp or settlement, or may be expelled (Rohwerder 2013, p. 2). This lack of stable habitation only adds to the disheartening future prospects of IDPs in the DRC.

It is clear that although Colombia came perilously close to state failure prior to the presidency of Álvaro Uribe, his "Democratic Security" policy and the increased capacity of governmental institutions that followed ultimately reasserted the strength of the state. While the combative period from 2002 to 2010 saw the state primarily rely on immediate and reactive efforts to address its crisis of internal displacement, the election of President Juan Manuel Santos in 2010 ushered in a new period of more long-lasting initiatives. Thanks to the stronger state he inherited, President Santos was able to put forth an impactful juridical framework, carry out two-phase assistance and reparation projects, and work towards a critical peace agreement with the FARC. Despite many remaining hardships to face, these combined efforts bode promising for the future of IDPs in the country. Contrary to this, once the First Congo War broke out in the Democratic Republic of the Congo in 1996, the state could not muster the strength to pull itself out of failure and perpetual violence. The Congolese state has since not been able to move beyond the immediate provision of humanitarian aid led by international organizations. Judicial, peacebuilding, and reparation efforts have proved futile, leaving IDPs in incredibly vulnerable situations. While in Colombia state strengthening and increased capabilities enabled the improvement of IDPs' long-term circumstances, in the DRC the state's failure has prevented the introduction of meaningful efforts to address the struggles of the internally displaced. □

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Chapter 8:

Political Power and Barriers for Internally Displaced Women in Colombia

Colleen Ward

□ Violent conflict has many kinds of victims, each of whom face distinct challenges. Victims' recourse and ultimate fates depend on their government's ability and willingness to provide resources to its victims. Colombia provides a particularly interesting case, because though it has one of the longest ongoing conflicts in the world, it has had uninterrupted democracy for the duration of the conflict. Colombia has consistently shown its commitment to the rights of its citizens and its internally displaced persons specifically through the legislature and judiciary. Though eighty percent of the casualties of Colombia's fifty-year war have been men, women have been disproportionately displaced and are victims of domestic and sexual violence. In response, internally displaced women have utilized existing government avenues to demand their rights and have organized in new ways to make claims on the state. However, organization for women comes with heightened risk. With the support of the state, organizations of displaced women have broken down social barriers and made significant political and material gains, but continually contend with a violent backlash from groups intent on reestablishing hierarchy and traditional social order.

In my paper, I will demonstrate both that conflict has created new urgency for political participation and organization for women, but has also increased the risks of any such participation. First, I will examine the scope of the conflict and the toll violence has taken on Colombia's population generally. Then, I will demonstrate how the legislature and in particular the judiciary have reformed and upheld the rights of internally displaced persons since 1997. Then, I will look at how that legislation and court action have viewed the rights of internally displaced women specifically. I will look at some specific examples of women's mobilization that have risen in response to violence against displaced women and the violent backlash to that activism. I will then show how in face of limited resources women's groups have utilized legal, state, private and international resources to advocate for the rights of displaced women. Finally, I will consider the implications of Colombia's experience for displaced women's mobilization in Colombia in the future.

Over the course of the fifty years of fighting amongst the state, FARC, ELN, and various paramilitaries, the effects of violence have been felt throughout the country. Since

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1966, an estimated 220,000 people have been killed as a direct result of the conflict (Yuhás, 2016). Far more have been displaced. Since 2000, the Internal Displacement Monitoring Center estimates an average of 300,000 people have been displaced each year. Though the rate of displacement has been declining since 2004, the Unit for Assistance and Comprehensive Reparations to Victims estimates six million Colombians are displaced today (Ferris 2014, p. 21).

Displacement and the personal violence that often follows have disproportionately affected women. Almost eighty percent of displaced persons in Colombia are women or children. Over ninety percent of internally displaced persons come from rural northern western Colombia. Most internally displaced persons then move to large cities and often live in slums. Bogotá has the highest number of internally displaced persons with 270,000. Displaced persons face disproportionate levels of poverty, domestic violence, and sexual violence. Ninety-eight percent of internally displaced persons live below the poverty line. An estimated fifty-two percent of displaced women are victims of domestic violence. Sexual violence is often a tactic of war used by all sides, and is widely recognized as being hugely underreported (Feldman 2013, p. 30). However, despite these staggering statistics, the Colombian government has made concerted legislative and practical attempts to respond to the needs of internally displaced persons.

The Colombia legislature and judiciary have established the rights of internally displaced persons and the mechanisms by which the government should secure those rights. The Colombian legislature passed laws establishing the rights of internally displaced persons even before the Guiding Principles on Internal Displacement was published by the United Nations. However, in practice, the government often failed to provide these services. Under Colombian law, any citizen can submit an “acción de tutela” to the Constitutional Court whenever one of their Constitutional rights has been violated. In 2004, the Constitutional Court reviewed over 100 such tutelas filed by internally displaced persons and concluded as Elizabeth Ferris as the Brookings Institute explains, that “fundamental human rights of the country’s internally displaced persons were being disregarded in such a massive, protracted, and reiterated manner that an ‘unconstitutional state of affairs’ had arisen” (Ferris 2014, p. 18). From February 2004 to December 2009, the Constitutional Court issued 84 “autos” or court orders relating to the administration, monitoring and reporting by government branches responsible for providing government services to IDPs (Ferris 2014, p. 18). The legislature and executive have also taken additional steps on their own to expand the protections for IDPs including the Law of Justice and Peace in 2005 guaranteeing the right to truth and reparations for victims of armed conflict, the Presidential Decree 1290 in 2008 establishing reparations for IDPs, and The Victims and Land Restitution Law in 2011 formally recognizing the existence of an armed conflict for the first time and providing more mechanisms for IDP reparations and government services.

In recent years, the Judiciary has begun recognizing and addressing the particular security concerns facing women. In 2008, in Auto 0092, the Constitutional Court acknowledged sexual violence as a frequent tactic in the conflict and stated that the Colombian government had an obligation to “prevent the disproportionate displacement of women and to work to ensure that displaced women are guaranteed all of their rights”. In the same Auto, the Court also ordered the Office of the Attorney General “to make progress on investigating cases of sexual violence” (Feldman 2013, p. 32). The Law Against

Violence Against Women in 2008 established various programs including an emergency hotline and guidelines for NGOs, police, and hospitals for victims of violence (Feldman 2013, p. 33). However, these programs are limited to specific geographic areas and awareness and access to them remains low. Another Court ruling in 2010 ordered increased protection for IDPs’ healthcare services and specific protections for female IDPs. In 2013, the Constitutional Court issued Auto 0098 addressing the risks female IDP leaders faced and “ordered the government to provide immediate protection through a mandatory presumption of risk rather than through the usual bureaucratic process of official estimation risk” (Lemaitre 2015, p. 20). President Santos has addressed the violence women face because of the ongoing conflict, but accessibility to resources for displaced women remains strikingly low.

The constant legal reform for internally displaced persons confirms reports that accessing government services can be very difficult. In “Shifting Frames, Vanishing Resources, and Dangerous Political Opportunities”, Lemaitre and Sandvik suggest that in a time when the government does not always have the resources to secure the rights of all its citizens, particularly those living far outside the reaches of the major cities, the frequent passage of new laws tries to reaffirm human dignity and rights in a violent context that continually undermines human dignity (Lemaitre 2015, p. 11). Even when the government cannot deliver on its own legislation, it at least confirms what its citizens’ rights should be, and provides some manner of recourse for them to try to secure them. This attitude could be taken as an encouragement for other community organizations to unify and secure their own rights with the knowledge that the state supports such efforts, physically when possible and always in principle. The system’s dependence on tutelas requires individual activism on the part of internally displaced persons, and the Court’s repeated responsiveness provides some encouragement to organizers. The state’s effectiveness in enforcing its own laws has been very mixed, but at the very least provides internally displaced persons and women in particular legal recourses and state confirmation of their rights, and encourages them to organize and claim those rights from the state and fill in the gaps when the state falls short.

The conflict and large-scale displacement requires activism for women to obtain government services, but any activism, especially for women, comes with risk. Traditional acceptable advocacy by women was limited to advocating for the basic material needs of one’s children and grandchildren. This advocacy was generally taken as nonthreatening because these women and their cause were thought of as apolitical (Lemaitre 2015, pp. 13-4). Extending the role of mother to the community allowed women to voice their opinions on local healthcare, water, food, and schools. It allowed women to expand their role in public life and make direct claims on the state without provoking political opposition, because they were seen as inherently apolitical themselves. However, this framework is inherently limited, because it cannot cover the scope of issues relevant to women, particularly the internally displaced population; every cause has to be connected to issues of children’s wellbeing and do not challenge traditional family structures or gender roles. Activism against domestic violence, sexual violence, and displacement for women can threaten the traditional social order. This kind of activism inspires much more resistance, and violence can sometimes prevent participation at all.

Violence against female activists is so widespread and difficult to prosecute, it presents a huge barrier to political participation. Violence has been used by all sides of the armed

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conflict as a means of intimidating all communities regardless of political activity. The constant threat of violence produces fear, and many adversarial groups take advantage, promising security in exchange for political loyalty. Since participation in a women's group upsets traditional gender balance, threatens the power dynamic established because of this violence, and attempts to mobilize communities against all competing armed groups, it places women at heightened risk for violence from all sides of the conflict. Armed groups target female leaders and their families to discourage political activism (Feldman 2013, p. 38). These threats are not abstract; the Aguilas Negras group for example, is a paramilitary group known for "death threats, committing acts of sexual violence and intimidation (including a few cases involving women's daughters), following women to their homes and organizations, and otherwise threatening them in person, by telephone and email" (Taylor 2011, p. 22). High profile assassinations and seeming immunity for perpetrators can successfully portray activism as thankless, dangerous work.

Lack of reporting, slow government response, and lack of resources to administering agencies makes confronting the violence directly very difficult. The social stigma and the lack of successful legal recourse prevents many victims of reporting crimes altogether. When sexual violence is used as a weapon in conflict, women often do not report because it is treated as bringing shame to her community and family. Even for reported crimes, legal recourse is very limited. Survivors of sexual violence are entitled to medical care by law, but women in rural areas frequently do not have easy access to medical services, and medical professionals have been reported not to treat women as victims but to blame them for their attack. Resources meant to help victims such as Rutas de Atención Integral have relatively low awareness and do not reach significant portions of the country (Feldman 2013, p. 33). Though law states hospitals must treat IDPs free of charge, many hospitals refuse to treat IDPs, and IDPs themselves often lack the documentation to prove their legal status. The International Organization for Migration claims that approximately half of IDPs do not seek medical treatment because they cannot afford it (Feldman 2013, p. 26). With lack of medical attention and continued stigma and intimidation, gathering the necessary evidence and prosecuting the perpetrator is very difficult.

The state formally recognizes the heightened risks for female leaders, but enforcement remains a perpetual challenge. In 2013, the Constitutional Court declared that violence against internally displaced female leaders was so widespread, the Court "ordered the government to provide immediate protection through a mandatory presumption of risk rather than through the usual bureaucratic process of official estimation of risk" (Lemaitre 2015, p. 20). Securing formal protection from the state is now significantly easier, but being a formally recognized and protected group can often be only nominal protection. Even larger organizations that have some sort of government protection are not in practice really protected from violence. For example, spokeswomen for the League of Women, one of the largest and most well-known advocacy groups, says they feel highly vulnerable to violence and of the 144 reported crimes against the organization's members including rape and the disappearance of family members, none have been solved (Brodzinsky 2016). The government has been unable to provide real protection for these groups, and so violence is simply a daily risk for members.

Angélica Bello's story illustrates both the risk posed to female activists and the lack of trust in local authorities to protect all of its citizens. Angélica Bello, the founder and director of the National Foundation in Defense of Women's Rights, lived under the

constant threat of violence. In 2009, when leaving the Ministry of Justice in Bogotá she was abducted and sexually assaulted. Her attackers told her they meant her attack as punishment for her activism (Bergtora Sandvik 2013). Her security risks became so severe she was displaced many times and was eventually granted two security guards by the Colombian government. She was found dead in her home on February 16, 2011. Her death was ruled a suicide, but international human rights groups called for an investigation, as her death came within days of her most recent receipt of death threats.

Bello’s work is a testament to the courage and perseverance of activists despite enormous risk. Her outspokenness about the realities of personal violence against women and her willingness to speak about her own experience of sexual violence is demonstrative of women working to remove the stigma around assault, and refusing to be intimidated. After her assault, she reported, “I was very scared. When the men abused me, beat me, the first thing they warned me was not to report it. They said that I should look at them very well, in the face, because I could see them again at any moment” (Amnesty International 2013). Violence is frequently used as a tool to humiliate and silence its victims, but Bello refused to be silenced. She used her own experience as further evidence of the extreme need for increased protections for women and for women to be willing to report attacks and try to hold their attackers responsible. With the help of activists like Bello, many women have begun seeing activism as the dangerous, but only possible escape from the fear and powerlessness many displaced women feel on a daily basis.

The pressing needs, scale of violence, and lack of alternative options have pushed women into political participation. There are 66 women’s IDP groups throughout Colombia, despite the well-known risk of affiliation with such groups (Lemaitre 2015, pp. 7-8). These groups help overcome the shadow of violence by creating a newfound sense of agency and hope; they transform the perception of the conflict itself and empower people not to see themselves asking for help, but demanding the rights which are owed to them (Brodzinsky 2016). These groups have been very innovative in reframing their political cause and utilizing all available means to secure their rights.

Activism on more controversial issues including domestic violence, sexual assault, and including displaced women in reparations payments utilizes three main tools: legal advocacy, private networks of female organizations, and international aid. Each presents its own advantages and challenges. Most groups use a combination of these tools to effect change and draw support and legitimacy from every level of government and society possible. Women’s groups have been very innovative and pragmatic, using resources and advantage as they have presented themselves to affect the change that is possible in that moment.

Since the Constitutional Court has been an active agent for the rights of displaced women nationally, many women’s groups have utilized the tutela petitions and have advocated for the creation of new laws and recognition for the particular risks facing internally displaced women. Women’s groups have been heavily involved in Constitutional Court proceedings relating to internally displaced women’s rights and have used legal means to secure resources and proper local enforcement of laws. Women’s groups were crucial to Auto 0092, the first court order recognizing the particular risks facing internally displaced women. Women’s groups came together to found the Auto 0092 Follow-Up Committee to monitor the Auto’s implementation on the ground. Further, the groups used the ruling as means to frame their advocacy for women’s safety and equal

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opportunity in terms of Constitutionally guaranteed rights that already justified their demands (Lemaitre 2015). This framing also aids advocacy for the enforcement of subsequent laws addressing reparations for victims. Advocacy groups have changed some of the language in their publications to use the word “victim” itself more often (Lemaitre 2015). This reframing emphasizes that women’s guarantees of safety and representation are the norm as stated by the Constitution and the Court, and internally displaced women are victims, robbed of their rights by the ongoing conflict.

The Constitutional Court is cognizant of and responsive to the failures of municipal governments and lower courts to uphold federal laws, but often does not have the authority to enforce laws when municipal governments ignore its rulings. Since 2008, Colombian law has required municipalities to include internally displaced persons in the local budget through the Single Integrated Plan (PIU). In 2010, the Constitutional Court reasserted through Auto 383 that the Single Integrated Plan process must include the direct participation of internally displaced persons (Lemaitre 2015, p. 21). National orders on PIUs require IDPs to participate in politics and create a national mechanism by which IDPs can voice their interests. When municipal governments denied these rights, the League of Displaced Women petitioned the state to try and secure a strong voice in local government. In 2010 after a series of attempts to engage the municipal government directly, the League of Women filed a tutela against its mayor, but was dismissed by the municipal court. The Constitutional Court overruled the municipal court and ordered the PIU to include IDPs, but the order was not followed. Without any other legal avenues, the League of Women has few other means of demanding their rights. The League of Women indicated to interviewers that they believe the local government and its contractors are tied to right-wing paramilitaries that are staunchly against IDP groups such as the League of Women which they associate with leftist politics (Lemaitre 2015, pp. 23-4).

In contrast, however, in the city of Mocoa, legal action temporarily resulted in real political power for internally displaced people, especially displaced women. More than half of Mocoa’s population is internally displaced people, and some IDPs have a role in local politics. In 2010, when the Constitutional Court ordered Mocoa to enact PIU procedures, reforms on the ground were significant (Lemaitre 2015, pp. 25-7). The municipality formed a committee of sixteen elected IDP representatives for a committee to represent IDP interests in PIU planning. This group, the Mocoa Committee of IDP Organizations, was much more active than the municipal government had intended and used its platform in PIU meetings to demand a role in the municipal government and an increase in resources directed towards IDPs. However, in 2012, the Victims Law required a different representative body, which replaced the Mocoa Committee of IDP Organizations. This committee had many of the same members, but was less powerful and so the new budget it helped pass did not include any provisions for internally displaced persons (Lemaitre 2015, pp. 25-7). Discouraged, the group eventually disbanded. Legal advocacy alone cannot address the needs of all displaced communities, particularly when municipal governments are operating with limited resources and do not wish to make the needs and opinions of its internally displaced population a priority.

When the state is lacking in resources or proves ineffective at guaranteeing rights, many women’s groups have developed networks to provide resources for one another. The League of Displaced Women has become well known internationally for its “City of Women”. Through a combination of private aid and public funding, the members of the

League of Women were able to buy a piece of land outside Turbaco and begin building a new community. They constructed the 100 homes in the community themselves. Though their efforts have been continually frustrated by violence and the lack of representation in the governance of Turbaco, the League of Women has provided its members with a community and sense of agency. Women who would likely never have participated in political life have become strong voices for change. Patricia Guerrero, a founder and the director of the group, explains, “When we started off, these women couldn’t look a mayor in the eye. Now they’re not afraid of anything”. The neighborhood is an unapologetic declaration of the power and resiliency of its members—from declaring their neighborhood as its own city to naming the city’s main street the Street of Women Warriors (Brodzinsky 2016).

Another group, Butterflies with New Wings Building a Future, won the 2014 United Nations Nansen Refugee Award for its work on resettlement, technical training, and legal aid for displaced women. The Butterflies focus on providing education and resources for abused women and also on encouraging them to report crimes to the police. The Butterflies have 120 members who volunteer their time and resources to holding demonstrations, lobbying government agencies, helping abused women take legal action against their attackers, and even taking women in need into their own homes. Despite several violent attacks on their members, the Butterflies try to maintain visibility as an example in a place where women are routinely silenced. One member declared that there is “a Butterfly flying in every area” of the city, so members can know and address the needs in the community (Preston 2014). This presence throughout the city, despite their small numbers, gives a sense of choice and network to displaced women. Many of the members joined the group after benefitting personally from its services. Gloria Amparo, a member of the Butterflies, repeatedly stresses the importance of feeling that camaraderie and support. Providing education and a community can transform the way women perceive their situation. She explains, “When a woman knows her rights and what the responsibilities of the state are, it allows her to have choices and make decisions. Knowing your rights, you can better defend yourself and your community” (Divers 2014). According to its members, this empowerment through knowledge and choice dramatically changes the way women perceive their situation and their willingness to demand their rights.

International organizations and NGOs can provide the necessary resources, coordination among agencies, and monitoring when government entities cannot. The United Nations High Commissioner for Refugees concentrates specifically on monitoring uniform enforcement of Colombian law on gender based violence. The Catholic Church also remains a powerful force often fulfilling basic needs including food, shelter, and help with government registration for IDP programs. However, it has not been a particularly powerful rallying point for female activists. International organizations have at times had a strained relationship with the Colombian government when rights groups accused the government itself of pursuing political objectives against armed groups at the expense of human rights and even committing human rights violations itself (Feldman 2013, p. 28). However, their presence has been important for accurate, impartial monitoring and for helping to build networks among activist organizations. They have generally remained relatively apolitical and have supplemented rather than led or determined the activism of displaced women’s groups.

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Women's organizations have benefitted from the resources and outreach of international organizations. In resource-scarce areas, international organizations can facilitate many of the services women's groups provide including in part the construction of the City of Women and some of the activism of the Butterflies, particularly through the monetary reward resulting from UN recognition. The first five allies the League of Displaced Women have listed on its own website are the United Nations Human Rights Council, National Endowment for Democracy, Global Fund for Women, USAID, and International Women's Tribune Center—all international organizations, two of them American. These resources are extremely helpful, but international aid generally remains a supplementary rather than driving force of activism.

In summary, Auto 0092 is representative of both the power and limitations of women's advocacy. Women's advocacy and tutelas were crucial to the court order, and Auto 0092 still represents an enormous victory for internally displaced women and the recognition of women's rights generally. Auto 0092 is an affirmation of the national government's commitment to the rights of women, and women's groups use it as a rallying point to encourage further work. After Auto 0092 was passed, many of the women's groups responsible coalesced to build a network to monitor its local implementation. This is another strong example of resourcefulness and harnessing government power to affect change, and shows an effort to expand the movement nationally to bring rights more uniformly to those who have not typically had their rights upheld. However, despite all these encouraging signs, enforcement of Auto 0092 is generally accepted as weak, and many women see very little difference in their quality of life and political position since its implementation (Lemaitre 2015, p. 19). Nevertheless, it remains an affirmation of internally displaced women's rights, a rallying point for activists across the country, and a useful tool for future activism. It signals that the state supports the rights of women, and the future for their rights and advocacy is hopeful.

The rights and activism of internally displaced women in Colombia seem to be in a similar position as Auto 0092: nationally recognized and with many successful stories, but still severely constrained by local violence and lack of implementation. The guarantees of rights outlined in national law and repeatedly upheld by the Constitutional Courts still appear aspirational rather than practical. However, they provide the basis under which women advocate for change, demand their rights from state agencies, and inspire one another to organize despite the enormous risks involved. Women's groups have shown tremendous resourcefulness and innovation combining all the legal, state, international and personal resources at their disposal to effect change nationally and locally. These groups have had important successes ranging from holding the government accountable to its own legislation to creating safer communities and means for women to speak up.

However, two of the most notable achievements of these groups cannot be quantified. First, these organizations have garnered national and international awareness of the plight and power of displaced women in conflict zones in Colombia. Second, activism has turned women who had previously not found any means by which to secure their basic rights into activists. The leadership skills developed amongst these women are the skills required for future political participation. Interview after interview show women expressing that their experience having a voice, feeling a sense of camaraderie, and knowing and demanding their full rights has transformed their perception of politics and their role in it. This paints a much more hopeful picture for future activists. Statistics on displacement, poverty, and

violence among the displaced remain staggering. However, national legislation and court rulings affirm women’s rights and value, and as women’s groups gain membership and visibility, they relay a hopeful message to displaced women that is contagious: that they have inalienable rights owed to them and that a network of national and international activists is working tirelessly to secure those rights for all displaced women. They suggest a cautious optimism about the future of activism and wellbeing for displaced women in Colombia. □

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Part III:
Corporeal Governance

Chapter 9:

Agency, Distance, and Distrust: Compulsory Vaccination in the United States

Konstantinos Karamanakis

□ Eight in ten Americans believe that parents should be legally required to vaccinate their children, and six in ten believe that unvaccinated children should be barred from enrolling in public schools (CNN/ORC 2015). Vaccines are popular, and for good reason: reports of once ubiquitous childhood diseases like, measles, mumps, polio, pertussis, and tetanus have decreased more than ninety percent since the legalization of their respective vaccines; and the Centers for Disease Control and Prevention (CDC) estimates that vaccinations will prevent more than twenty-one million hospitalizations and nearly seven-hundred thousand deaths among immunized children born between 1994 and 2014 alone (CDC 2014). It is understandable, therefore, given the widespread popularity and demonstrated efficacy of compulsory vaccines, why every jurisdiction in the United States currently mandates a uniform schedule of age-specific immunizations for enrollment in public schools. It is less discernable, however, why forty-eight states legally exempt parents from immunizing their children against vaccine preventable diseases (VPDs) when the practice conflicts with their religious beliefs – and why eighteen states exempt parents from immunizing their children for mere reasons of conscientious doubt. This paper will explore the motivations among every state legislature save Mississippi’s and West Virginia’s to allow religious or philosophical exemptions to vaccination laws.

First, we consider whether a state has a vested interest in immunizing a population, and if so, under what circumstances the responsibility of the state to promote the general welfare takes precedent over the right of the individual to live a self-determined life. Decades of medical research proves that vaccinating oneself reduces the risk of personal infection and the risk of infection among susceptible individuals unable to be vaccinated – perhaps best demonstrated by the marked reduction in cases of influenza-related morbidity and mortality among the elderly in communities with high rates of childhood vaccination against influenza (Roser 2007; Fine et. al. 2007, p. 912). Moreover, the Supreme Court has continually upheld the right of a community to “protect itself against an epidemic of disease which threatens the safety of its members” (*Jacobson v. Massachusetts*, 1905), and its 1944 decision that “the right to practice religion freely does not include the liberty to expose the community or the child to communicable disease, or the latter to ill health or

death” (*Prince v. Massachusetts*, 1944). The legal status and public health benefits of vaccination laws demonstrate the vested interest of states in vaccinating children against VPDs, and that this interest need not legally nor medically be subordinated to the personal preferences of a parent.

Second, we consider what social and political developments have compelled states to subordinate their prerogative to protect against VPDs, to the demands of parents who believe that vaccines are medically unnecessary and/or unconstitutional. The CDC reports an average of less than ten-thousand complaints from the parents of more than ten million children immunized per year (most of which regard temporary rashes near the point of injection, headache, fever, and crying). Less than one percent of children in the United States are totally unvaccinated, and less than twenty-percent of children are under-vaccinated; of these un- and under- vaccinated children, just fifteen-percent are due to non-medical exemptions (Cooper et al. 2008, p. 151). This data suggests that most vaccine-hesitant and non-compliant parents nevertheless pursue some form of vaccination. Indeed, a thorough analysis of the causes of vaccine non-compliance reveals that most parents of un- or under-vaccinated children merely question the necessity and efficacy of the recommended twenty-eight doses of nine vaccines for children aged six – rather than ardently and definitively oppose vaccination. Thus, this paper concluded that non-medical exemptions to vaccination laws are not the result of increased political pressure from the minority of conscientious objectors who actively refute the necessity and constitutionality of vaccines, but a politicized response to a growing plurality of skeptical parents who casually support exemptions without necessarily taking advantage of them.

Finally, we consider why parents confused by modern medicine or suspicious of government intervention are more numerous today, and more reluctant to defer to the expertise of public health specialists today, than at any time in the previous half-century. The success of vaccines in reducing the prevalence of once unstoppable illnesses has reduced parental concerns of vaccine-preventable diseases and increased the reliance of healthcare professionals on vaccination. Because most guardians have neither experienced, nor known someone who has experienced, the effects of VPDs, they feel justified in questioning the necessity of immunizing their child against them. The present arrangement between the federal government and the manufacturers of vaccines may breed mistrust among parents, thus emboldening their suspicions. Moreover, the proliferation of online medical sources grants parents more agency vis-à-vis their health care providers, thus eroding the privileged position of professional medical opinion and oftentimes legitimizing non-scientific sources whose findings are presented in online searches in the same manner as scientific sources. I therefore conclude that the effects of these developments have transformed the issue of mandatory immunization from what Mala Htun considers a technical issue – that which requires an advanced education and intensive training in order to understand, like tax brackets or offshore balancing – into an absolutist issue – that which invokes a powerful, visceral response from novice and expert alike, like gun control or abortion (Htun 2003, p. 13). The number of ardent antivaccination parents has not surged, but resistance towards immunization has become an acceptable opinion in what is now more than ever a moral debate on whether parents or politicians know what is best for their children. Unwilling deny such antivaccination sentiments, despite the vast majority of doubtful parents choosing to ultimately vaccinate their children in some form, states allow for non-medical exemptions to immunization laws.

