The Law and Society Review at the University of California Santa Barbara

Volume I **2001–2002**

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The Law and Society Review at the University of California, Santa Barbara, is published annually by undergraduate students at UCSB under the leadership of Law & Society Program faculty. The Law & Society Program, an interdisciplinary major, draws faculty from the humanities and social sciences and utilizes both a theoretical and empirical approach to the understanding of law, with courses ranging from alternative dispute resolution to criminal justice. The Program is among the most diverse majors at the University and is designed to explore topics extremely relevant to current issues facing our country. *The Law and Society Review* aims to be an interdisciplinary endeavor, seeking submissions from undergraduates in all majors and disciplines in order to gain a more comprehensive outlook on contemporary law in action within our society. *The Law and Society Review* is an undergraduate, peer-reviewed journal highlighting outstanding undergraduate scholarship, including articles devoted to undergraduate research and fieldwork, and theoretical thought processes.

Selection Criteria

The Law and Society Review at the University of California, Santa Barbara, carefully considers all submissions of undergraduate scholarship received. Submissions are reviewed and considered anonymously, without regard to the author name, major, political affiliation, race, color, national origin, religion, sex, physical abilities, age, ancestry, martial status, sexual orientation, prior publications, or pending publication offers. Authors of submission must have undergraduate standing at the University of California, Santa Barbara, at the time the submission was written and works can be submitted no later than one school calendar year from the author's commencement from UCSB. Publication in the *Law and Society Review* does not prohibit authors' submissions to concurrent or future publication in other journals or publications, nor are previously published works in other journals or publications ineligible for publication in the *Law and Society Review*, permitting the prior publication allows.

Editorial Disclaimer

The Law and Society Review at the University of California, Santa Barbara

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Contributors

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Jonathan E. Cruz graduated form UCSB in 2001 with a B.A. in Sociology and a minor in Music. He will begin a J.D. program at Loyola Law School in Los Angeles in the Fall of 2003 and plans to combine his interest in law with his love of music to establish a career in entertainment law.

John Ginder is a senior at UCSB majoring in Global Studies with a Political and Socioeconmic emphasis. He grew up in Santa Barbara and attended the University of Oregon for two years after graduating from Santa Barbara High School. John moved back to his hometown intending to transfer to UCSB and major in Film Studies. After taking an interest in international law and politics, John decided to major in Global Studies. Upon graduation in June 2002, he will be applying to law schools and hopes to pursue a career in international law.

John Salinas Lopez is a fourth year senior majoring in Law and Society and Microbiology, with a concentration in genetic engineering. He is interested in the growing spectrum of law within the processes of the biotechnology industry. He plans to complete Master of Science graduate work in the area of regulatory processing for bio/pharmaceutical and biodevice development, with the ultimate goal of a career practicing patent law. When John is not reading books or flipping test tubes, he enjoys an active athletic lifestyle. As a proud member of the Big Brothers Big Sisters Program in Santa Barbara County, he enjoys playing video games and eating ice cream with his little brother Angel.

TiTi Nguyen grew up in Virginia, thirty miles from Washington, D.C. While at UCSB, she has interned at the Santa Barbara Superior Court Own Recognizance Unit as well as the Federal Bureau of Investigation in Washington, D.C. TiTi graduated Winter 2002 from UCSB with a B.A. in Law and Society (Criminal Justice emphasis) and a B.S. in Computer Science. Upon graduation, she received Highest Honors, the Academic Excellence Award, and Distinction in the Major of Law and Society for her Senior Honors Thesis work. Next year, she will attend the University of California School of Law at Berkeley and study technology law.

Joey Chella Soto is a senior Environmental Studies major at UCSB. She was raised in San Juan Capistrano, California, which is known for its picturesque landscapes and the historic Mission of San Juan Capistrano. Joey enjoys outdoor recreation and views life as an endless adventure. She loves to travel, which can be a bit inconvenient at times, but she has found that it is possible to balance hard work and play. She plans to achieve a career in environmental law, and hopes to attain the outstanding insight and knowledge that her professors at UCSB possess.

Christi Thompson is a senior majoring in Law and Society. She grew up in Carmel Valley, where she was recently married. She met her husband while in her sophomore year of college, and they are both currently students at UCSB. Christi plans to get a Ph.D. in Sociology and then devote her life to her family and raising a child.

Roger J. Thompson is a Regent Scholar at UCSB majoring in History and has a particular fascination with modern U.S. history. He plans to pursue a Ph.D. in History and eventually teach and write. His current research includes a study of the Red Scare of 1919-1920 in Los Angeles as well as Arab and Muslim racism in America post-9/11. The essay published in this journal was written as an Honor's project for Professor Hasegawa. He is happily married to Christi Thompson and lives in Santa Barbara. Comments can be directed to rogerthompson4@cox.net.

Todd R. Tunstall was born and raised in San Dimas, California, a small town on the outskirts of Los Angeles County. He is currently a third-year Law and Society student at UCSB and planning on graduating with an emphasis in Criminal Justice and a minor in Global Peace and Security. He hopes that after graduation in the Spring of 2003 his degree will help him springboard in to a career in the F.B.I.

*Julie Zhalkovsk*y is originally from the former Soviet Union. She was born and grew up in the city of Odessa in the former republic and current nation of Ukraine. Currently, Julie's family resides in San Francisco, where she plans on returning upon graduation from UCSB in June of 2002. Julie graduates in June with a bachelor's degree in Law and Society. Upon graduation, she plans on attending a top law school and looks forward to a long and rewarding career as an attorney, considering the field of civil rights litigation as her legal emphasis.

Santa Barbara County Bar Foundation Paper Prize Awards

The Santa Barbara County Bar Foundation is the sponsor of the *Law and Society Review's* annual paper prize competition. Every submission to the *Review* is eligible for the prizes, with first prize receiving $500, second prize $200, and third prize $100. After the submissions have been chosen for publication, the *Review* selects paper prize award winners that exemplify outstanding scholarly undergraduate writing in the field of law and society.

2001-2002 Paper Prize Award Recipients

First Prize

Joey Chella Soto

Hearst Development Case:
A Dispute Turned Negotiation

Second Prize

John Ginder

Rethinking National Missile Defense

Third Prize

Christi Thompson

The Impact of Three-Strikes:
A Socio-Legal Perspective

Editors' Note

The publication of this journal marks the inaugural year of the *Law and Society Review at UCSB*. Recognizing the need for the development of publication forums for undergraduates, the *Review* was established this year as an outlet specifically for undergraduate expression in the broad field of law and society scholarship. We strove to generate a foundation so that the *Review* will continue as an annual publication.

This *Review* is a testament to the extensive reach of law into all facets of society. Modeling the approach of the Law & Society Program, the *Review* is an interdisciplinary endeavor, highlighting a diversity of outlooks and demonstrating the widespread influence law has in society. The articles in the publication include topics ranging from science and technology, Supreme Court case analyses, California state and local issues, and a conspiracy theory. Many of the articles reflect September 11th's undeniable connection to historical events and its implications for a vast array of contemporary issues.

The broad reach of the *Review* to undergraduates across the UCSB campus is indisputable. After unneeded anxiety about the success of our efforts, the *Review* received sixty-eight submissions from students in thirteen undergraduate disciplines—Global Studies, Environmental Studies, Business Economics, Philosophy, Anthropology, Sociology, Spanish, History, Political Science, Communication, Computer Science, Psychology, and Law & Society—and four class levels, including recent UCSB graduates.

The *Review* owes a debt of gratitude to our faculty advisor, Eve Darian-Smith. Her belief in the importance of undergraduate scholarship and research is unwavering and vitally important to the existence of this *Review*.

It is with great pride and accomplishment that we present to you this inaugural 2001-2002 edition of the *Law and Society Review at UCSB*.

Sincerely,

Sarah Cramer
Co-Chief Editor

Monica Fawzy
Co-Chief Editor

Hearst Development Case: A Dispute Turned Negotiation

Joey Chella Soto

Development in the coastal areas of California continues to grow, and landowners, citizens, and political authorities must come together to reach agreement between conflicting interests. While some seek to preserve the untouched land, others focus on the potential of development for economic gain. The case involving the California coastal area of Hearst Ranch and San Simeon Point serves as a classic example of conflicting interests, but not necessarily non-negotiable differences between parties. Currently, the Hearst Corporation seeks to develop portions of its land into a resort hotel and golf course, while many environmental organizations seek to preserve the untouched environment (Cardenas 2002). After a history of heated debate, the Hearst Corporation and two environmental organizations, The Nature Conservancy (TNC) and The Conservation Fund (TCF), are attempting to negotiate their separate interests (Smith 2002). The proposed possibility of the environmental organizations purchasing plots of land where development was intended works to satisfy the interests of both parties. The Hearst Corporation intends to make a profit off the land, while the environmental groups aim to purchase and protect the land under a conservation easement, which would prevent development of any kind on the land forever (Smith 2002). The outcome of these efforts is extremely crucial to the future of the "18-mile stretch of undeveloped coastline from Cambria to Big Sur" owned by the Hearst Corporation (Cardenas 2002). Due to the vastness of the property, the coastal location, the ecologically diverse natural environment, and the lack of development thus far, the result of Hearst land negotiations will greatly affect all future development in this coastal area.

The Hearst Corporation's proposal to build 650 hotel rooms and an 18-hole ocean front golf course was first publicized in 1998 when San Luis Obispo County approved an amendment to the Major Local Coastal Program (Kropp 2002). This amendment, approved as an update to the North Coast Area Plan, designated four zones of the Hearst land as open for development. This was the first major revision to the North Coast Area Plan since it was certified by the California Coastal Commission (CCC) in 1983 (California Coastal Commission 2002). Although approved by the County, the CCC rejected the proposal because it failed to meet the regulations

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imposed by the California Coastal Act (Kropp 2002). The Coastal Act aims to "protect coastal resources by limiting new development to existing developed areas" (California Coastal Commission 2002). Section 30250 of the Coastal Act requires that new development be "concentrated in and around existing developed areas with adequate development capacities" or, where such areas are not available, development must be "located where adequate public services exist" (California Coastal Commission 2002). In addition, Section 30251 of the Coastal Act rejected the development due to the protection of visual resources and, in conjunction with Section 30242, opposed the use of agricultural grazing lands for development in one or two zones, instead of four, in the locations of Old San Simeon and Cambria. Because no common zoning agreement was reached between the CCC and the County, the original four zones allowed for "visitor-serving services," as established in 1983, and then later confirmed by the CCC and the County in 1988, were left open for possible development by the Hearst Corporation (Lyon 2002).

Hearst's attempt in 1998 to win development approval was also opposed by environmental organizations, such as the Environmental Defense Center, Friends of the Ranchland, and the Sierra Club, who collectively gathered public opinion that opposed the development they feared would open doors for increased coastal development (Kropp 2002). They aided the CCC in obtaining the necessary data to deny the proposal and ensured that the County would not override the Coastal Commission's ruling. The Hearst Corporation was not allowed to go through with development unless it complied with the Coastal Act and both the County and CCC agreed upon terms of development zoning. Currently, four zones of possible development are still present on the Hearst Ranch, although the application to develop the land was not approved. The possibility of Hearst development is again an issue at present, as the Hearst Corporation is promoting a more considerate perspective on land conservation (Cardenas 2002). The company is willing to sell its development rights on the rest of the company's 83,000 acres in exchange for the right to build on 257 acres. The Hearst Corporation is attempting to produce 279 certificates of compliance (COCs) to gain legal approval of development on the 257 acres (Hensley 2002). COCs address lands that were mapped before the State Subdivision Map Act of 1893 and allow a landowner to dig up old property records that date back to ancient mining claims or federal patents and bypass the subdivision process entirely (Committee for Green Foothills 2002). In this

way, Hearst may evade the current agricultural zoning of its parceles to allow for more development zoning of its parcels to in desired areas (Environmental Defense Center 2001).

While opponents of proposed land development remain suspicious of Hearst's use of COCs, Hearst claims that the COCs verify the existence of legal parcels, and that gathering COCs is a process that is commonly used to determine property value (Lyon 2002). Hearst sees the land as completely under their ownership, as the land has not been changed by any new legislation. In order to obtain permits to build on this land, however, Hearst must achieve County and the CCC approval. In light of the 1998 rejection of development application, it may be in Hearst's best interest to approach development plans with an awareness of the public disdain on the issues. While the County has already issued 260 of the desired 279 parcels as possible locations of development through the use of COCs, Hearst is also showing interest in conserving portions of its land. After the 1998 dismissal of the development proposal, the Hearst Corporation has been focusing on conservation easements as a mechanism that is successful in retiring development rights (Lyon 2002). At present, Hearst is negotiating with The Nature Conservancy (TNC) and The Conservation Fund (TCF) to sell some of the land rights to these environmental organizations, who aim to place conservation easements on any acquired property (Smith 2002).