A Legal History of Vaccinations in the United States

Americans believe deeply in the autonomous self, and cherish the right of every citizen to live a self-determined life, free from arbitrary interference, regardless of religion or creed. The First Amendment to the Constitution of the United States stipulates that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” while the Fourteenth Amendment stipulates that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.” If both state and federal governments are prohibited by the Due Process Clause the Equal Protection Clause from implementing laws that discriminate against certain religious traditions, are states constitutionally required to exempt pious parents from immunizing their children if doing so is incongruous with their faith? Not necessarily. A state may limit the religious freedom of an individual when the manifestation of his preferences would endanger the general welfare. Indeed, the Supreme Court of the United States has continuously upheld the predominance of the Lockean maxim *Salus populi suprema lex esto*: the welfare of the people shall be the supreme law (Locke 1689).

The Supreme Court first prioritized the State’s prerogative to vaccinate in 1905, when Reverend Henning Jacobson sued the city of Cambridge, Massachusetts for fining him upon refusing to vaccinate his youngest son from smallpox in 1902. Jacobson was a Swedish-born immigrant who himself had suffered at the hands of a botched inoculation as a boy. The early smallpox vaccine was crude by today’s standards, but certainly its risks were fewer than those posed by the prospect of contracting smallpox. Remembering his own hardship, however, the Reverend argued that the Fourteenth Amendment ought to spare his son from the “pollution and fifth and disease” of “blood-poisoning” (Parmet et al. 2005, p. 652). He would not be successful in avoiding his fine.

The Supreme Court rejected Reverend Jacobson’s contention that the Due Process Clause shielded him from public health interventions - especially considering that the 1902 outbreak of smallpox in Cambridge had yielded more than two-thousand-three-hundred invalids, and nearly three-hundred deaths (compared to seven-hundred invalids and ninety-seven deaths in 1901; Parmet et al. 2005). Arguing for the majority, Justice J. M. Harlan declared that “upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members” via inoculation (*Jacobson v. Massachusetts*, 1905). The Supreme Court would uphold and expand *Jacobson* in its *Adams v. Milwaukee* decision that states may delegate its vaccination prerogative to municipalities (1913), its *Zucht v. King* decision that excluding non-vaccinated children from schools does not constitute arbitrary discrimination (1922), and its *Prince v. Massachusetts* decision that the First Amendment does not grant a parent the right to expose a community or their child to a vaccine-preventable disease by refusing an immunization (1944).

These rulings demonstrate that states are not constitutionally required to blindly respect the wishes of a lay person whose particular faith tradition is incongruous with vital public health promotions. Indeed, it is perhaps *more* constitutionally controversial to vest the State with the power to grant such exemptions than not: for doing so forces governments to either assess the authenticity of a person’s reported faith through some form of criteria – which could violate the First Amendment’s stipulation that no law shall be made “respecting an establishment of a religion” – or blindly accept every request for a religious exemption –

which would virtually nullify the Court’s interpretations. In 1971, for example, the Massachusetts Supreme Judicial Court ruled in *Dalli v. Massachusetts Board of Education* that “state exemption for objectors who believe in the tenets and practices of a recognized church or religious denomination violates the Equal Protection Clause” because it discriminates against parents who hold “sincere, though unrecognized, religious beliefs” (Calandrillo 2004, p. 388). The New York State Supreme Court ruled similarly in its *Sherr v. Northport-East Northport Union Free School District* (1987) decision. Moreover, Rollins School of Public Health Professor Alan Hinman’s notable 1998 study of religious exemption laws found that thirty-two of the forty-eight states that currently permit such exemptions have never denied an application (Hinman 1998).

In states with more stringent criteria, parents are founding their own religions. Such makeshift parishes include the Fellowship of Divine Rights, the Universal Family Church, the Church of the Illumination, and the Rosicrucian Fellowship – each of which specifically “object to any ungodliness entering the Body Temples of themselves or their children” (Vaccination Liberation League). The Congregation of Universal Wisdom, for example, was founded in 1975 by a retired chiropractor in New Jersey. Today the Congregation claims more than five-thousand members, its only tenet that “no court or civil legal body or any tribunal anywhere in the universe shall proclaim itself master in judgement over the physical, mental or spiritual health of any living thing;” its only sacrament an annual seventy-five-dollar donation to the founder himself (McNeil 2003; Calandrillo 2004, p. 357). Religious exemptions, originally introduced to placate the few who, like Reverend Jacobson, sincerely oppose immunization, now cater to the growing many who wish to avoid vaccinating their children for reasons of unexamined doubt and confusion.

Vaccination as a Science

States are legally permitted to require the immunization of children against preventable diseases when doing so advances the general welfare – and medical science indicates that it does advance the general welfare. As previously noted, the annual rate of cases of the most lethal childhood diseases have been greatly minimized by vaccination (CDC 2014). When a community is immunized, VPDs lack a sufficient group of bodies within which to multiply and spread (a phenomenon known as herd immunity), and the rates of infection plummet. For this reason, the United States has experienced a one-hundred percent reduction in cases of smallpox, diphtheria, polio; a nearly one-hundred percent reduction in rubella, influenza, measles, and tetanus; and an eight-percent reduction in acute Hepatitis B (Roush and Murphy 2007). The chances of suffering from these highly-contagious diseases – diseases that often resulted in heart failure, seizures, brain damage, deafness, blindness, paralysis, and even death for tens of thousands of American children ever year before the introduction of modern vaccinations – are today less than one in one-million.

Surely the near-eradication of VPDs is an achievement, but at what cost have we freed the polity from the throes of disease? Opponents of mandatory vaccination, like British medical researcher Andrew Wakefield and American M.D. Robert Sears, argue that vaccines overwhelm children’s immune systems, produce symptoms worse than those associated with VPDs, and cause autoimmune diseases like autism. Medical research accredited by the Centers for Disease Control and Prevention, the American Medical Association, the National Academy of Sciences, and most others conclude that vaccines

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are neither responsible for the recent surge in autism nor for most manifestations of autoimmune diseases in young children. Moreover, where medical research *has* indicated a degree of causality between immunization and suffering, steps were taken to immediately correct the questionable vaccine and provide medical exemptions for vulnerable populations (e.g., the associations between Guillain-Barré Syndrome and the 1976 swine influenza virus vaccine, idiopathic thrombocytopenic purpura and the measles-mumps-rubella vaccine, Acute Disseminated Encephalomyelitis and rabies vaccines made from rabbit CNS tissue, pericarditis and the smallpox vaccine).

For example, many antivaccination groups entertain the theoretical possibility that thimerosal, a mercury-based preservative commonly used in vaccines, causes allergies, autism, multiple sclerosis, diabetes, and sudden infant death syndrome. Yet, levels of this preservative in vaccines has only decreased since the 1950s, making its use in vaccines an unlikely cause of the surge of autism in young children since the 1950s (Clandrillo 2004, p. 397). Some contend that the concentration of nine vaccines to the first six years of a child's life bombards and weakens an infant's immune system. However, babies naturally encounter millions of immunologic cells, bacteria, and viruses every day, and the level of antigenic proteins in vaccines has drastically decreased since 1900 - from more than three-thousand in the diphtheria-tetanus-pertussis vaccine alone to no more than one-hundred-and-fifty in all recommended vaccines from birth to age five (Poland and Jacobson 2012, p. 10). Others purport that enduring a vaccine-preventable disease is *healthier* than receiving a vaccine. immunization. This is a gross falsehood. For those infected with measles, for example, the chances of developing pneumonia are one in twenty; for encephalitis, one in two-thousand; for death, one in three-hundred. The chances of developing encephalitis from contracting the mumps is one in three-hundred; the chances of contracting congenital rubella syndrome from rubella is one in four. The chances of developing these conditions from the measles, mumps, and rubella vaccines is between zero and one in one million (Calandrillo 2004, p. 391). Medical research clearly indicates that requiring the vaccination of children against once ubiquitous childhood diseases promote the general welfare of all the people.

It is worth noting the State's financial interest in immunizing as many children as medically possible. According to the Department of Health and Human Services (HHS), the national measles outbreak of 1989-1991, cost the United States upwards of one-hundred-million-dollars, in addition to the cost of forty-four-thousand hospital-stays' worth in lost work hours (National Vaccine Advisory Commission, 1991). The 2011 outbreak of one-hundred-and-seven cases cost more than five-million-dollars, while the 2014 California outbreak cost more than four-million-dollars (CDC 2014). Indeed, in an unvaccinated world, the CDC predicts that American adults contracting VPDs would result in ten-billion-dollars' worth of unnecessary healthcare costs and more than thirty-thousand otherwise avoidable deaths each year; while the Department of Health and Human Services concludes that for every one dollar spent on the measles-mumps-rubella vaccine, seven to fourteen dollars are saved (Calandrillo 2003, p. 381). Most shockingly, M. Khan and J. Ehreth of the Tulane School of Public Health contend that the sixty-seven-billion dollars it will cost the United States to vaccinate its growing population between 2000 and 2050 will prevent the expenditure of an estimated one-hundred-and-twenty-eight-billion dollars' worth of medical care, and nearly nine-hundred-thousand deaths (Khan and Ehreth 2003). Despite rare occurrences of severe reactions associated with certain vaccines, a clear

majority of scientists and economists agree that immunizations are the most effective means of promoting public health.

Analyzing Their Skepticism

This paper has so far demonstrated that states have a vested interest in vaccinating children against vaccine-preventable diseases, that this interest is legally prioritized above the personal and religious preferences parents, and that nearly all available medical research supports this prioritization. If the vast majority of Americans support vaccines, and neither the Constitution of the United States nor the medical community support non-medical exemptions to immunizations, why has every state save Mississippi and West Virginia endorsed the practice? Because: more parents than ever before are skeptical of – even if begrudgingly supportive or ultimately compliant with – recommended immunizations. Many are mis- or under-informed, many are uncritically accepting of non-scientific sources, and many simply refuse to believe data which supports the state’s prerogative to achieve herd immunity. Indeed, among Wisconsin parents who claimed at least one non-medical exemption in 2012, sixty-five percent reported that they were “concerned that children’s immune systems could be weakened by too many immunizations;” among parents whose children were up to date with recommended vaccines, that statement was still endorsed more than one third of them (Poland and Jacobson 2012, p. 8).

One reason for this skepticism is that the success of vaccines has reduced the prevalence of VPDs to the point at which doctors can no longer take for granted that parents fear the effects of these diseases more than they doubt the efficacy of complex medical science. In a 2006 survey of sixteen mothers of newborns (eight of them vaccinators and eight of the non-vaccinators), twelve mothers believed that some vaccine-preventable diseases were “not so bad,” implying that the costs of immunizing a child outweigh the risks of contracting a VPD (Benin et al. 2006, p. 1537). One mother noted that she was “not overly concerned with the incidence of [these] diseases . . . we don’t live on a farm . . . my infant is not at risk for tetanus right now . . . and as far as I know, there’s no diphtheria.” This data suggests that parents, unable to see and touch and feel the pain rendered by such diseases, minimize their severity and the risk of being affected by them. Indeed, a 2014 study of the efficacy of different communicative styles employed by pediatricians indicates that parents would be more trusting of healthcare professionals if vaccine-preventable diseases were more prevalent in American communities. In this study, doctors either recounted the risks of diseases, showed photos of the effects of diseases, or provided a narrative from a mother whose child had been affected by a vaccine-preventable disease. While the first two practices actually increased parental doubt towards immunization, the latter assured parents that immunization was necessary (Nyhan et al. 2014, p. 839). Conversely, a parent can easily conjure up images of fevers, chills, crying infants, rashes, and other side effects of vaccines. To parents, these tangible side-effects weigh more heavily than the abstract effects of an infrequent disease.

If lack of imagination caused skepticism among parents, a vivid reminder from one’s pediatrician would reveal to parents the vital importance of immunizing their children from preventable diseases. This, however, is not the case. As the Nyhan et al. trial has demonstrated, corrective information about vaccine-related controversies can actually

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increase a skeptic's resolve. Indeed, data shows that vaccine-hesitant parents view healthcare providers as dishonest, condescending, and uninformed. One mother in a 2006 survey commented that she felt "really painted into a corner and there's really no support in the medical community . . . I went through a dozen doctors who were just like, 'I will not treat you if you're not going to vaccinate your child;'" another replied that "the doctors don't have the answers for me to these specific questions about vaccines . . . I don't think they have the time or the motivation to find me the answers;" and another than she would like to see "pediatricians educated more on the potential detrimental side to the vaccine program and not financially rewarded for giving vaccines" (Benin et al. 2006, p. 1538).

One reason may be that parents are compelled to distrust doctors because of the institutional arrangement between the federal government and the manufacturers of vaccines. In 1960, the California Court of Appeals ruled that Cutter Laboratories was negligent in selling an unviable vaccine, despite its vaccines having passed all federal inspections (*Gottsdanker v. Cutter Laboratories*, 1960). Similar decisions were upheld by the Ninth Circuit Court (*Davis v. Wyeth Laboratories*, 1968), and the U.S. District Court of Southern New York (*Tinnerholm v. Parke Davis & Co*, 1968). Manufacturers promptly threatened to halt the production of vaccines in the wake of their newfound liability. Congress therefore approved the National Childhood Vaccination Injury Act of 1986, which 1) resolved that only the Government of the United States could be liable for damages suffered as a result of immunization, given that a small percentage of individuals will inevitably suffer adverse effects; 2) established a Vaccine Injury Table to track the causation of certain conditions to vaccinations; and 3) created the National Vaccine Injury Compensation Program to provide unlimited compensation for medical expenses and up to two-hundred-and-fifty thousand dollars in damages to anyone who presents a preponderance of evidence that a vaccination may have triggered a negative outcome (Calandrillo 2004, p. 409). While the creation this program ensures that the one-in-a-million children who respond negatively to a vaccine are financially secure, it also gives the impression that vaccinations are inherently dangerous. Indeed, more than seventy-five percent of anti-vaccination websites cite that vaccination policies are motivated by profit, and that information regarding the real effects of immunizations are withheld by government officials (Kata 2010, p. 1710). Coupled with the United States' recent history of using the power of the State to control the bodies of its citizens (See Chapters 10 and 11), it is understandable that some parents are suspicious of state motives.

Yet, the development most destructive to the trust normally shared between parents, pediatricians, and politicians is the advent of online medical sources – particularly non-scientific, anti-vaccination sources presented by search engines alongside, and in the same format as, legitimate medical sources. Parents may wonder whether vaccines are a worthwhile investment, or whether vaccine-preventable diseases are really 'that bad.' Parents always have. However, given that the effects of VPDs are severely minimized by vaccines, more parents enter the vaccine debate with ambiguous opinions; and given the presentation of scientific data alongside non-scientific data online, antivaccine parents feel vindicated and unsure parents feel justified in their suspicions. For example, in a 2005 survey of vaccine conforming and non-conforming parents, more than eighty percent of parents who do not conform to federal immunization schedules reported that they thought children receive more vaccines than good for them, and that this weakens their immune system. More than fifty percent believed that it is better for a child to develop immunity by

getting sick, and that immunization requirements were a violation of the consumer’s constitutional right to choose (Salmon et al. 2005, p. 474). The data concludes that assurance among parents who doubt the efficacy of vaccines results from their preference for source materials sympathetic to their pre-conceived sentiments. A 2013 survey similarly reveals that non-conforming parents consult on average three more sources when seeking out information about immunization, and that these sources are twenty-percent more likely than the sources of conforming parents to be websites (Brunson 2013, p. 1399). Indeed, Anna Kata’s landmark 2010 analysis of online medical sources reveals that *one-hundred percent* of the one-hundred-and-fifty most popular anti-vaccination websites purport that vaccines contain poisons; and that seventy-five percent contend that vaccines erode immunity, that natural immunity is safer to immunization, and that vaccination schedules are motivated by profits (Kata 2010, p. 1710). Where scientific studies report their findings with room for error, as no research is ever completely conclusive, non-scientific sources present their information as matters of fact. These ‘facts’ include: “Vaccines are biological poisons, harmful to health, and a contributing factor in childhood illness” (<http://www.vaclib.org/sites/debate/about.html>); “Just because you give somebody a vaccine, and perhaps get an antibody reaction, doesn’t mean a thing. The only true antibodies, of course, are those you get naturally” (<http://www.whale.to/vaccines/antibody.html>); “No one has the moral or ethical right to compel parents to vaccinate their children against the parents’ wishes – not the doctors, not the schools, not the government at any level” (<http://www.vaccinationnews.com>); “M.D.s invented the term sudden infant death syndrome to explain away the ‘coincidence’ that babies die about the same time they receive vaccines;” (<http://www.vaccination.co.uk>); and “Asking the CDC to look into vaccine safety is like asking the fox to guard the chicken coop” (<http://www.whale.to/b/hoax1.html>). Their candor and online presentation elevates them to the status of medical advice.

Moreover, these studies indicate that more than thirty-percent of parents who did conform to federal recommendations also believed that children receive too many vaccinations and that this weakens their immune system. (Salmon et al. 2005, p. 474). Forty-seven percent of non-conforming parents believed that vaccines were unsafe – but so did thirty-two percent of conforming parents (Kennedy et al. 2005, p. 255). This suggests that parents who are not necessarily anti-vaccination are finding it difficult to defer to the judgement of their doctors in the presence of abundant and abrasive online sources. Indeed, Kata’s study found that eighty-percent of all internet users search for health information online, and that of the one-hundred-and fifty most popular sites, twenty-five of them were anti-vaccine; but with names like Generation Rescue, Global Research, Moms Against Mercury, SafeMinds, The Informed Parent, the National Vaccine Information Center, Vaccination Liberation, and ChildHealthSafety, AskDrSears.com, VaccineInfo.net, Vaccination News, it is difficult to identify them as such. At the same time that opponents of immunization has become more vocal, advocates of required immunization have grown less confident on their support for state-sponsored medication.

Conclusion

Resistance to the recommended schedule of vaccinations has become an acceptable opinion in what has become an increasingly moral debate. Temporal distance from the effects of preventable diseases like polio and measles, distrustful public-private

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institutional arrangements, and increased agency resulting from the proliferation of the Internet World Wide has empowered those who oppose vaccines, and made those skeptical parents who would previously defer to the judgments of a trained medical professional become more ambivalent. The acceptance of once obscure opinion regarding the medical efficacy and constitutionality of state-mandated vaccinations - and the unwillingness of state legislatures to rile the spirits of the growing many who view medical discourse as a moral debate - has therefore led to the adoption of religious or philosophical exemptions in forty-eight states. □

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Chapter 10:

Discrimination and Experimentation: A Study of How Different Racial Groups Are Adversely Affected by Government Research

Ashley Puk

□ The medical community has long struggled with the ethics of research. It appears clear: if a subject is being hurt or is not fully aware of the damage being done to them, the researcher is clearly at fault, having taken advantage of an individual without the faculties to refuse. In our relativist world, there is no such clear divide. What happens when a perfectly ethical study veers the way of ambiguity, justified by the search for treatments and cures? How can a researcher balance the pursuit of knowledge punctuated by the risk of the unknown and the potential for abuse of personal autonomy, sanctioned against by the Hippocratic oath?

The U.S. government has approached this issue with caution, not formally adopting a code until late in the twentieth century. It stands that before and after ethical research guidelines were adopted, the U.S. has abused the “Do No Harm” maxim of the Hippocratic oath. While some early government research began with beneficent purposes, seeking answers to scientific questions, others were conducted without regard to those without power to refuse. Researchers and scientists became comfortable with little oversight and no accountability, and some held their own internal prejudices against groups of people they studied. Experiments happen to different social groups, and they tend to happen differently—with different methodologies under different stresses and circumstances. Minority and disadvantaged groups have disproportionately been subject to experimentation, though it remains that general populations have also been subject to non-consensual experimentation as well. What is particularly pressing is, however, not in the generalities but the specifics. These experiments tend to be in reaction to a phenomenon or series of events, but they manifest themselves differently, as this paper will attempt to explain.

For the sake of clarity, this paper distinguishes between groups negatively affected by experimentation based on race and ethnicity. People of color have tended to face disproportionate abuse due to lack of resources and social powerlessness. White people

tend to be the most privileged group, due to factors like socioeconomic status and a history of social dynamics favoring white skin. It should be clear that both people of color and white people are subject to unethical research. This paper’s analysis of experimentation on privileged groups will also include experimentation on populations where there is no specific target, as can be illustrated in radiation experiments. The point of distinguishing populations from specific minority groups is that the former is randomly involved and the latter is targeted specifically based on their minority status. People of color are arguably more vulnerable to this type of research and will be referred to as such, but it should be noted that both groups are vulnerable, as any experimentation necessitates vulnerability. The purpose of the distinction here is to create a nuanced analysis of how experimentation manifests.

From a broader perspective, it seems like a worthwhile endeavor to distinguish between these groups, specifically in how they are experimented on, and what that can say in a larger scope of body politics.

Legal Precedent

For most of United States history, there was no formal treatment of ethics in research under common law. Precedent was created after World War II during the Nuremberg trials, which condemned and prosecuted war criminals from the Axis powers that engaged in egregious acts of human rights violations—including unethical human experiments that took place inside concentration camps.¹¹ There, the Nuremberg Code was established with ten main precepts stipulating the conditions under which experimentation could take place. Some key features: experiments must be done with the voluntary consent of the human subject, there must exist necessary conditions of good-will, freedom to terminate the experiment, and ability to end an experiment that in time could violate any former precepts (“Trials of War Criminals” 1949, p. 182).

Later, the Helsinki Declaration of 1964, created by the World Medical Association for medical professionals, stipulated an international code of ethics. While it was not binding, the intent was to set an example for a country to adopt (McNeill 1993, p. 47).

Safeguards for minority groups within the United States were never so broadly defined until the Civil Rights Act of 1964. The introduction of institutional review boards made further headway in terms of oversight on departments that might abuse their authority. The Belmont Report of 1979, issued by the Department of Health, Education, and Welfare, put into official writing what exactly qualified as human experimentation and when it was considered illegal under the common law.

At-Risk Group Experimentation

Perhaps the most widely cited example of unethical treatment in the United States appears in the Tuskegee Syphilis Study. By no means the only study that targeted African-American groups, this case is notable for its length and scope, especially since it was in

11. Not only was Germany the first country to introduce criteria for ethics in research with its Directive of 1900 requiring consent and explanation to subjects, but Nazi medical doctors and experimenters cited the U.S. history of unchecked experimentation as reason for absolution. Most lost their case, but they weren’t wrong.

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violation of the precepts of the Nuremberg code after 1949. Organized by the U.S. Public Health Service (PHS) in 1932, the study saw the deaths of 28 to 100 men, women, and children from untreated syphilis or syphilitic side effects, even after penicillin was being mass-produced for treatment of the disease by the 1940s.

What began as a six-month-long study to treat the disease in black men in Macon County, Alabama eventually became a forty-year observation of the debilitating effects of syphilis on the black body. The initial study began in 1929 and was partnered with the Rosenwald Fund, a foundation whose prime benefactor was concerned with declining black health in the South and giving aid and treatment to economically depressed black regions. Macon County experienced the highest incidence of venereal disease at the time, with 36% of black men in the county suffering, largely due to low socioeconomic status and lack of access to healthcare (Jones 1994, p. 88). In this iteration of the study, the participants were studied but also treated despite how rudimentary treatment was at the start. After the study lost funding in 1932 due to the stock market crash, the PHS continued observation and autopsies, but without any treatment. Participants in the study were not told they had syphilis, but rather “bad blood” and believed they were being treated for it (Jones 1994, p. 90). The incentives for continuing the study ranged from the promise of a hot meal, meager stipends, and ostensibly free health care (Lederer 1995, p. 121). The experiment was ended in 1972 when a whistleblower and PHS employee, Peter Buxton, leaked the existence of the study to the public, leading to congressional investigations and ultimately an apology by the Clinton Administration in 1997 to surviving victims (Champion 1994, p. 234).

The Tuskegee study is perhaps the most well-known government-sanctioned experiment, particularly for its illustration of the vulnerability of minority populations, when consent is not gained and trust is breached. Though there is no written documentation of the motivation behind continuing the study after the loss of funding besides “scientific pursuit,” it is most likely that the researchers wanted to document the difference between syphilis on African-Americans and white men, to understand if it affected them differently. At-risk, underprivileged groups realize the real consequences of the study and as a result, distrust the modern healthcare system—with some African Americans today viewing any type of medical study as a way to “treat people like guinea pigs.” The Tuskegee study so hurt the image of public health care that HIV was believed to be a manmade virus created to kill African-Americans on a mass scale in many black communities (Freimuth et al. 2001, p. 805).

While the general public was shocked to hear of these unethical studies, the mistreatment of black bodies by medical authorities is not all that uncommon. The expectation for poor health care for black Americans dates back to the height of slavery. The institution of slavery was predicated on the perceived cultural and intellectual superiority of white people and this dichotomy made the prospect of experimentation permissible to the eighteenth and nineteenth century white sensibilities. The rise of scientific white superiority occurred about the time when medical practices and hospitals were becoming institutionalized and respected (Byrd and Clayton 2000, pp. 289-294). Two incredibly important beliefs became acculturated, critical in understanding how experimentation became normalized, where: 1) black people were considered property, i.e., non-citizens and 2) they were believed to be affected differently by disease and infection (Beardsley 1987, p. 12). The former provided the justification and the latter, the

motivation. Many social scientists at the time went so far to say that black people did not feel pain as strongly as white people, and thus painful experiments would be more permissible (Byrd and Clayton 2000, p. 250).

The early nineteenth century was marked by near-universal distrust of doctors and physicians in the South, but as the century progressed so did their esteem, largely thanks to medical discoveries predicated on experiments done on non-consenting individuals. When modern medicine proved beneficial to populations, doctors and physicians were framed as authorities of health in society at large (Byrd and Clayton 2000, p. 198). Physicians were the prime contributors to the culture of disregard for black bodies, sharing the prevalent attitudes of white supremacy. The pseudoscience of phrenology, an approach to measuring physiological differences between African-Americans and Caucasians in order to prove the former’s inferiority, had virtually no scientific grounding but fit the narrative of the era (Byrd and Clayton 2000, p. 215). Early naturalists like Edward Tyson and Francois Bernier were pivotal in creating racial classifications during the seventeenth century, where Tyson likened the black people on the coasts of Africa to apes, and Bernier decided to create classifications of people based on skin color rather than country or region of origin (Byrd and Clayton 2000, p. 214). Bernier did not anticipate the social repercussions of making the distinction, but his work was perpetuated.

Historically, there were precedents within the institution of slavery to provide the barest medical care to slaves, not necessarily out of beneficence but as an economic cost-benefit analysis (Byrd and Clayton 2000, pp. 231; 287). Slaves cost a relatively large amount of money and maintaining their health was critical for steady output on a plantation. Free blacks were worse off because most physicians were whites, who refused to see black patients, and health care cost money that they could not afford to spend. Following the Civil War, evidence shows the disparity between health care for black citizens and white citizens increased, larger than it was during slavery (Byrd and Clayton 2000, pp. 329-330; Beardsley 1987, p. 28). Upon passage of the thirteenth and fourteenth amendments, freed slaves had no prospects; they were removed from their place of origin, had no skills beyond that gained on the plantation, no savings, and no social safety net. Many were forced into tenant farming, an institution akin to slavery that forced poor free slaves to become perpetually indebted to their previous masters that were loaning them farm tools and seeds (Byrd and Clayton 2000, p. 352).

During Reconstruction, the U.S. government put institutions in place like the Freedmen’s Bureau to help black Americans acclimate to free life. They were severely lacking in resources, and paired with a general disregard for black lives moving into the Redemption period, free black people were almost worse off (Byrd and Clayton 2000, pp. 347-351). They were generally left without any form of health care or self-sustaining job opportunities and no writing or reading skills. Much of the plight of freed slaves was blamed on them and black people were projected to go extinct by the year 2000 based on their mortality and morbidity rates.

The most obvious reasons for experimentation were the increasing demand for test subjects during the rise of medical schools and rise of modern medicine (Savitt 2007, p. 77). The medical profession depends on an intimate knowledge of anatomy, which school officials acknowledged by acquiring slaves, freed blacks, and poor whites for students to learn from. People with all types of diseases were encouraged to join studies but even if a free black person did join a medical school experiment lab to be cured of a malady, the

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unequal power dynamic blurred what necessarily constituted consent. While white people did participate in experiments, historical records show that test subjects were overwhelmingly people of color despite majority white populations (Savitt 2007, p. 81).

Aside from medical school experiments, many forays into improved modern medicine could only be accomplished on living bodies. Slaves and freed blacks presented the most accessible and compliant subjects and did not quite have the social clout to refuse study. The much-cited discoveries by J. Marion Sims M.D. illustrate the simultaneously positive and negative consequences of experimentation (Byrd and Clayton 2000, pp. 272-274). Often considered the “Father of Gynecology,” Sims pioneered an experimental vesico-vaginal fistula surgery that cured women suffering the condition that caused the membranous wall between the uterus and anal canal to rupture, usually during birth. However, Sims experimented on slave women, lent out by their masters and sometimes even bought by Sims himself. Sims operated on some slave women over 30 times until he was able to find a successful treatment, addicting some to opiates “to modulate their bowel and bladder function.” He also exposed their genitals to observers because of the commonly held belief that “Blacks did not have morals or perceive pain as Whites did.” While Sims’ discoveries were revolutionary for feminine health, they are not free from the cloud of abusive power dynamics and exploitation of people not able to defend themselves.

The combination of disdain for freed black people by fellow citizens, a lacking system for medical care, and a government that took a rather laissez-faire approach creates a cultural consciousness of disregard, making experiments like the Tuskegee study fully possible.

It is, however, important to note that unethical human experimentation by the government does not just affect at-risk groups with a history of abuse and neglect. Several studies by the U.S. Army and Central Intelligence Agency (CIA) have affected soldiers and civil populations without their consent, specifically during wartime.

Privileged Group Experimentation

The U.S. government has faced enduring scrutiny the past few decades over several experimentation projects, most of which had been outlawed by the Nuremberg Code. Since many military and CIA documents have become declassified, the public has become aware of radiation, chemical, and torture experiments that occurred on U.S. citizens during and after World War II.

Perhaps the most well-known example of U.S. government experimentation on its unwitting citizens manifests itself as Project MKULTRA, a moniker referring to a multitude of studies that were done on soldiers and other unsuspecting groups between 1950 and 1973, focused particularly on brain function and altered cognitive states. Vehicles for experimentation included psychedelics, chemicals, hypnosis, sensory deprivation, and other types of psychological torture. The experimenters almost never acquired consent from participants, feeling that awareness might interfere with accurate or realistic results. Many of the MKULTRA files were destroyed in 1973 at the order of Richard Helms, the CIA Director between 1966 and 1973, to protect the privacy of those engaged in research, making it difficult to imagine the full scale of the operation. Besides Helms’ interest in protecting identities, there was no pretense of justifiability after the Nuremberg Code had been adopted.

Much of the motivation behind MKULTRA was the creeping Cold War hysteria that the enemy (i.e., communist governments) were experimenting with the possibility of mind control. The prospect that enemy combatants could capture U.S. soldiers and take away their autonomy justified many of the research in this behavioral arms race. In a 1978 interview between journalist David Frost and Helms, Helms expressed the belief that mind-control experiments were valuable because it was the CIA’s “responsibility not to lag behind the Russians or the Chinese in this field, and the only way to find out what the risks were was to test things such as LSD and other drugs that could be used to control human behavior.” One of the fears was that if U.S. soldiers were captured as prisoners-of-war, they could succumb to communism or give up critical U.S. intelligence through mind control.

There was an unprecedented number of U.S. soldiers who, after returning as POWs, confessed to complying with the enemy. As Michael Otterman writes in “American Torture: From the Cold War to Abu Ghraib and Beyond,” one survey found that 70 per cent of the 7190 US POWs has co-operated with North Koreans and Chinese. In particular, 39 per cent of the 3323 Army prisoners signed propaganda petitions, 22 per cent made voice recordings, and 11 per cent wrote pro-Communist articles (Otterman 2007, p. 34).

As many ex-POWs will attest, this was a result of severe psychological and physical torture, which produces false confessions far more frequently than useful intelligence (Rejali 2011, pp. 31-32). There was no actual evidence that foreign nations had discovered the secret to mind control—just physical and psychological torture—but the CIA sought preventative measures in the form of MKUltra.

In one division of MKUltra, LSD was used on soldiers and unsuspecting CIA personnel to see the extent to which it would move them into compliance. Researchers even tested on one another—for example, Dr. Frank Olson, a CIA specialist in biological weapons, was unwittingly dosed with LSD, experienced a “bad trip,” and became incredibly depressed and anxious after the drug ran its course. Olson either jumped or fell to his death out a window in a hotel after being transported to New York City to be treated for the onset depression. The LSD experiments did not target one group of people, but rather sought to measure the effect of LSD in the average man (i.e., a man most likely to go into war and be captured).

Complaints about these experiments have not gone unaddressed. In the 1958 case *United States v. Stanley*, a master sergeant named James B. Stanley brought a charge against the CIA for being involved in an LSD test and experiencing negative consequences without his consent. The Court ultimately upheld the precedent of *Feres v. United States* (1950) that prohibited service members from collecting damages based on personal injury experienced in the field of duty, arguing that Stanley was fulfilling his job in service of the United States. Delivering the opinion of the court, Justice Jackson acknowledged that “A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty, if not impossibility, of procuring witnesses, are only a few of the factors working to his disadvantage,” but goes on to justify the government by its “extremely favorable” compensation system.

On the civilian side, the United States has engaged in some of the same covert (and some non-covert) human experimentation. On the Democracy Now! report for July 13, 2005, journalist Amy Goodman and expert in biological and chemical terrorism Leonard Cole, discussed a June 2005 instance of the Department of Homeland Security releasing a

non-toxic gas into the New York City subway ventilation system and compared it with known examples from 1966 where the government did the same. The U.S. Army conducted 239 so-called “vulnerability tests” between 1949 and 1969. The published purposes were to test how viable a biological attack might be in major metro areas. Despite the relative harmlessness of the experiments, civilians questioned the legitimacy of the government conducting this on unwilling participants.

Differences Between Experiments

There begs the question: what exactly marks experimentation on non-consenting disadvantaged groups versus groups not traditionally considered “vulnerable” to the caprices of government action and prejudice?

Studies that target people of color tend to be motivated by two factors: 1) perceived difference between people of color and white people—those with different physiognomies were long believed to have different physiologies and 2) a history of neglect.

In the initial iterations of the Tuskegee charter, researchers believed that syphilis affected black people differently. Where syphilis in white people targeted neurological function, it was accepted by most physicians that black people suffered a higher rate of cardiovascular syphilis. Much of early U.S. medicine was predicated on maintaining the supremacy of whites—if the study could confirm the physiological difference, it could also, in some concrete way, prove a point. Syphilis had been previously studied in the 1890s in Oslo with white men suffering the disease, so the Tuskegee study was chosen as the platform to observe the degenerative effect of syphilis on the black body (James 1994, p. 89).

This study was neither the first nor the last study to attempt to measure racial differences. According to a report for NPR on June 22, 2015 by journalist Caitlin Dickerson, during World War II, the U.S. Army attempted to measure the effect of mustard gas and lewisite on white, black, Puerto Rican, and Japanese-American soldiers, and whether the chemical affected colored skin differently. White soldiers were distinguished as the control group because white skin was considered the baseline for any research involving racial differences. In the 1944 mustard gas study involving 39 Japanese-Americans and 40 white soldiers, there were no discernible differences in how the mixture affected the skin—both shared similar amounts of pain that can only be expected from diluted mustard gas applied directly to the skin.

The history of slavery is the necessary condition that allowed experimentation on unsuspecting black citizens; the institution devalued the black body to the point that the body was believed to not even experience pain the same way white bodies did. The Tuskegee researchers followed a “no duty to rescue” type mentality after the study lost funding in 1932. Without the researchers, the black men in Macon County would not have had access to regular check-ups and healthcare; their syphilis would have persisted regardless. From the perspective of the PHS, they were observing the effects of the disease—neither helping nor harming. This view ultimately depends on the assumption that the black body is an object, to be observed, to be owned, to be reshaped for whatever the situation deems necessary—but not to be treated equally to the white body. The crux of the situation is demonstrated with the introduction of penicillin, which became available to treat syphilis on a mass scale. The subjects were denied access to penicillin, for it would

interfere with the goals of the study. There is also evidence that subjects who tried to get health care elsewhere were denied that choice. The PHS could no longer justify the experiment on observatory grounds—they were actively prohibiting treatment and even causing deaths that could have been avoided. The initial disregard could have been redeemable if the subjects were consenting to allowing their degrading bodies to be studied, but the subjects were not considered people deserving of health care.

The basic assumption of second-class citizenship can apply to almost all vulnerable minority groups. In the case of Japanese-Americans being exposed to mustard gas or mind-control experiments—those citizens already faced prejudice in the United States due to their ‘Other’ status. When war with Japan began, Japanese-Americans were suspected of betrayal and espionage because of their immigrant status. There existed the belief that Japanese-Americans were hardwired to be subservient to the Japanese emperor and were biologically not loyal to the United States. Even the way they were referred to—as hyphenated Americans—contributed to their place as Others, not quite American and still connected to their origin country if only in name. Due to the executive order by President Roosevelt, affirmed by the Supreme Court case *Korematsu v. United States* (1944), 110,000 Japanese civilians living in the US were forced into internment camps without trial. This dismissal of basic human rights paved the way for experiments on them. If they were subversives or communists, they deserved to be experimented on. If they were not, they were unintended casualties and their mistreatment would not be met with an enormous public backlash. In the case of the Tuskegee victims as well, there was no tangible consequence to abusing the trust between the participants and their government. The rights of those vulnerable populations are secondary because a history of discrimination reinforces secondary status.

Studies that target privileged groups tend to have different objectives than those of minority groups. Where one is motivated by the mentality “because we can and there are no consequences,” this mentality is governed by the belief that it is necessary for the common good. This is an abstract fear or anxiety made concrete by contextual events. In the case of MKUltra, the US government felt threatened by the spread of communism and “subversive” ways of thinking after World War II. Even though success stories of mind-control in Russia and China were unsubstantiated, the CIA justified itself as reactive. If it did not research ways itself, it was unprepared in fulfilling its duty to the People as an intelligence organization that protects them from security threats. This is similar to the impetus for studying biological weapons—if the enemy can employ those strategies at any moment (spraying chemicals into our ventilation system, poisoning the water supply), we should be prepared. In the eyes of the CIA and US Army, the methods employed may be unsavory but the enemy will not be pulling punches. Unfortunately, mass hysteria feeds into more hysteria and the stress to be ahead of the curve leads to the expansion of programs like MKUltra.

Many Americans are complicit in torture, and some will give up actual bodily autonomy in exchange for security in the abstract. In the case of these experiments, they were done on non-consenting individuals but for the ostensibly justifiable reason of stopping the apparently inevitable spread of communism. There is no discriminatory dimension here, beyond that of ideology (though, in a more nuanced sense, some of the anxiety did come from the ideology taking hold in non-white countries). These victims of experimentation are not chosen based on an immutable characteristic but are chosen

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specifically for their randomness. A disregard for the human body is still at play but it is not targeted or longitudinal. The victims are chosen based on proximity and chance, while minority groups are chosen based on their status as an Other, inherently different, inherently a subject for study. The fact that Tuskegee participants were abused by observation, is quite telling in the type of vulnerability they experience. Though the loss of funding did not make the researchers suddenly have malicious intent, but that they continued the experiment without regard for the autonomy of the men involved. The men were subjects for study because they had dark skin. Japanese-American soldiers were subjects for study because of their ethnic origin. Meanwhile, it was felt to be extenuating circumstances to experiment with psychedelics on unsuspecting victims. There was a sense of urgency about communism coming to lurk in the United States, infecting the minds of people. The anxiety that existed with the Tuskegee subjects and Japanese-American soldiers was more of a deep discomfort and rejection of other groups existing as equals. This belief that there was something different between white people and everyone else became a deeply engrained prejudice that the instinct to study seemed justifiable.

The Tuskegee study and the mustard gas study illustrate how white skin is used as a baseline for what is normal—regardless of mental predispositions, health, income and really any control variable. As long as this mentality persisted in medicine, experiments would recur.

The comparative study here is not necessarily universally true of all experiments organized by the U.S. government, but there is a definite perceivable trend in the way these experiments are conducted. Ultimately, the bodies of people of color tend to fare far worse when left to the devices of rogue governmental whims. Vulnerable groups do not have the institutional controls that protect them from abuse, particularly at the hands of the body that is contracted to protect them. The shameful history of slavery and dehumanization normalized the excesses of abuse in the particular experiments done on vulnerable groups mentioned. There was no real point of reference for at-risk groups to recognize that they were being taken advantage of; harm and disregard are a regular part of their lived experience. Both methods and contexts for experimentation are insidious—while minority groups see this abuse in trustworthy institutions, other groups see abuse as a matter of national security. It is no surprise that talk of experimentation leads into talk of torture, as in Otterman's text.

Resistance to the recommended schedule of vaccinations has become an acceptable opinion in what has become an increasingly moral debate. Temporal distance from the effects of preventable diseases like polio and measles, distrustful public-private institutional arrangements, and increased agency resulting from the proliferation of the Internet World Wide has empowered those who oppose vaccines, and made those skeptical parents who would previously defer to the judgements of a trained medical professional become more ambivalent. The acceptance of once obscure opinion regarding the medical efficacy and constitutionality of state-mandated vaccinations - and the unwillingness of state legislatures to rile the spirits of the growing many who view medical discourse as a moral debate - has therefore led to the adoption of religious or philosophical exemptions in forty-eight states. □

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Chapter 11:

Racial Politics of Coerced Sterilization in the Twentieth-Century United States

Miriam George

□ With the passage of the Fourteenth Amendment, the United States guaranteed all citizens, regardless of race, the right to “life, liberty, and property,” as well as “equal protection of the laws.” However, just decades later, the same government which had fervently declared the equality of all citizens under the law went on to act in a manner that proved otherwise, through its espousal and promotion of coerced sterilization for certain groups of people. Coerced sterilization—that is, legally requiring people to undergo surgical or other forms of sterilization in order to prevent any capacity for future reproduction—was practiced by the federal and state governments throughout the twentieth century, specifically targeted against women of minority races. Motivated by the belief that these races were inferior and that they posed substantial social and economic problems, government agencies and taxpayer-funded hospitals coerced hundreds of thousands of Native American, African American, and Hispanic women into consenting to permanent sterilization procedures to prevent them from reproducing. This paper aims to expose and examine the underlying racial politics which influenced this mass, coerced sterilization of minority women at the hands of the government in the twentieth-century United States.

A Legal History of Coerced Sterilization in the United States

In its landmark 1948 *Skinner v. Oklahoma* decision concerning the punitive sterilization of a man convicted of robbery on several occasions, the Supreme Court held that the ability to reproduce is “one of the basic civil rights of man,” meriting government regulation in only the most severe of cases. However, the Court’s previous 1927 ruling in *Buck v. Bell* had far greater influence on the formation of policy around the issue of coerced sterilization in the twentieth century United States. In *Buck v. Bell*, the Court upheld a Virginia statute that provided for the eugenic sterilization of people considered “genetically unfit.” State legislatures across the country interpreted this holding as Court approval of such policies, subsequently popularizing eugenic sterilization nation-wide. This ruling marked a break with the past, explains historian Sally Torpy (2000, p. 3), since prior to the twentieth century, the U.S. government had only sterilized individuals for punitive reasons.

When the practice of sterilizing specific demographics of the population through coercive means was first introduced, it was aimed at regulating the reproduction of mentally disabled women, but was later expanded to target women of certain minority races as well.

As demonstrated by the decision in *Buck v. Bell*, coerced sterilization in the twentieth-century U.S. was founded on the assumption that certain individuals are more genetically fit to reproduce than others. As a result, the U.S. employed a negative eugenics approach, *regulating* reproduction among those whom they deemed “unfit” to reproduce, as opposed to a positive eugenics approach, which *encourages* reproduction among certain groups of people. Justice Oliver Wendell Holmes justified coerced sterilization in his majority opinion in *Buck v. Bell* by stating that “it is better for all the world if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sanctions compulsory vaccination is broad enough to cover cutting the Fallopian tubes” (1927). However, Alexandra Minna Stern (2016, p. 226) explains that between the 1920s and the 1970s, the rationale for sterilization evolved from simply preventing the genetically-unfit from reproducing, to preventing individuals deemed “unfit” for parenting from reproducing, preventing dysfunctional families, and stymying overpopulation and the unchecked growth of welfare and public assistance. Proponents of coerced sterilization cited the Malthusian philosophy that population grows geometrically, while the food supply increases arithmetically, thereby necessitating the imposition of limitations on population growth to prevent overcrowding and the overburdening of the welfare system (Torpy 2000, p. 2).

However, the roots of coerced sterilization of Native American, African American, and Hispanic women extended deeper than the mere social and economic justifications provided by its proponents; coerced sterilization was based on the fundamental belief that people of color were *lesser* than white citizens, and would pass these inferior genes onto their offspring, thereby polluting American society. Harry Bruinius (2006, p. 14) explains that the motifs of purity and innocence have guided and influenced American culture since colonial times; Bruinius cites John Winthrop’s speech to his fellow Puritans aboard the *Arbella*, in which he exhorted them to remain pure, holy, and excellent. Minority individuals were perceived as a threat to America’s achievement of the Winthropian ideal of racial purity in the twentieth century. Racial eugenics was viewed as an offshoot of Darwinian social thought, which proposed that some are “naturally endowed with strength, health, and intelligence” (Bruinius, 2006, p. 36), while others are weak, sickly, and dull, so in the state of nature, the principle of “survival of the fittest” determines which individuals survive and which do not. Thus, the government, backed by the American majority, believed that when eugenic principles were applied to society, they would act as a purification mechanism, working to diminish the presence of weaker minority individuals in order to create a superior race over time. Other social scientists of the time contended that purifying American society was the only way to achieve “national efficiency and happiness” (Bruinius 2006, p. 212), both of which were hindered by the large presence of minority races within America’s borders.

As a result, coerced sterilization was the culmination of the racial politics that dominated the twentieth century. In 1907, the Indiana state legislature passed the first law giving Hoosier hospitals and health care facilities the power to sterilize genetically “defective” Americans; within the next two decades, fifteen other states passed laws giving

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their hospitals sterilization rights. In total, 32 states passed some form of sterilization law in the twentieth century (Stern, 2016, p. 2), and even in states without laws, obstetricians sterilized thousands of women in the name of “racial hygiene” and the government simply looked the other way (Bruinius, 2006, p. 10). The Supreme Court, through its *Buck v. Bell* decision, affirmed the government’s right to pass sterilization laws as well. Bruinius (2006, p. 7) observes that this ringing government endorsement of sterilization stemmed from the perception that sterilization was *humane*; it was easy to perform and inflicted little pain on the individual being sterilized, and was therefore a favored means of population control by the federal and state governments. On the whole, between 100,000 and 150,000 low-income, and oftentimes, minority individuals were sterilized each year through federal programs such as Medicaid and Aid to Families (*Relf v. Weinberger*, 1973). Indeed, Beverly Horsburgh (1996, p. 556) calculates that as of 1982, fifteen percent of white women had been subjected to sterilization by the government, as compared to 24 percent of African American women, 35 percent of Puerto Rican women, and 42 percent of Native American women—evidence of the racial animus with which the government acted.

Informed Consent versus Government Coercion

At the time, the U.S. District Court defined informed consent as “voluntary, knowing assent from the individual on whom any sterilization is to be performed,” (Torpy 2000, p. 7) given by the patient after she receives all information on the operation. Specifically, consent included the following: a comprehensive explanation of the procedure occurring, as well as all discomforts, risks, and benefits which were to be expected afterwards, a description of alternate procedures which could be more suitable for the individual, an offer to answer any questions the individual had about the procedure, and notification that the individual may withdraw consent and elect not to participate in the procedure at any time. Critically, the U.S. District Court also mandated that individuals considering sterilization be given notification that no federal benefits could be revoked if they decided not to consent (Torpy 2000, pp. 7-8).

However, federal and state healthcare agencies and hospitals exercised various forms of coercion to force minority women to undergo permanent sterilization. Due to an absence of standardized consent protocols, hospitals often did not obtain written consent from patients, merely looking for oral acquiescence before performing the procedure, or, in some cases, not seeking any form of consent at all before doing so. Other times, written consent forms were provided, but they were not accompanied by any oral or written translation or explanation to Native American and Hispanic women, allowing physicians to employ patients’ poor knowledge of English to their advantage. Physicians also used various manipulation tactics to obtain patient consent; they often failed to mention the permanent nature of the procedure and the availability of other, non-permanent forms of birth control (Torpy 2000, pp. 13). Many obstetricians attempted to convince minority women to undergo sterilization just after they had given birth, and were “vulnerable and...medicated” (Ibid.). Women were also told that sterilization would resolve other medical problems they were facing; Torpy (2000, p. 9) cites the example of a Native American woman who was experiencing migraines. She was advised by her physician to undergo a hysterectomy to alleviate her pain, when in actuality, she later learned the problem was caused by a brain tumor.

In addition, minority women faced welfare and custody threats from physicians: they were told that if they did not consent to sterilization, their welfare benefits would be withheld by the government, or their children would be removed from their custody. Many of these women were not aware of the coercion they were being subjected to; they were largely unaware of their rights, and when placed under pressure by their physicians, they readily gave their consent to be sterilized. Finally, population control was a growing concern in the twentieth century, with government officials and the country’s white majority expressing fears that the U.S. did not have sufficient resources and funds to support its rapidly-expanding population. As a result, minority reproduction came under siege, and Native Americans, African Americans, and Hispanics were accused of having too many children—none of whom they could support—and sapping up welfare benefits that were paid for by the majority’s taxpayer dollars. While birth control became popularized in this century, Dorothy Roberts explains that the federal government portrayed sterilization as the only “publicly-funded birth control method readily available to [minority women]” (1993, p. 1971), limiting their access to other forms so that they would undergo permanent sterilization. Overall, minority women’s lack of access to quality health care and unfamiliarity with the law made them more likely to bow to the coercion of the federal government, wanting to retain the few rights and protections they had.

Coerced Sterilization of Native American Women

Torpy (2000, p. 1) posits that Native American women were particularly vulnerable to sterilization by coercion due to their dependence on federal programs such as the Indian Health Service, the Department of Health, Education, and Welfare, and the Bureau of Indian Affairs. She notes that during the 1970s, the Department of Health, Education, and Welfare was responsible for funding over ninety percent of sterilization costs for low-income individuals; this resulted in a 350 percent increase in sterilization between 1970 and 1975. Native Americans were easy targets for a number of reasons; several cultural and social differences existed between the Native American and American lifestyles, making it easy for the U.S. government and the white majority to “otherize” and disdain them, thus garnering popular support for their coerced sterilization (2000, pp. 4-5). Native American women typically had large families with several children during this time period, and the government frowned upon this ‘rampant’ reproduction. Angela Davis (1981, p. 19) notes that in a pamphlet distributed to several Native American tribes by the Department of Health, Education, and Welfare, there was a sketch of a family with ten children and one horse next to a sketch of a family with one child and ten horses; this sketch was representative of the majority opinion that fewer children meant more wealth and prosperity, as well as the government’s belief that Native American reproduction should be curbed to alleviate their heavy dependence on government programs.

Moreover, Native Americans constituted a small minority population in the twentieth century, essentially invisible to the majority of American society; as a result, the government was permitted a high degree of “bureaucratic secrecy” (Torpy 2000, p. 5) in its dealings with Native Americans, allowing it to use coercion without restraint. The federal government gave Native American women access to Indian Health Service facilities, but these health facilities were typically located far from Native American reservations, and offered poor quality of care to the women who attended them. Torpy argues that the facilities often lacked adequate funding and resources, which prevented them from

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administering satisfactory health care to patients. Horsburgh (1996, p. 557) agrees, noting that financial difficulty and understaffing caused health facilities to resort to sterilization, rather than offering patients “long-term obstetric care or contraception”. In addition, few oversight and accountability mechanisms were put in place to regulate the operation of these facilities, allowing the abuses to continue unchecked. As a result, in obtaining consent for sterilizations performed, Indian Health Service physicians typically failed to meet the federal guidelines for informed consent.

Since the Native American population was largely perceived as foreign and insignificant by the American public, the government was able to sterilize Native women in a widespread, comprehensive manner, with little backlash from the majority. The General Accountability Office conducted a study to determine the number of Native American women sterilized at four of the twelve existing Indian Health Service facilities between the years 1973 and 1976, concluding that 3,406 women were sterilized in just these four facilities, leaving only 100,000 Native American women of childbearing age remaining nation-wide (Torpy 2000, p. 7). Torpy explains that the percentage of Native American women who were sterilized would compare to 452,000 non-Native American women being sterilized at the time, a staggering statistic (Ibid.). In total, Native American tribe representatives claimed in the late 1970s that, of the Native American women of childbearing age in their respective tribes, between twenty and fifty percent were sterilized without their consent by the Indian Health Service (Stern 2016, p. 225). This mass sterilization was particularly egregious because Native American women place enormous cultural value on motherhood, so they viewed the loss of their fertility as incredibly shameful and, above all, non-consensual (Torpy 2000, p. 8).

Coerced Sterilization of African American Women

The same absence of informed consent was present in cases of sterilization of African American women. Roberts (1993, p. 1970) explains that control of African American women’s reproduction was a vestige of slavery, reminiscent of the dominance that slaveholding males exercised over their female slaves’ bodies. Even after slavery was abolished, American society and government continued to regulate reproduction of African American women. In the 1930s, for example, state governments in the South funded several birth control clinics with the express purpose of reducing the birthrate of African American babies; this was perceived as critical in order to lower welfare costs during the Great Depression era (Roberts 1993, p. 1970). In 1939, the Birth Control Federation of America, led by Margaret Sanger, organized its “Negro Project”, which attempted to limit the right of reproduction to only those blacks who bred “carefully”—those who were intelligent, fit, and able to raise children properly. This eventually led to the mass sterilization of African American women, Roberts concludes. In the 1970s, obstetricians often coerced African American mothers to consent to sterilization before performing abortions for them or delivering their babies when they were in labor (Roberts 1993, p. 1971). In addition, Horsburgh (1996) cites a study comparing the variation by race in treatments prescribed by gynecologists for women suffering from endometriosis, a curable uterine condition. The study found that gynecologists typically diagnosed white women whom they treated as suffering from endometriosis, while they diagnosed African American women with pelvic inflammatory disease, which they claimed was only curable through sterilization. Therefore, as a result of the coercive tactics exercised against them

to obtain their consent, African American women “constituted 43 percent of all federally-funded sterilization patients,” according to a 1973 survey cited by Stern (2016, p. 225).

Lutz Kaelber (2014), Professor of Sociology at the University of Vermont, notes that in the specific case of North Carolina, a total of 7,600 individuals were sterilized by the North Carolina Eugenics Board in the twentieth century, and African American women accounted for 65 percent of those sterilized, although they made up only a quarter of the population. Kaelber (2014) explains that one precipitating factor that caused the spike in sterilizations among African American individuals was the white majority’s fear that they would have to support the growing African American population through welfare; he writes that “attention shifted away from the structural causes of poverty and crime to placing the blame for urban poverty and social unrest on blacks, [and] sterilization of blacks was facilitated.” Essentially, the sterilization of African American women became viewed as necessary in order to free white society from the financial burden that they believed African American citizens posed.

Moreover, Paul Butler (2010, p. 3) argues that the federal and state governments and the country’s white majority viewed African American criminality as inherent and biological, therefore perceiving sterilization as the solution to this issue. Roberts (1993, p. 1954) agrees, asserting that “crime is...constructed according to race”; race is used to determine that which is “criminal.” Subsequently, punitive measures administered in response to crimes differed based on race as well, with African Americans receiving far more stringent punishments than their white counterparts for any crimes committed. Since propensity for criminal acts was perceived as varying based on biological race, African American women were subjected to coerced sterilization as punishment for criminal activity at higher rates than white women. Roberts (1993, p. 1968) offers numerous examples of cases in which African American women convicted of drug abuse and other minor criminal offenses were ordered to undergo sterilization as a condition of probation, forcing them to choose between their ability to reproduce and their very *freedom*. In this way, governments were able to coerce African American women into consenting to sterilization procedures, which they believed would purify and economically strengthen the American populace in the future.