Critics of Hearst's intentions feel that the COCs may be used as threats in putting forth the potential of development (Johnson & Weiss 2001b). They also suspect that COCs will be used as part of a strategy that "has become a way for landowners to force conservationists to pay ever higher prices for land they want to protect as open space" (Johnson & Weiss 2001a). Furthermore, many feel that Hearst is simply attempting to win public support, or at least decrease public skepticism of their development, to "neutralize opposition to the development" (Cardenas 2002). However, The Nature Conservancy and The Conservation Fund have a more positive view of Hearst's willingness to negotiate the purchasing of some plots of its land. Both non-profit environmental organizations have been trying since August 2001 to purchase some rights to the land in order to place a conservation easement on it (Smith 2002). It is important for both environmental organizations to finish negotiations as soon as possible because the CCC ruling that allows only two zones of the Hearst land to be developed may change with the election of new members to the CCC. In other words, the CCC ruling is only a permanent solution to preventing

development beyond two zones as long as the same people remain on the CCC (Lynn 2002). The negotiations must be made within the next six months, or TNC and TLC will be forced to withdraw due to money lost from spending extensive time on this single issue. It is also important for conservation easements to be made now, while the Hearst land is still owned by one trust, because in future years, individual owners may adopt the land in many separate plots. Multiple owners would make a conservation easement on vast areas of land nearly impossible (Smith 2002). On this matter, Hearst appears to be determined to complete negotiations in the interest of first promoting conservation, and then seeking development opportunities (Lyon 2002).

In this case, some may see how the CCC is working against the goals of TNC and TCF to conserve the land, as it insists on allowing only two zones of land. When the CCC turned down the Hearst resort application in 1998, they argued, "the development would open the door to commercial exploitation, not only of Hearst's property but of a 30-mile stretch of coast" (Johnson & Weiss 2001b). Now that Hearst has the potential to develop most of their land because of COC's, TNC argues that the firm ruling by the CCC is interfering with the possibility of conserving more than just the two zones designated. TNC views this as a limitation in trying to conserve the land, due to the fact that the protective ruling only lasts as long as the members of the CCC remain the same and share the same view (Smith 2002). Both the Hearst Corporation and TNC with TCF seek to settle land rights before the land is sub-divided into individual ownerships, which would make any chance of conservation very difficult (Lyon 2002). At the moment, the Hearst Corporation and TNC with TCF are negotiating the future of the Hearst Ranch land. The willingness of Hearst, TNC, and TCF to make negotiations with the environmental organizations may be a promising step in the right direction of dispute resolution.

This case reflects various components of classic environmental dispute resolutions. The component of power is evident within this case. According to Linda Kropp of the Environmental Defense Center in Santa Barbara, California, Hearst attempted during the 1998 dispute to use political connections to ensure the approval of updated zoning that allowed for development on the property. Hearst spoke with the Senate majority leader and Senate speaker, but could not win over the power of the California Coastal Commission and various environmental organizations backed by public concern.The power of the CCC and the County is displayed in their mutual use of power to enforce their own rulings.

However, the CCC can be seen as preventing environmental protection because its ruling is preventing more conservation easements to be made. If the CCC agreed to the County's ruling of four zones, there would be more land for potential purchasing land rights, thus more opportunity for conservation easements to ensure environmental protection forever. The power of the CCC and the legislation of the Coastal Act, although it aims to regulate coastal development, could actually work against the aims of environmental organizations.

The issue of relationships is also evident in this case. The relationship between the Hearst Corporation and environmental organizations is important to both parties in order for common interests to be met. Furthermore, The Nature Conservancy and The Conservation Fund are confirming their similar interest to work jointly to preserve the natural environment. Both non-profit organizations view negotiations with the Hearst Corporation as a feasible means to achieve an outcome that meets their interests and exceeds their best alternative to negotiated agreement. At the same time, the Hearst Corporation is calming the fears of the public by mediating plans to develop. The relationship between corporate, political, public, and organizational power is clearly explored in this case.

The major stakeholders taking part in current negotiations, the California Coastal Commission, the County of San Luis Obispo, the Hearst Corporation, The Nature Conservancy, and The Conservation Fund, are all working in their own best interests. This is the first time that the Hearst Corporation has offered to negotiate with environmental interest groups. Thus, major changes in the consideration of environmental issues are apparent in this case. The fact that the Hearst Ranch property makes up eighty-three thousand acres of California's San Luis Obispo County supports the importance of negotiated agreements between development and environmental conservation. It is unclear exactly how much of the Hearst Ranch land will be forever protected under conservation easements, nor for what price the land rights would be sold, but nonetheless acknowledgment of interests from opposing sides has clearly been achieved. This dispute, although full of criticism and suspicion, brings the reality of environmental dispute resolution to the forefront. Hearst seeks to develop and make a profit off the land, but realizes the need to consider other interests before pursuing its own. This constructive approach that pacifies the clash between environmental and developmental interests has transformed what was once a highly contradictive dispute into a promising negotiation.

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The Impact of Three-Strikes: A Socio-Legal Perspective
Christi Thompson

California's three-strikes law has had a massive impact on the political, social and economic landscape of the state. Penal Code 1170.12 (Proposition 184), passed by voters in March 1994, requires that defendants who have been convicted of prior violent or serious felonies be subject to the mandatory sentencing standards of twice the normal length for second felonies and twenty-five years to life in third felony convictions. The three-strikes law was passed in an atmosphere of crime hysteria brought about by the media and politicians, thus illustrating the power of public opinion, perception of crime and interest groups as sources for sentencing legislation. The law has successfully traded the indeterminate sentencing standards for mandatory sentencing schemes which reduce a judge's discretionary power. The effect of this law has been most strongly felt by minority groups, who are significantly overrepresented as second and third strike offenders in California's prisons. In addition to displacing many minorities, the three-strikes law has cost taxpayers, not only in increased taxes, but in cuts throughout much of California's public school system. The impact of the three-strike law has had significant political, social and economic effects on California's landscape by decreasing judicial discretion in lieu of strict mandatory sentencing laws, displacing minority communities through mass incarceration and depleting financial resources from other government funded programs.

Playing on Public Fear

The murder of Kimber Reynolds by a career criminal prompted her father, Mike Reynolds, to begin drafting legislation that later became Proposition 184, which the National Rifle Association dubbed the "three- strikes, you're out" law. Unfortunately, as soon as the bill made its way into the Assembly, it was killed in committee (Vitiello 1997:411). Reynolds began gathering signatures in an effort to get his initiative on the ballot. "Despite National Rifle Association and California Corrections and Peace Officers Association support, signature gathering was going slowly and the bill appeared to be doomed were it not for the murder of Polly Klaas in late 1993" (Schultz 2000:569).

The California three-strikes law was passed after, "Polly Klaas,

an innocent 12-year-old girl, was kidnapped during a slumber party … [and] was subsequently murdered … [by] a repeat felon with prior convictions for burglary and kidnapping, the case became an icon for what is wrong with the criminal justice system in California and across America" (United States Center on Juvenile and Criminal Justice 1994:1). The media publicized the case incessantly perpetuating a fear of crime among the public, resulting in overwhelming support for Proposition 184. "The campaign literature supporting passage of Proposition 184 declared that the law would put 'rapists, murderers and child molesters behind bars where they belong'" (Vitiello 2002:264). They further argued that the passage of the bill would reduce crime by 22% to 34% and produce $23 billion in social savings. The bill passed with more than 70% approval (Schultz 2000:570).

Michel Foucault (1995) argues that those who study the legal system should, "regard punishment as a complex social function … [and] a political tactic" (23). Foucault would regard the three-strikes law as a necessary reaction to a terrible crime that resulted in public unrest. The law has two critical functions: creating solidarity among the masses and placating society's need for revenge by establishing draconian laws that will serve as retribution for the society as a whole. Politicians use this law and other "get tough" rhetoric to get elected (Davis 1995:233; Gaubatz 1995:5; United States Center on Juvenile and Criminal Justice 1994:1; Simon 2000:1112). Jonathan Simon (2000), in his essay "Megan's Law: Crime and Democracy in Late Modern America," describes this as governing-through-crime. Simon (2000) argues that, "governing through crime … is attractive to people because it permits popular fears and experiences to be valorized in the strongest and most public terms … [to create] a sense of renewed solidarity with fellow citizens" (1119-1120). As a result of the solidarity among voters on the issue of crime, politicians find it very easy to jump on the "tough on crime" bandwagon.

After the Polly Klaas murder, "Democrats in the legislature jostled to take for themselves ownership of the crime issue of the election … [and] the Republican Party and its 'Contract with America' made crime a center stage issue" (Vitiello 2002:261). Political leaders debated back and forth on how best to solve the epidemic of crime that was plaguing the state. The crime issue was used to "mobilize crime-fearful voters at the polls" (Schultz 2000:583) as a means to further the goals of politicians. By 1999, many politicians still strongly supported the measure, despite many reports of the inefficiency of the three-strikes law (Vitiello 2002:258).

Does the Three-Strikes Law Reduce Crime?

Michel Foucault (1995) argues in his book *Discipline and Punish: The Birth of the Prison*, that we must, "rid ourselves of the illusion that penalty is above all (if not exclusively) a means of reducing crime" (24). Supporters of the three-strikes law would claim just the opposite; that the law will serve as a deterrent to future criminals and that locking habitual offenders up will work at reducing crime through the theory of incapacitation preventing the offender from committing crimes against the public through incarceration (Gaubatz 1995:25). Although both deterrence and incapacitation are legitimate theories of punishment, the three-strikes law rarely reduces crime based on either one. Overall, the crime rate in California has decreased since the implementation in 1994, but there are a number of reasons to doubt that the new law is the cause.

First, the crime rate began to decline before the implementation of the three-strikes law. Further, the three-strikes law should have a delayed effect, rather than an immediate impact on the rate of crime. "For example, the effects of a Three Strikes sentence for an offender sentenced to twenty-five-years-to-life instead of, say, six years, would not show up until after his sixth year of imprisonment" (Vitiello 2002:268). Second, criminologists suspect the drop is a result of socio-economic factors rather than the new law. During the mid to late 1990s the economy was strong, and society had more opportunities to offer people, reasons typically associated with reduction in the crime rate. However, California's economy has slipped into a recession as a result of the dotcom bust and other layoffs, and as expected, the crime rate has begun to creep upward again (Vitiello 2002:270). Third, evidence obtained in studies that compare counties within California show that, "crime dropped 21.3% in the six counties that have been the most lenient in enforcing Three Strikes, while the toughest counties experienced only a 12.7% drop in their crime rate" (Vitiello 2002:270). Although the three-strikes law may have had some impact on the crime reduction during the late 1990s, it is unlikely that it is responsible for the majority of the drop.

Proponents of three-strikes argue that the law serves as a deterrent for future criminal activity. Determining the effectiveness of deterrence requires a tool to infer how much criminal behavior would have occurred had it not been for the enactment of the three-strikes law. Unfortunately, it is extremely challenging to precisely measure the deterrent effect of the three- strike law. Despite the difficulties, a study conducted by Franklin Zimring, Gordon Hawkins, and Sam Kamin, reasoned that if the law has a deterrent effect, "the percentage

of crimes committed by one-strike and two-strike offenders would decrease, and the percentage of crime committed by those who are not within the law's provisions would not be affected" (Vitiello 2002:277). Instead, they found that the change in rates of crime was statistically insignificant. Criminologists would argue that the law is unlikely to deter crime because many offenders are unlikely to calculate the crime in a cost-benefit analysis, weighing the length of the sentence against the benefit gained by the offense. After the passage of the three-strikes law, "one study indicated that 83% of the robbers caught and facing sentencing under three strikes did not expect to be caught, … and 80% of another sample of felons stated that they had no idea that they were subject to three strikes" (Schultz 2000:574). The deterrent effect that supporters of the legislation had promised, in practice, is negligible.

Although the three-strikes law does not successfully deter crime, it does serve to incapacitate criminals from committing more offenses. Three- strikes advocates posit that the law will work at reducing crime by incapacitating career criminals who, they claim, are responsible for the majority of the crimes committed in society (Beres & Griffith 1998:4). "A typical estimate [is] that doubling the prison population might reduce serious crimes by ten percent—more in the case of burglaries and robberies, less for homicides and rapes" (Currie 1998:29). The three-strikes law has not been successful in preventing crime in society, in part because of the types of crimes most likely to be prosecuted under the law. Drug-related crimes account for the largest group that is prosecuted under the three-strikes law (California Department of Corrections 2002b). These types of crimes are relatively unresponsive to increased incarceration because of the criminological concept known as the "replacement effect—putting a drug dealer or gang leader in prison may simply open up the position for someone else in an ongoing enterprise" (Currie 1998:30). Murder and rape are also unresponsive to increased incarceration because they are usually crimes that an offender commits only once in their lifetime except for serial killers or repeat rapists. This means that putting murderers and rapists behind bars is unlikely to reduce or prevent similar crimes in the future. Beres and Griffith (1998) studied the effect of the three-strikes law on incapacitation and found that, "Incapacitation … will display declining marginal efficiency: as the average prison term increases, the amount of crime prevented by each additional inmate will decline" (9). This implies that as the three-strikes law catches more and more offenders in its wide net, it will have less and less impact on the overall crime rate.

The three-strikes law was hailed by its supporters as being the necessary legislation to protect society from violent offenders. In actuality, 80% of people serving sentences under the law were for nonviolent crimes (Cowart 1998:625). On the flip side, the law also has the potential to actually release violent criminals onto the streets. The three-strikes law will inevitably increase the number of inmates throughout the entire Corrections system, which can lead to prison overcrowding. Lisa Cowart (1998) states that this can result in, "the early release of criminals, many of whom were incarcerated for serious or violent crimes. … The three strikes laws were a response to public demand for safety from violent criminals, yet some states, including California, are granting early release to some violent criminals as one method of combating the prison overpopulation problem" (644). The impact of the three-strikes law on reducing crime has been minor, while the implementation has been costly and has the potential for creating numerous problems.