Coerced Sterilization of Hispanic Women

Similarly, Hispanic women, particularly immigrants, were sterilized en masse by the federal and state governments throughout the twentieth century. Bruinius (2006, p. 257) observes that immigration fears pervaded the United States in the early twentieth century as masses of non-Nordic people flooded the country; these people were perceived as possessing biological defects and inferior intelligence levels. Mexican immigrants were viewed as a greater threat than other immigrant groups, and subsequently, were sterilized at higher rates. In their 1934 report, Paul Popenoe and Ellen Morton Williams portrayed the “Mexican problem” as a public and fiscal threat to American society’s health. The study tracked 504 families who were recipients of public aid at the time, and Popenoe and Williams (1934, pp. 216-218) concluded that Mexican families typically had the largest family size — the mean Mexican family had 5.2 children, as compared to the American mean of 3.53 children — but that Mexican parents produced children who were

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“eugenically inferior” to those of other races, incurring large public expenses with little benefit to society in return (Ibid., p. 220).

The 1978 district court case *Madrigal v. Quilligan* best exemplifies the nature of the sterilization by coercion that thousands of Hispanic women were forced to undergo. The suit was brought by ten working-class women of Mexican origin who were coerced into postpartum tubal ligations shortly after undergoing cesarean deliveries. All of the plaintiffs were low-income, and had immigrated to California from rural Mexico when they were only teenagers; none of them spoke English. In addition, in her article, Alexandra Minna Stern (2005) emphasizes that the sterilizations in question in *Madrigal* were financed by federal agencies that provided local hospitals—in this case, County General Hospital in Los Angeles, California—the funds to carry out the family planning initiatives put forth by President Lyndon B. Johnson in his War on Poverty initiative.

Madrigal v. Quilligan brought to light the corruption and coercion occurring in County General Hospital, and similar hospitals across the country; it was discovered that the physicians in charge of the hospital viewed population control through a racial lens, operating under the impression that certain races were more fit to reproduce than others. In fact, the plaintiffs obtained the testimony of a witness who had previously worked at County General, and she alleged that Dr. Quilligan, the head of Obstetrics and Gynecology at County General, had stated that “poor minority women in L. A. County were having too many babies; that it was a strain on society; and that it was good that they be sterilized” (Stern, 2005). Minority women who had two or more children already were specifically targeted by County General obstetricians. Anthropologist Carlos Velez-Ibanez, who helped argue the women’s case in court, asserted that motherhood constituted the very essence of Mexican women’s identity, and as a result, having a large family was perceived as desirable. Therefore, he argued, the sterilization by coercion practiced by County General and other federally-funded hospitals “was an affront to the ingrained values of Mexicans and constituted a violent kind of ‘cultural sterilization’” (Stern 2016, p. 230) as well.

Dr. Bernard Rosenfeld, astounded by the coercion he had witnessed when he did his residency at County General, authored a report which alleged that between July 1968 and July 1970, the hospital saw “a 742% increase in elective hysterectomies, a 470% increase in elective tubal ligations, and a 151% increase in post-delivery tubal ligations” (Stern 2005). These tremendous statistics are the result of several factors, one being the fact that obstetrics residents at the hospital were pressured to meet a certain quota of tubal ligations. The physicians in charge of County General also coerced residents into performing the surgeries by describing them as an opportunity to gain practical surgical training and experience; as a result, residents were more likely to compel minority women to be sterilized than if they had not faced these pressures from their superiors. Moreover, Dr. Rosenfeld noted that obstetricians and residents rarely obtained informed consent from their patients before commencing sterilization, another reason that the hospital was able to achieve such high numbers of sterilization cases (Stern 2005).

In the case of the plaintiffs in *Madrigal*, all ten were coerced in a strikingly similar manner by County General physicians—they were all offered the option of sterilization immediately after they had finished a difficult childbirth, which, their lawyers argued, was not a state in which they could give objective consent to sterilization; in fact, in three of the ten cases, no consent was obtained prior to the procedure, and in the other seven, heavy coercion was used. In some cases, obstetricians did not tell the women that the procedure

was irreversible, in others, the women were told that the only way to solve other, entirely unrelated medical complications they were facing was through sterilization, and in one case, the plaintiff gave her consent only after being told that her husband had already signed the consent form, which was not true (Stern 2005). All of these coercive actions violated the informed consent laws previously established by the federal government.

The judge presiding over the case ultimately ruled in Quilligan’s favor, determining that there was not enough evidence against the physicians to prove that they had acted without the ten women’s consent. However, despite the loss, the case had a positive impact on the rights of Hispanic women throughout the country; consent forms were required to be bilingual from that point onwards. The case also increased county hospitals’ compliance with federal guidelines, such as that requiring a 72-hour waiting period between the time when consent was obtained and the time when the procedure was performed, it put an end to the sterilization of those individuals below 21 years of age, and it created the requirement of a written statement of consent from the patient, accompanied by the physician’s assurance that the patient’s welfare benefits would not be restricted despite her decision not to receive the procedure (Stern 2005). Since County General and many other government-funded hospitals had previously violated all of these provisions, the aftermath of the case was perceived as a major success by minority women and their advocates.

Conclusion

Therefore, racial politics played a fundamental role in the practice and perpetuation of coerced sterilization of minority women by the government in the twentieth-century United States. Racial purity was greatly valued by those in power at the federal and state levels of government, so they perceived it necessary to limit the reproductive capacities of certain, “inferior” minority groups, specifically Native Americans, African Americans, and Hispanics. They did so by attaching stipulations to grants of funds to local hospitals and health care facilities, encouraging them to practice sterilization for the sake of population control and social and economic wellbeing. Hospitals complied, using coercive methods to obtain minority women’s consent to sterilization, and in some cases, obtaining no consent at all before performing the procedure. This phenomenon of mass sterilization by coercion demonstrates that American government and the majority of society viewed minority racial groups as fundamentally lesser in the twentieth century, lacking inherent value and humanity, and simply weighing society down, socially, economically, and criminally. Thus, coerced sterilization was merely a physical manifestation of the unfortunate truth that, although created equal, not all individuals were treated as such by the government and their fellow citizens in this era. □

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Chapter 12:

The Coerced Sterilization of HIV-Positive Women in South Africa

Madison Armstrong

□ While HIV infection rates continue to decline in the developed world, rates increase annually in many developing countries. Human immunodeficiency virus (HIV) destroys CD4 cells in the immune system that are responsible for fighting infection and stopping its spread within the body. Left untreated, CD4 cell count will continue to decrease—eventually reach the threshold necessary for an AIDS diagnosis (AIDS.gov 2016). Sub-Saharan African countries have some of the highest rates of HIV infection in the world. In particular, South Africa has one of the highest HIV prevalence rates at 19.2 percent. South Africa is unusual in that prevalence rates are higher among women than men. Of the 7 million South Africans living with the disease, over 4 million are female (UNAIDS). Additionally, young women are three to seven times more likely to contract the infection than young men. As a result, a majority of women infected are of reproductive age (Mthembu 2011, p. 4). Women living with HIV face a massive stigma in South African culture, especially in regards to their sexual health and reproductive rights. In the last few years, South Africa has seen a spike in forced and coerced sterilizations of HIV-positive women by healthcare professionals despite robust informed consent laws and the increased availability of medication that makes pregnancy safe for HIV-positive women and their children. This paper seeks to offer an explanation for the large gap between laws that explicitly ban coerced sterilization and the reality for many HIV-positive women who have endured the procedure.

HIV-Positive Women in South Africa

While HIV is largely seen in the United States as a disease that infects gay and bisexual men, quite the opposite is true in Sub-Saharan Africa. Women constitute the majority of those living with the disease and of new transmissions in the region, making it very likely that the regional gender gap in HIV infections will continue to grow (Aulette-Root et al. 2014, p. 2). In South Africa, gender inequities leave women with severely limited power in sexual relationships and higher poverty rates—both of which are highly correlated to the disproportionate rate of infection among women. One example of this power disparity is

the most common form of contraception—the male condom. The male condom protects both partners, but the decision of whether or not to wear one ultimately falls to the male, meaning that women have limited power in their reproductive health.

According to a Human Sciences Research Council of South Africa study, men were five times more likely than women to report having multiple sexual partners in the last year (Shisana et al. 2014, p. 69). A significant component of South African masculinity is to have multiple sexual partners, resulting in men having a higher risk of contracting HIV and transmitting it to a female partner. Moreover, women ages 15-24 were over eight times more likely than their male counterparts to have been involved in a sexual relationship with a partner more than five years older (Shisana et al. 2014, p. 67). Given cultural notions of masculinity, older male partners are more likely to have engaged in sexual relationships with a greater number of partners, thus increasing their risk for HIV and the possibility of transmission to female partners. Additionally, the age gap exacerbates power imbalances in the relationship and furthers gender inequities. South African health clinics attempt to prevent transmission through encouraging women to abide by the ABCs, “Abstain, Be faithful, and use Condoms” (Aulette-Root et al. 2014, p. 5), but the nature of the power relations between men and women in sexual relationships makes this nearly impossible in practice.

In addition to higher infection rates among women, the disease takes a greater toll on women socially and economically. HIV-positive women are seen through the lens of a double stigma in regards to both their perceived sexual behavior and their HIV status. Women in South Africa are expected to control their sexual desires and to be less interested in sex than men (Aulette-Root et al. 2014, p. 50). Because HIV is a sexually transmitted disease and is not traditionally associated with monogamy, HIV-positive women are viewed as practicing immoral sexual behavior. Moreover, prevailing beliefs that HIV-positive women are disgusting—both because of the infection and their promiscuity—make it difficult for women to find and hold onto a partner after disclosing an HIV-positive status (Aulette-Root et al. 2014, p. 50). In a culture where women are valued for their role in the household, the absence of a partner can lead to social isolation and deep poverty, which work to further limit power among an already marginalized population.

Beyond the social and economic impact of not having a partner, attitudes surrounding HIV further marginalize infected women and result in widespread discrimination towards HIV-positive women. False beliefs about how HIV is transmitted manifest into forms of discrimination such as family and community members requiring women to use separate articles of clothing and eating utensils (Aulette-Root et al. 2014, p. 50). Rather than attributing the high prevalence rate of HIV among women of reproductive age to the disadvantaged position of women in South African society, the stigma serves to place blame on individual failings of the infected women (Aulette-Root et al. 2014). Additionally, the intersection of gender, race and class contribute to an even larger stigma projected onto certain subpopulations of the HIV-positive community. Among women, black Africans were the most likely to contract HIV (Shisana et al. 2014, p. 49). While black Africans constitute a racial majority in South Africa, they have much lower incomes than white South Africans (Desilver 2013). Beyond race, there is a clear relationship between socioeconomic status and prevalence rates of HIV, with rates increasing as household income decreases (Shisana et al. 2014, p. 51). The stigma surrounding both the disease itself and the already disadvantaged groups who are more likely to be infected

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contributes to a powerful notion of *otherness* that is used to discriminate against women living with the disease and that dictates access to care.

Access to safe and quality care is particularly important for HIV positive women wishing to have children. Due to the additional stigma childless women face and the availability of antiretroviral therapy (ART) to make pregnancy safe, more and more HIV-positive women are choosing to have children (McLaughlin 2014, p. 78). In South African culture, female fertility is strongly associated with a higher social status (Cooper et al. 2007)—so many HIV-positive women desperately seek to combat the stigma they face from the disease. However, HIV-positive women wishing to have children face severe discrimination from healthcare workers and the broader medical community. The stigma held by broader society permeates the medical community and works to influence those charged with delivering medical care to HIV-positive patients. The following section will discuss one form of discrimination that South African HIV-positive women face in regards to reproductive rights and healthcare.

Coerced Sterilization of HIV-Positive Women

In the last few years, there have been increasing reports of forced and coerced sterilization of HIV-positive women in South Africa (Kardas-Nelson 2009). Although the precise number of women sterilized without their consent is unknown and the stigma of both HIV and infertility makes it difficult to determine, one important qualitative study has been conducted. Following reports of coerced sterilization to the South African Women's Legal Center in 2008, the Her Rights Initiative (HRI) set out to speak to HIV-positive women to determine how sterilizations occurred. 22 women—all recruited from support groups for HIV-positive women—were interviewed for the study. The study found that doctors and healthcare workers most commonly coerce HIV-positive patients into sterilizations after giving birth or while seeking other reproductive healthcare. Women reported that doctors commonly presented sterilization as the primary form of birth control for HIV-positive women (Strode et al. 2012, p. 63). Some also reported that doctors claimed having another child would be detrimental to their health—and potentially fatal—due to their HIV status. Nearly all were told that they would benefit from sterilization due to their HIV status and few were informed of the risks, consequences, and details of the procedure. Many women were not aware that the procedure meant that they would be infertile. Of the few women who were informed of the consequences, nearly all were incorrectly told that the procedure could be easily reversed. Additionally, none of the women were aware that they had the right to refuse the procedure (Strode et al. 2012, p. 64). Most women were asked to sign consent forms under extreme duress—such as while in labor or on the way to the operating room—and felt that they must consent to the procedure in order to obtain other needed services (Strode et al. 2012, p. 65). In a few extreme cases, women had no knowledge of their sterilization until discovered by another doctor several years later while receiving treatment for another issue (Strode et al. 2012, p. 66). While women experienced force and coercion to varying degrees, it is clear that none in the study gave their free and informed consent to be sterilized. Moreover, since the conclusion of the study, the South African Women's Legal Center has continued to receive reports of coerced sterilizations from HIV-positive women and has filed complaints against several offending hospitals (Tswana 2016).

The South African cultural emphasis on fertility and motherhood makes sterilization especially devastating for women. Despite a desire to have more children, sterilization makes this impossible for women who endure the procedure. Among women interviewed in the HRI study, this caused feelings of “trauma, isolation, helplessness, stress and long-term humiliation” in victims, as well as a sense of loss of female identity and increased social isolation (Essack and Strode 2012, p. 28). Women also reported that disclosure of their sterilization to family and partners was extremely difficult and many chose not to inform their partners in fear of physical abuse, divorce and financial consequences. One woman who was open about her sterilization reported, “[After I was sterilized and my boyfriend left me] I’d get SMSs from his [new] girlfriend saying, ‘I got his child’, you see things like that, ‘you barren thing’” (Mthembu et al. 2011, p. 22). Beyond the profound social impact of sterilization, it threatens the financial stability of married women. In South African culture, bride payments called *lobola* are commonly paid from the husband’s family to the bride’s. Women expressed fear that their *lobola* could be rescinded if they disclosed their infertility, resulting in humiliation and a serious financial loss for their families (Essack and Strode 2012, p. 30). In addition to the stigma of being HIV-positive, women who undergo coerced sterilizations face added discrimination for being infertile in a culture where a woman’s ability to reproduce is of great value.

Domestic and International Reproductive Rights Laws

In 2014, the South African National AIDS Council conducted a study to measure the strength of the stigma surrounding the HIV positive population. The Council found that 7 percent of respondents indicated that they had been forced or coerced into undergoing a sterilization procedure (16). This is likely a low estimate considering the stigma attached to being sterile. The prevalence of forced and coerced sterilization in South Africa is particularly interesting given the country’s progressive tradition regarding reproductive rights, robust informed consent laws for sterilization, and international reproductive rights treaties to which South Africa is a party.

Indeed, South Africa was one of the first nations to include reproductive rights in its national constitution. In addition to granting freedom and security to one’s own body and explicit anti discrimination provisions on the grounds of sex and sexual orientation, the constitution goes a step further. Section 27.1.A states “everyone has the right to have access to healthcare services, including reproductive healthcare” (Constitution of the Republic of South Africa 1996). At the time of its passage, South Africa was the only country in the world to enumerate access to reproductive healthcare as a constitutional right (McLaughlin 2014, p. 78). The Department of Health has interpreted this to mean that every person has the right to engage in safe and pleasurable sex and to choose whether to have children and how many children to have (Choice on Termination of Pregnancy Act No. 92, 1996). In this way, South Africa has taken very progressive constitutional steps to protect freedom of choice and access to reproductive healthcare for all people.

Furthermore, South Africa has robust sterilization and informed consent laws. The Sterilization Act of 1998 states that adults over the age of 18 have the right to be sterilized so long as they are given a clear explanation of the procedure and its consequences (Sterilization Act 1998). Patients wishing to be sterilized must provide proof of their understanding and consent to the procedure in writing—an especially progressive law

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considering South African law does not require written consent for most other medical procedures (McLaughlin 2014, p. 82). Additionally, the National Health Act of 2003 contains provisions that require informed consent for medical procedures. To obtain informed consent, patients must be made aware of the full procedure, risks and benefits, alternative treatment options, and be explicitly informed of their right to refuse service. Information must also be delivered in a language that the patient is comfortable with and must take into account their level of literacy (National Health Act 2003). Case law surrounding these statutes has gone even further to protect women from forced and coerced sterilizations. Case law has established that consent for sterilization requires substantial knowledge of the procedure and its effects. Additionally, consent cannot be obtained through coercion or fear (McLaughlin 2014, p. 83). While most women in the HRI study did sign a consent form, their general lack of knowledge surrounding the procedure and the conditions under which consent was obtained would not hold up as informed consent in court. These sterilizations were in violation of constitutional, statutory and judicial law.

In addition to strong domestic laws, several international laws and treaties signed by South Africa protect women from coerced sterilization. First, the Universal Declaration of Human Rights guarantees the right to have a family, which sterilization makes impossible (McLaughlin 2014, p. 79). The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that women have the right to choose when to have children and must have access to the education and information necessary to exercise this right. CEDAW General Recommendation 24 in particular encourages states to ban non-consensual sterilization and require informed consent to be obtained in such a way that respects the rights, needs, perspective and privacy of the patient (Convention on the Elimination of All Forms of Discrimination Against Women 1979). Furthermore, the Protocol to the African Charter on Humans and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2003 protects the rights of women to decide whether or not to have children, and the number and spacing of said children. The Maputo Protocol is noteworthy in that it requires signatory states to pledge to protect the rights described in the document (Maputo Protocol 2003). As with the domestic laws, it is clear that forced and coerced sterilizations violate a number of these in laws in important ways. International laws to which South Africa is signatory require informed consent for sterilization and protect the sexual and reproductive rights of women. Informed consent for sterilization and reproductive rights are clearly and repeatedly codified in both domestic and international law and coerced sterilization is unmistakably illegal.

Analysis

As evidenced by the Her Rights Initiative study, there is a large gap between laws and the reality on the ground for many HIV-positive women. Despite clear laws banning the practice, forced and coerced sterilization for HIV-positive women is becoming more prevalent. An examination of why this is occurring and a possible explanation for the large gap follows. First, it is important to examine who exactly is being violated and where these procedures are taking place. The HRI study—the only one of its kind in South Africa—was conducted in the KwaZulu-Natal and Gauteng provinces and did not record respondents' race. All women in the HRI study felt that their “consent” did not constitute informed consent under the law and they were not given the opportunity to make an informed and independent choice. Nearly all women were coerced into signing consent

documents, but a few were sterilized without their knowledge. Women were from both urban and rural areas and while the procedures predominantly occurred in public clinics, they also took place in private clinics (Strode et al. 2012, p. 63). Although the scope of the study is limited, it is particularly interesting that the sterilizations seem to transcend region, setting and class lines to some degree. As previously discussed, HIV-positive women in South Africa are disproportionately poor, but the occurrence of the procedure in both free public and pricey private clinics suggests that sterilizations do not only target poor women. To our knowledge, the issue is not concentrated in a given area, nor is a specific subgroup of HIV-positive women targeted. Rather, it appears that the problem is much more complex than a socioeconomic or geographic division.

Despite the existence of explicit laws banning the practice, prevalence of the illegal sterilizations is increasing among HIV-positive women. In part, the disparity can be attributed to a policy failure. Clearly lawmakers failed to create an efficient plan for implementation and effective enforcement policies. It appears that there is a significant disparity between the values of lawmakers and those of medical professionals. While lawmakers value informed consent and the reproductive rights of all women, medical professionals by and large do not seem to share these values. Medical professionals were the ones who encouraged and coerced HIV-positive women into “consenting” to sterilization procedures and accepted forms of “consent” that did not measure up to requirements detailed in the laws. While the law explicitly bans the practice, it did not go far enough in creating implementation and enforcement procedures that adequately accounted for the differences in opinion between lawmakers and medical professionals. The laws contain no enforcement mechanism or penalties for transgressions of the law. In terms of enforcement, it is left up to women who have been violated to pursue legal action against the medical professionals who treated them. This is particularly problematic because women with HIV are disproportionately poor and have limited access to legal remedies. Additionally, many women do not publicly reveal their status and litigation would require them to do so—subjecting them to discrimination stemming from an extreme stigma. The law is flawed in that it fails to include adequate enforcement mechanisms to account for the value differences between lawmakers and healthcare professionals.

Next, it is apparent that the strong stigma surrounding HIV-positive women plays a role in the disparity between laws and social reality. In South Africa, over 22 percent of those living with HIV experienced discrimination due to their HIV status (The People Living with HIV Stigma Index 2015). Additionally, HIV-positive women are more likely to experience discrimination than their male counterparts as they are burdened with the additional stigma of being perceived as sexually promiscuous and irresponsible. Discriminatory attitudes are particularly strong around the reproductive rights of HIV-positive women. There is a common belief that HIV-positive women should not reproduce to avoid mother-to-child transmission and further spread of the disease (Mthembu et al. 2011, p. 4). The stigma is widespread and works to inform the values of healthcare workers in important ways. Discrimination towards HIV-positive women who exercise their reproductive rights permeates the healthcare profession, but it is not clear that the stigma alone accounts for the invasive procedures done to women absent their consent. Stigma can certainly account for discrimination, but performing illegal and traumatizing procedures on HIV-positive women suggests the presence of a force beyond negative attitudes.

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In conjunction with weaknesses in the law and the harsh stigma that surrounds HIV, the attitudes of healthcare workers towards HIV-positive women are important. More HIV-positive women are now pursuing motherhood as a result of widely available medicine that prevents mother-to-child transmission and increased access to antiretroviral therapy (ART) that makes pregnancy safe for HIV-positive mothers (Mthembu et al. 2011, p. 4). Despite the relative safety of pregnancy for HIV-positive women and their children, healthcare workers demonstrate a limited understanding of reproductive and contraceptive choices available to HIV-positive women (Mthembu et al. 2011, p. 5). Furthermore, the power imbalance between patients and providers can result in providers projecting their own values and prejudices against HIV-positive women onto their patients. Perceptions that HIV-positive women should not be mothers are apparent in many of the documented cases. When asked why she believes she was coerced into sterilization, one HIV-positive responded in reference to her doctors, “They just said that a person with this disease is not allowed to have more children” (Mthembu et al. 2011, p. 12). Women put their trust in their healthcare providers and are likely to accept their recommendations when given few other options.

Moreover, healthcare providers often presented sterilization as the only option for HIV-positive women and gave patients little choice in making a decision. When sterilization is the only option presented—and when presented forcefully—this seriously limits patient choice and autonomy. One woman reported, “He was shouting at me while all were listening. I did not have time to say anything as we were arguing... I was embarrassed and I just signed without getting time to read the form” (Mthembu et al. 2011, p. 16). In this way, healthcare workers use their positions of authority to control the contraception options offered to their patients and forcefully persuade them to give “consent” to sterilization procedures. The power of doctors in presenting limited choices and employing forceful persuasion tactics left patients feeling intimidated after interacting with healthcare workers, resulting in women giving “consent” to be sterilized.

When presented with limited options, the power imbalance between patients and doctor also served to make women afraid to question the recommendations of doctors and healthcare professionals. As one participant explained, “in those days we did not know much about our rights. One was simply told, and to say to a doctor, ‘I do not want’ was unheard of. You were just told to do this or else you had to leave the clinic or hospital” (Strode et al. 2012, p. 64). Several women also reported being unable to ask even simple questions after being told that they should be sterilized. One woman explained, “one can see in any case that, no, she [the nurse] has epaulettes so she was an important somebody and she’d say she doesn’t want to be questioned” (Strode et al. 2012, p. 64). Healthcare providers’ discrimination and stigma towards HIV-positive women resulted in the presentation of limited options regarding reproductive health and the power imbalance between providers and patients makes patients reluctant to raise any concerns to their doctor’s recommendations.

Additionally, reproductive options were often presented while women were in extreme pain or under duress. Women were asked to sign consent paper while they were already in labor or being wheeled to the birthing room (Strode et al. 2012, p. 65). Some women also reported that they felt compelled to give consent for sterilization in order to have another procedure. One participant said, “He [the doctor] was willing to help me... but he can only help me if I sign to sterilization because he didn’t wish to see me in the hospital later with

another request for abortion” (Mthembu et al. 2011, p. 17). Beyond the presentation of limited options and the power imbalance between patients and providers, requiring consent from patients under extreme conditions and in return for access to other procedures makes informed consent impossible and forced sterilizations more prevalent.

After an exploration of the extra-legal conditions that allow forced and coerced sterilizations to occur, it is important to understand the motivations behind this behavior from healthcare professionals. Here, we turn back to a discussion of the pervasive stigma surrounding the sexuality of HIV-positive women and motherhood. Many women reported being told that sterilization was necessary to prevent their future children from being orphaned when they died from HIV. One woman explained, “They then told me that I had to be sterilized because I was HIV-positive. They only had a file but they said if I were to have a child again, who would raise it because I was going to die soon” (Mthembu et al. 2011, p. 13). This completely ignores the ability of HIV-positive women to live long and full lives as loving and effective mothers—especially considering widespread access to safe and effective treatment for symptoms relating to HIV. Healthcare workers have taken it upon themselves to prevent future orphans from entering the system and to stop the spread of HIV by taking preemptive measures to sterilize a population of women who they believe are unlikely to live to fully raise their children. This is particularly troubling among healthcare professionals as they should be fully aware of new developments in ART that make a long and productive life probable for HIV-positive women. These attitudes originate from a strong stigma, but an extreme power imbalance and lack of protection within the laws give discriminatory attitudes the platform to restrict HIV-positive women’s reproductive rights in an invasive and permanent way.

Conclusion

The disparity between laws and social reality in terms of the forced and coerced sterilization of HIV positive women in South Africa is puzzling. While the stigma, weaknesses in the laws and the methods of obtaining “consent” certainly help to explain the gap, the prevailing attitudes of healthcare workers regarding their HIV positive female patients and the power dynamic between patients and doctors most fully explain the disparity. Healthcare professionals have taken it upon themselves to right the social wrong of an increasing number of orphans through coerced sterilizations of a population that is perceived to be more likely to die prematurely. Laws fall far short of protecting this vulnerable population and the stigma continues to prevail. Rather than stronger laws, it seems that a widespread change in the professional culture of healthcare workers regarding HIV-positive women must occur. The discrimination faced by women outside of the healthcare industry suggests that culture among healthcare workers stems at least in part from a wider societal stigma that laws have little power to combat. □

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Part IV:
Ideologies in Movement

Chapter 13:

Rights in Conflict:

The *Abuelas*' Search for Truth in Post-Dictatorship Argentina

Katie Daniels

"I came and put my body on the line.... I think that this is our message: that everyone has to put their bodies on the line."

-- *Hebe de Bonafini*,
Former president of the Mothers of May Square

□ When Laura de Carlotto went missing, her mother Estela did not know that her activist daughter was pregnant. Later, Estela would learn that Laura had given birth to a baby boy before being murdered by agents of Argentina's military dictatorship (Haberman 2015). Estela did not know what happened to her grandson. In 1979, two years after her daughter's disappearance, Estela joined a group of women who had also lost both their children and grandchildren to the regime. Known as the *Abuelas de Plaza de Mayo*, these women sought to identify and reunite their disappeared grandchildren with their biological families (Penchaszadeh 1992, p. 193). "Each case is a triumph of truth over lies, horrors, and deceit," Estela would later say (Haberman 2015).

Estela's quote illustrates how the *Abuelas* understand their mission to restore their disappeared grandchildren. As Gandsman (2009, pp. 162-184) has argued, by establishing the grandchildren's real identities, the *Abuelas* hoped to reveal the truth about the dictatorship's crimes and to refute any effort to suppress this painful history. The trouble arose when some grandchildren did not want to find out their biological identities, bringing the grandmothers' right to truth into conflict with their progeny's right to identity (Gandsman 2009, pp. 162-184). As the grandchildren brought their cases to court, the centrality of this issue to Argentina's process of transitional justice has led the courts to favor the right to truth over the right to identity. This pattern is a positive development for the *Abuelas*, who have equated public recognition of the dictatorship's crimes with justice

(Haberman 2015). But the court cases also set a troubling precedent for government overreach into Argentine citizens’ private lives.

From the Streets to the Courts

When the *Abuelas* first formed in 1977, their weekly marches outside of Argentina’s presidential palace were a courageous protest against the military *junta* (Haberman 2015). During the seven years the *junta* ruled Argentina, the government “disappeared” 30,000 of its citizens to secret prisons where they were tortured and often killed (“Dirty War”). Because of the widespread terror the government instilled, public discourse about the disappeared, including the 500 toddlers or infants born in captivity, was limited. The grandmothers had to resort to extrajudicial methods of finding their grandchildren, especially because the *junta* tried to discredit their advocacy as the work of “*las locas*,” or crazy women (Gandsman 2012, p. 20). The grandmothers plastered “missing child” posters on the streets and undertook private investigations; one woman even worked as a maid in the household of a couple she suspected had abducted a disappeared child (Goldman 2012).

But even as their own country dismissed their work, the *Abuelas* gained an international presence. As Penchaszadeh (1992, p. 293) recounts, the grandmothers traveled the globe and pleaded their case with world leaders like the pope. They sought out scientists in particular because the *Abuelas* anticipated the difficulty of proving a disappeared child’s biological identity in court (Penchaszadeh 1992, p. 294). If they ever appeared before a judge, the grandmothers wanted their case to be scientifically ironclad. In 1984, a University of California at Berkeley geneticist named Mary-Claire King and an Argentine geneticist named Ana Maria Di Lonardo developed a test for the *Abuelas* known as the Grandparents’ Index (Goldman 2012). It could identify the genetic link between a grandparent and their grandchild with 99.9 percent accuracy (Gandsman 2009, p. 163).

That same year the *Abuelas* used the Grandparents’ Index to prove that a young girl named Paula Logares was the daughter of a disappeared couple (Goldman 2012). Thanks to this test, Paula became the first disappeared grandchild identified through biological markers and was reunited with her biological family (“Reclaiming the Past” 2008, p. 171). Her landmark court case illustrates how the *Abuelas* constructed language to argue that knowing one’s biological or “true” identity was essential for the welfare of both the individual and post-dictatorship Argentina.

Security agents had kidnapped baby Paula and her parents when the family was living abroad in Montevideo. Paula was given to a former police officer and his wife to raise; her parents remain disappeared (Robert 1994, p. 11). Paula’s adoptive parents argued that the years Paula spent in their care should weigh in their favor (Gandsman 2009, p. 172). Despite genetic tests proving that Paula was not their biological child, the judge was hesitant to award custody to Paula’s biological grandmother (Gandsman 2008, p. 172).

The *Abuelas* countered that Paula’s true identity, and therefore well-being, was rooted in her biological heritage. “Only the restitution to her legitimate family guarantees to avoid the risk of serious mental damage and will provide the recovery of her real identity,” they said (Gandsman 2008, p. 172). The grandmothers were deliberately setting up a parallel between their grandchildren and post-dictatorship Argentina. In their eyes, the government had perpetrated two wrongs by first kidnapping their children and then lying about the disappearances. Hiding the disappeared grandchildren’s true identities let the dictatorship’s

lies taint the next generation (Gandsman 2009, pp. 162-184). Argentine society could only recover by facing the truth of the dictatorship's crimes; the grandchildren's bodies would act as vehicles for this transitional justice.

The parallels between knowing the disappeared grandchildren's identities and knowing about the dictatorship's crimes are not new. Other commentators have noted an interconnected relationship in which the grandchildren's mental health acts as a microcosm for the social health of the nation. "The children of the disappeared stand as uncomfortable reminders of the unresolved issues left over from the dictatorship," write Karen Robert and Rodrigo Gutierrez Hermelo in their interview with the then-teenaged Paula (Robert 1994, p. 11).

As Esteban Costa, a therapy coordinator for disappeared children, remarked "the incapacity of the society to assume its responsibility regarding the disappeared parent" compounds the disappeared child's identity crisis (Robert 1994, p. 13). Living through the dictatorship frightened many adults into silence about the past and resulted in a lack of conversations about the disappearances. "If the justice system were to recognize the disappeared as victims," says Costa, "That simple fact would be significant for these kids' health" (Robert 1994, p. 13). His observations support the claim that the *Abuelas'* search for their grandchildren was necessary both for the individual families involved and for the "health" of Argentine society. In order for society and their grandchildren to heal after the traumatic identity crisis that the dictatorship caused, the *Abuelas* believed that the truth had to be uncovered (Gandsman 2009, pp. 162-184).

Still, some grandmothers expressed doubts about the morality of their work. Reflecting on the Logares trial, Estela admits "That was the day when I had the greatest doubts about our work and whether we were doing it for us, for the children, or, if it was our need, whether we were causing them any harm." ("Reclaiming the Past" 2008, p. 173). Her concern seems to foreshadow later court cases that would not reach the Logares case's happy conclusion. The judge ruled in the *Abuelas'* favor and Paula moved in with her biological grandmother (Gandsman 2008, p. 172). But Estela—the woman who would one day become president of the *Abuelas*—was already wondering if the grandmother's right to truth would always be in their grandchildren's best interest.

Establishment of Conflicting Rights in the Courts

From the time the *junta* granted itself amnesty and held democratic elections in 1983 and into the late '90s, Argentina experienced a gradual increase in public dialogue about the dictatorship's human rights abuses (Penchaszadeh 1992, p. 296). The human rights movement made significant but not total progress under President Raul Alfonsin, the first democratically elected president after the *junta* (Penchaszadeh 1992, p. 296). Since Argentina had a fragile, untested democracy, Alfonsin was pragmatic about balancing justice for the regime's victims against the military's denial of wrongdoing. Although he launched the world's first successful truth commission, Alfonsin caved to military pressure and passed two laws that restricted the *Abuelas'* access to justice (Wright 2014, p. 78).

The first, the *ley de punto final*, put a statute of limitations on the charges a citizen could bring against a military leader; the second, the due obedience law, exempted everyone but the highest ranking military officers from prosecution ("Dirty War"). This made it difficult for the *Abuelas* to prosecute their children's murders (Wright 2014, p. 78).

Instead, thanks to a loophole in the du obedience law, they focused on charging military officials with the only crime they could: “[the] appropriation of minors and substitution of identity,’ or the practice of offering babies born to captive women to pro-military families for adoption” (Feitlowitz 2011, p. 24). Along with different Argentine legal groups, the *Abuelas* began filing criminal charges and by 2000, more than 100 baby abductions were under investigation (Wright 2014, p. 100). Since this was initially the only way relatives of the disappeared could get justice, grandchildren like Paula became the focus of the first court cases brought against the regime.

By the time Argentina declared Alfonsín’s laws unconstitutional in 2005, the grandmothers’ court cases had created legal precedents for two conflicting sets of rights: the right to know and the right to identity (“Dirty War”). In 1998, an Argentine federal court cited an Inter-American Commission on Human Rights case in their ruling that relatives of the disappeared had a “right to truth” about their loved one’s fates (EAAF 2006, p. 115). The grandmothers’ emphasis on biological truth is reflected in other ways, like the title of the government office responsible for investigating disappearances. The name of the National Commission for the Right to Identity, or CONADI, implies that identity is tied to biology (Vaisman 2014, p. 398). To this day, the *Abuelas* define a person’s essential characteristics as “cultural, biological, and social charges, transmitted from previous generations... [which] link each person to social groups and to traditions” (“Genetic Aspect—The Identity”). By acknowledging that biological identity also has social and historical consequences, the *Abuelas* continue to position their right to truth as part of Argentina’s post-dictatorship narrative.

But during the mid-1990s, a new challenge had emerged. The disappeared grandchildren had become legal adults and custody was no longer a legal issue, even if the *Abuelas* still desperately wanted to be reunited with their grandchildren. The question was now more complicated. Adoptive parents of disappeared children, like in the Logares case, had often resisted the *Abuelas*’ demands for genetic testing since any proof that their child had been disappeared could send them to jail (Gandsman 2008, p. 172). However, now the grandchildren themselves were refusing genetic tests. Since 2003, there have been eight cases in which the *Abuelas* claimed to have found a potential disappeared grandchild but that person has refused to have his or her biological identity confirmed (Gandsman 2009, p. 164).

This brings the grandmothers’ established right to know into conflict with the grandchildren’s right to identity, which also has a legal basis. In 1984, Argentina adopted article five in the American Convention on Human Rights, which states “Every person has the right to have his physical, mental, and moral integrity respected” (Gandsman 2009, p. 172). The country has also agreed to article eight of the U.N. Convention on Rights of the Child, which promises states will “undertake to respect the right of the child to preserve his or her identity without unlawful interference” (“Convention on the Rights of the Child.”). In other words, the grandchildren also had a strong legal and moral argument that the state should respect their rights to privacy and identity.

The grandmothers, however, argue that such rights entail a corresponding obligation, illustrating the tension not only between two sets of rights but also between two visions for Argentina’s future. From the *Abuelas*’ perspective, the grandchild’s right to identity obligates him or her to investigate whether it is true; as the grandmothers put it, “The right to an identity is the right to know who you are” (Gandsman 2009, p. 173). Furthermore,

the grandchildren have a duty to discover their biological identities because their bodies are living testaments to their disappeared parents. As Paula Logare's grandmother said, "The fact of finding a grandchild far away from where you lost him or her is an indication that... that your own child is gone. That this little girl is all alone is the physical proof that your son or daughter has disappeared" (Robert 1994, p. 12). Determining biological identity is a way to honor the disappeared and to acknowledge the state's role in this crime.

The Argentina government grossly mistreated its citizens' bodies during the *junta*. But in their efforts to seek transitional justice, the *Abuelas* supported a pattern of judicial rulings that may inadvertently endanger citizens' bodies again. As Gandsman (2009, p. 172) has observed, it is ironic when a human rights group like the *Abuelas* argues for "the coercive intervention of state power" against "a right to privacy... [and] physical and psychological integrity." But for years, criminal charges against the dictatorship could only be leveraged through the grandchildren's bodies. In addition, these grandchildren were the only proof the *Abuelas* had that the crime of disappearance had taken place. These factors influenced the Argentine courts, which began to favor the grandmothers' right to truth over the grandchildren's right to identity.

Rewriting History Through Identity

One fall day in 1999, a retired policeman named Policarpo Vazquez was arrested and charged with kidnapping his daughter, Evelyn Vazquez (Gandsman 2009, p. 163). Like other children of the disappeared, Evelyn struggled to comprehend that her adoptive parents may have been involved in the disappearance of her biological parents. Another such child, Victoria Montenegro, describes the same dilemma. "I know they're not my parents," she said in an interview with a British newspaper, referring to her adoptive parents. "But I also spent many years of my life with them and I don't have any feelings of hate for them" (Stocker 2012). Perhaps this is why Evelyn attempted to bargain with the court: she would agree to genetic testing but if the results proved she was the child of a disappeared couple, her adoptive parents would not be tried (Gandsman 2009, p. 169).

The *Abuelas* refused. The group petitioned a judge to order a forced blood test for Evelyn. As their lawyer Alcira Rios pointed out, "In the end, Evelyn does not have legal documents" (Gandsman 2009, p. 169). The state now had an obligation to determine Evelyn's real identity, highlighting one practical stake the state has in these cases. The *Abuelas* also argued that since a judge would order the test, Evelyn technically wouldn't be responsible if her adoptive parents went to jail. As Gandsman (2009, p. 169) observes, this point raises disturbing questions about the "willingness to use the state as a means of coercing an adult citizen who had not committed a crime." Unlike the Logares case, which involved a young girl, the *Abuelas* were now asking the state to impose their right to know over an adult citizen's right to identity. Evelyn summed up the situation best when she said, "My human rights are being violated in the name of human rights" (Gandsman 2009, p. 172).

Evelyn's lawyer also tried to bargain with the courts, offering information about other disappeared children in exchange for impunity for the adoptive parents. He framed his argument in terms of transitional justice, asking, "What do we do with the children of the disappeared? Some type of reconciliation has to be possible. If not, we fail as a society" (Gandsman 2009, p. 167). The Vazquez case represented two paths that Argentina could

follow on the road to justice and healing. Society could “move on with the past” and choose reconciliation and impunity; or, it could stand with the *Abuelas* and reject the dictatorship’s version of history, which implicitly justified its brutal treatment of civilians (Gandsman 2009, p. 167).

Initially it seemed like the courts favored the *Abuelas*. In 2000, a federal court ordered a forced blood test on Evelyn Vazquez, but three years after her appeal the Supreme Court overruled the verdict (Gandsman 2009, p. 170). For a time, Evelyn’s rights to identity and privacy trumped the collective right of the state to investigate crimes, as well as the grandmothers’ right to know. “A person doesn’t have to supply their body... to be used to extract elements of proof,” wrote the judge, a statement that privileged an individual over the state and represented a huge step away from the dictatorship’s coercion of citizens (Gandsman 2009, p. 171).

A milestone ruling in Argentine history, the Vazquez case raises interesting questions about why the *Abuelas*, a human rights group working to uncover state-sponsored crimes, turned to the state to help carry out their search for justice. Ultimately, the *Abuelas* needed the state to legitimize their cause and to resolve the issues of truth and identity caused by their children’s disappearances (Gandsman 2009, p. 176). For example, Evelyn’s kidnappers had dictated her identity until the *Abuelas*’ brought them to court, thus letting the legacy of the dictatorship continue (Gandsman 2009, p. 176). In order to get justice, the *Abuelas* wanted the state to reject the *junta*’s narrative and replace it with the truth about their grandchildren’s biological parents – even if it meant jeopardizing those grandchildren’s right to identity.

The Brave New World of Genetic Testing

Until 2006, if the courts ordered a suspected disappeared grandchild to undergo a DNA test, the test was usually a blood sample like the one demanded in Evelyn’s court case. Now, geneticists can get usable DNA from the surface of hairbrushes, toothbrushes, and even worn clothes, potentially giving the state unprecedented access to its citizen’s sensitive genetic data. This new method, known as shed-DNA testing, is not as physically intrusive as a “forced blood extraction” but it represents a new development in the relationship between the state and its citizens’ bodily autonomy (Redaccion 2006).

Guillermo Gabriel Prieto was the subject of the first shed-DNA case to reach Argentina’s Supreme Court (Vaisman 2014, p. 399). His parents, Guillermo Antonio Prieto and Emma Gualtieri de Prieto, had always told him and his brother that the boys had been born at a private clinic (Vaisman 2014, p. 399). But when the brothers were young, human rights groups tried to get them tested against the *Banco Nacional de Datos Genéticos*, a database created in 1987 by Alfonsín and the *Abuelas* to “organize, operate and preserve a file of genetic data” specifically to confirm the identities of the disappeared and their children (“Historical Origins”). Guillermo’s parents refused to let their children submit to the tests. As an adult, Guillermo did the same (Vaisman 2014, pp. 399-400). In June 2005, a judge ordered a raid on Guillermo’s home for items to test for shed-DNA and, like Evelyn, Guillermo appealed to the Supreme Court (Vaisman 2014, p. 400). But several years had passed since Evelyn’s case and the Supreme Court now supported the judge’s decision. Unlike forced blood extractions, shed-DNA identity tests were acceptable (Vaisman 2014, p. 400).

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The court's decision illustrates the Gordian knot of competing rights claims that often accompany these cases, as well as providing insight into whose rights the state decides to favor. In his analysis of the case, Noa Vaisman (2014, p. 400) identifies a number of "interconnected crimes" and three victims with conflicting rights, which the court had to resolve. Guillermo, the first victim, had suffered three separate crimes: he had been kidnapped; his identity and legal documents had been forged; and his parents had been forcibly disappeared (Vaisman 2014, p. 400). This last crime implies that his parents' disappearance was the original crime from which all other stemmed and further suggests that the court, like the *Abuelas*, recognized the historical and social reverberations of their disappearance.

The second victim was Guillermo's biological family, whose right to know what had happened to Guillermo's mother had been jeopardized. Finally, the court named Argentine society itself as the third victim (Vaisman 2014, p. 401). "According to the Court," says Vaisman, "Argentines have the right to find out the extent and nature of the human rights violations committed by the regime" (Vaisman 2014, p. 401). In other words, the Supreme Court believes that the dictatorship's crimes had damaged society as much as they had damaged Guillermo, in addition to creating an identity crisis for both parties. The court's language illustrates the gains Argentina has made toward its post-dictatorship recovery. This is not only because of the *Abuelas*' work; the state also has an interest in investigating past human rights abuses because otherwise international human rights groups could intervene and jeopardize Argentina's sovereignty (Vaisman 2014, p. 403). Still, the court's decision illustrates how the *Abuelas*' emphasis on the right to know the truth influenced post-dictatorship recovery. The right to the truth, the court decision implies, justifies state overreach into an adult citizen's private life.

In 2009, Argentina's Congress passed a bill sponsored by the *Abuelas* that legalized the removal of "minimal amounts of blood, saliva, skin, hair or other biological samples" to determine the citizen's identity ("Argentina forces DNA tests"). If the citizen refused to be tested, a judge can issue a warrant for a shed-DNA test, thus enshrining Guillermo's case into law. Congress approved the bill by a 58-1 vote, a huge advancement in public discourse from the days when, as Costa complained, no one talked about the disappeared (Robert 1994, p. 13).

The law "doesn't violate in any way the body or the privacy," said Estela, now the president of the *Abuelas*. "It will surely help discover the identity of the grandchildren we have been searching for so many years" ("Argentina forces DNA tests"). But although the law marks an important turning point on Argentina's road to justice, it also sets a troubling precedent for genetic data access in the country. "It's an absolute invasion of the right to biological privacy," said lawyer Gregorio Badeni in an interview. "No one has the right to know what I have inside my body.... I can give it up voluntarily, but no one can obligate me to deliver it" ("Argentina forces DNA tests"). As the International Commission on Missing Persons enumerates, possible risks of governmental access to citizens' genetic data include "tracking of unwanted immigrants, the augmentation of criminal databases to include innocent people, and real or perceived threats to privacy" ("Conference Report" 2014, p. 14). This law also could allow the government to require DNA testing "whenever a judge determines the evidence to be 'absolutely necessary'" ("Argentina forces DNA tests"). Finally, the law potentially undermines article 19 of Argentina's Constitution, which says that the state cannot "[infringe] on an individual's private domain unless his

private actions injure a third party or offend the moral order” (Vaisman 2014, p. 401). The social and political climate that the *Abuelas* helped create may test the ability and willingness of the Argentine government to protect the rights of its citizens, even as the state continues to seek transitional justice for the dictatorship’s crimes.

Conclusion

In the summer of 2014, Estela de Carlotto got the call she had been anticipating for more than 35 years. Ignacio Hurban, a musician who had always suspected he was adopted, voluntarily signed up for a genetic test that proved he was Estela’s long-lost grandson. “The discovery was a triumph that resonated across Argentina,” reports Haberman (2015). Gandsman (2012, p. 197) observes that for groups like the *Abuelas*, the disappeared “are not defined by their disappearance but, rather, they are defined by the underlying cause for their disappearance.” Since the disappearances were politically motivated, the *Abuelas’* work eventually took on political significance. Only by making the government share their moral claims could the group get justice, a human rights “takeover” of the government that once wronged them. But in their effort, the *Abuelas* paradoxically became a human rights organization that occasionally jeopardized the rights of the citizens it sought to help.

Argentina has now entered into a new political era, one in which “a discourse of powerlessness and resistance originating out of the dictatorship’s atrocities, has become integrated into the state” (Gandsman 2012, p. 212). This was not the grandmothers’ original intention. “I never was a political activist or even a political supported. I never even thought about politics,” said one grandmother of her life before her child’s disappearance (Gandsman 2012, p. 203). But intentionally or not, the *Abuelas* succeeded as a human rights group because they translated their individual grief into a national grief that only the government could absolve (Gandsman 2012, p. 204). It remains to be determined if Argentina can sustain its path to transitional justice while protecting its citizens’ rights and maintaining the delicate balance between the right to truth and the right to identity. □

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Chapter 14:

Reagan and AIDS: A Complicated Legacy

Jack Massih

□ The spread of a mysterious disease with no available treatment and a high fatality rate represents a public health nightmare. One such scenario coincided with the Ronald Reagan administration, and that was the onset of the HIV/AIDS epidemic. Before the Reagan administration, sustained transmission of HIV did not occur, and the public health community had no knowledge of the disease. That changed in 1981 when the first reports of the disease eventually known as AIDS began to surface. As the crisis worsened, it fell to the administration of Ronald Reagan to deal with the epidemic. Some have excoriated Reagan's response, the most virulent of polemics like Larry Kramer calling him a "monster" and claiming Reagan is responsible for more deaths than Adolf Hitler due to a deliberate lack of urgency in responding to the disease (Kramer 2007).

Kramer raises the need for a closer examination of the Reagan White House's response to the HIV crisis. The intent of this paper is to discuss the ideological underpinnings of the administration's response that left many, particularly in the homosexual community, feeling ignored by their nation's leader. The paper also considers if the White House's reaction was as sluggish and deliberate as detractors claim. AIDS presented a complicated problem for policy makers, and Reagan's socially conservative ideology did influence the measures taken to fight the disease, but so did his administration's fiscal attitudes. In the latter years of the regime, the government took drastic steps to combat the crisis, oftentimes over the opposition of the most strident social conservatives among Reagan's policy makers. Reagan's complete political ideology influenced the formation of the government's response to AIDS, rather than homophobic attitudes alone.

A New Crisis and the New Right

In June of 1981, 5 months after the inauguration of Ronald Reagan, the CDC's weekly report first identified patients that were sick with the HIV virus, although at the time the cause of their affliction was a mystery. The disease perplexed public health officials, because its victims presented an unusual array of symptoms, including a susceptibility to minor infections and the presence of a rare-type of cancer known as Kaposi's Sarcoma

(Engel 2006, p. 5). The international public health community raced to find a cause for the disease, and quickly deduced that the culprit must be a retrovirus. The virus was so quick to mutate that it was incredibly difficult to isolate.

The ailment was also unique in that the first cases were overwhelmingly among young, gay, sexually active men. This in turn fed into some policies and paranoia that help contextualize the claim that the response to AIDS was motivated by homophobia. A particularly painful episode was the closure of bath-houses by many municipal authorities, leaving many gays feeling persecuted for their lifestyle (Engel 2006, p. 15). Early efforts at research and prevention into the disease did little to stop its spread, as the rates of infection doubled each year from 1981 to 1985 (Francis 2012, p. 293). The disease required the mobilization of a massive public health campaign to contain its spread, and the only entity with the resources to mount such an effort was the federal government.

The Reagan administration came to power in 1981 and brought with it to Washington a new, conservative political philosophy known as the “New Right.” One very prevalent tenant of the New Right was the importance of religion, especially evangelical Protestantism, which Reagan appealed to fervently for support (MacKinnon 1992, p. 25). These conservative, religious views held by Reagan and most of his top administration officials certainly clashed with those of the gay community, which was overwhelmingly secular and liberal. The religious right’s condemnation of homosexuality also grew during the late 1970’s, summed up by the slogan “homosexuals cannot reproduce, so they must recruit” popularized by the anti-gay “Save Our Children” campaign (Miller 1995).

Other important views of the New Right included a belief in the power of free markets and individual liberty that bordered on the fanatical. Reagan came to power with the intent to cut taxes, reduce spending and ease up regulations in an economic program later dubbed “Reaganomics.” The religious and economic views of Reagan and his followers dovetailed with one another, especially in the administration’s staunch opposition to godless communism, but there was one notable contrast. The promotion of wholesome family values was “the only exception to the New Right’s call for individualism and independence” (Hoggart 2005, p. 150). An ideology insisting on strict social conservatism and minimal government intervention had to face a crisis demanding massive intervention on behalf of the homosexual community and drug users, “two groups for which the White House had little regard” (Kirp 1989, p. 67).

Reagan on AIDS and Homophobia

Reagan could have done more to acknowledge the epidemic, especially in its early years. One of the incidents that many of Reagan’s detractors often point to as evidence of his administration’s indifference to AIDS is a press conference in October of 1982 between Larry Speakes, Reagan’s press spokesman, and reporters. The topic of the burgeoning epidemic came up when a reporter asked “does the President have any reaction to the announcement—the Centers for Disease Control in Atlanta, that AIDS is now an epidemic and have [sic] over 600 cases” (Cohen 2001). Speakes’ indicated that he nor the president did not have any knowledge of AIDS. He then proceeded to engage in a series of ribald exchanges with reporters that generated laughter among those gathered which indicates a lack of urgency about the issue. The language used, including Speakes jokingly upbraiding a reporter for saying “I love you, Larry” as they discussed the “gay plague” comes off as

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insensitive if not outright homophobic. It is easy to see how the gay community would feel hurt by these comments made by the mouthpiece of the administration, and in light of the subsequent pandemic that HIV matured into, it is a poor reflection on the administration that this was the first exchange in which they discussed it publicly.

Reagan himself did not publicly talk about AIDS until 1985. He first mentioned the disease when he was in a news conference where he discusses the budget dedicated to fighting AIDS, and he claims fighting the disease was a “top priority” for his administration (The President’s News Conference 1985). Now whether or not the administration did truly treat AIDS as a top priority is not a clear cut truism, but the fact that Reagan described it in such terms shows that he at the very least recognized the seriousness of the disease and that people wanted a cure to be found.

Reagan’s comments in 1985 disprove Kramer’s claim that Reagan did not mention AIDS during the first 7 years of his presidency (Kramer 2007). Nonetheless, it did take a long time, more than 4 years, for Reagan to mention the disease. According to Dr. Donald L. Francis, Reagan “did not seem to understand the seriousness of AIDS until his friend Rock Hudson announced he had it in July 1985” (Francis 2012, p. 292). For many this represented an unacceptably long gap in acknowledgement, especially in light of the cavalier attitude of Speakes in the 1982 press conference, and it helps explain the vitriol of polemics like Kramer. The question becomes what explains this long public silence from the administration?

Signs point to the fact that Reagan himself was not a homophobe, or at least not to the extent that he would turn his back on gay Americans as they suffered from the ravages of the AIDS epidemic. Reagan had a background in Hollywood, where there were many closeted gay individuals, including some personal friends of his like Rock Hudson, who succumbed to complications resulting from AIDS in 1985 (MacKinnon 1992, p. 150). Although merely being around gay people does not guarantee the Reagan was not a homophobe, it indicates that he at least knew and interacted with gay individuals, potentially allowing him to empathize with the community.

Furthermore, Reagan was willing to use his political clout to protect gays when he penned an op-ed in opposition to Save the Children’s 1978 ballot measure in California that would have banned homosexuals from teaching in public schools (Cannon 2014). A deep-seated homophobe probably would not expend political capital to defend the gays, especially one in Reagan’s position as presumptive presidential nominee running as a social conservative. As president, Reagan did not sign any pro-gay legislation, but he also did not enact any new anti-gay legislation (Carpenter 2004). Therefore, Reagan’s presidential legacy regarding gay rights largely reflects how he handled the AIDS crisis with authors like Carpenter or Cannon viewing him favorably, while personalities like Kramer think it reflects a callous indifference at best or intentional abandonment at worse.

Reagan’s Fiscal Policies

When a new disease breaks out, it is important for public health authorities to jump into action, but this was not the case in the early years of the AIDS outbreak. In a reflection on the Centers for Disease Control’s (CDC) early handling of the outbreak Francis asserts that the early 1980’s was “a bad time for a new epidemic...[because] the new Reagan White House and [its] agenda conflicted with good public health practices” (Francis 2012, p. 291).

According to Francis there was something about the Reagan era policies that engendered an inadequate response to the challenges HIV posed; this points to the possibility was that the conservative ideology of the Reagan administration did not set it up well to respond quickly to the AIDS crisis, but this was not necessarily motivated by homophobia.