Judicial Discretion

The three-strikes law has stripped the discretionary powers of judges away by requiring mandatory sentencing standards for second and third felony offenders, eliminating sentencing alternatives, and giving the sole discretion of removing "strikes" to the prosecution. The mandatory sentencing standards of the three-strikes law limit the judge from determining the length of the sentence based on the estimated amount of time it would take to rehabilitate the offender, or the level of seriousness of the crime. Mandatory sentences also restrict the judge from considering mitigating circumstances in third strike offenses because, "the third strike, triggering the twenty-five years to life term of imprisonment may be for any felony, not just serious or violent felonies" (Vitiello 2002:264). Instead, the application of the law in third-strike offenses is inversely related to the level of seriousness associated with the crime. For instance, if the crime is murder, the sentence imposed under the law is likely to be similar to the sentences that existed before. Conversely, if the crime is petty theft, the sentencing scheme is dramatically different, where the offender could have received six months in jail, a $1,000 fine, or both (Olson 2000:558), he is now subject to the same twenty-five years to life as the murderer (Vitiello 2002:264).

The three-strikes law has removed the judge's power to choose sentencing alternatives such as rehabilitative treatment programs for relatively minor property or drug-related crimes. California Penal Code 1170.12 section 4 states, "there shall not be a commitment to

any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center." This makes it impossible for the judge to opt for an alternative penal strategy that may be better suited for dealing with the problems that led the defendant to commit the crime in the first place. Tina Olson (2000) argues that, "California's 'Three-Strikes' law results in disparate treatment of criminal defendants because it allows first strike defendants to plea bargain without requiring rehabilitation, but then severely punishes them if they commit a new offense" (547). Larson and Garrett (1996), authors of *Crime, Justice, and Society*, claim that mandatory sentences can also, "compromise justice by encouraging judges who find sentences inappropriate to dismiss cases and acquit offenders" (308). Reducing the amount of judicial discretion can create unexpected and adverse problems throughout the criminal justice system and society as a whole.

Despite the limit on judicial discretion, there has been movement by the courts to shift some of the discretion back to the judges. Originally, the three-strikes law included a provision that allowed the prosecution the sole discretion to remove or "strike" a prior offense in an effort to preserve justice. In *San Diego County v. Romero* (1996), "the California Supreme Court stated that 'dismissal' is a judicial rather than a executive function, and that this power cannot be conditioned upon approval of a district attorney" (Schultz 2000:577). In response to this decision, Michael Vitiello (2002) states, "in holding that a trial judge has independent discretion to 'strike' a prior felony, the court assured some individualized treatment for criminal offenders" (282). Although this helps increase judicial discretion, judges are still prevented from altering the length or type of sentence for second and third strike convictions.

The Impact of Three Strikes on Minorities

Minority communities have probably been the most affected by the three-strikes law because minorities are more likely to be serving a sentence under the law than the white majority. In California, as of December 31, 2001, the breakdown by race of second and third strike offenders was: 26.2% white; 31.4% Hispanic; 38.2% Black; 4.1% Other (California Department of Corrections 2002b). Given these statistics, 73.6% of inmates serving for second or third strike offenses are from minority groups. Despite the obvious statistical evidence that there is a bias in the way that the law is being applied, it is highly unlikely that the courts will rule that this is a violation of the Equal

Protection clause of the Fourteenth Amendment. In *McCleskey v. Kemp* (1987), the court ruled that statistical evidence showing bias in the system is not enough to prove intentional discrimination and suggested that the, "legislatures are better at assessing statistical studies and assigning moral significance to their findings" (Cole 1999:138). Given that politicians are unlikely to change aspects of the three-strikes law for fear of being viewed as "soft on crime," the overrepresentation of minority inmates will continue to have huge socio-legal implications.

There are a number of reasons that can account for the large percentage of minorities serving sentences under the three-strikes law. Usually, inner-city neighborhoods, with a large percentage of minorities, suffer from higher crime rates and thus become the focus of "quality of life" policing (Cole 1999:44). "The theory behind quality-of-life policing is that subjecting people to regular frisks and reducing the incidence of quality-of- life crimes will also prevent more serious crime by promoting a sense of law and order, making it more costly to carry weapons in public, and using arrests for minor infractions to detect, detain, and deter more serious criminals" (Cole 1999:44). The more pronounced presence of law enforcement in these areas increases the likelihood of contact between the police and members of the community. David Cole (1999), author of *No Equal Justice*, points out that the courts have upheld that stopping an individual on the basis of "reasonable suspicion" is acceptable, and being in a high-crime area is a factor that police can consider for finding that suspicion (44). Once the police have stopped an individual they can request a consent search, but are not required to inform the detainee that they are legally entitled to decline. Cole (1999) acknowledges that many people do not exercise this right because they "do not know their rights or are afraid to assert them" (31). Either way, since minorities are more likely to be living in crime-ridden areas and come in contact with police more frequently, they are more likely to get caught committing illegal activities.

The overrepresentation of minorities serving time under the three- strikes law can be partially attributed to the structure of drug laws. Specifically, there is a huge disparity in sentencing between the powder and crack forms of cocaine. The law can be described as the following: [The] law equates 5 grams of crack with 500 grams of powder cocaine, a 1-to- 100 ratio that no other country recognizes. Possessing 5 grams of crack is a felony with an automatic five-year prison term, while 5 grams of the same drug in powder form is a misdemeanor likely to carry no jail time (Egan 1999:20). This law has

huge implications for the Black community, who compose 90% of the people prosecuted for crack possession under the law (Cole 1999:142; Egan 1999:20). Due to the fact that possession of 5 grams of crack automatically results in a felony charge, Blacks are more likely to have been charged with previous drug felonies, which could be considered as a strike against them under the three-strikes law. Had the drug been in powder form, the crime would have been a misdemeanor, not a felony, and could not be considered for the purposes of three-strikes.

The impact of the war-on-drugs and other "get-tough measure[s] are felt principally in minority communities" which can have tremendous influence on other social problems (Cole 1999:149). Unfortunately, as more minorities are locked away for non-violent drug offenses, the social costs to the community can be extreme. Incarceration has a profound effect on the inmate's family. Clearly, when the offense is violent, incarcerating the offender may actually help protect the family, on the other hand, if the offense is drug-related or non-violent, as are 80% (Cowart 1998) of the crimes prosecuted under the three-strikes law, the impact on the family may be too high. If the offender has children, those children will now have to grow up without one of their parents. If the offender had a job, the family now has to try to survive with one less income. These stresses can lead to trouble, both in the family and the community. The child could begin having problems in school, getting into fights, or other delinquent behavior. The loss of income could put a struggling family onto the street, contributing to the social problem of homelessness. Paul Butler (1995) sums up the issue in his article in the Yale Law Journal: "Black people have a community that needs building, and children who need rescuing, and as long as person will not hurt anyone, the community needs him there to help" (716). The problems faced in minority communities have been amplified by the war-on-drugs, and the three-strikes law has compounded those issues by further increasing the minority representation in prisons.

The Cost of Three-Strikes

The three-strikes law has not only had a strong impact on criminals, but on law-abiding citizens as well. Not only has the statute not effectively reduced crime, it has cost taxpayers immensely, both fiscally and socially. The mandatory sentences imposed under the three-strikes law has limited the amount of plea-bargaining that can be done between a prosecutor and the defense. Usually, the prosecutor has the ability to offer a lesser sentence in exchange for a guilty plea,

but with mandatory sentences for any third-strike felony, the prosecutor has little to offer. Since the passage of three- strikes, more and more defendants have chosen to exercise their due process rights and go to trial, instead of plea-bargaining. The increased number of cases going to trial has raised trial costs and bogged down the courts (Cowart 1998:632; Olson 2000:555). David Schultz (2000) points out that there has also been an, "11% increase in pretrial detention in the local jails as a result of three strikes" (580). Every aspect of the criminal justice system is experiencing an increased financial burden as a result of the three strikes law, and the most profound cost is in the California Department of Corrections.

According to the California Department of Corrections Quarterly Fact Sheet (2002a), the CDC has jurisdiction over 304,749 felons, with an annual budget of $4.8 billion. Advocates of three-strikes argue that the cost of maintaining high levels of incarceration is necessary to prevent the epidemic of crime that society would face had not so many offenders been locked away. Unfortunately, as it has been shown, mass incarceration has very little effect on the overall crime rate, nor does it address any of the underlying causes of crime. It is clear that the law is based on the assumption that third-strike felons, regardless of how minor the crime, are beyond any hope of rehabilitation and that it is safer for society as a whole to impose lengthy sentences. In some cases, this may be absolutely necessary, in others though, the cost to society may be too high. The cost of imprisoning an offender for a relatively minor non-violent offense is $26,894 a year, or $672,350 for twenty- five years (California Department of Corrections 2002a). This value goes up when the expenses associated with the medical needs of older inmates are included. Considering the costs, along with a well-documented criminological phenomenon that as an offender ages, he or she is less likely to commit high- risk or criminal behavior, known as "aging-out" (Currie 1998:75), it is unlikely that the incarceration of this particular offender would be beneficial to society in the long run.

It has been extremely costly to incarcerate so many people, and it has come at the expense of other government funded programs. "The money spent on prisons … [is] money taken from the public sector that educate, train, socialize, treat, nurture, and house the population—particularly the children of the poor" (Currie 1998:35). Opponents of the three-strikes law argue that increased prison spending will certainly result in a trade-off between prison and education. This is illustrated in the *New York Times*: "As the prison budget swelled, California raised tuition to make up for the university financing gap. Over the last ten years, as the states population grew

by 5 million people, state university enrollment fell 20,000" (Egan 1999:20). In today's society, an education is critical for getting ahead in society. Unfortunately, as the funding for public school decreases, the quality of education diminishes and fewer people have the opportunity to go to college. This can cause strain on society which can aggravate the crime problem, based on the idea of Merton's Strain Theory:

> Basically, Merton's theory is a frustration-aggression theory. All Americans are encouraged to pursue certain general and ideal goals—for example, the attainment of esteemed occupational status; but many, if not most, do not have access to legitimate means such as funding for quality schooling for their realization. Frustrated in this sense, a certain number of people … can be expected to invent or adopt illegitimate means to accomplish their purposes (Larson and Garrett 1996:203).

Due to the fact that most of the prestigious and desirable occupations require at least a four-year college degree, cutting educational budgets result in fewer scholarships and financial aid for less-fortunate students, thus blocking those people from even being able to compete for those "esteemed occupational" positions. Merton would argue that the strain created by systematically blocking some people from legitimate means of goal achievement will cause some people to come up with innovative means to obtain them, which include crime. In an attempt to gain wealth and power, some people might become gang-leaders or drug lords, or involved in other illegal organizations, thus producing more crime. The cost of mass-incarceration generates an ironic trade-off between funding the criminal justice system and educational programs that could be preventing crime.

Conclusion

The three-strikes law has had a profound effect on the political, social, and economic landscape of California since its implementation in 1994. The law has been used by get-tough politicians to get elected and simultaneously has reduced sentencing discretion among judges. Supporters of the three-strikes law have argued that the law was necessary to protect society from violent career criminals. They have argued that the law would deter future crime and incapacitate known offenders from continuing on their crime spree. As it has been shown, the law has not achieved either of those goals effectively. The law will most certainly lead to an increased prison population, and possibly overcrowding, which has

the dangerous effect of early release programs for inmates without mandatory sentences. The law has been fiscally and socially expensive without producing the benefits its proponents promised it would. Minority communities have been adversely affected by the uneven application of three-strikes as a result of quality-of-life policing in high-crime areas and the powder/crack cocaine disparity. Educational spending has been
significantly cut back in attempt to fund the growing prison population. The law was intended for violent habitual offenders, but the large majority of offenders are non-violent, and continuing to allow the law to be applied for non-violent third offenses will aggravate the ever increasing problems associated with the three-strikes law.

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Juvenile Waivers and the Effects of Proposition 21

Jonathan E. Cruz

INTRODUCTION

The perception that juvenile crime is growing in quantity and gravity combined with the notion that the consequences minors face in the juvenile justice system are too lenient has led to a trend of "get tough" laws being enacted throughout the nation. Predictions by criminologists and sociologists that young "superpredators" were going to produce a wave of violent crime between 1992 and 2010 (Beresford 2001) have produced the sentiment that juveniles should serve "adult time for adult crimes" (Pete Wilson 1998). Adding to this sentiment are the tragic and unforgettable school shootings the media has shown the nation in Columbine, Santee, and El Cajon – horrific but rare mass murders by teenagers that with such media coverage creates a public fear of young people.

One example of these new policies is revisions of juvenile "waiver" laws. A waiver of juvenile court jurisdiction is used under certain circumstances to transfer a child's case from the juvenile system to the criminal court system. The guidelines for the waiver process vary from state to state. Guidelines for the state of California can be found in section 707 of California's Welfare and Institutions Code.

In an effort to fight against young offenders committing serious crimes, California voters have recently passed initiatives like Proposition 21, the Gang Violence and Juvenile Crime Prevention Act (March 2000). This piece of legislation is very controversial but for the purpose of this paper, focus will be placed on Proposition 21's effects on the waiver. Proposition 21 made it easier for juveniles to be transferred into the jurisdiction of adult criminal court by adding other transfer mechanisms, enumerating more crimes requiring mandatory transfer, and lowering the age limits at which the criminal court can take jurisdiction. Legislation like Proposition 21 shifts the focus of juvenile justice from rehabilitation to punishment as the number of waivers continues to increase nationwide.

Waiver laws are sociologically interesting because they exemplify a more general set of issues concerning the relationships between law and politics. The separation of power into three branches of government is ideally supposed to allow the court system to be autonomous. This autonomy would mean that the court's

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decisions should not be affected by ethical, social, political, or economic considerations (Sutton 2000). On the other hand, the United States balances formal law with substantive justice emphasizing ethics. The juvenile justice system has traditionally individualized its decisions due to its rehabilitative nature and perception that children do not have fully developed conceptualizations of right and wrong (Fagan & Deschenes 1990). The debate over the statutory changes made by Proposition 21 raises serious questions about the political agendas behind such legislation. Not only does Proposition 21 focus on punishment, it shifts discretionary power from judges to prosecutors and from the courts to the legislators who have political agendas and the power to draw the support of manipulated voters.

METHODS

After reviewing the recent literature on juvenile justice to understand the history of the system and the role it has in society, an interview schedule was created to get a grasp of the waiver process in California's juvenile court system. Probation officers, attorneys from both the Public Defenders Office and District Attorney's Office, as well as a juvenile court judge from a small California county were asked the same questions about the waiver process and their experiences with it. When all of the subjects identified Proposition 21 as significantly changing the waiver process, the focus of this research shifted to the effects that Proposition 21 has had on the waiver process. Each subject was asked the same basic questions, ranging from their job titles to how they would change the current laws if they could. The majority of questions were dedicated to the waiver process and Proposition 21. Depending on their responses, different follow-up questions were asked providing four different perspectives of juvenile court waivers from the key participants in the system. Due to the sensitivity of the subject, juveniles who had experience with the process were not interviewed and no confidential information viewed during the course of this research will be disclosed. Points of interest will be discussed without going into specific details that might identify any juvenile person. Since the sample included only a small group of subjects from one county, results presented here may not be representative of how the waiver process works elsewhere in California or the nation. Nonetheless, the data collected from them is important to understanding the effects of Proposition 21 on the waiver process from first hand experiences.

Waiver Process

The juvenile court system is based on the concept that the court has the role of parens patriae, to act in the best interest of the child. The juvenile court was first established in Cook County, Illinois in 1899, with the intentions of investigating, diagnosing, and prescribing treatment to young offenders, in order to rehabilitate and not necessarily punish (Beresford 2000). Emphasizing treatment, supervision, and control, the goal of the juvenile court was "to resolve the wayward youth's family, social, and personal problems and prepare the youth to be a healthy, productive, and law abiding adult" (Fagan & Deschenes 1990). A distinction to be made between the juvenile courts and adult courts is that juvenile proceedings are to be considered civil as opposed to criminal, therefore supposedly less stigmatizing (Champion & Mays 1991; Fagan & Deschenes 1990). Additionally, the juvenile court provides special rights and immunities for children such as a shielding from publicity, detention only among other juveniles, and the retention of certain future civil rights (*Kent v. U.S.* 1966). For more than half of the 20th century, the Juvenile Court had jurisdiction over offenders under the age of 18, with the exception of cases waived to criminal court after a full investigation was made to decide whether or not a youth offender was fit for the juvenile court process.

In *Kent v. U.S*. (1966), the first major change in juvenile justice took place, creating guidelines for due process in the juvenile court requiring fitness hearings, right to counsel, and a statement of reasons by the court for any waiver decision. In California, until the passage of Proposition 21, the juvenile court has relied solely on the judicial mechanism via fitness hearing for waiving minors to criminal court (Raymond 2000). Proposition 21 incorporates two other mechanisms for transfer: legislative and concurrent jurisdiction or prosecutorial waiver.

The Judicial Waiver Process

As ruled in *Kent*, due process is required in the judicial waiver of juvenile court jurisdiction. When a child is arrested and has committed one of the violent offenses enumerated in Welfare and Institutions Code section 707 (b) after reaching the age 14 or 16, depending on the offense as provided by Proposition 21, the District Attorney's Office has 48 hours to decide whether or not to request a fitness hearing. After the fitness hearing is requested, the defendant usually waives his rights to a speedy trial so that both counsels can

adequately prepare their arguments for the fitness hearing. While the People and the Defense are working out their arguments, the probation department prepares its own fitness report for the juvenile. All of the entities involved refer to California Welfare and Institutions Code section 707 and address the following criteria that decide fitness:

1) The degree of criminal sophistication exhibited by the minor.
2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.
3) The minor's previous delinquent history.
4) Success of previous attempts by the juvenile court to rehabilitate the minor.
5) The circumstances and gravity of the offence alleged in the petition to have been committed by the minor (California Welfare & Institutions Code 2001).

The process of a fitness hearing appears to be very thorough for all of the parties involved. After considering all of the statements as well as the criteria enumerated above, the judge makes the decision of whether or not the juvenile is amenable to the treatments of the juvenile court. Other factors that weigh into the judicial decision are public safety and the best interests of the child. If the child is deemed fit he or she remains under the jurisdiction of the juvenile system. If the judge decides that a child is unfit, the juvenile is then tried in the criminal court.

Statutory Exclusion – The Legislative Waiver Mechanism

The national trend of "getting tough" on juvenile crime has brought legislatures to statutorily exclude certain young offenders from juvenile court jurisdiction based on age and/or offense criteria. Some states have defined the upper age limit for juvenile court jurisdiction as 15 or 16, excluding a large number of offenders under the age of 18 from the juvenile justice system (Snyder, Sickmund & Poe-Yamagata 2000). Voters added statutory exclusion to California's waiver mechanisms via Proposition 21, which lowers the minimum age for juveniles to be eligible for transfer from 16 to 14 and by enumerating more felony offenses for which a juvenile can be considered for transfer.

Proposition 21 altered the law to increase the number of children eligible to be tried in adult criminal court. According to California Welfare and Institutions Code section 602 (b), 14-year-olds who are accused of committing murder or sex crimes are mandated to be subject to criminal court jurisdiction. As of March 8,

2000, California Welfare and Institutions Code section 707(b) enumerates felonies for which a 14-year-old receives a fitness hearing but has the burden of proving fitness for juvenile jurisdiction. These felonies include arson, robbery, assault causing great bodily injury, making or selling one–half ounce or more of a controlled substance, carjacking, and other serious crimes. The law varies based on the nature of the offense and prior history as to whether or not a juvenile is presumed fit or unfit for the jurisdiction of the juvenile court. The law also provides for the third waiver mechanism.

Prosecutorial Waiver – Concurrent Jurisdiction

This option of transfer gives prosecutors discretion to file certain cases directly into criminal court because both the juvenile and adult court share the original jurisdiction of a case. Similar to other methods of transfer, this process has limitations on age and offense criteria (Snyder et al. 2000). Proposition 21 added this mechanism for transfer and explains the guidelines for this practice in California Welfare and Institutions Code section 707(d).

The law provides the District Attorney with the discretion to file a case directly into criminal court under a variety of circumstances. The District Attorney has discretion with juveniles over the age of 16 who commit any offense described in 707(b), with the exception of murder and certain sex offenses described in 602(b), in which case a criminal court filing is mandatory. This is also the case if an offender age 14 or older commits a 707 (b) felony, if any of the following circumstances apply:

1) The offense is punishable by death or life imprisonment were an adult to commit the same crime.
2) A firearm was personally used by the subject.
3) The minor was previously found unfit for juvenile jurisdiction.
4) The offense was gang related.
5) The offense falls under the category of a hate crime.
6) The victim was a 65 or older, blind, deaf, or otherwise disabled and the minor should have been aware of this disability.

Other factors related to the juvenile's age and prior felony history are also considered and explained in this section of the Welfare and Institutions Code. Depending on the charges and if the case is filed in juvenile or criminal court, incarceration is almost mandatory and rehabilitative programs are out of the question (Ochoa 2000).

This provision of Proposition 21, giving prosecutors the right to direct filing of juveniles to criminal court, has been the subject of much controversy. Many people believed that this provision of the

law violated the separation of powers, taking away judicial discretionary power and moving it to the prosecutor or executive power in the court system. During the course of this research, the California Appellate Court in San Diego concurred with this perspective. It was ruled that "giving prosecutors discretion to charge someone younger than 18 as an adult has the unfair effect of also determining how the youth will be sentenced," on May 16, 2001, in *Resendiz v. Superior Court* (2001). This decision prohibits direct filing, so this mechanism is not in use in California at the time this paper is being written. However, in *Manduly v. Superior Court*, the same decision was handed down in February 2001, but the prohibition was lifted when the State Supreme Court agreed to review the case in April. The legality of this provision in Proposition 21 and the mechanism itself remains debatable.

ANALYSIS

Evaluating the methods of transfer is a difficult task since there is not very much information regarding any of the recently created waiver mechanisms. Though judicial waiver has been around as long as the juvenile justice system, it is difficult to compare it to the other two mechanisms since most of the information available is unreliable and comes from other states (Dawson 2000). By interviewing the key players in the juvenile court system, some insight concerning the waiver process and effects of Proposition 21 might be gained from the people who are directly involved in the process.

The Purpose of Juvenile Court

The perspective that the juvenile court is supposed to serve a rehabilitative function has not disappeared, despite the shifting punitive focus. When the subjects were asked what they thought the role or purpose of the juvenile court was the consensus was the court's role was to rehabilitate. "Treatment" and "the best interest of the child" were also mentioned. One thing to note is that a couple of respondents explained the efforts made towards educating young offenders who were processed through the court. Apparently this county has a wide variety of juvenile services to serve as diversion programs, ranging from help with school to in-home therapy. One of the primary goals of the probation department is to "restore victims to wholeness." This could be interpreted as the offenders being victims in a sense, also since they are considered victims of society.

The Purpose of Waivers

The interviews produced much less consensus concerning the purpose of waivers. The different responses all seemed to be well explained. Containing the intractable or those who have exhausted the resources of the juvenile justice system without change was the original purpose for the judicial waiver (Bishop, Frazier, Lanza-Kaduce & Winner 1996). A response that focused directly on Proposition 21 was that the legislation was a backlash to the perception that juveniles were treated too softly under the jurisdiction of the juvenile court. The backlash of legislation happens to give the District Attorney's Office a great deal of power. A Deputy District Attorney depicted legislation as responsible for the initiative and did not critique it in any way other than saying that he voted for it. This question also drew a simple critique from a public defender that Proposition 21 was "nuts" because it was so punitive, like locking people up and throwing away the key. Providing an explanation for this critique, the subject shook her head and said that the press distorts youth crime to the public while the reality is that cases today have decreased in severity and in number. The juvenile court judge also agreed with this perception that juvenile crime was declining. His opposition to Proposition 21 was made public in local newspapers, to which he wrote articles explaining the cons of the initiative during the election period. Losing discretionary power was not the only concern of this judge. This subject is responsible for establishing important youth rehabilitation programs in the county for which some offenders will no longer have the opportunity to use with the passage of the proposition. The judge depicted the severity of the new laws in his articles and explained that young offenders who deserved adult court treatment received it under the law prior to Proposition 21. Probation representatives agreed with both the judge and the public defender in that the new laws were too punitive and they believed in the original waiver practice and purpose. The probation department deals with many juvenile offenders, many who do not even set foot in the juvenile court, and they also believe that youth crime has gone down in recent years. This perception could be inaccurate due to the variety of diversion programs available in the county as well as the fact that the more serious crimes are being waived, and therefore, not considered part of the juvenile caseload. A second explanation for this skewed perspective is that, with the exception of the probation department, all of the regular participants rotate with their colleagues to the assignment of juvenile court every few years.

Proposition 21 in Effect

When follow-up questions became very specific, all of the subjects needed to consult some type of reference to answer the question at hand. This usually happened with follow-up questions specific to changes made by Proposition 21, such as "who has the burden of proving fitness?" Consultation of various guides to California law suggests that most of the people who deal with juveniles on a day-to-day basis are still unfamiliar with the recently passed legislation. They were all quite familiar, though, with their role in a fitness hearing in terms of what they are responsible for and how much they can influence the outcome of the hearing. The Deputy District Attorney who handles juvenile cases in the subject county has the option of including a statement with the probation report, but makes it a point to prepare his own brief addressing each of the five criteria listed under the judicial waiver process (California Welfare and Institutions Code 707) for submission to court. The Public Defender, in addition to giving input to the probation officer on the case, routinely hires an expert witness such as a psychologist to meet with the child and testify in court to prove fitness. Based on the interviews from both counsels, the report prepared by the probation department is quite influential in the judge's decision for fitness.