If anything, the fiscally conservative bent of the administration had a bigger impact on its response; disease prevention is expensive, and the Reagan administration had an aversion to raising budgets. Francis criticizes this “simple minded attitude” as having “no room for complex concerns like AIDS” (Francis 2012, p. 298). Going by Francis’ conclusions the administration is still responsible for the crisis, but not due to homophobia, but rather its fiscal conservatism. Whether this interpretation of the crisis offers comfort to the millions of Americans with HIV/AIDS and their loved ones is a different question.

Many authors who do believe that Reagan’s response to AIDS was inadequate place the blame not on homophobia, but rather the fiscal policies of the administration. At a time when public health needed a well-funded and coordinated response the administration’s “policy-innovations led not to national strategies, but to funding cuts, program losses, and introduction of competitive measures into the existing system” (Poirier 1994, p. 131). This indicates that the inadequate response resulted from policies that simply cut funding and flexibility across the board, rather than a specific willful negligence of a disease affecting primarily gays. The administration would have poorly handled any new outbreak, regardless of its primary victims. Reagan and the New Right were uniquely disadvantaged to deal with AIDS from a public policy perspective, but because of their economic policy.

Even as the implications of the crisis became more clear, Reaganites were reluctant to expand funding. Writing in 1989, shortly after the end of the administration’s tenure, David L. Kirp explains that conservatives viewed calls for increased response to the crisis as motivated by a desire for “program-padding” (Kirp 1989, p. 67). Again, Kirp reinforces the notion that the administration was incredibly wary of ballooning budgets, which explains its somewhat muted response to the epidemic. Reagan’s ideology was an important factor driving his response, but it was fiscal rather than social conservatism.

Francis and Poirier classification of Reagan’s response to the crisis is not the only viewpoint on Reagan’s handling of the epidemic. Francis blames anemic funding for AIDS prevention programs for the stifled response, and claims this lack of spending resulted from the administration’s fiscal conservatism. However, the reality is that Reagan did approve budgets that rapidly ratcheted up funding for AIDS throughout his tenure as president. Budgets dedicated to AIDS prevention rapidly increased from 1981 to 1989, from the paltry sum of two hundred thousand dollars in 1981, to over \$1.3 billion in 1989, the final year Reagan was president, and budgets typically doubled on a year over year basis. (Johnson 2008, p. 9). This certainly challenges the notion that Reagan’s administration ignored the crisis entirely, because even as a fiscal conservative he approved billions in new spending.

Of course, Reagan had a Democratic majority in the house that was more likely to increase spending on prevention programs, so Reagan may have been simply enacting budgets he did not entirely approve of for the sake of political expediency. Regardless if Reagan wanted to enact these budgets, they do complicate Francis’ narrative of public health agency’s hamstrung by a lack of government spending. Some authors do contend that Congress essentially dragged the administration into AIDS policy. Kirp contends the Congress “foisted” each increase in spending on the White House, yet he also notes that

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AIDS related initiatives “fared rather better” than other public health priorities (Kirp 1989, p. 66). If the administration truly had something against AIDS research, this result seems backwards, as the administration would logically seek to deflect spending away from AIDS into other public health initiatives or target it with the deepest cuts. This indicates that the lacking response was borne less out of a specific desire to ignore AIDS, and rather an ideological opposition to increased spending in general.

Poirier points out that the Reagan administration “immediately shelved” a call for \$3.1 billion in funding against AIDS made by the Presidential Commission on HIV (Poirier 1994, p. 132). So the thesis that Reagan did not want to take aggressive measures to counteract AIDS still holds despite the fact that he approved spending increases on HIV prevention. The administration would accept moderate increases in prevention as the epidemic became ever more serious, but would not approve the massive spending. The fiscal conservatism of the administration prevailed over calls for increased government intervention on AIDS with disastrous consequences.

The Language of the Administration

More goes into an administration’s response to an epidemic than merely spending money. The language of the internal debates and the public news releases by the White House reveals much about the ideological bent of the administration and how it went about fighting the AIDS crisis. Many officials in the administration were particularly concerned with how to talk about the AIDS crisis, for did not want to validate the gay lifestyle or that of drug users. At the time, Nancy Reagan was promoting her anti-drug “Just Say No” campaign and the war on drugs was heating up. These initiatives had to do with the ideology of the New Right, which was based heavily in social conservatism, most of Reagan’s appointees to high level administrative positions were religious conservatives.

MacKinnon notes that these Reaganite religious conservatives were obsessed with the idea of the traditional family and viewed gays as sexual deviants who threatened the sanctity of familial life. This had the important consequence of turning “victims into predators” when it came to dealing with the HIV epidemic (MacKinnon 1992, p. 64). Therefore, the Reagan administration had a real problem with how to talk about AIDS, they did not want to discuss prevention methods that could be seen as approving of homosexuality. In this regard the homophobia of the Reaganites certainly played a role in shaping AIDS policy, in that it refused to talk about AIDS in a certain way.

The Reagan administration wanted to treat AIDS as a public health issue rather than a civil rights issue. After attending the first session of his advisory body where AIDS was on the agenda, Reagan said he wanted to treat HIV “as a major public health problem” (Brier 2009, p. 78). The veiled intention behind this was to not acknowledge the fact the disease disproportionately impacted homosexuals and drug users, and instead focus on protecting the larger and apparently more wholesome public.

This had consequences for how his administration handled the crisis. The first time administrative officials talked about the crisis in 1983 they seriously discussed whether coming out and “condemning homosexuality as a moral wrong” (Brier 2009, p. 83). This clearly shows that there were legitimate homophobic undertones within the administration, even as at that very same meeting they recognized they needed to respond to the public concern about AIDS. Tellingly, the next meeting among White House staffers to discuss

AIDS would not occur for two more years. The administration had an issue with accepting of homosexuals, and it was slow to discuss the crisis internally, lending credence to the theory that homophobia induced the administration to ignore the crisis.

As the crisis grew, silence could not remain the status quo for the administration, but when it came time to talk about specific public policy proposals, many officials wanted to eschew good public health practices based on scientific advice and epidemiological evidence. Many of Reagan’s advisors wanted AIDS education to fit their “socially conservative” views that portrayed “gay men as sick and dangerous” (Brier 2009, p. 84). Officials discouraged their agencies from talking about safe public health practices like encouraging condom use and other safe sex practices. Nothing was to be said, especially to school children, that might offend the sensibilities of families or condone homosexuality.

Engel contends that this way of talking about the epidemic contributed to the views of many, like Kramer, that the administration was completely ignoring gays, even when the administration acted proactively. The administration insisted on “drawing morality lessons from the epidemic” (Engel 2006, p. 78). This upset many in the public health community and those affected by the outbreak, who thought that morality should not be discussed in relation to public health policy, while the New Right Reagan administration insisted that it should. Here one sees that the ideological differences on both sides lead to the separate perceptions of the same actions.

Ironically, in 1986 White House officials suggested policies that “comported almost precisely with recommendations from the most progressive public health specialists” (Engel 2006, 78). The divide therefore was resulting more from this language issue, by the mid-late 1980’s everyone recognized the importance of combating the disease, but activists and the administration used decidedly different language. “Criticism of Reagan administration AIDS policy did not so much hinge on actions taken” but rather on “whether or not traditional family values had a role in public policy formation” (Engel 2006, p. 79). Under this thesis, the conservative messaging of the regime played a role in how detractors viewed Reagan’s response to the AIDS crisis more than the actual policies.

Divisions on How to Talk about AIDS

The voices of the Reagan administration were not monolithic; there was considerable division among the social conservatives. Brier claims that the regime’s response to the crisis “produced splits and disagreements” within the White House (Brier 2009, p. 81). This internal dissension makes it difficult to pin down one specific mouthpiece for the administration, as there were different advisors tasked with different messaging. As AIDS was a multifaceted and complex crisis there were several people with key roles, and they could be boiled down into two different factions based on how they wanted to combat the crisis.

There was the faction made up of William Bennet and Gary Bauer, who did not want to talk openly about homosexual practices and wanted to preserve the administration’s commitment to family values. As Reagan’s advisors, Bennet and Bauer led the charge for promoting family conscious material. They wanted “federal programs focused on protecting children from unseemly discussion” which included anything deviating from heteronormativity and a commitment to traditional marriage (Brier 2009, p. 87). As the two leading figures in the Department of Education, they had a massive impact on how the

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government initially educated the country about AIDS. With these social conservatives at the helm, the administration would not acknowledge the needs of the gay community and the proper responses to the epidemic.

On the other side were men like Surgeon General C. Everette Koop and Admiral Watkins the head of the Presidential Commission on HIV, who were more open to frank scientific discussion (Brier 2009, p. 81). Surgeon General C. Everette Koop was a particularly interesting character in the story of the development of AIDS policy. In 1986 Reagan tasked Koop to write a report on AIDS in an effort to combat the spread of the disease and educate American citizens. (Engel 2006, p. 81). Koop fit in the Reagan mold in that he was a staunchly conservative with deeply held religious views; he was strongly opposed during his nomination due to his anti-abortion stance (Bowman 1992, p. 210). On the outside, he would seem like someone that would not be prepared to speak frankly and openly about confronting AIDS, and instead would tow the line of upholding family values as desired by the New Right.

Yet this was not the case, Koop was deeply committed to promoting the public health and he spearheaded several initiatives to tackle issues like tobacco, abortion and eventually AIDS. Koop established himself as a strong-willed activist who took his job as surgeon general very seriously. Koop did not let his religious beliefs get in the way of using scientific evidence and good judgement to promote public health, nor was he afraid of controversy. (Bowman 1992, p. 210). The battle over how the administration would respond to AIDS would be shaped mainly by these two camps. Like most political regimes, the Reagan administration was not ideologically homogenous, therefore it becomes difficult to assign an explicit ideological motivation to all the actors within Reagan's White House.

The More Moderate Voices Prevail

Reagan's choice of Koop to write a report on AIDS is a clear signal that Reagan wanted decisive action taken by someone willing to advocate the necessary solutions to combat the growing pandemic. Koop's report did not disappoint those looking for an aggressive response to the epidemic, tackling the crisis head on in a document he then widely distributed to the American public. Koop's report focused on initiatives that shocked hardliners conservatives like condom-usage and sexual education at an early age (Engel 2006, p. 82). Indeed, Koop shied away from the tactics of men like Bennett and Bauer by discussing openly the best ways to combat the spread of AIDS, and this shows that Reagan himself was not opposed to dealing with the crisis head on. Koop's "frank and open" discussion of the crisis pleased many of Reagan's critics on the frontlines of the crisis, and it represented a major break from the administration's perceived stance (Brier 2009, p. 89).

This challenges the contention that the administration was homophobic, as it did not shy away from a discussion of the issues, even those that social conservatives did not want to discuss. The Reagan administration created more than 20 million copies of Koop's report for distribution, showing a true commitment to aggressively reduce the spread of the disease, and Koop also went on a nationwide tour making speeches to educate people about AIDS prevention (Brier 2009, p. 90). If Reagan was indifferent to the suffering of those afflicted with AIDS, he did not have to follow through with disseminating Koop's report.

In addition to the Surgeon General’s report the President also created a Presidential Commission to deal with the HIV crisis. Bauer was a large driver behind the creation of the commission with the intent to roll back the language of Koop’s report. Bauer did not want to encourage certain behaviors, like free condom usage and free-needles, which were anathema to the hardline social conservatives in the administration (Brier 2009, p. 94). This commission represented the best opportunity for the faction headed by Bauer to push-back against the more compassionate track taken by men like Koop.

However, despite Bauer’s strenuous opposition, Reagan appointed a gay person to the 13-person commission, showing he was sensitive to the wants of activists (Brier 2009, p. 94). Torn between the two factions in his administration, Reagan once again leaned towards the more compassionate, activist pack. Like Koop, the head of the Commission, Admiral Watkins also refused to defer to Bauer and Bennett with his findings. His report repudiated certain policies advocated by the hardliners within the administration, including the reduction of the welfare state and an emphasis on mandatory testing. (Engel 2006, p. 100). Despite the socially conservative bent of the administration there were separate views on how to deal with the crisis, and both sides were important in informing policy.

One of the main fault-lines within the administration was whether or not to require mandatory testing for AIDS. The hardliners like Bauer believed the government should require mandatory tests to determine those infected with HIV. However, in this case moderates like Vice-President Bush also joined in calling for universal testing, in addition to a large swath of the American public. (Engel 2006, p. 92). Reagan could have easily caved to this pressure, and supporters likely would have hailed him for taking an aggressive but necessary step to combat the crisis for a minimal expenditure of political capital. However, gay rights activists were concerned about the civil-rights and privacy implications of universal testing, and therefore opposed it. Koop’s report and the Presidential Commission on HIV also dissuaded against testing for fear of the privacy concerns of HIV-positive people.

“Ultimately, Reagan deferred to the states on the issue” (Engel 2006, p. 93). Reagan’s declination to pursue universal testing shows that he was indeed sensitive to the findings of Koop’s report and Watkin’s commission as well as the calls of many gay-rights groups who opposed the stigma of testing. Even when faced with a politically expedient opportunity to implement a policy with broad popular support Reagan declined, deferring to the scientific findings presented by Koop and Watkins. At this crucial juncture, Reagan chose not to persecute homosexual Americans, another example of Reagan consistently siding with the more compassionate voices of his administration.

Conclusion

The administration’s response to AIDS was complicated. The White House did not ignore the crisis, but rather dealt with AIDS in its own way motivated by its particular ideology. Certain writers have shown that the Reagan’s response, especially in the earliest days of the outbreak were inadequate. However, these insufficient responses were not necessarily motivated by homophobia as certain polemics have charged, but rather a more complex mix of the New Right ideology that came to power with Reagan.

In addition to socially conservative ideology, Reagan’s fiscally conservative ideology also influenced his stance, as he slashed budgets and deemphasized government

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intervention at a time when it was needed to combat the emerging epidemic. Reagan's personal views on homosexuality were complex, he likely was not a homophobe, having several homosexual friends from his days in Hollywood and even arguing against an anti-gay ballot measure. Hardline social conservatives did have significant influence over how the administration spoke about the crisis, but the views of the more progressive and compassionate of Reagan's public health advisors always had an opportunity to surface, and received their due deference. Like any crisis, the incumbent administration made mistakes, and its handling of the response reflected its own unique mixture viewpoints. Instead of jumping to conclusions the administration's actions they deserve careful consideration to improve policy formation in the future. □

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Chapter 15:

Homophobia in Poland and Hungary: Assessing its Political Motives and Influences

Thomas Hanley

□ Both Poland and Hungary have taken hard stances against homosexuality in recent years. In accounting for Polish and Hungarian homophobia, there is a clear discrepancy between each country's position on homosexuality before 2004, and policy in the ensuing years. As Agnieszka Graff notes in the context of Poland, “[a]n astounding shift in public discourse about homosexuality occurred in the space of a mere two or three years – from complete silence at the turn of the twenty-first century to almost daily headlines in the news by later 2005 and early 2006” (Graff 2006, p. 434). Hadley Renkin spoke with Hungarian LGBT activists and found the same sort of post-2004 change to have taken place in Hungary (Renkin 2009). In attempting to account for this change, 2004 is a hallmark year because it is the year both Hungary and Poland joined the European Union. Understanding the Polish and Hungarian position within the European Union will be central in answering this paper's main question: mainly, what has accounted for the rise in Polish and Hungarian homophobic rhetoric and policy since 2004?

In order to understand homophobia in Poland and Hungary, it is imperative to understand geography's important role. Part I will begin by explaining that Poland and Hungary – two former Soviet states, and current members of the European Union – are uniquely positioned within Europe. Both find themselves between a socially liberal West, represented by the European Union, and a socially conservative Russia. Each party competes for influence over Poland and Hungary, the European Union attempting to push its European norms while Russia looks to align each country's ideology with its own to create “agents of influence” within the EU (Fedorov 2013, p. 320).

Setting these two competing ideologies as the foundation for the analysis, the paper then moves into part II, evaluating the rise of homophobia in first Poland, and then Hungary. Understanding the domestic considerations in the context of this international ideological struggle will advance the work, showing the rise of homophobia running parallel to the success of far right, nationalist governments. Since 2004, both Poland and Hungary have elected far right governments, which have politicized homosexuality as a means to reestablish national control from the far-reaching European Union. The analysis

will explain that heteronormativity and the traditional family are closely associated with each state’s national identity.

Part III will conclude the paper, following a simple premise: if Polish and Hungarian homophobia is a rejection of the European Union, then what influence does Vladimir Putin’s Russia have in that rejection? In other words, is homophobia an indicator that Poland and Hungary have become Russian agents of influence within the European Union? The answer will represent a critical divergence between Poland and Hungary. While the Hungarian government admires Russia, the Polish authority does not trust the Kremlin – making it clear that the influence may be an important factor in Hungary, but not one in Poland. Therefore, this paper will look to prove that Polish and Hungarian homophobia is first and foremost a rejection of the European Union’s attempt to impose its norms on each state’s national identity. Yet only Hungary offers credible evidence of Putin’s Russia influencing that rejection.

II: COMPETING IDEOLOGIES

RUSSIAN INFLUENCE

Russia has had a clear strategy when it comes to Central and Eastern Europe (CEE). Russia does not view the CEE countries as “subjects of international relations but as objects of a competition between great powers” (Fedorov 2013, p. 316). Vladimir Putin’s Russia seeks to be an influential centre of a multipolar world equal to the USA, China, or the EU (Fedorov 2013, p. 324). Central and Eastern Europe are particularly important in this context as the area lies between the pillars of that multipolar world that Russia seeks to exploit – specifically, the liberal West and the Russian state. Putin himself appears committed to creating an alternative model to the EU and the West that would revive the multipolar world that has evaded Russia since the fall of Communism (Ayoub and Paternotte 2014, p. 214). This logic has been backed by key policy initiatives like the creation of Russia’s alternative to the European Union, the Eurasian Economic Union (Klapisis 2015, p. 26). Yet the European Union has dominated Europe, leading Russia to change strategy – instead of directly challenging the EU, Russia now looks to undermine it. The Russian goal is to transform the CEE states into Russian “agents of influence” within the European Union (Fedorov 2013, p. 320).

It is in gaining significant influence that Russia can enact its goal “to subvert European unity, and ultimately Euro-Atlantic unity” (Matthews 2015). In executing this strategy, one of the more interesting ways in which Russia has been proven to become involved in Central and Eastern Europe has been through its support of far right parties. First and foremost, Putin’s Russia has financed far right parties across the European continent (Polyakova and Shekhovtsov 2016). Russia also created the Russian National Forum, a group with close ties to Vladimir Putin, that works to bring together far right, conservative groups in order to “formulat[e] a framework for close cooperation between ‘nationalist forces’” (Klapisis 2015, p. 36). While these groups come from a variety of backgrounds, they all tend to share two commonalities: a strong dislike for the European Union, and a disdain of U.S. hegemony (Matthews 2015). European far right political parties are particularly important in this context, and the Kremlin goes even further in organizing conferences exclusively for the EU’s far right parties. These conferences are held in Russia

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and focus on political and ideological issues that create close bonds between the Kremlin and Europe's far right (Klapsis 2015, p. 36).

Interestingly, "the protection of traditional values and the family against 'homosexual propaganda' is first among these issues" (Klapsis 2015, p. 36). As Vladimir Putin outlined in his 2013 State of the Federation speech, Russia's position on homosexuality is part of a broader strategy to "be the leader of a new political and cultural model that offers an alternative to both the EU and 'the West'" (Ayoub and Paternotte 2014, p. 2). This ideology has been politicized with discriminatory legislation like Russia's infamous article 6.13, which bans the "distributing [of] 'propaganda' or 'nontraditional sexual relations' to minors" (Polsdofer 2014, p. 1070). Homosexuality is central to this political and cultural model, as "Putin has repeatedly referred to the need to counter 'homosexual propaganda', which threatens to undermine the foundation of a society based on heterosexual families" (Klapsis 2015, p. 19). Thus, the European Union's liberalism is "perceived as a social and national threat" (*Ibid.*). In this sense, if Putin can get countries like Poland and Hungary to buy into the fundamental principles of this new political and cultural model, like the rejection of homosexuality, then Poland and Hungary would be so ideologically opposed to traditional Western European values that their place in the European Union would cause the European project's cause to run stagnant.

EUROPEAN UNION INFLUENCE

The other side in this ideological clash in Poland and Hungary is the West, specifically the European Union. When Poland and Hungary formally joined the European Union in 2004, Russia recognized the move as "a definite success of the West and Russia's strategic defeat" (Fedorov 2013, p. 317). The European Union's success was part of its strategy for an integrated Europe, "[b]y pursuing integration, the European Union can influence other states by the power of its ideas and norms and ensure democratic member states that share European normative values" (Slobodchikoff 2010, p. 6). The Copenhagen Criteria, agreed upon in 1993, serves as the model for European shared norms. It outlines three criteria related to human rights and the common market, specifically citing the "protection of minorities" (Slobodchikoff 2010, p. 3). The criteria promote Western liberalism, granting equal rights to all its citizens regardless of sexual orientation, religion, or other preferences (Klapsis 2015, p. 19).

European acceptance for homosexuality has been codified in European law as well. Article 13 of the Amsterdam treaty forbids any sort of "discrimination based upon sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation," and the European Charter of Fundamental Rights explicitly prohibits discrimination based upon sexual orientation (O'Dwyer and Schwartz 2010, p. 232). Additionally, the European Parliament was clear in 1998 that the EU would not allow membership to any country violating the human rights of lesbians and gay men through its legislation and policies (Bell 2001).

The normative values outlined in the Copenhagen Criteria, EU legislation, and poignant Parliamentary rhetoric are critical for countries wanting to join the European Union, as they have to be willing to ascribe to these norms. Yet, states like Hungary and Poland saw the financial benefit, free movement, and security gains to be worth adopting the shared norms of the European Union, even if the countries did not agree with each one

(Slobodchikoff 2010, p. 7). The process of joining the European Union, called accession, is particularly interesting in the context of this discussion. With shared norms at the heart of European unity, getting applicants to ascribe to these liberal Western norms is relatively easy during the accession process. The EU gets unparalleled access to affect domestic politics in applicant states, as each state is mandated to do whatever it is asked in order to align with European Union standards (Grabbe 2002). Ascribing to liberal EU norms proved to be relatively easy in Poland and Hungary, as both countries had center liberal governments upon entering the EU (Wood 2005; Basista 2005). And despite a short unsuccessful center right government from 1998-2002 in Hungary, neither country has had anything that could resemble a right wing government from the fall of Communism to their joining the European Union (Müller 2011).

The problem with the EU, as the case of Hungary and Poland demonstrates, is its enforcement after accession. The European Union is limited to two insufficient options in attempting to promote Western liberal values in member states. The first is public shaming, as the European Parliament attempted to do with two separate resolutions against homophobia either alluding to or explicitly calling out Polish domestic policy (Graff 2010). Yet, politicians across Poland agreed that the EP’s resolutions were entirely “ineffectual” on domestic legislation (O’Dwyer and Schwartz 2010, p. 233). The second is to revoke the membership of a member state, which is a dangerous precedent to set and would only ever be used as a last resort (Slobodchikoff 2010, p. 19). Substantial LGBT rights legislation comes about when states fear the cost of external pressures, and the European Union has been structurally limited in being able create that pressure (Ayoub 2015). As Cas Mudde and Erin Jenne sum it up: the EU is “dogged by structural weaknesses that impede [its] ability to bring about a substantive reversion to democracy” (Jenne and Mudde 2012, pp. 148-149). This weakness limits the EU’s ability to regulate its member states.

II: THE FAR RIGHT AND HOMOPHOBIA

INTRODUCTION

These structural weaknesses make Putin’s continued interest in creating agents of influence within the European Union critically dangerous. And it is exactly why the rise of far right governments in Poland and Hungary is so alarming, particularly within the context of this ideological battle. As research has shown, “the disapproval of homosexuality is often associated with right-wing authoritarianism in psychological research...even stronger as compared to conservatism, social dominance orientation, and dogmatism” (Akker, Ploeg, and Scheepers 2012, pp. 68-69). Nationalism is equally critical to this psychological perspective, as it sees “...the proper member of the Nation [as] both heterosexual and reproductive. Seen as neither, LGBT people come to represent the Nation’s Other. In this analysis, to be gay is to deny the Nation and its needs, and so to align oneself with its transnational enemies” (Renkin 2009, p. 23). This is particularly frightening as strong authoritarianism and nationalism are readily associated with Europe’s far right (Mudde 2007). The rise of the far right in Poland and Hungary would prove this theoretical base correct, codifying this type of thinking into law and public discourse.

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POLAND

Poland's Law and Justice Party (PiS) originally came to power in 2005; one year after Poland's joining the European Union (O'Dwyer and Schwartz 2010, p. 229). Considered to be a center right conservative party at the time, certain policy positions mirrored Europe's far right. One of the best examples was its attack on homosexuality. The party's 2005 campaign made their ideological position regarding homosexuality quite clear: as a 2005 TV spot stated, "Rather than provocative parades of homosexuals, we want state help for Polish families" (*Ibid.*). The country's new Prime Minister (PiS) would openly declare, "homosexuality is contrary to nature" (Graff 2006, p. 436). The new President was to be Lech Kaczyński, who had previously banned the 2004 and 2005 gay rights marches in Warsaw during his time as mayor (Renkin 2009, p. 21). As he argued during his presidency, "Gay people may protest as citizens but not as homosexuals" (Graff 2010, p. 584). This sort of rhetoric led to the two European Parliament resolutions meant to combat homophobia. But as Polish parliamentary speaker Marek Jurek (PiS) responded, the resolutions were another means of Europe attempting to harm Poland by "promoting an ideology of homosexual communities," leading the Polish parliament to pass a resolution disputing the European Parliament's claims (O'Dwyer and Schwartz 2010, p. 233).

With the election of the Law and Justice Party, homophobia found its way to all facets of Polish governing. The Polish Education minister from 2005 to 2007, Roman Giertych, fired the national director of teacher training for distributing a Council of Europe handbook on tolerance, which included several paragraphs on homosexuality. He would replace the director with a hardened anti-gay proponent, going so far as to propose the firing, fining, and imprisonment of any teacher caught "promoting homosexuality" in Polish classrooms (O'Dwyer and Schwartz 2010, p. 225). Lambda Warszawa's 2005-2006 survey of 1,023 Polish gays, lesbians, and bisexuals found discrimination on the account of sexual orientation to be rampant in employment, housing, education, medical care, and in dealing with public authorities (O'Dwyer and Schwartz 2010, p. 225).

The Law and Justice Party would lose power following a corruption scandal in 2007, but would still maintain a prominent role in opposition. During its opposition period, any proposed bill suggesting the legal recognition of same-sex civil unions were continually shot down (Górska, Bilewicz, Winiewski, and Waszkiewicz 2016). The party returned to power in 2015, attaining enough votes to govern without any coalition partners (Detwiler and Snitow 2016). This newfound independence has exacerbated homophobia in Poland. The 2015 election victory has seen Polish policies and rhetoric move to a position "that only a year [prior] was the exclusive domain of the far right" (Polyakova and Shekhovtsov 2016). This has solidified the party as a threatening far right party poised for significantly more aggressive attacks targeting the "homosexual lobby" (Detwiler and Snitow 2016, p. 57).

HUNGARY

While a Socialist government brought Hungary into the European Union, it would be a nationalist, far right government that would give the country international attention (Wood 2005). In 2010, Viktor Orbán's Fidesz Party, a conservative nationalist party, won more than two-thirds of the parliamentary seats in the Hungarian national election. This left many in the international community wondering whether Hungary could slide back

into the authoritarianism of its communist past, becoming the first EU members state to do so (Jenne and Mudde 2012). The party has proven to be both aggressively nationalistic and morally conservative, posing a dangerous threat to the West (Müller 2011).

As opposed to Poland, it is important to note that there does exist a prominent party further right on the Hungarian political spectrum, called Jobbik. Meaning “The Better” in Hungarian, Jobbik has become the third biggest party in domestic Hungarian politics (Krasztev and Van Til 2015, p. 129). Fidesz has had a role in this success as it is seen as a nationalist conservative success story, “legitimizing the beliefs of Jobbik supporters” (Müller 2011, 7). Most important in the context of this argument, Jobbik has forced Fidesz to keep shifting its ideology further right in order to poach votes. In this sense, Fidesz has normalized the far right narrative in Hungary as Viktor Orbán’s party has taken “to co-opt[ing] many of Jobbik’s views and policies [in recent years]” (Polyakova and Shekhovtsov 2016).