The probation department might be thought to have little involvement in a case before it is adjudicated, but the fitness report it prepares on a juvenile is very detailed and important to the fitness decision. The fitness hearing report prepared by the probation department includes factual information about the current offense and the juvenile's prior record, as well as the subject's social, academic, developmental and employment histories, the minor's statement, statements from attorneys involved in the case, as well as statements from the victim, parents, and law enforcement officers involved. Probation gathers all of this information in addition to making a careful evaluation of the subject's fitness based on the criteria already enumerated. Both attorneys acknowledged the probation department as very important in process of a fitness hearing.

These roles for the fitness hearing were the same before Proposition 21 passed, only the criteria and the burden of proving fitness changed with the legislation. Even though their roles in the fitness hearing did not change, all of the subjects, with the exception of the Deputy District Attorney, were against Proposition 21. Apparently, the associations of Public Defenders, Probation and Judges were strongly against Proposition 21 when it was on the

ballot. In fact, the California Judges' Association voted to oppose Proposition 21, taking a position on a voter initiative directly related to the juvenile justice system for the first time in the organization's 71-year history (Ochoa 2000). The three entities that opposed the proposition would all like to go back to the law before it was passed. They all saw it as too punitive, straying away from the juvenile court's purpose. One point the Probation department made about Proposition 21 was that it had a couple of good points concerning gangs, but the scope of the changes was too wide. As for the District Attorney, when asked about his satisfaction with current waiver laws and how he might change them, the analogy was made that "he does not build the planes, he just flies them."

DISCUSSION & CONCLUSIONS

The juvenile court has been around for just over 100 years and is undergoing dramatic changes. Judicial waivers have been around since the beginning of the juvenile court system for the older teens committing heinous crimes but have only recently been called into question for the discretion and leniency given to young offenders (McNulty 1996; Myers 1999). The new waiver mechanisms of California are rigid, inflexible, over inclusive and vulnerable to political agendas (Feld 2000). Legislative exclusion allows prosecutors to determine whether or not a young offender is a delinquent or a criminal by manipulating their charging decisions (Feld 2000). At the moment, the prosecutorial waiver is unconstitutional, which is a good thing for California in order to maintain a system of checks and balances. Proposition 21 was a big mistake in terms of its waiver provisions, if not all the changes it made. Of the agencies represented by interviews, three out of four opposed Proposition 21. The only agency that favored the initiative had leverage to gain in the courtroom with its passage. Though the judge had lost some discretion with the passage of Proposition 21, the children lost the most. Based on the strong opposition the legislation received from the legal entities dealing with juvenile offenders, with the exception of the District Attorneys and traditional law enforcement, it is amazing that such an initiative could pass.

The Effectiveness of the Waiver

Based on studies in other states, the effectiveness of the waiver mechanisms altogether can be discussed and it can be assumed that a similar trend will be seen in California. Studies have found that

juveniles transferred into adult court serve shorter sentences than they would have received had they remained within the juvenile system, often times only being put on probation, proving the criminal court system to be softer than the juvenile (Feld 1999; Fritsch, Caeit & Hemmens 1996; Van Vleet 1999). Another folly of the "get-tough" movement is that juvenile courts have begun to answer the calls for harsher treatments, incarcerating more youths instead of putting them through the programs the juvenile justice system has worked to establish over the past few decades (Van Vleet 1999). How is the community made safer from the juveniles who should receive adult time if adult crime earns sentences of probation? Who is supposed to be rehabilitated if the public is looking to have so many offenders incarcerated? The rate of judicial waiver increased 68% between 1988 and 1992 (Feld 1999). One can assume, since the trend of "get tough" legislation continues to run its course that waivers only increase though the crime rates of juveniles have dropped nationwide. The numbers might actually show a decrease in judicial waivers but it would only be the result of the new waiver mechanisms being utilized. In any case, many studies have shown that juveniles who receive adult court sentences have higher recidivism rates than young offenders who remain in the juvenile system. Part of this surely can be attributed to the probation sentences that so many of these waived offenders receive. "Get tough" initiatives seem to be well received by people but if anything they only produce more hardened criminals that go through the criminal court system repeatedly or put young children in cells and throw away the keys. Is this what society really wants? *Time* magazine summed up the reality of the recent "get tough" trend:

> In the past five years, most states have made it easier to charge and punish children as adults. Thirteen-year-olds are therefore getting mandatory life-without-parole sentences, and there's nothing appellate courts can do to help them. We have effectively discarded these lives. Should we make 11-year-olds eligible for life behind bars? Nine-year-olds? Seven-year olds? We are inching closer and closer to a moral line (Cloud 1998).

Where To Go from Here

Finding out that the law actually has little, if any, deterrent value is disappointing but one of the great things about America is that the laws can always be amended. Prosecutorial Waiver is unconstitutional and Legislative Waiver still gives prosecutors too

much power, not to mention the fact that it is badly written and poorly thought out. The judicial waiver appears very thorough and effective, maybe because it has been around for over a century. Too bad none of the politicians decided to tell that to the voters. Further exploration into the effectiveness of waivers and the other facets of Proposition 21 is still required. It might be useful for voters to educate themselves about the laws they are voting for and the laws already in place before again engaging in Faustian trades where our children are our souls and the bliss only an illusion.

One new form of "get tough" legislation deals with blended systems. Blended systems provide juvenile judges the options of imposing juvenile or adult sentences, imposing both a juvenile and adult sentence, suspending the adult sentence under agreed terms, impose a sentence past the normal limit of the juvenile jurisdiction, having a hearing when an offender reaches the age of majority and then determining if an adult sentence needs to be imposed (Redding & Howell 2000). California currently has blended sentencing once the adult court processes the juvenile and gives the child a criminal record, therefore, some modifications on this system might make for a more efficient manner of dealing with serious young offenders.

As with most problems in our society, juvenile justice could be more effective as a whole and specifically in terms of the waiver process with some education and careful changes. While California educates its voters it can also treat the juvenile offenders with vocational or technical training so that they can be reincorporated into society and become the law-abiding adults the juvenile courts are supposed to create. Along the way it might even be possible to educate all the at-risk youth in the streets so that they never enter the system criminal or juvenile.

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Rethinking National Missile Defense

John Ginder

The superiority of the United States nuclear capabilities is indisputable and recognized by all of the world's nations. This fact alone should be sufficient to provide an adequate deterrent to any nuclear strike against U.S. territory or that of its allies. The Bush administration, nevertheless, feels that deterrence alone is no longer viable and is pursuing a national missile defense system (NMD) with ground, sea, and air-based components that is excessive relative to the perceived threat and reckless in terms of maintaining strategic stability.

The tragic events of September 11, not to mention the 1993 World Trade Center and 1998 Oklahoma City bombings, are a grim example of the futility of such a system, as it has become more and more obvious that an anti-ballistic missile system will not protect American citizens from those who are determined to attack the continental U.S. Oddly though, the administration contends that 9/11 proves that the U.S. must develop a large scale NMD as part of its defense (Council for a Livable World 2001a). While it is true that in light of the terrorist attacks the U.S. must take steps to increase its security, the administration's claim that missile defense is now even more necessary is not only illogical, but it belittles the intelligence of the American public.

The consequences of deploying such a system could be dire, ranging from a mere increase in anti-American sentiment to a full-blown arms race like that of the Cold War years. Thus, the most critical factor to be considered is the extent to which this decision will affect international relations and security. The U.S. has come a long way in improving relations with Russia in particular. To upset this progress would jeopardize years of diplomatic efforts. Despite virulent international opposition to a U.S. defense system of this type, the Bush administration is persistent in it's "go it alone" attitude. As a world superpower the United States has a responsibility to lead by example; but the willingness of the present administration to advocate the deployment of a NMD and thereby risk a renewed arms race sends the wrong message to the rest of the world.

On March 17, 1999, the United States Senate enacted the National Missile Defense Act of 1999 which dictated the policy to deploy as soon as is technologically possible an effective National

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Missile Defense system capable of defending the territory of the United States against limited ballistic missile attack (National Missile Defense 1999). Technology is the only criterion mentioned in the NMD Act, but other factor must also be taken into account. The Clinton Administration opposed the legislation for this very reason and suggested that the following four criteria must be considered: the existence of a significant threat that would warrant an NMD, the cost of developing an effective system, the existence of the necessary technology, and the question of whether the decision to deploy would put U.S.-Russian relations in jeopardy (Keeny 2000). While the issues of cost and technology warrant a brief analysis, the most significant criteria to be evaluated are the degree of the perceived threat of ballistic missile attack and the potential impacts on foreign relations resulting from the deployment of a massive NMD.

The cost of the proposed multi-tiered missile defense system is estimated at $273 billion (Council for a Livable World 2001b). The most critical issue regarding the cost is whether or not a credible threat does in fact exist that would warrant this enormous expenditure. In the absence of such a confirmed threat, the system would be a colossal waste of American taxpayer's dollars.

The technology of developing a defense system must be proven beyond a doubt to be effective before the decision to deploy can be made. Is the technology available to develop and deploy a system capable of protecting the U.S. and its citizens from a ballistic missile attack? As of now, it is not. Most of the testing has been conducted under unrealistic circumstances, which creates bias in the test results and does not prove its effectiveness in the event of an actual strike. For example, the administration has claimed success in the capability of the system to overcome countermeasures such as decoy warheads used to confuse the radar guidance of the interceptor while the real warhead continues toward its target. A recent test proved this to be true (Smith 2002); however, the decoys were spherical while actual warheads are cone-shaped, which made it easier for the system to distinguish between the decoys and the test warhead. In a realistic circumstance, countries capable of developing countermeasures could easily make cone-shaped decoys.

Acts of terrorism continue to be the foremost threat facing U.S. national security, and as recent examples have proven, are committed without the use of ballistic missiles. Some intelligence sources claim that terrorist groups are indeed pursuing ballistic missile capabilities; however, none have yet achieved the necessary technology (Federation of American Scientists 2001). Developing a system to shield from ballistic missiles will only prompt would-be

attackers to focus their resources on finding a way around the system. The most feasible and inexpensive method of overcoming a missile defense system is to use vehicles other than ballistic missiles to deliver the warhead, which itself is relatively small. As we have seen in the past, explosives can be transported and detonated causing excessive damage by a variety of alternative methods, such as the truck used in the 1993 World Trade Center bombing or the small boat that nearly destroyed the USS Cole. September 11 proved that even commercial airliners can be turned into weapons. The danger of relying on a NMD for defense is analogous to the Maginot line used by the French to protect from German invasion during the early years of WWII. The defensive capability of the line was known to the Germans to be virtually impossible to overcome, so they simply devised a strategy for going around it (Perry 2001:40).

The only countries currently capable of striking the continental U.S. with ballistic missiles are Russia and China (Federation of American Scientists 2001). Given the consequences, such a strike would be highly implausible. The only condition under which an attack by either country would occur is in the event of a U.S. first strike on Russia or China, an equally far-fetched scenario. What then, is the threat the administration perceives as warranting a massive missile defense system?

It has been predicted that in the near future certain rogue nations (those labeled by the administration as bearing hostile intent toward the U.S.) will acquire intercontinental ballistic missiles (ICBMs) capable of reaching the U.S. (Federation of American Scientists 2001). One must recall, however, that during the Cuban Missile Crisis in 1962 the U.S. had the surveillance technology to detect the Soviet missile sites being erected in Cuba. It seems that after forty years of significant advances in surveillance and intelligence capabilities, the U.S. should be able to detect any ICBM development or movement long before a launch. Moreover, even if a rogue nation was able to develop a limited ICBM capacity without U.S. detection, it is almost inconceivable that the leader of such a nation would sacrifice his or her entire country to certain and total destruction by the U.S. for the mere chance of striking one or two American cities.

Using conventional precision guided weapons, such missile development sites could easily be destroyed if diplomatic negotiations failed to cease ICBM programs. The case of North Korea is an example of the success of diplomacy in persuading hostile countries to abandon missile programs. In 1999, former Secretary of Defense William Perry negotiated a moratorium on North Korea's Taepo Dong missile program (Berry 2000), which recently has been voluntarily extended

until 2003 (Federation of American Scientists 2001).

The most important factor to be considered is the ramification of NMD deployment on U.S. relations with the rest of the global community, especially Russia and China. While for the most part, Moscow's reaction to Bush's announcement to withdraw from the ABM Treaty has been relatively subdued, there has been vehement criticism within the Russian government. The former Russian Ambassador to the U.S., Vladimir Lukin, voiced his opposition in his statement on December 13, 2001: "The U.S. used our enormous help to conduct the anti-terrorist operation in Afghanistan, then announced its position on ABM. It's a sign, and a bad sign at that" (Boyle 2001). Vyacheslav Volodin, Leader of the Fatherland All-Russia Faction in the Duma, argued on the same date that the Bush administration's decision is a reflection of a superpower that is trying to dictate its rules to the world (Boyle 2001). Does the threat of attack justify the potentially negative impact of a U.S. missile defense on foreign relations?

Continued U.S. commitment to arms reduction agreements is of critical importance to maintaining positive international relations. The decision to deploy an NMD system has significantly affected the status of two of the most important treaties signed by both the United States and Russia in the history of nuclear disarmament: the 1972 Anti-Ballistic Missile Treaty (ABM) and the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT). While the ABM Treaty has been outright abandoned by the U.S., the 1968 NPT would be undermined by an inconsistency on the part of the U.S. to reduce the world's nuclear arsenals. The area of concern lies specifically in Article VI of the NPT, which states: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date" (U.S. Department of State 2001). If the deployment of a large-scale NMD were perceived by other nuclear powers to pose a threat to their deterrence capabilities, the result could be the proliferation of nuclear weapons arsenals in order to overwhelm a U.S. defense. Both Russia and China have warned that they would increase the size and technology of their nuclear arsenals if the U.S. deploys such a system (World Policy Institute 2000). The disregard for these treaties is inconsistent with our responsibilities as a world leader to ensure global security, and will not allow us to legitimately hold other countries to their obligations.

The sole purpose of the ABM Treaty was to limit missile defense deployment in an effort to maintain strategic stability during the Cold War. Some argue that provisions of the twenty-nine year old

document are outdated and, as Henry A. Kissinger claims, do not address the new national security environment, one that was not even considered, let alone anticipated when the ABM treaty was signed (Kissinger 1999). By that same logic, one could dispute the validity of the two hundred twenty-six year old United States Constitution, a concept unthinkable to those who ironically share Kissinger's view. Even though the Cold War has ended, the need for strategic stability remains critical to global security.

On December 31, 2001, the Department of Defense (DoD) submitted to Congress the Nuclear Posture Review (NPR), which outlines a proposed change in U.S. nuclear strategy. The report advises that nuclear weapons play an increasing role in military planning, proposes the development of new types of such weapons, and suggests the potential for resuming underground nuclear testing (Nuclear Posture Review [Excerpts] 2002). In addition, the NPR advocates the development of contingency plans for situations which would merit nuclear strikes against specific nations: Current examples of immediate contingencies include an Iraqi attack on Israel or its neighbors, a North Korean attack on South Korea, or a military confrontation over the status of Taiwan (Nuclear Posture Review [Excerpts] 2002). North Korea, Iraq, Iran, Syria, and Libya have all been declared to be immediate, potential, or unexpected contingencies (Nuclear Posture Review [Excerpts] 2002). China and Russia are also mentioned as possible future targets; however, Russia is an unlikely candidate unless U.S. relations with Russia significantly worsen in the future (Nuclear Posture Review [Excerpts] 2002). More importantly, it reflects a willingness of the administration to consider nuclear weapons in a war fighting capacity rather than as the traditional deterrence capability only to be used in self-defense of U.S. interests. It must be noted that the NPR is not a change in U.S. policy, it is merely a proposal by the Defense Department. Unfortunately though, it exposed to the entire international community the hawkish attitudes within the DoD.

The insistence on developing a NMD despite international opposition coupled with the recent NPR is irresponsible and dangerous. By announcing the future deployment of a protective shield while pursuing a strategic policy that outlines plans for possible nuclear attacks on specific countries, the U.S. has put itself in a very vulnerable position. Those nations specified in the NPR will most certainly feel threatened and may in turn rapidly proliferate their arsenals in anticipation of a U.S. strike. Such nations could see the actions of the U.S. as an intention to attack indiscriminately and without fear of retaliation. Furthermore, being fully aware that the NMD will not be ready for deployment any time in the near future, a radical or suicidal

leader may take the earliest possible opportunity to strike the U.S. before its shield is erected. This is of course an unlikely situation, but unfortunately, it is one in which the administration has knowingly placed American citizens.

The threat of possible ballistic missile attack by a few hostile countries is simply not significant enough to risk the deterioration of our relations with the rest of the world. In addition, diplomacy has been shown to have desirable outcomes when applied to arms reduction. The Cooperative Threat Reduction Program has helped Russia disable more than 4,900 nuclear warheads at cost of $3.2 billion to the U.S. from 1992 to 2000, a fraction of the cost for developing missile defense (World Policy Institute 2000).

With respect to the cost criterion, the projected cost of the NMD is a large sum of money for a system that is unable to protect us from our top security concern of terrorism. Rather than allocating these funds to missile defense, the money would be better spent on increased anti-terrorism programs, not to mention any of the various federal programs lacking sufficient funding.

The technology criterion is also lacking. The technology must be proven to be effective; so far, it has not. According to former President Bill Clinton, this was the reason for passing the decision on to the current administration (Clinton 2000). Furthermore, simple countermeasures are able to confuse even the most sophisticated NMD, and are easily acquired by any country with access to ballistic missile technology (Krieger 2000).

The preservation of years of improving relations with Russia since the end of the Cold War is critical to maintaining global stability and security. It would be devastating, not to mention counter-productive, to regress to previous tensions and animosities. Russia, our former adversary warned that the deployment of an American NMD would undermine previous weapons reduction agreements and could result in a new arms race, not just with Russia, but possibly the rest of the world (Tyler 2001). It is for this reason that the U.S. must pursue diplomatic avenues to reduce the threat of missile attack through multilateral arms control agreements rather than simply erecting an unreliable and internationally criticized NMD.

In so much as the U.S. has a responsibility to defend its citizens, it also has a responsibility to stand by the promises made under international treaties. In this age of globalization, the U.S. cannot afford the isolation that would result from ignoring international obligations and the concerns of those in the global community. In conclusion, the Bush administration must consider the potential global impacts of the proposed National Missile Defense system, question

whether the massive scope of the system is warranted by the actual threat, and consider whether it is worth the risk of jeopardizing U.S. foreign relations and possibly the future security of our nation.

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Computer Security and the Law:
Regulating the Export of Encryption

TiTi Nguyen

Of all aspects of computer security, none have been more regulated by the government than encryption. Although these regulations have been in place since the end of World War II, the United States' policy towards the export of encryption has increasingly been reexamined because of the growth of computer and Internet usage. At issue is balancing national security and economic interests in order to determine the extent to which the government can, and should, regulate encryption. The trend over the years has been to loosen regulations, despite resistance from the government. What remains to be seen is if this trend can continue in the face of such adamant government resistance and in light of the Sept. 11 events.

Past and Present Encryption Policies

The government began to regulate encryption after World War II. While domestic use of encryption remained (and pretty much still remains) unregulated, the export of encryption technology was forbidden and encryption was classified as a munitions (Baladi 1999). Eventually, new regulations were implemented that allowed for some flow of encryption products. One such regulation was the International Traffic in Arms Regulations (ITAR)(1996). Implemented by the State Department, ITAR was the regulating arm of the Arms Export Control Act (1994), which gave the President the authority to control "the import and export of defense articles…and to provide foreign policy guidance to persons…involved in the export and import of such articles" (Baladi 1999). Any item the President designated as a defense article was put on the United States Munitions List (USML), a list of items that required import and/or export licenses. Encryption technology was one such commodity placed on the USML. Any product that operated with 40-bit encryption or less could be exported freely, but to manufacture or export stronger encryption required a government-issued license (Baladi 1999; Radlo 1996; Klopfenstein 1999: 780-781). Bit encryption involves the number of 0s and 1s used to encrypt data that has been stored electronically. The more bits used to encrypt, the

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harder the "key," or the exact bits used to scramble the message, is to figure out in order to descramble the message.

The State Department initially oversaw the encryption export regulations. In 1996, Executive Order 13,026 ("Administration of Export Controls on Encryption Products") transferred jurisdiction of nonmilitary encryption products to the Commerce Department (Soma and Henderson 1999: 106). While encryption items on the USML were still regulated by the State Department, the rest of the encryption the remaining regulations, citing the harm of these regulations to economic interests and Constitutional liberties. There are many reasons for support of or opposition to continued government regulation of encryption.

Support for Encryption Regulations

The government's primary concern is the use of encryption to threaten national security, while law enforcement's concern is its ability to conduct electronic surveillance against such criminals and terrorists. Pasko (2000) writes:

> While encryption offers American industry a tremendous advantage in conducting its business by ensuring that transactions and industrial secrets are kept safe, encryption also offers many opportunities for misuse. Criminal activities that use encryption technology to their advantage, such as terrorism, organized crime, and industrial espionage have prompted the federal government to enact strong laws regulating encryption in order to prevent such misuse. (337)

In addition to potential misuse, the government and law enforcement are worried about law enforcement's ability to collect evidence that has been encrypted. They argue that law enforcement agencies do not have the resources or time to conduct brute force attacks to recover keys used by drug traffickers, child pornographers, and information terrorists. Baladi (1999) writes that "[t]he Department of Commerce and the FBI are concerned that the proliferation of encryption will make it more difficult to monitor and apprehend terrorists, which will threaten the security of the United States." Moreover, Smith (1999/2000) notes that "[a]bsent some form of key recovery or recoverable method, a brute force attack will not meet law enforcement needs" (16). Thus, they support the limits on encryption strengths, built-in key recovery systems, and key escrows, where encryption keys can be deposited and held for future reference.

The government and law enforcement assure that proper procedures have been implemented in order to protect Constitutional Rights. The supporters acknowledge the Constitutional and economic concerns related with regulating encryption, but the balance of rights must weigh in favor of maintaining public safety.

Support Against Encryption Regulations

Industry has historically disliked government regulation of free market competition. However, the limits on key lengths that can be manufactured and/or exported, government review prior to manufacturing, and the necessity of a government-issued license prior to exporting, have put high-tech industry at a disadvantage to foreign firms who have no such restrictions. Black (2001) writes, "[s]ome critics contend that, because of U.S. restrictions, the industry has already lost more than $65 million" (297). These regulations affect the industry's ability to protect business transactions from corporate espionage or fraud, as well as to attract new clients. The industry argues that since stronger encryption is being created outside of the United States, it cannot compete at an international level, nor can it take advantage of the same kinds of security its international competitors are using.

Privacy is also a key issue for protesters of encryption regulation. The main reason for encryption is to maintain private and confidential information. This purpose would be defeated if anyone else, even law enforcement, could easily decipher the key. Additionally, the protestors do not believe the government can, or should be, trusted to not abuse its access to key recovery methods, no matter what procedural protections have been implemented. Whether the recovery methods are through "back doors" into the encryption algorithm or through key escrow, which is depositing encryption keys to a government or independent agency, the protesters believe government would be too tempted to use these recovery methods without proper supervision or accountability. Baladi (1999) argues, "there [would be] no difference between mandating key escrow for encryption software and mandating key escrow to our homes." Since escrowing house keys has never been acceptable, even against the government's argument of national security and public safety, encryption keys should not be considered any different (Baladi 1999).

Civil libertarians are also concerned with Constitutional violations that may incur as a result of encryption regulations. Foremost is the right to privacy that has been interpreted from the Fourth Amendment. Another concern is the possible abuse of Fourth

Amendment search and seizure restrictions. The civil libertarians are not convinced the government would use "back doors" into encryption algorithms only if it was given proper authority by the courts. Instead, they believe the government would abuse its access and decrypt encrypted messages before bothering to gain court approval. The First Amendment right to free speech could be implicated in the government's ability to restrict or deny a request to manufacture or export encryption code. This issue has slowly entered the court system, and different courts have come to different conclusions about whether encryption source or object code constitutes speech. The government cannot regulate encryption if it constitutes speech, but can if it does not. Finally, the Fifth Amendment's right to not self-incriminate has also become a contentious issue. The argument is that by requiring the escrow of the encryption key, the government would be compelling depositors to turn over potential evidence against themselves because the key would allow law enforcement access to possibly damaging evidence.

Analyzing the Need for Encryption Regulations

While the government does have a valid need to protect national security and to help law enforcement fight crime, limiting the kinds of encryption that can be manufactured, imported or exported, will not do this. Instead, these limits not only hurt economic and technological interests, but also the very people the government is intent on protecting from harm.

Economic and technological interests are hurt because domestic businesses cannot compete with international firms that offer better and stronger encryption with less government intrusion. These businesses include those that manufacture and sell encryption products, as well as those that use encryption as part of their services. In addition, not only do these businesses lose users because they cannot guarantee better encryption of data, they also lose the ability to protect their own transactions from possible violations of privacy and confidentiality. This also true for individuals, who also cannot take advantage of the protection stronger encryptions afford them.

The violation of privacy because the government allows only weak encryptions is made worse by the government's insistence on key-recovery methods and escrow systems. Not many are willing to trust that the government would diligently protect Constitutional Rights and not abuse these privileges. Also, it is not likely that illegitimate users will "play by the rules," use weak encryption or allow for key-recovery methods to help law enforcement catch them

in the act. Moreover, it is unlikely that international terrorists will use the weak encryptions that are allowed by the U.S., when much stronger encryptions are available outside of the U.S.

Furthermore, regulating the flow of information is a losing battle. The Internet has the ability to distribute anything from anywhere, thus many stronger encryption products than what the U.S. government is allowing are already widely available! (Sehgal 1999: 82). In addition, the ability to distribute encryption products to a large audience would also allow a large audience to review the encryption code. Open source critique is good because it helps improve the product by finding flaws and gives a better understanding about how the code works, both kinds of knowledge the government could use to its advantage to protect national security.