The rise of Fidesz has been particularly interesting, as Hungary had shown signs of accepting European norms regarding homosexuality following the accession process. For instance, the country had already legalized same-sex civil partnerships in 2007 (*Reuters* 2007) and the Hungarian Constitutional Court had already ruled that the approved legislation was constitutionally legal as the country’s constitution considered “same sex relationships legally protectable” (Kovács 2012, p. 180). Additionally, the Constitutional Court had ruled that the constitution explicitly prohibited discrimination on the grounds of sexual orientation (*Ibid.*). This sort of policy was significantly more progressive than Poland, where both civil unions and marriage between same-sex couples were and still are illegal (*Reuters* 2007). The election of Orbán’s Fidesz Party would challenge this liberal precedent.

Since Orbán’s election, Hungarian homophobia has been on the rise both on the streets and in the country’s legislation. Hungary has seen a rise in far right counter demonstrations at Pride events throughout the country (Kinnvall 2015). Right wing politicians throughout the country have come to label members of the LGBT community as “deviants” who “spread sickness throughout the Hungarian Nation” (Renkin 2009, p. 21). Prominent Hungarian politicians argue that Pride Marches need to met with equally public counterdemonstrations, “in order to protect our children, and in the interest of assuring the healthy development of our community” (*Ibid.*). This sort of rhetoric has become legitimized through Viktor Orbán’s biggest move as Prime Minister: destroying the 1989 Hungarian Constitution, and replacing it with a brand new 2011 constitution called Hungary’s Fundamental Law (Kovács 2012).

The ideological reasoning behind the new constitution is carefully laid out in the constitution’s preamble, calling attention “to the moral defeats of the twentieth century” and to Hungary’s “need for spiritual and intellectual renewal...” (Tartakoff 2012, p. 362). While the new constitution did not outlaw the previously legalized same-sex civil unions, it did explicitly define marriage as a union between a man and a woman (*Ibid.*), making it impossible for future Hungarian legislatures to make same-sex marriage legal (Kovács 2012). Beyond that, the new constitution lacked any mention of prohibiting discrimination on grounds of sexual orientation – a noticeable admission, as both EU law and previous rulings from the Hungarian Constitutional Court had protected Hungarians against such discrimination (*Ibid.*). Additionally, by recognizing marriage as the union of a man and a woman, the constitution only granted state protection to heterosexual relationships because

the traditional family was seen as the base upon which Hungarian society was built (*Ibid.*). Interestingly, one of the only other countries in the world to defend the new Hungarian constitution was Poland, where the chairman of the Law and Justice Party publicly declared that Hungary had “restored democracy and elementary order” (*BBC Monitoring International Reports* 2012).

HOMOPHOBIA AS A REJECTION OF THE EUROPEAN UNION

Polish support for the new Hungarian constitution is indicative of the similarities in each country, specifically in advancing homophobic rhetoric and policy. Both Polish and Hungarian homophobia is a reaction to the EU imposition of Western liberalism on each state’s domestic agenda. Graff contends that the right to be a homophobe became a question of sovereignty following EU accession, and homophobia is now seen as a form of patriotism – standing up to the European Union which seeks to violate traditional domestic cultures (Graff 2010). This is why, as previously noted, the same sort of homophobia was not present in Hungary and Poland before EU accession. As soon as the European Union was able to influence domestic policy, an argument for the infringement of each state’s national identity and domestic culture became valid. This created the necessary political opportunity for the far right to rise up in both places – claiming to stand up for Polish and Hungarian national values against a Europe that looked to replace those values with broader, European ones.

In this sense, homosexuality has become associated with the transnational Other, specifically Europe and the West (Renkin 2009, p. 24). The homophobic logic in Poland and Hungary is that homosexuals are looking to undermine the traditional family with a careful plan – to bring confusion to the aesthetic, moral, and political order throughout Europe (Graff 2010). The homophobic rhetoric and action is seen as a necessary defensive reaction to the European Union’s forcing of a “sexual democracy” upon each country (Fassin 2007). The rise of the far right was that defensive reaction. Hungary’s Fidesz Party and its new constitution was declared as a response “to the moral defeats of the twentieth century” (Tartakoff 2012, p. 362), while Poland’s Law and Justice Party saw their ascendance into power as being called to bring about a “moral revolution” to Polish society (O’Dwyer and Schwartz 2010, p. 237).

Homosexuality is therefore politicized as a representation of the European Union attempting to subvert Polish and Hungarian national identity and domestic culture. Renkin notes that criticism and discrimination of the LGBT community in Hungary are “merely pretexts for other political meanings” following the economic decline since its 2004 entry into the European Union. She describes the LGBT community as “scapegoats” for Hungarian anger directed at the European Union (Renkin 2009, p. 24). And in Poland, Graff points out that homophobia “can only be understood in their historical and political context – at the intersection of hopes and anxieties concerning Poland’s place in the European Union” (Graff 2006, p. 435). Thus, homosexuality seems to be the most powerful place to stand up against European policy, as each country associates it with a moral right. For example, in 2015 both countries worked together to stop a European Union ministerial agreement that would have forced all EU member states to honor same-sex marriages wherever they were contracted in the European Union (Gennarini 2015).

III: EVALUATING THE RUSSIAN INFLUENCE IN EU NORM REJECTION

INTRODUCTION

The Polish and Hungarian response to European policy and norm diffusion regarding homosexuality seems likened to what Putin’s Russia had hoped for from EU member states – mainly, an ideological dispute set to bring about European policy stagnation and friction within the European community of states. Both countries argue the imposition of homosexuality is in contradiction with their national identities. As homophobia clearly aligns ideologically with the Kremlin, it makes sense to evaluate what influence Russia plays in the Hungarian and Polish position on homosexuality.

HUNGARY

For Hungary, there does seem to be a legitimate connection between the Kremlin and Viktor Orbán’s Hungarian government. Putin and Orbán have developed a close relationship, as Orbán believes “Europe’s ‘prevailing ideological winds’ are ‘blowing from the East’ and sees in Russia an ideal political model for an ‘illiberal state,’ which he admires” (Matthews 2015). It has lead Orbán to embrace what some have called a process of “Putinization,” which combines authoritarian politics and state-supervised economics (Müller 2011, p. 9). While Putin and Orbán have crafted an important alliance, the new alliance between Moscow and Budapest has a lot to do with the Hungarian extreme right Jobbik party. Jobbik, the party Orbán has been reliant upon poaching policies from, is in favor of leaving the European Union for Russia’s Eurasian Economic Union (Klapisis 2015). The head of Jobbik, Gabor Vona, has openly praised Putin as a leader standing up for “traditional family values, Christian morality and our common Eurasian heritage” (Matthews 2015). Additionally, members of Jobbik have been invited, and have traveled to and from Russia to meet with leaders in the Russian Duma and with prominent Russian academics (Polyakova 2014, p. 36). Therefore, there is significant evidence that Hungary has become an agent of influence for Putin. The Hungarian state has certainly come to accept Putin’s alternative political and cultural model to the European model – a dangerous precedent for European unity.

POLAND

The case of Poland is vastly different. First and foremost, there are no close connections between the Kremlin and Polish political parties like there are in Hungary. Additionally, the dynamic of the ruling Law and Justice Party provides a lot of insight into the relationship between Poland and Russia. The party chairman, Jarosław Kaczyński, dominates Polish politics. Formerly the prime minister, today Kaczyński is neither the president nor prime minister, although Mr. Kaczyński handpicked both and is considered “arguably the most powerful [person]” in Polish politics (Lyman 2016). Kaczyński’s twin brother, Lech Kaczyński, was President of Poland until his sudden death in 2010 following a plane crash in Smolensk, Russia (Dehaas 2011). Some in Poland claimed that the Russians were responsible for the crash, and some of these “conspiracy theorists” found their way into prominent government positions like current Defence Minister Antoni Macierewicz (*The Economist* 2015). The official report following a Russian-lead investigation placed the blame on “inebriated Polish commanders who pressured their pilots to attempt a landing, while omitting plausible evidence from the Polish side that

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Russian air traffic controllers gave incorrect flight paths and altitudes” (Dehaas 2011, 41). Jarosław Kaczyński was quick to call the report a “mockery of Poland” (*Ibid.*), and the incident reinforced Kaczyński’s “deep distrust of Russia” (Nizynska 2010, p. 473). This has exacerbated tensions between the two governments, and represents the difficulty in characterizing Poland as Putin’s agent of influence within the European Union.

The biggest impact upon Poland in its resistance to the EU’s sexual democracy has not been Russia, but the Catholic Church. After the fall of Communism, it was the Polish Catholic Church that successfully lobbied against the inclusion of provisions to protect LGBT rights in the new constitution, long before the rise of the Law and Justice Party (Ungar 2000, p. 72). As Poland’s chief nationalist ideologue argued during the interwar period, “Catholicism is not an appendage to Polishness ... it is embedded in its essence, and in a large measure it is its essence” (Walicki 2000, p. 32). Since the fall of Communism, the Catholic Church has had political influence that is unrivaled anywhere else in Europe, with 95% of Poles identifying as Catholic (O’Dwyer and Schwartz 2010, p. 237) compared to only 39% of Hungarians (Hungarian Central Statistical Office 2011). Therefore, the Catholic Church has tremendous influence in Poland and is a primary reason as to why homosexuality has become such a politicized issue. The EU’s position on homosexuality is considered to be in direct contradiction with Catholic doctrine, and therefore the Polish Catholic Church works vigorously to encourage the government to reject European liberalism as it pertains to homosexuality.

IV: CONCLUSIONS

Ultimately, both Poland and Hungary continue to find themselves positioned geographically and ideologically between a liberalizing West and a continually authoritarian Russia. The European Union had appeared to be winning this ideological battle, as both countries joined and were forced to adopt European standards during accession. Yet recent Polish and Hungarian homophobia in spite of European norms on homosexuality seems to suggest a new ideological aligning with Vladimir Putin’s Russia. In evaluating Putin’s influence in this European rejection, there is a connection in Hungary as both Prime Minister Orbán and Hungarian political parties, like Jobbik, have developed close relationships with the Kremlin. On the other hand, Polish-Russian relations are particularly tense, as the leader of Poland’s ruling party has made it clear that he does not trust the Russian state. The country’s ideological alignment has more to do with Poland’s relationship with the Catholic Church than the Kremlin.

Today, heteronormativity and the traditional family represent a Hungarian and Polish national identity that both countries believe the European Union is looking to erode in order to bring uniform liberal policy to the European continent. As such, recent years have seen a rise in Polish and Hungarian homophobic rhetoric and policies from the ruling far right – which is considerably dangerous in light of history, where “...only twenty-five years ago, U.S. leadership and Western Europe’s resolve helped bring democratic institutions, liberal values, and economic prosperity to Central and Eastern Europe” (Polyakova and Shekhovtsov 2016). The West may have prevailed over the Soviet Union twenty-five years ago, but this is different as the “authoritarian challenges” presented in Poland and Hungary are far more complex and demanding (Jenne and Mudde 2012, p. 148), particularly in recognizing Hungary’s place in the European Union and its close relationship with Russia.

How the EU responds to Polish and Hungarian homophobia will be indicative of how it plans to respond to these newfound authoritarian challenges. The European Union needs a political answer – something more effective than public shaming, but certainly less than member expulsion. □

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Chapter 16:

The Impact of “States of Emergency” and the State’s Appropriation of the “Terrorist” Body

Emily Murphy

“Perhaps there has been, at some point in history, some great power whose elevation was exempt from the violent exploitation of other human bodies. If there has been, I have yet to discover it (Coates 2015, 8).”

□ States around the world have begun implementing states of emergency in the wake of ISIS’s increasingly frequent and violent attacks. On July 19, 2016, the French National Assembly voted to extend its state of emergency for six months, to last until the end of January 2017. On October 3, 2016, Turkey extended its own state of emergency. Both countries experienced several prominent terrorist attacks throughout 2015 and 2016, primarily from individuals associated with the Islamic State of Iraq and al-Sham (ISIS) or other violent Islamist movements.

The state-led response to terror and emergencies has also been prominent in the United States. President-elect Donald Trump (at the time a nominee) gave a speech on June 13, 2016, in which he stated: “I will use this power to protect the American people. When I’m elected I will suspend immigration from areas of the world where there’s a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats” (Beckwith 2016). Such a turn to nationalist, isolationist tendencies is consistent with Chowanietz’s argument that national crises, especially terrorist attacks on national symbols, tend to result in a “rally around the flag” effect, in which the citizenry and opposition politicians support the incumbent government and reduce criticism of leaders (Chowanietz 2010, pp. 673-698). Yet in many cases, states of emergency can allow governments to engage in extensive violations of individual rights, especially rights pertaining to individuals’ autonomy over their own bodies.

Nongovernmental organizations such as Human Rights Watch, Amnesty International, and le Collectif contre l’islamophobie en France (CCIF) have begun following the potential

abuses to individual body privacy in France during the state of emergency (Pascual, Jean-Baptiste Jacquin et Julia 2016; Anonymous 2013b). For example, various reports suggest that there have been over 3.5 thousand warrantless searches, about five hundred house arrests, and eighty deportations from France during the state of emergency (Pascual, Jean-Baptiste Jacquin et Julia 2016; Anonymous 2013). Scholarship on the topic has been dominated by Chebel d’Appollonia, who noted that “we have all lost, in terms of both the preservation of civil liberties and the enhancement of public security. Both have eroded.” D’Appollonia suggests that the loss of civil liberties for wide segments of state populations are seen as “lesser evils” than the evil of country-wide insecurity (Chebel d’Appollonia 2012). Indeed, most political scientists would likely agree that the fundamental requirement for state legitimacy is the state’s ability to protect its citizenry and defend its territory. The modern-day transnational terrorist threat constitutes, therefore, an existential threat to all states. Even from a human rights perspective, the safety requirement in of today seems paramount. Yet, as this paper will show, the idea of a constant state of emergency or peril is neither new nor, perhaps, accurate.

In the United States, there is some analysis and discussion of historical examples of state power infringing on the rights of individual bodies during times of emergency, yet watchdog groups seem to pay less attention to modern-day instances in the United States. In less than a week after the September 11 attacks, the United States Government adopted the Immigration and Nationality Act, in which “the INS was allowed to detain any alien for forty-eight hours without charge and to extend detention for an additional period in a series of reforms as the first step towards the implementation of harsher immigration restrictions supposedly designed to strengthen security (Chebel d’Appollonia 2012, p. 1).” Even Supreme Court decisions, such as the infamous *Hamdan* case (2006), entrenched a system in which “congressional action...has strengthened the ability of the president to act without being constrained by the courts in the future (Schain 2008, pp. 11-129).” It is thus important to assess the extent to which the United States government takes action against individual bodies during times of “emergency.” It is helpful for such an analysis to turn to literature regarding the “State of Exception” made famous by the work of Carl Schmitt and Giorgio Agamben (McConkey 2013, pp. 415-428). McConkey noted, “In the case of the direst threat...would not the coordinating and coercive force of the state, with its capacity to make a universally enforceable decision, be the best means of overcoming the threat?” (McConkey 2013, p. 415).

Sadly, in the U.S. and wider Western world, there is a long history of a “politics of fear,” which legitimizes the Machiavellian concept of a “State of Exception”. To explain the “politics of fear,” it is useful to look to Richard Jackson’s work of that title, in which he points out: “There are a number of palpable dangers inherent in the politics of fear. In the first instance, political fear is highly damaging to democratic politics and civil society because it de-legitimizes dissent, narrows the discursive space for political expression, and expands state coercive power at the expense of individuals and social institution” (Jackson 2008, pp. 176-202). The politics of fear is implicit in the state defense of liberty-restricting detainments, interrogations, and even uses of torture. It is somewhat paradoxical that the strongest state measures against individual bodies are the results of fear – it is the psychological explanation for the insecure bully, on the largest scale.

Moreover, Schmitt and Agamben formulated the idea of “State of Exception” to counterbalance anarchist thought and tendencies, and there is some evidence to support

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that the United States became a State of Exception in response to anarchists and communists themselves. During the early twentieth century, the “First Red Scare” referred to, as noted by a former Communist Murray Levin, “a nationwide anti-radical hysteria provoked by a mounting fear and anxiety that a Bolshevik revolution in America was imminent -- a revolution that would change...the American way of Life” (Levin 1971, p. 29). Indeed, U.S. Governmental policies during the “First Red Scare” indicate a deep level of societal fear. Both the Immigration Act of 1917 and the Anarchist Act were used in numerous cases of state assaults against citizens’ bodies and liberties, culminating in the Palmer Raids in 1919 and 1920 (Chacon 2008, pp. 145-163). The Palmer Raids represent a pretty direct parallel to modern-day counterterrorism interrogation and detention strategies, which often capture innocent individuals in drawn-out and violent episodes of detention (Biswas and Zahi 2011).

There appears to be a direct connection between a widespread sense of impending doom for “the American way of life” and a governmental response which focuses on controlling the bodies of those considered to pose a grave threat to “the American way of life.” Indeed, President Woodrow Wilson pushed Congress to authorize the Sedition Act of 1918 in order to surveil and deport immigrants in the United States during the Red Scare of 1918-1920. By 1920, rhetoric had evolved into active aggression against anarchists and promoted “vigorous enforcement of the law (Anonymous 1920b, p. 1).” In December of 1920, the U.S. Senate considered legislation to further constrict immigration and naturalization laws. The defense of naturalization laws, in particular, supports this study’s claim that the “Red Scare” constituted a state of emergency/exception.

Despite the mass deportations under the Immigration and Anarchist Acts, and mass surveillance authorized by President Wilson, another “Red Scare” emerged in the wake of the Second World War and the onset of the Cold War. Historians have come to consider McCarthyism a period of broad infringements on civil liberties. Most potently, the period was characterized by broad, baseless accusations and detentions of suspected “communists.” Detention without cause constitutes a serious breach into the private sphere of a citizen’s body.

The U.S. Government’s responses to crisis during World War II perhaps legitimized and cemented repressive politics of fear. War is arguably one of the most threatening of emergency situations, and the World Wars served to justify strong military leadership and decision-making abilities. Yet it is during this period that President Franklin D. Roosevelt committed one of the worst acts of human rights violations within the United States -- the internment of Japanese-Americans. This Presidential action constituted a severe infringement on liberty and, furthermore, directly targeted the bodies of American citizens. Again, the period correlated to an increase in nationalist propaganda and rhetoric, as well as a general “rally around the flag” attitude among the American population. Such indirect support for a state controlling bodies is alarming, but may provide valuable insights to the current American political scene.

McCarthyism

The era of “McCarthyism” obviously lasted much longer than the initial “Red Scare.” Perhaps the influence of the Second World War played a role in heightening tensions, but the onset of the Cold War is most often considered the cause of increased polarization

among American society, between capitalist and communist/socialist/anarchist forces. At the heart of Cold War political theory was, in fact, that the American “way of life” was threatened by Soviet, communist, and anarchist influences piercing U.S. mores.

President Roosevelt grasped power and used it to combat an economic “state of emergency” in a way that no other President had attempted previously. The New Deal marked a momentous change in the role of the President in the U.S. government: it would thereafter become a position of immense power and influence in the government and society beyond, just as Schmitt and Agamben advocated should happen in a “state of exception.” The 1930s marked a significant expansion of the considerations of “state of emergency” -- being that it now included economic emergency -- and vested the President with the role of doing whatever may be necessary to resolve the crisis, with the full support of the American people.

The New Deal developed during the Great Depression set a precedent that was followed throughout WWII, especially in the wake of Pearl Harbor, when President Roosevelt authorized the internment of Japanese-Americans in a way that violated the individual's rights to freedom and liberty of body and home. Having stomached such a reckless use of Presidential prerogative, it is no wonder the American people could so easily stand behind the era of the Second Red Scare and government-enforced McCarthyism. Even dictionary definitions highlight the unjust nature of McCarthy-era detainments and deportations: the online source Dictionary.com defines it as “the practice of making accusations of disloyalty, especially of pro-Communist activity, in many instances unsupported by proof or based on slight, doubtful, or irrelevant evidence” (Dictionary.com). Both Red Scares, then, demonstrate the reach of the U.S. law enforcement and governmental agencies to literally control the movement of individual bodies, even via extra-legal methods and with dubious legitimacy. Newspaper sources demonstrate the effectiveness of the government's use of “emergency” to garner popular support -- even tacit support by the media is demonstrated in the sheer amount of attention paid to the topic.

Contemporary American politics have been characterized by the state's focus on the “terrorist other” -- the “terrorist” body. Implicit in such an interest is a need to define who constitutes a terrorist and what actions make someone a terrorist rather than a criminal. Law enforcement has tended to target the Muslim community in America as the most likely terrorists, much as the state of emergency in France presently and unfairly targets all Muslims. The most significant acts of U.S. state repression of individual Muslim bodies have been made possible through the USA PATRIOT Act, the employment of extraordinary rendition, and the acts of torture carried out at Guantanamo Bay and Abu Ghraib, among other high-security detention facilities. The state's ability to take away one's liberty and freedom is certainly a fundamental right of governments and law enforcement, yet it seems that in today's “perpetual” emergency state, the American populace perpetually falls prey to the Schmittian concept of a warranted liberty- and freedom-encroaching tyrant.

II. Modern Case Study: State Responses to “radical Islamist terrorism” and Torture through Extraordinary Rendition and Guantanamo

The U.S. Government has acknowledged the legitimacy of taking actions against individual liberties and freedom of body in contemporary times as well. In 1994, Jamie S.

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Gorelick, at the time the U.S. Deputy Attorney General, noted, “the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General” (Gorelick 2005). While the remainder of Gorelick’s speech suggested he did not condone the authority, he nonetheless did not actively fight against it, a trend which subsequent policymakers have continued since.

The American government has received significant blowback for its use of torture on noncitizen bodies held at Guantanamo Bay Detention Center. The U.S. Government, under the Bush administration, considered those held at Guantanamo to be unlawful combatants, and therefore not subject to international law regarding POW treatment. Certainly, the use of torture at Guantanamo is a reprehensible use of state power. Yet far less attention has been paid in the media to the U.S. Government’s use of “extraordinary rendition,” which persisted throughout the past several presidential administrations (Savage 2014; Eddington 2015).

Extraordinary rendition poses a complex issue for the relationship between the U.S. state’s assertion of power and the bodies of citizens, yet it is ultimately an issue which directly parallels those of the Red Scares. In early December 2014, the U.S. Senate released a report in which it admitted to having wrongfully detained twenty-six American citizens in other countries. The Central Intelligence Agency captured detainees considered to potentially have intelligence valuable to the War on Terror, and sent them to third countries where domestic laws such as the Fourth and Eighth Amendments would not apply, where the CIA could use “enhanced interrogation techniques” (a euphemism for torture) on them (Ackerman 2016). One of the twenty-six wrongfully detained detainees being forced to stand for sixty hours, being subjected to constant loud music, and being “shackled alone in freezing-cold cells in Afghanistan” (Shane 2014).

The CIA even resorted to sexual abuse, more often than not employed by the worst of Africa and Asia’s dictatorships, to obtain information from detainees. CIA officers photographed blindfolded, naked detainees. The Intelligence Community retained the photos to use as leverage against former detainees who might pursue legal or political recourse against them (Ackerman 2016). In other words, the CIA accepted and acknowledged -- at least internally and secretly -- that its actions likely violated detainees’ rights under American and international law. Indeed, the American Civil Liberties Union has launched a lawsuit on behalf of former detainees against former CIA contractors alleged to have masterminded “enhanced interrogation techniques,” raising the possibility that the CIA might have negated the negligible intelligence benefits of its torture program by opening a Pandora’s box of legal complications and dilemmas (ACLU 2016). Moreover, the country’s citizens and politicians must investigate and reflect on the American government’s preparation of fail-safes in order to violate its own laws. The CIA not only violated the rule of law but also sought to mitigate potential fallout with methods that were themselves illegal.

It is important to acknowledge the direct power the CIA therefore has over even American citizens’ bodies, but more relevant to this paper is the notion that this extent of torture and form of extraordinary rendition is the direct result of the War on Terror, which many see as a perpetual state of emergency, lasting from the attacks of 9/11 into the present day. The beginning of the War on Terror, of course, was the U.S. Government’s passing of the Patriot Act. While the Patriot Act did not specifically condone torture, the enabling

of heightened surveillance demonstrated the extent to which American government figures were willing to pursue intrusions into the private sphere of individuals.

In the same context, the U.S. government authorized the 2003 invasion of Iraq, ostensibly to remove Saddam Hussein from power and dismantle weapons of mass destruction. The invasion of Iraq and American military efforts to create stability in a land of “emergency” led to one of the most abhorrent examples of torture in American history: the torture (often against innocent or low-level criminals) conducted at Abu Ghraib (Sontag 2004). While U.S. Administrations never supported nor encouraged the human rights violations at Abu Ghraib, it remains an important data point in this analysis of the acceptance of torture during times of perceived threat or emergency. The powers of the state, acted upon detainees bodies in this way, demonstrates the link between state power and individual repression in such contexts. Sontag suggests that the treatment of detainees at Abu Ghraib by American military personnel demonstrates a blatant disregard for the humanity of the detainees. It is perhaps an aspect of the “state of emergency”/“state of exception” that the state dehumanizes the “other” in order to preserve a sense of stability in a world in which the state has lost its legitimacy or power to control external forces and protect its citizens and its “way of life.” It is a theme repeated by various scholars, including Nussbaum, who argues that a “politics of disgust” drives the creation of “other” groups by states (Nussbaum 2010). Even if the state did not directly condone or order the torture at Abu Ghraib, its overall dehumanization of the “enemy” allowed the soldiers guarding the prison to justify their actions to themselves.

It is also interesting to consider the extent to which international condemnation has failed to elicit a genuine response from American policymakers and administration officials (Kulich 2012; Anonymous2013a; The Associated Press 2014; Bilefsky 2014, A13). In several instances throughout American history, the U.S. Government has condoned the use of torture or ostracization of minority groups in other states. Yet in many of the most extreme cases of the state’s use of torture and surveillance on individuals, pressure from the international community has been fairly subdued, at least as far as the American media is concerned; for example, revelations of NSA spying on EU and UN leaders has had little effect on U.S. standing in Europe or the international community. The findings of this paper suggest that tacitly-supportive reporting about U.S. government attacks on individual freedom reinforces the “rally around the flag” effect by heightening the perception among the American population that we are, in fact, in a perpetual state of emergency.

Case Studies and Rhetorical Analysis

Between 1918 and 1920, federal and state law enforcement agencies targeted suspected “reds” in a dramatic way: through raids, warrantless arrests, and mass deportations. *The New York Times* reported on January 21, 1920, that “truck loads of alleged Reds from lodging houses, pool halls, cafes and soft, drink saloons, haunts of Russian Radicals, were delivered at the Government detention station last night in a carefully planned raid against suspected communists and anarchists in Seattle” (Anonymous 1919e, p. 15). This quotation is only one of numerous *Times* articles from 1919 alone that highlighted the U.S. law enforcement’s aggressive pursuit to detain and deport suspected “Reds.” Deportation and detainment, of course, are hallmarks of state limitation and control of bodies.

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Restricting freedom of movement, for non-criminal causes, seems to rub against the very essence of American democracy.

An analysis of *New York Times* articles in the 1918-1920 period provides helpful insights about the nature of American society's views towards the U.S. Government's appropriation of bodies during the period. Notably, many articles report abuses of individual liberty and freedom (especially freedom to privacy in one's home and the extension of the bodily sphere) without passing a particular judgment. Indeed, if one takes the news reporting to be a reflection of general American societal attitudes, it is evident that support for the government's policies was high, even though said policies infringed on basic rights and liberties guaranteed in the U.S. Constitution, such as the right to *habeas corpus*. It is also relevant to note the significant parallels between the selected quotations below and contemporary political rhetoric, as demonstrated in the table.