Finally, it is laughable that the government claims it cannot recover keys from strong encryptions in a timely or resourceful manner. As history shows, such as when the Allied forces wanted to crack the German's Enigma encryption machine, when the government devotes its focus on one thing, it will be sure to get it. Additionally, claims that strong encryption, such as 128-bit keys, may take "a trillion years to break with current technology" are equally as absurd (Baladi 1999: Footnote 35). At one point, 40-bit keys were thought impossible and impractical to break, yet it now can be done in under 4 hours, and 56-bit keys were thought secure, yet these too can now be broken with the resources the government has—and within reasonable time frames. Soma and Henderson (1999) emphasize this position:

> The encryption debate also poses the question of whether strong encryption applications…can be broken…. A University of California at Berkeley student broke [a 40-bit PGP-encrypted message] using 250 workstations tied together for a brute force attack. The 250 computers broke the code in 3.6 hours. The National Security Agency ("NSA") used this information to explain that, in comparison to the 40-bit key, the 56-bit technology was virtually unbreakable.
>
> …
>
> Philip Zimmermann testified that Northern Telecom of Canada engineers developed a special chip to crack 56-bit DES codes. These chips, if linked with 50,000 similar chips at a cost of $1 million, could try every 56-bit DES key in seven hours. For a $10 million investment that time

> could be reduced to twenty-one minutes, and for $100 million, just two minutes. Furthermore, Zimmermann made the point that NSA resources could probably reduce that time to a few seconds." (126-127 [footnotes omitted])

Thus, technology will soon, or already is, available to break strong encryptions.

The government is rightfully concerned that strong encryption could be used to harm national security as well as to evade the law. This concern has been heightened in the past months since Sept. 11, as the government has detained hundreds for questioning, planned for military tribunals with secret evidence and no appeals process, expanded wiretapping capabilities, and allowed the taping of privileged lawyer-client conversations (Rosin 2001: A1; Pincus 2001: A6; Lancaster 2001: A1; "An Affront to Democracy" 2001: A24; Lardner and Slevin 2001:A1). All of this has happened in the name of national security. It is not inconceivable for the government to revoke these looser regulations in favor of tighter restrictions on what kinds of encryption can be exported. What the government must not also forget is that in preventing possible terrorists from using these products for harm, it is also preventing possible victims from using these products for protection.

Conclusion

The debate over regulating encryption will undoubtedly continue as the regulations become tighter or looser. What must also continue is the constant questioning about these regulations and the need for the government to justify its intrusion. While the government does have an interest in protecting national security and aiding law enforcement's fight against criminals, this should not come at the cost of stunting economic and technological growth, as well as the careless violation of Constitutional Rights.

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Should Genetic Code Be Patented?

John Salinas Lopez

Marked by the increases in microbiological research and technology, many research institutions, both public and private, have discovered genetic technology and gene[1] sequences that have promising potential. News reports flourish with breakthrough accomplishments dealing with genome[2] sequencing, gene development into protein expression, and even stem cell culture isolation giving rise to the potential for human cell cloning. Amidst all the scientific speculation, the occasion arises when a developing institution moves to protect their research investment by contacting a patent lawyer for consultation. As a vastly increasing amount of genetic code patents flood the United States Patent Office, society wonders whether or not genetic sequence should be patented. Furthermore, if patent is justified, what parameters and guidelines should be required? After conducting elaborate research, it is my conclusion that genetic code and sequence can be patented material, provided that the patent is not so biotechnically broad that it creates a monopoly or illegitimate patent protection based on lack of product or potential product specificity. I will share case studies demonstrating genetic code patent parameters that are too broad, proving that dangerously broad patents are monopolistic and devastating to the research industry as a whole. In contrast, I will provide insight into exactly how precise a biotechnological design should be in exemplifying the specific parameters necessary for a legitimate patent of genetic sequence.

Genetic code and gene sequence meets patent criteria under law based on three crucial arguments involving biotechnical development. These criteria offered by Professor Vernellia R. Randall of the University of Dayton School of Law justify genetic code as patent worthy material. The first argument recognizes the effort involved in locating, characterizing, and determining the roles coding genes play in an organism. This arduous process of scientifically intensive research elevates the discovery of the genetic sequence to the status of an invention, and not merely a discovery. Secondly, Randall argues that discoveries of this nature are expensive in terms of both laboratory time and money; therefore obtaining a patent may be among the only methods an institution can use to protect their research and personnel investments. Finally, patents by

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their inherent nature promote original research and development, as patents facilitate the focus of effort in innovation and inhibit the effortless duplication of the arduous research process already explored and invented (Randall 2001).

In the emerging field of genetic engineering[3] , the innovations surrounding developing and manipulating genetic codes and biotechnological tools are certainly viable and worthy of patenting. The touchy dynamic that follows suit is defining the parameters necessary regarding specificity for the gene sequence and its purpose. If the gene or technique is patented under too broad of terms, the outcome can be problematic. As this case study will demonstrate, inappropriately broad patents tend to stifle innovative competition of researchers, especially in an emerging field of genetic engineering and recombination[4] . For instance, consider the Agracetus cotton patent case study as described by Seth Shulman (1995) in his special feature from *Technological Review* entitled "Patent Medicine". Agracetus, a subdivision of a major chemical company, designed a "gene gun" that functions to insert an expressive genomic sequence-containing vector into cotton plants, creating immunity to a devastating cotton disease. On the advice of counsel, Agracetus applied for patent protection that broadly declared claim to all genetically engineered cotton, regardless of the technology used. The U.S. Patent Office initially granted Agracetus the patent, and all other institutions conducting research in the area of cotton genetic engineering, including the U.S. Department of Agriculture, would be forced to pay royalties to Agracetus under patent law (Shulman 1995). As the proceedings continued, Agracetus refused to grant out licensing, thus forcing institutions nationwide to consider the elimination of their cotton research projects. Fortunately, the initial issuance of patent protection was overturned, and the cotton genetic engineering research field remains an oligopoly of several leading research institutes.

The new question in litigation requires the identification of the specific degree of patent protection that Agracetus is inclined to receive. In defining the parameters necessary to arrive at a fair patent, the parameters must avoid using the Plant Patent Act of 1930 as the only legal precedent and include the precedent set by *Diamond v. Chakrabarty* (1980) concerning utility patent in plants as well. The Plant Patent Act (PPA) protects the inventor of an asexually distinct and new variety of plant, including mutants, hybrids and newly formed seedlings, allowing for patent protection under those broad parameters (Bennett 1994). The *Diamond v. Chakrabarty* case set precedent in allowing issuance of patent for "any new and useful process, machine, manufacture, or composition of matter, or any new

useful improvement thereof," pertaining now under new precedent to plant life (Bennett 1994). Establishing viability for patent under this act and precedent of established utility has been widely effective in patenting plant genes, gene transfer vectors[5] , and transgenic plants[6] much like those used by Agracetus.

In further isolating the patent variation that Agracetus should receive, we examine an article by P. Lange (1994) entitled "'Patenting' of Living Organisms-Patents and Plant Breeders' Rights". Lange offers a precise parameter: "example of things suitable for patent protection are genetically manipulated constructs in plant material coding for specific proteins-such as virus resistance" (Lange 1994). Such a patent would certainly encompass plant material such as an insertion vector that is distinguished by the fact that it contains the expressed genomic construct necessary for the disease resistant phenotype[7] of the Agracetus cotton plant. As we consider these parameters, the only element of research and development that is eligible for patent are the genetic sequences inserted into the transfer vector, and the "gene gun" used to insert the transfer vector into the cotton chromosomes, and certainly not all genetically engineered cotton plants, independent of technique.

Unfortunately, such broad biotechnology patent claims are not always overturned in favor of a more precise remedy. Revisiting Shulman's article "Patent Medicine" found in *Technology Review* where he describes a case concerning the U.S. National Institute of Health (NIH). A senior researcher used gene therapy[8] on a human being for the first time ever in effort to treat a child with a rare blood disease. The U.S. Patent Office issued patent to NIH for protection of all ex vivo gene therapy, which under patent protects removing malfunctioning human cells and genetically altering the chromosome composition before re-insertion into the patient (Shulman 1995). Joseph Glorioso, head of the Department of Molecular Genetics and Biochemistry at the University of Pittsburgh in Pennsylvania, was quoted in the science journal *Nature* when asked how he and his colleagues felt: "deep despair [about the patent], it is analogous to giving someone a patent for heart transplants" (Malavich 1995). The importance of arriving at specific and concise parameters for a patent become terribly obvious when broad patents such as these manifest themselves and essentially shut out all other practical uses for a widely used technique such as cell therapy.

Essential to the biotechnical development adventure, we must understand that with the virtually completed Human Genome Project, a mad scramble to patent human gene sequences has begun, especially those sequences that have potential for development in HIV infection

therapy. HIV therapy research and human genomics demonstrate an example of genetic engineering that is inherently highly specific based on its scientific nature, especially when implications of patent protection arise. In HIV gene therapy research, the genome is scoured for nucleotide[9] sequences that in this case study are indicative of sequences that code for cell surface proteins lacking HIV virus receptors on the cell surface of a human cell. The discovery of the CCR5 HIV receptor gene within the genome is a highly specific sequence. When one of two receptor genes are knocked out, HIV loses affinity for the cell and greatly reduces the chance for infection to occur (Fields 1996). In presenting this gene sequence for patent, Progenics Pharmaceuticals made note of the functional specificity of the sequence, and the practical and applicable use of the gene in pharmaceutical production of protease inhibitors[10] and nucleoside analogs[11] which will be the practical line of attack of the HIV drugs that could be developed (Reuters 2001). Patent proposal such as the CCR5 HIV receptor gene exemplify the parameters of specificity that should be required to receive a deserving patent.

The analysis of both theories illustrates that patenting genetic code is justified in the discovery of sequences to the status of an invention based on the effort in characterizing the gene. Understanding that discoveries in genetic code and therapy are expensive is crucial; a patent is required to protect the investments. Finally, acknowledging how patents promote further research and development with the inhibition of duplication, especially with the CCR5 HIV receptor gene, functions to demonstrate the appropriateness of patents. It is crucial, however, to realize that broad parameters in patenting biotechnology, especially genetic sequences, can be extremely damaging and monopolistic, as with the cotton plant created by Agracetus, and the patent owned by NIH pertaining to cell therapy. The implementation of strict and precise parameters function to issue a legitimate and promising patent for an exciting breakthrough in the biotechnology industry.

Endnotes

[1] Gene- a unit of heredity;a segment of DNA specifying a particular protein or polypeptide chain (Madigan 2000).
[2] Genome- the complete set of genes present in an organism (Madigan 2000).
[3] Genetic engineering- the use of in vitro techniques in the isolation, manipulation, recombination and expression of DNA (Madigan 2000).
[4] Recombination- process by which genetic elements in tow separate genomes are brought together in one unit (Madigan 2000).

[5] Vectors- a genetic element able to incorporate DNA and cause it to be replicated in another cell (Madigan 2000).
[6] Transgenic plants- plants that stably pass on cloned DNA that has been inserted into them (Madigan 2000).
[7] Phenotype- the observable characteristics of an organism (Madigan 2000).
[8] Gene therapy- treatment of disease caused by a dysfunctional gene by introduction of a normally functioning copy of a gene (Madigan 2000).
[9] Nucleotide- a monomeric unit of nucleic acid, consisting of a sugar, a phosphate, and nitrogenous base that compose a strand of DNA (Madigan 2000).
[10] Protease inhibitors- a compound that inhibits the action of viral protease by binding directly to the catalytic site, preventing viral protein processing (Madigan 2000).
[11] Nucleoside analog- a component of genetic material used to inhibit retroviral replication within a host cell (Fields 1996).

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The Flag Burning Debate

Todd R. Tunstall

The first rendition of the American flag was first flown on January 1, 1776, at the militia fort atop Prospect Hill overlooking Boston, Massachusetts. This flag was composed of thirteen alternating bars of red and white with a smaller rendition of the Union Jack in the upper left hand corner. This design inspired Betsy Ross to sew the most well known of the pre-independence banners in May of the same year. Her flag gave birth to the famous stars and stripes trend that would continue to be the trademark of American sovereignty through the rest of the Revolutionary War and on through the next three centuries. On June 14, 1777, the Second Continental Congress formally accepted the Betsy Ross design as the official flag of their swaddling nation. The flag as it is defined today, with the original thirteen red and white stripes and fifty white stars in the upper left hand corner on a field of blue, was finally adopted by Congress in 1960 after the addition of Hawaii as the fiftieth state in the union. Over the course of Ol Glory's history, she has flown over the North Pole with Robert Perry, fluttered at the peak of Mt. Everest next to Barry Bishop, and stood stiff against the solar winds when placed on the moon by Neil Armstrong. President Harry Truman even invoked a national holiday out of reverence for the flag to be held annually on June 14. Despite these and countless other obvious ties between the American flag and American patriotism, America's sovereignty and the nation as a whole, on June 11, 1990 the United States Supreme Court deemed any law protecting the integrity of this national symbol unconstitutional. The Supreme Court made a heinous mistake when it ruled in a controversial decision that the charges brought against Shawn Eichman for violating the Flag Protection Act of 1989 were unconstitutional and furthermore that Congress had no authority to protect a national emblem; thereby, unfairly dooming the flag to forever be a prop defamed by radical protesters incapable of conveying their message through civilized dialect.

Flag Burning Catalyst: *Texas v. Johnson*

The flag burning controversy began with the *Texas v. Johnson* (1989) decision that declared the Texas law prohibiting the desecration of venerated objects including the American flag was unconstitutional. In this decision, the Supreme Court held that the Texas statute was unconstitutional because it prohibited the communicative impact of Johnson's expressive conduct (*Johnson* 1989: 412); Johnson was arrested because his burning of the American flag was deemed offensive to the observers. The Court held in the majority opinion, written by Justice Brennan, that government has no right, under protection of the First Amendment, to forbid an action

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merely because society finds the idea offensive or disagreeable, even where our flag is involved (*Johnson* 1989: 397). Justices Marshall, Scalia, Blackman and Kennedy supported this opinion. It did not hold, however, that all flag burning in any circumstance was protected.