The quotations selected in Table 1 show the gradual violation of bodily rights by the government. In early 1919, there was evidently a general unease and desire for increased security, yet there were mostly vague, broad calls for "increased security" and "war on anarchy". By June 5, 1919, however, the *Times* reported that law enforcement officials had created a list of at least ten thousand "radicals" to be investigated. The sheer amount of resources dedicated to the investigations of these alleged "radicals" demonstrates the extent to which the "war on anarchy" represented a state of emergency/exception. The link between the threat of anarchists and the government's "right" to conduct covert surveillance of anyone demonstrates the extent to which the American public was willing to support drastic, liberty-infringing liberties and the right to privacy of one's body and space.

Tables 1-6 are divided into six tables comparing rhetoric across the three case studies by thematic categories, in order to demonstrate the similarities between the three selected periods of state repression leading to mass detainment and deportation. While each time period corresponds to different levels of press formality, the nature of articles from the time period, and the sheer availability of such similar quotations, strongly demonstrates the consistency across the cases. The references to terrorist bodies and the characterizations thereof are particularly interesting, as the casual manner in which they are discussed shows to some extent the level of complacency among the American population towards assaults on "terrorist" bodies.

Table 1 considers how terrorists are described, and how the community is expected to interact with suspected terrorists. During the First Red Scare, reporters referred to terrorist acts as "bomb outrages," encouraging community members to be "extra vigilant". During both the Second Red Scare and modern era, descriptions of the terrorist "other" imply that their values are inherently anathema to cherished American liberal values. In all three cases, non-state community actors constitute a significant force against terrorists, who are clearly stigmatized as being outside of the norm of society.

**TABLE 1:
Descriptions of Terrorists and Community Reactions**

First Red Scare Quotations (1919-1930)	Second Red Scare Quotations (1948-1958)	Modern Era Quotations (2001 -2016)

<p>January 6, 1919 -- “Since the anarchist bomb outrages in Philadelphia the New York police have been taking precautionary measures to prevent violence here....all members of the uniform force are to be extra vigilant in guarding public buildings...to keep the ‘Red’ leaders and their activities under close watch. (“Police Watch the Reds”, 1919)”</p>	<p>May 9, 1949 -- “The Communists dismissed from the University of Washington were secret, covert members of the party, masquerading as honest liberals and free men.” (Allen, “Communists as Teachers,” 1949)</p>	<p>August 24, 2011 -- “The Islamic world view divides the world into the House of War and the House of Islam. A state of war, not peace, perpetually exists between Islam and unbelievers.” (Gawthrop 2011)</p> <p>“The Professor Watchlist...says its mission is to educate students about “true free market values.” Charlie Kirk, its founder and executive director, wrote in a blog post that “it’s no secret that some of America’s college professors are totally out of line” and that it was time to expose them (Mele 2016).”</p>
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Table 2 further shows the extent to which rhetoric in each period suggested the “terrorist” body must be fought with actual physical force. Physical force is so supported that many newspapers and politicians referred to a literal “war” between, essentially, the forces of good and the forces of evil. Historians and political scientists often point to Lyndon B. Johnson’s declaration of a War on Poverty as the starting point for political uses of abstract wars among American presidents. Yet, as shown in Table 2, references to war and physically attacking even just *suspected* terrorists are common in the history of the American approach to counterterrorism. In 1919, *The New York Times* had no qualms about discussing a “war on anarchy” and a “hunt for anarchists” as being prominent and, to an extent, laudable approaches to anarchist violence. The theme carried into the hunt for communists during the Second Red Scare, when community members were invited to join the “propaganda war” and “crusade” in order to “round up” communists, as McCarthy did. The modern era, of course, has been characterized by the awkward wording of “crusade” and the characterization of the terrorist as being an “enemy combatant.”

TABLE 2:
References to Establishing a “War on [anarchism, communism, ‘terror’]”

First Red Scare Quotations (1919-1930)	Second Red Scare Quotations (1948-1958)	Modern Era Quotations (2001 -2016)
June 5, 1919 -- “officials throughout the	September 13, 1950 -- “Admiral William F. Halsey	September 21, 2001 -- “Our war on terror begins with al

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<p>country [were] rapidly being spread today in the most determined war on anarchy the Federal Government has ever undertaken...”</p> <p>“There will be no interference with him in his conduct of the hunt for anarchists”</p> <p>“Two of the best detectives of the bomb squad of the New York City police, who are familiar with the ways of anarchists, particularly the Italian anarchists of the metropolitan district...”</p> <p>“All statements and literature that are in any way un-American should be forwarded to Police Headquarters, giving names and addresses of persons...”</p> <p>(Special to The New York Times 1919, 1)</p>	<p>Jr. today called on every citizen to join the crusade for freedom as a fighter in the propaganda war with communism...there was another kind of war, a ‘war of words and ideas,’ in which every American citizen should play a part...Premier Stalin’s ‘big lie’ he asserted, is repeated by Russian delegates who contend in the United Nations that the United States is out to conquer the world.” (“Crusade by All Urged,” 1950)</p>	<p>Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. Americans are asking, why do they hate us? They hate what we see right here in this chamber - a democratically elected government. Their leaders are self-appointed. They hate our freedoms - our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.” (Bush 2001)</p>
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Table 3 portrays anyone with even the least potential for terrorist sympathizers as a subversive bent on bodily harm. In 1919, anti-communists argued that anarchists sought “a reign of terror by bomb explosions.” In 1954, communists’ access to weapons could supposedly decide whether “the sons of American mothers may live or die.” An Islamophobic 2014 book even alleges that true Muslims must be willing to martyr themselves (i.e., sacrificing their bodies) to kill infidels and fulfil God’s wishes. These quotations suggest a link between the bodies of the “good” and the bodies of the terrorists, in that the “good” are likely to be very physically and legitimately attacked. The state, therefore, would likely need to attack the terrorists individually in order to truly combat the threat posed by terrorists. Table 3’s quotations would provide, as seen earlier in this paper, the foundation for state repressive actions.

**TABLE 3:
References to Constant High-Level Terrorist Threat, i.e. “reign of terror”**

First Red Scare Quotations (1919-1930)	Second Red Scare Quotations (1948-1958)	Modern Era Quotations (2001 -2016)
<p><i>July 3, 1919</i> -- “the anarchists intend to create a reign of terror by bomb explosions...the plans have not been divulged, but it is known that many suspected persons have been under surveillance and that they will be arrested on the least suspicious move.” (Anonymous 1919a) “Precautions Nation-Wide”; Anonymous 1919b)</p>	<p><i>March 2, 1954</i> -- “He then read it, declaring exposure of Communists working on secret weapons might determine whether ‘the sons of American mothers may live or die.’” (“McCarthy, Dirksen Suggest Labor Camps for Army Reds; CAMPS’ SUGGESTED FOR REDS IN ARMY Witnesses at McCarthy Hearing”, 1954).</p>	<p><i>August 21, 2014</i> -- “To be wholly consistent with the tenets of Islam and to express one’s unconditional faith in it, a Muslim must be willing to die to advance the spread of Islam, and be deemed a “martyr” for it or a self-sacrificing “warrior.” (Cline 2014)</p>

The USA PATRIOT Act received significant criticism for the authority it gave to the NSA to monitor electronic communications between American citizens (and noncitizens) without the traditional warrant approach to criminal investigations. It also expanded the restrictive nature of US immigration laws. Jennifer Chacon noted that, “changes in immigration enforcement [since 9/11] have increased racial and ethnic profiling in newly expanded immigration efforts and flooded an overburdened administrative and judicial system with detainees... (Chacon 2008, p. 157).” As Table 4 demonstrates, the use of surveillance, and even of making “lists” of suspected terrorists, is, once again, consistent with past uses of US state power to restrict individual's’ liberty to move and retain power over their body. Mass surveillance is a direct watching of the individual body, in a way which infringes the private space and private sphere. In many ways, electronic surveillance may actually be less intrusive than the typical, historical means of mass surveillance, as quotations from the Red Scares suggest citizens report suspicious neighbors to police in order to “index” terrorists, and even suggest detaining citizens in “disagreeable labor camps” in order to best monitor those with the *potential to become* terrorists.

**TABLE 4:
Making lists of terrorists, mass surveillance, and mass detainment**

First Red Scare Quotations (1919-1930)	Second Red Scare Quotations (1948-1958)	Modern Era Quotations (2001 -2016)
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<p>June 5, 1919 -- “In the search to find “those who exploded the bombs in eight cities of America last Monday...”</p> <p>“10,000 radicals indexed...every one of them will come in for a searching examination as to where he has been and what he has been doing for the past three months.”</p> <p>District Attorney Swann: “It would be well if [the list of suspected individuals] were enlarged so as to include not only those who have committed crimes but potential criminals of all kinds.”</p> <p>(Anonymous 1919b, 1) “Question Radicals Here”, Anonymous 1919c, 1)</p> <p>January 21, 1920 -- “truck loads of alleged Reds from lodging houses, pool halls, cafes and soft, drink saloons, haunts of Russian Radicals, were delivered at the Government detention station last night in a carefully planned raid against suspected communists and anarchists in Seattle...only three American citizens were caught in the dragnet...” (“27 Seattle Reds</p>	<p>March 2, 1954 -- “Senators Joseph K. McCarthy and Everett M. Dirksen suggested today ‘disagreeable’ labor camps for armed services personnel who were Communists or who invoked the Fifth Amendment when asked about Communist associations.”</p> <p>“Senator Dirksen...said Secretary Stevens would be asked to produce figures on how many persons there might be in the Army, both as enlisted men and officers, who had admitted present or past Communist membership or who had refused to answer such questions on their loyalty forms.”</p> <p>“The junior Senator from Wisconsin has declared political war....Senator Watkins also said the Eisenhower Administration had reason to be proud of its record ‘in ferreting out Communists and jailing the guilty.’” (“McCarthy, Dirksen Suggest Labor Camps for Army Reds; CAMPS’ SUGGESTED FOR REDS IN ARMY Witnesses at McCarthy Hearing”, 1954).</p> <p>December 8, 1954 -- “It listed eight items, including conviction of fifty Communist party leaders and indictment of forty-nine; addition of sixty-two organizations to the Justice Department’s official list of subversive organizations that now total 255; indictment of</p>	<p>November 17, 2016 -- “Look, the president needs to protect America first, and if that means having people that are not protected under our Constitution have some sort of registry so we can understand, until we can identify the true threat and where it’s coming from, I support it.” (Carl Higbie, Trump supporter and former Navy SEAL)</p>
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Held”;(Anonymous1920a, 17)	one person for treason ; conviction of two for espionage and ten for making false statements to the Government	
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(Hartmann 2016)

Table 5 considers the rhetoric used by the media in each of the three cases with regards to deportation, but it is especially enlightening to look at the selected quotation from 1919. This quotation highlights the connection between deportation (forcing movement of a body and the home/private sphere) and torture. In a period before Guantanamo functioned as a detention center, individuals described as being deported “as anarchists and revolutionists” had “blackened eyes and lacerated scalps as souvenirs of the new attitude of aggressiveness which has been assumed by the Federal agents... (“Quick Deportation for the Reds” 1919c).” In the latter two cases, on the other hand, efforts were directed less at deportation of those in the country, but rather the prevention of immigration. The prevention of immigration is perhaps a hazy topic for this paper, as it concerns the state’s regulation of a non-citizen’s freedom of movement. However, the cases are still indicative of the ways in which a state reacts to insecurity by aggressively acting against bodies, whether through refusing asylum or scalping. Additionally, it is significant to note the significance of “raids” in all three cases, wherein Federal agents are seen as having some state power-derived right to enter into private domains.

**TABLE 5:
References to Deportation Efforts**

First Red Scare Quotations (1919-1930)	Second Red Scare Quotations (1948-1958)	Modern Era Quotations (2001 -2016)
<i>November 9, 1919</i> -- “an effort will be made to deport them as anarchists and revolutionists ...most of them had blackened eyes and lacerated scalps as souvenirs of the new attitude of aggressiveness which has been assumed by the Federal agents against Reds and suspected Reds. Twelve of the men who were roughly handled and later released said they were soldiersThe thirty-five alleged Reds who were sent to Ellis Island from this	<i>October 24, 1954</i> -- “The McCarran-Walter Immigration Act... refuse to admit Communists as temporary visitors to the United States . What American civil servant would not feel ‘shyness about using his discretionary powers to waive the legal admissibility of a Communist?” (“Granting Visas to Communists, 1954).	<i>November 16, 2016</i> -- “Anybody that's brought into this country from the migration is going to be out. We’re not gonna do it. We’re gonna have a country again, we’re gonna have borders, we’re gonna have a country again, right now we don't have a country.” (Trump, in ABC News 2015)

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<p>city last night were joined there by thirty of the same type who had been arrested in the northern district of New Jersey in raids directed by Federal Agent Frank P. Stone of Newark, The entire sixty-five will be taken before a Federal Commissioner on Monday...a lawyer representing some of the arrested men, said he would attempt to free them all through habeas corpus proceedings..they will probably be held in this country for some time, even if the court's order their deportation.” (Anonymous1919c, 3) “Quick Deportation for Raided Reds” ; 1919d, 3)</p>		
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(News 2015)

Table 6 describes the way Americans deported or proposed to deport three generations of immigrants who represented real or imagined threats to the United States, denying those immigrants freedom of movement. Politicians in 1920 sought “the protection of the country from the revolutionaries and radicals eager to descend upon it,” often an excuse to detain them and house them in subhuman conditions. In 1954, American officials referred to undocumented immigrants as “subversive aliens,” dehumanizing them so that the civil-rights violations of Operation Wetback seemed less inhumane. The upcoming Trump administration will “ensure that other countries take their people back when we order them deported.” In all three eras, administrations have denied immigrants control over their own bodies, ostensibly as a way to further secure the state. Such detentions and deportations seem almost automatic to the perceived constant “state of emergency.”

**TABLE 6:
References to Increased Deportation and Efforts to Stop Immigration**

First Red Scare Quotations (1919-1930)	Second Red Scare Quotations (1948-1958)	Modern Era Quotations (2001 - 2016)

<p>November 22, 1919 -- “An investigation is also being carried on by the agents of the Department of Justice into the circumstances which make it possible for hundreds of Reds who have been ordered deported to remain in this country and to keep up their propaganda for the destruction of the American Government...Chairman Johnson said that the committee intended to undertake a broad survey of the immigration problem, with a view to legislation which would permit entrance to this country only of men with the making of good citizens.” (Anonymous1919d, 15) “Red Plot to Kill Officials Bared” ; Anonymous 1919e, 15)</p> <p>December 3, 1920 -- “Besides amendments to the Naturalization Reorganization and Immigration bills and the Japanese question, it will consider immigration in general...Mr. Johnson, Chairman of the committee, favors a resolution to suspend all immigration temporarily and to secure time for careful</p>	<p>December 8, 1954 -- “...deportation of 129 alien subversives; orders for 410 to be deported; orders for denaturalization of forty-nine and the barring of 172 subversive aliens...”(“M’Carthy Breaks with Eisenhower; Rues 1952 Support”, 1954).”</p>	<p>C. 2016 -- “5. Immediately terminate President Obama’s two illegal executive amnesties. All immigration laws will be enforced - we will triple the number of ICE agents. Anyone who enters the U.S. illegally is subject to deportation. That is what it means to have laws and to have a country.” “7. Ensure that other countries take their people back when we order them deported.” (Trump 2016)</p>
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<p>deliberation on a general and permanent law.”</p> <p>“The protection of the country from the revolutionaries and radicals eager to descend upon it is one essential object of a general immigration law. It has sometimes appeared as if the immigration authorities were not too eager to keep out these undesirables. It is true that it is difficult to ascertain the opinions of the immigrants here, and that, except in the case of notorious Reds, the detection of the undesirables must be provided for on the other side. Elaborate systems for this purpose are being devised, but the best of them will be impotent if the representatives of this Government abroad and at home are tenderer to the suspected would-be settler among us than to the rights of American citizens and the safeguarding of our form of government from its most dangerous enemies...what is needed is vigorous enforcement of the law.”</p> <p>(Anonymous1920b, 1)</p> <p>“Immigration”;</p> <p>Anonymous 1920b, 1)</p>		
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Citations for Tables 1-6: (Trump; Cline 2014; Bush 2001; Gawthrop 2011; Savage 2009; Bilefsky 2014, A13; Savage 2014; Shane 2014; Anonymous1919c, 1; Anonymous1919d, 3; Anonymous1920b, 1; Special to The New York Times 1919, 1; Anonymous1919e, 15;

Anonymous1919b; Anonymous1919a, 8; Anonymous1920a, 17; DAVID E SANGER and MAGGIE HABERMAN 2016; Arango 2015)

Conclusion

Commentators in the wake of 9/11 have surmised that the massive expansion of the U.S. security apparatus and intelligence services are a component of what will henceforth be a perpetual state of emergency. France has voted to renew its official state of emergency multiple times since attacks around Paris on November 13, 2015, shocked the country. The U.S. has not conducted any such formal process, yet the renewal of security funding and attention to military efforts, both internal and external, point to the possibility that this is the case. The ACLU quoted Mike German, a former FBI agent, as stating, “It raises fundamental questions about whether a domestic intelligence agency can protect civil liberties if they feel they have a right to collect broad personal information about people they don’t even suspect of wrongdoing” (ACLU 2016). This question should be at the core of policy debates in both academic and journalistic circles, yet there seems to be a lack of interest in the concerns raised by German and this paper.

The rise of Donald Trump to the Presidency of the United States suggests that the American people accept the claim that modern America is under a constant and never-ending threat, as his campaign was predicated on nationalistic, racist sentiments suggesting a return to white, male-supremacist America. This paper has shown that similar sentiments prompted severe restrictions on individual liberty and enabled an attack from the government against the American body and privacy of individuals’ homes. There is thusly a desperate need for attention and consideration of the infringement of rights by the government during times of perceived (even if ill-founded perception) emergency. □

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Contributors

Armstrong, Madison: Madison is a Political Science major and Faith, Peace and Justice Minor with a concentration in economic mobility at Boston College. Originally from Portland, Oregon, Madison is a graduate of Lake Oswego High School in neighboring Lake Oswego, Oregon. She is passionate about anti-poverty initiatives in the United States and hopes to re-conceptualize the way the US government and its citizens think of poverty. Madison has worked in Boston at Action for Boston Community Development helping low-income clients access much needed services and for Victory Programs—Boston Living Center with the HIV positive population. She has also worked at CapitalEdge in Washington, D.C. as a federal lobbyist representing municipal governments, fighting for increased funding for many programs benefiting low-income populations. Upon graduation, Madison hopes to pursue both a Masters of Public Policy and Juris Doctor with a focus in public interest law.

Daniels, Katie: The oldest of six children, Katie is a Maryland native and attended Georgetown Visitation Preparatory School in Washington, D.C. Now a senior at Boston College, she is a double major in English and political science, as well as a political science honors student, a John Marshall Project fellow, and an accidental member of the men's Ultimate Frisbee team. Katie plans to pursue a career in journalism after graduation, and has worked for *Boston College Magazine*, *Commonweal*, and National Public Radio.

Garcia, Cesar: Cesar is a graduate of Lewiston Senior High School in Lewiston, Idaho, and is a senior at Boston College. He is double-majoring in Economics and Political Science, and is particularly interested in the studies of political economy and international relations. As part of the Political Science Departmental Honors Program, he is writing his thesis on the practical implications of rentier state theory. Throughout Cesar's time at Boston College, he founded *Colloquium: The Political Science Journal of Boston College*, served on the Executive Board of the Organization of Latin American Affairs, and worked as a student supervisor at the Cadigan Alumni Center. He also spent a semester abroad at the University of Deusto in Bilbao, Spain, where he studied international relations and finance. Following graduation, Cesar will be joining Morningside Translations as an associate, and eventually hopes to pursue a Juris Doctor or Master of International Affairs.

George, Miriam: Miriam is originally from Singapore, but has lived in Shrewsbury, MA for most of her life. She is currently a junior at Boston College, majoring in Political Science and minoring in Hispanic Studies. Miriam is particularly interested in the

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protection of the civil rights and liberties of minority and immigrant groups. She has worked with both the Civil Rights Division of the Massachusetts Attorney General's Office and the Massachusetts Commission Against Discrimination to end discrimination and ensure equal opportunity for all to participate in civic society, in areas such as employment, housing, education, health care, and voting. Her interest in the civil rights of minorities and immigrants is what led her to write on the forced sterilization of minority and immigrant women by the United States government in *Body Politics*.

Hanley, Thomas: Thomas is a graduate of McQuaid Jesuit High School in Rochester, NY. At Boston College, Thomas is majoring in Political Science with a minor in International Studies. As a dual Irish-American citizen, Thomas studies and experiences have focused on the European continent. In 2015, he worked as a strategist intern with R/GA digital advertising working on Nike's Western European Running Campaign in their London, England office. Following that experience, Thomas spent the 2015 fall semester studying Political Science at the University of Copenhagen in Denmark. Most recently, Thomas spent the 2016 summer working for the United States Department of State's U.S. - European Media Hub in Brussels, Belgium. In Boston, Thomas is currently working on his Political Science Departmental Honors Thesis studying the relationship between the inclusion of far-right political parties into European parliamentary politics and hate violence directed towards refugees. His work is centered on Denmark's far-right *Dansk Folkeparti* and Sweden's far-right *Sverigedemokraterna* and each party's relationship to domestic hate violence. Thomas's focus on the European far-right is what lead him to focus his chapter on homophobia in Poland and Hungary, two countries governed by far-right governments.

Karamanakis, Konstantinos, Editor: Kosta is a Political Science major and History minor at Boston College. A native of Dudley, Massachusetts, he is a graduate of Shepherd Hill Regional High School and a first-generation college student. Kosta is passionate about improving the way governments interact with their citizens. He previously served as an appointee of Governor Deval L. Patrick on the Massachusetts After-School and Out-of-School Time Coordinating Council and the Governor's Statewide Youth Council, where he advised policymakers on unaccompanied youth homelessness and the educational achievement gap. Most recently, Kosta completed research at the Theological School of Halki, Istanbul, on the evolving relationship between the Ecumenical Patriarchate of Constantinople and the modern Turkish state, followed by a yearlong study of international politics and British government at Mansfield College, Oxford. He is currently writing a Political Science Departmental Honors Thesis on rehabilitative criminal justice, and hopes to pursue a Juris Doctor upon the completion of his undergraduate degree.

Lin, Lauren: Lauren is currently a junior at Boston College majoring in both International Studies and Political Science with a minor in French. Her concentration within the former is Ethics and International Social Justice, with interests in security and conflict resolution. Most recently, Lauren received a research grant to conduct preliminary research in Taiwan over the summer in preparation for a senior thesis examining the complex relationship between China and Taiwan. In the Spring of 2017, Lauren will be spending the semester abroad studying History at l'Université Paris-Sorbonne in Paris, France. Outside of

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academics, Lauren has previously worked with Jumpstart, an Americorps program aimed at helping preschoolers in under-resourced schools achieve a level of literary development on par with that of their peers at other schools. She also currently works as the Senior Copy Editor of *Kaleidoscope International Journal*, a student-run undergraduate journal focused on publishing political, economic, and cultural articles on regions spanning the entire globe.

Massih, Jack: Jack is a Political Science and Economics Major in the Morrissey College of Arts and Sciences. He is originally from Hockessin, Delaware, where he graduated from the Charter School of Wilmington. He is very interested in economic policy and the government's role in regulating markets. He has published several articles for the Delaware based think tank, The Caesar Rodney Institute, where he worked as an intern. He has also worked for the Delaware Office of the State Bank Commissioner, where he participated in bank examinations and met the governor and several state legislators. After graduation he will be taking an analyst position at the economic consulting firm, Cornerstone Research.

Murphy, Emily: Emily is a senior in the Morrissey College of Arts and Sciences at Boston College. She majors in Political Science and Islamic Civilizations and Societies, and is in the Honors programs for both fields. She is from Burlington, Vermont. Emily's studies have led her to focus on counterterrorism and the ways in which soft power efforts to securitize modern nations may infringe on civil liberties for minority groups and communities, and Muslim communities in the West in particular. She will be going to Muscat, Oman next year with the Fulbright program to study concepts of egalitarianism in Ibadi thought and how that translates to counterterrorism.

Pino, Jordan A., Editor: Originally from Winter Park, Florida, Jordan is a graduate of Lake Highland Preparatory School and a senior at Boston College. He is pursuing a double-major in both Political Science and Philosophy, and he is a member of the Departmental Honors Program of the former. In fulfillment of the program, Jordan is writing his thesis on the politics of welfare reform. In the past, Jordan has completed a Research Internship in Poverty Studies at the American Enterprise Institute (AEI) and a Legislative Internship in the Office of U.S. Senator Bill Nelson (D-FL), both in Washington, D.C. Most recently, he returned from an overseas exchange program at the University of Durham in the United Kingdom, where he studied Philosophy, Politics, and Economics (PPE). Jordan is particularly interested in law and politics, and he hopes to pursue a career at their intersection. These interests are what led to his legal and political research of transgender civil rights in the United States for this book, *Body Politics*.

Puk, Ashley: Ashley is currently studying at Boston College and pursuing a B.A. in the Department of Political Science in the Honors Program with a minor in Economics, graduating in 2018. Ashley hails from a small town in northern New Jersey and matriculated from Westwood Regional High School in 2014. She has worked in local politics over the course of her studies, most recently with the Massachusetts Women's Political Caucus, campaigning and organizing on behalf of highly-qualified female candidates vying for office on the state and local levels in Massachusetts. Ashley is passionate about addressing through policymaking rampant inequality that has been

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perpetuated by highly-regarded institutions in American society. Her choice to research unethical human experimentation at the hands of the U.S. government as her seminal research paper reflects this, as well as the broader topic of body politics.

Sheridan, Kevin: Kevin is currently a senior at Boston College majoring in both political science and economics. He is originally from Clark, New Jersey, and is a graduate of Saint Peter's Preparatory School in Jersey City, New Jersey. He has been involved in local politics through his work for his county's Department of Economic Development. He most recently worked in public finance while interning at Standard & Poor's and will be returning to the company after graduation as a fulltime credit analyst. Kevin has focused his studies on the interaction of different economic and political systems due to his interests in both political economy and international politics. Enthusiasm for these topics brought his attention to the European Union and, particularly, the causes and implications of the region's recent refugee crisis.

Tobin, Connor: Connor grew up in Juno Beach, Florida before coming to Boston College. He is a double-major in Political Science and Economics, and he is a member of the Departmental Honors Programs of both. Interested in comparative politics, international economic institutions, and multinational tax avoidance, Connor is currently writing an Economics Honors Thesis on corporate tax inversions. After graduation, he will work for Charles River Associates as an antitrust analyst. For the past three years, Connor has worked at Perkins School for the Blind, where he has taught physical education and swim lessons. Inspired by the children there who have overcome so much and show great promise for the future, he decided to research the international development of disability law and culture.

Waghorne, Sylvia: Sylvia is a senior at Boston College pursuing a double major in Political Science and English. Sylvia is a member of the Political Science honors program, and she is a John Marshall Undergraduate Fellow. Previously, she interned for Lisa Wagner and Company, a Chicago-based political fundraising and event-planning business. Currently, she is an Undergraduate Research Assistant for the Boisi Center for Religion and American Public life at Boston College. After graduating, Sylvia hopes to continue to pursue her interests in politics, law, and international relations.

Ward, Colleen: Colleen is a Political Science major at Boston College. Colleen grew up in Washington, D.C., where she attended National Cathedral School. Colleen is a member of the Political Science Honors Program. During her time at Boston College, she has worked as a Congressional intern in Senator Edward Markey's Boston office and an intern in the Education Department at the Newseum in Washington DC. Colleen took Professor Newmark's literature and philosophy class *The Imaginary City: Why Writers Love Venice* in Venice in the summer of 2014. In 2015, Colleen spent a semester in Brussels studying international relations, specifically the European Union and NATO. These international studies have increased her enthusiasm for international affairs in her career. Since returning to Boston College's campus, she has worked as a research assistant to Professor O'Rourke on the United States' role in regime change during the Cold War. After graduation, she plans to attend law school.