The dissenters in this case, led by Chief Justice Rehnquist, held that in finding the Texas law protecting the flag unconstitutional, the Court ignored Justice Holmes' familiar aphorism that a page of history is worth a volume of logic (*Johnson* 1989: 421). Chief Justice Rehnquist elaborated on the many tragic and heroic deeds throughout which our flag has flown, quoting accounts from the Civil War and then up through 1949, when President Truman established June 14 as Flag Day. The dissenters point to several instances where rights have been either excluded from First Amendment protection, as in the case of "fighting words" (*Chaplinsky v. New Hampshire* 1942: 568), or where a specific organization has been granted express use of a symbol or phrase, such as the phrase "Olympic" and the multi-colored rings (*San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* 1987: 582). In all, the dissenter's basic argument was that the flag deserved consideration independent of negative precedence because of its "unique position" as a national symbol. These thoughtful arguments, however, did not deter the fumbling majority who proceeded with tunnel-like vision to rely strictly upon the First Amendment as the basis for protecting Johnson's inarticulate plea of idiocy.

Flag Protection Act of 1989

The *Johnson* case and the subsequent decision immediately caught Congress' attention. At the time, forty-eight out of the fifty states in the union had anti-flag burning statutes in their Constitutions, and Congress was determined to guarantee the American flag the protection it so richly deserves. Accordingly, after hearing depositions by several speakers on the value of the American flag and the subsequent wording of an act that would comply with the Johnson ruling, Congress enacted the Flag Protection Act on October 28, 1989 (Section 700 of Title 18, United States Code). The Act read:

> Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

The Act also had a mandate which stated that any appeal could be taken directly to the U.S. Supreme Court and that the Court should expedite the decision to the greatest extent possible. The goal of this Act, as publicized by both the House and the Senate, was not to abridge free speech as the Courts had suggested, but to merely "remove the American flag as a prop" from those wishing to convey individual views (*United States v. Eichman* 1990: 407).

The passing of this Act sparked two separate instances of

immediate rebellion. The first and foremost of these two acts of delinquency involved Shawn Eichman, who was arrested for burning an American flag at a protest in Washington, D.C., on October 30, 1989, in direct conflict with the newly enacted Flag Protection Act. The second, less rigorously pursued infraction was committed on the steps of a post office building in Seattle, Washington, by Mark Haggerty and several associates. This case was not as important to the government because Mr. Haggerty stole the flag that he disgraced from the pole on the post office property and was therefore burning a flag that belonged to the United States government. Because of these circumstances, the case would not be of as much value in setting precedence in the burning of privately owned flags as the *Eichman* case.

United States v. Eichman

Judge Rothstein dismissed the initial hearing scheduled for Ms. Eichman in the District Court for the District of Colombia before the actual trial in a summary judgment on March 5, 1990, on the grounds that the Flag Protection Act was unconstitutional as applied to the politically expressive conduct of the accused (District Court for the District of Colombia Docket No. 89-1434). This ruling was the exact reason the clause allowing immediate appeal to the Supreme Court was included in the subtitles of the original act. The government wasted no time in the appeals process and the Supreme Court heard the first arguments on May 14, 1990.

The defense for the appellees in this case was concise and to the point; prohibiting flag burning, they contended, was a blatant infringement upon free speech. First Amendment rights were at the heart of this argument that relied upon the fact the amendment stated:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

William N. Kunstler, the lead attorney in the defense of Ms. Eichman, also relied heavily on the precedent set in the Johnson case which he alleged held that any law prohibiting defacement of the flag was unconstitutional. This assumption was in direct contrast with the decision held by the majority of the Court which was that "the restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances" (*Johnson* 1989: 402). In this statement the Court has stated that it did not specifically forbid Congress from making a law that would protect the physical integrity of the flag in every circumstance is exactly what the Flag Protection Act was; it forbade every possible type of disgrace.

Another of Mr. Kunstler's arguments relied on *Hustler Magazine, Inc. v. Falwell* (1988) in which he quoted part of the

Court decision stated that speech is not subject to regulation "simply because it may embarrass others or coerce them into action" (*Hustler* 1988: 55). This finding unfortunately does not directly apply to the circumstances in regards to Ms. Eichman because actions and speech have been regulated if they are construed to evince action. The archetypal example of this was set in the *Chaplinsky v. New Hampshire* (1942) decision of which held that, "allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances" (*Chaplinsky* 1942: 571). This decision specifically dealt with speech that would "constitute a breach of the peace by the speaker-including 'classical fighting words'... and other disorderly words, including profanity, obscenity and threats" (*Chaplinsky* 1942: 573). This holding had direct relevance to the actions of Ms. Eichman for if burning an American flag does not incite violent thoughts of breaching the peace then the vandal is probably surrounded by similarly minded hoodlums.

Attorney General Kenneth Starr took the helm for the government in this landmark case. The central argument at the forefront of Starr's argument was that by prohibiting flag burning, Congress was within its legal bounds in regards to free speech because the subject would still have countless other expressive options with which to convey his or her message. Basically, Starr's point was that the speaker can defame the politics of the United States until he or she is blue in the face because it is not the message that the law was designed to suppress, but only one particular method of conveying that message. Chief Justice Rehnquist's analysis of the Act's goal was to "deprive [the subject] of only one rather inarticulate symbolic form of protest - a form of protest that was profoundly offensive to many-and [leave them] with a full panoply of other symbols and every conceivable form of verbal expression to express [his or her] deep disapproval of national policy" (*Johnson* 1989: 434). Another instance of a form of communication being deprived First Amendment protection was *New York v. Ferber* (1982) which held that, "the States are entitled to greater leeway in the regulation of pornographic depictions of children" because the consequences of the conveyance were detrimental to the child's emotions, future psyche "and classifying child pornography as a category of material outside the First Amendment's protection [was] not incompatible with this Court's decisions dealing with what speech is unprotected" (*Ferber* 1982: 747).

The overall breadth of society?s value for the American flag at this point in time is without question, as Starr also made perfectly clear. At the time of this appeal, only two out of the fifty states in the union did not have flag protection statutes in their state constitutions. This was also supported by facts reported by Warren S. Apel of the Freedom Forum which stated that, "nearly all 50 state legislatures have expressed advance approval of [a Federal Flag Protection] amendment." This "unique value" of the flag as a national symbol, as Justice Stevens dissented in the *Texas v. Johnson*, should allot the Flag Protection Act special consideration as much as or even more so

than fighting words and child pornography.

Amicus Curiae Brief from Senator Bidden

Senator Joseph R. Bidden Jr. also urged the Court to reverse the District Court's decisions in his brief of amicus curiae, or address by a friend of the Court (*Eichman* 1990: 611). He reiterated the facts already presented by Starr that the *Johnson* case only struck down two attempts at prohibiting flag burning, it did not give flag burners complete immunity. He quoted Dean Geffory R. Stone, a witness who testified before the members of Senate Committee on the Judiciary, as saying "the Court did not hold in *Johnson* that there is an inviolable First Amendment right to burn the American Flag" (*Eichman* 1990: 637). The Flag Protection Act, in contrast to the Texas statute, was content neutral and aimed at protecting "the physical integrity of the flag at all times," (*Eichman* 1990: 617) and therefore, could not be claimed to be suppressing a specific anti-government message. Senator Bidden also contended that in the decision of *Smith v. Goguen* (1974), in which the Court overturned a conviction which held Mr. Goguen accountable for wearing an American Flag sewn on the seat of his pants, the Court intimated that a statute "aimed at protecting the physical integrity of the flag in all circumstances" would be held constitutional (*Goguen* 1974: 590).

According to Senator Bidden, there is actually a test set forth by the Court in *Clark v. Community for Creative Non-Violence* (1984) which is based on the decision that, "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions" (*Clark* 1984: 293). This three-pronged test to ensure that freedom of speech is not unduly infringed upon has been established as follows:

1) The restrictions must be content neutral.
2) The restrictions must be narrowly tailored to serve a significant government interest.
3) The restrictions must leave ample alternative channels for communication of the information.

When the Flag Protection Act is regarded under such scrutinizing light, it still can be held to agree with all three rules set forth, and therefore, must be held constitutional.

Amicus Curiae Brief from Governor Cuomo

Mario M. Cuomo, the Governor of the state of New York at the time of the trial, also had a profound interest in the reversal of the District Court's decision. He had a concurring content neutral act in the processes of approval by the New York State Legislature which depended on the reversal of Judge Rothstein's initial dismissal in order to be further considered and possibly enacted. Governor Cuomo's *amicus curiae* brief focused on the "curing" of the constitutionality problems presented in the *Johnson* case. He stated that the Flag Protection Act "avoids the constitutional defects this Court found in the Texas statute by banning all physical assaults on

the flag regardless of whether any communication is involved" (*Eichman* 1990: 647). Governor Cuomo relies on another three stage test to validate his "curing" claim, the test set forth in *O'Brien v. U.S.* (1968). Dave O'Brien was arrested and subsequently incarcerated for burning his draft card on the steps of the South Boston Court House in 1968. The Supreme Court upheld the conviction on the basis that the action of burning the card was not protected, but the speech component of O'Brien's expression would have been protected speech. This decision gave birth to the *O'Brien* test for constitutionality which, in regards to the Eichman case, states that:

1) The governmental interest in protecting a unique symbol of national unity is important and substantial.
2) The government interests advanced in the Act are not related to the suppression of expression.
3) The incidental interference of the Act with expression is minimal and no greater than necessary.

In much the same way as Senator Bidden, Governor Cuomo addressed each statement of fact individually and concluded that the Flag Protection Act which Shawn Eichman held in so much contempt was, in truth, constitutional by these definitions.

Amicus Curiae Brief from The House of Representatives

The Speaker of the House of Representatives and his Leadership Group submitted their own *amicus curiae* brief, as was their right since a Congressional Act was being challenged. Their brief focused on the efforts of William J. Hughes, a senior member of the Judiciary Committee and the Chairman of that Committee's Subcommittee on Crime. He spearheaded the effort to construct the desired statute with respect to the *Johnson* decision and believed that a Constitutional amendment was unnecessary because a constitutionally feasible statute was very obtainable. Representative Hughes specifically touched on Justice White's statement in regards to the Goguen case that

> "The United States has created its own flag, as it may. The flag is national property, and the nation may regulate those who would make, imitate, sell, possess, or use it. I would not question [nor should the Court] those statutes which proscribe mutilating, defacement, or burning of the flag or which otherwise protect its physical integrity" (quotations omitted) (586-587).

The House of Representatives directly countered the respondents claim that the government's sole interest in protecting the physical integrity of the flag arises out of its symbolic value, because there were other significant reasons as well. Congress contended that they passed the Flag Protection Act because "it wished to shield the flag from harm as an incident of sovereignty with a specific legal significance apart from its symbolic value...and that protecting the flag protects that sovereignty interest" (*Eichman* 1990: 741). To prove this, the House presented to the District Court numerous instances in which "violations of the flag's integrity have been

deemed threats to the sovereignty of this nation" (District Court for the District of Colombia Docket No. 89-1434, 12a). The asserted goal was to illuminate the persistent determination of Congress to afford our flag its duly granted protection without infringing upon the opportunity of citizens to exercise their right to speak out against their government, its policies, or the flag that represents it.

The Decision of the Court

The Court rendered its decision in favor of the respondents on June 11, 1990. The five-to-four decision was met with heated controversy from Congress and the majority of the general public. The general sentiment was that a Constitutional Amendment should not be necessary to protect our flag, but the Court left little choice in the matter. The opinion of the Court was written by Justice Brennan and concurred by Justices Marshall, Blackmun, Scalia and Kennedy. In his deposition, Justice Brennan stated that the government, in defense of its long-labored over Act, "invited us to reconsider our rejection in Johnson of the claim that flag burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First Amendment. This we decline[d] to do" (*Eichman* 1990: 313). There is no explanation as to why the Court decided to blatantly ignore a request of a coequal branch of government that, as a basic principle, speaks with the voice of the American public. The Court merely offered an overbearing statement stating that it would not even grace the government's concern with consideration. Instead, he countered that the government's goal in passing the Act was to prohibit unsavory ideas from being shared through expressive speech, of which there was no proof in the written composition of the Act, but which applies directly to First Amendment protection.

The dissenters in the *Eichman* decision, the same as in *Johnson*, were led by the Chief Justice William Rehnquist. Joining him were Justices Stevens, White, and O'Connor. The dissenting opinion focused on the true analysis of the case, which Justice Stevens addressed in his opening remark of, "The Court's opinion ends where proper analysis of the issue should begin" (*Eichman* 1990: 319). The various messages conveyed by burning a flag vary between circumstances and generations. For example, in the 1960s, burning a flag might have been in protest of the Vietnam War, while in *Johnson*, Mr. Johnson was upset by the Republican Party platform, and then in *Eichman*, Ms. Eichman was demonstrating against the Flag Protection Act. These varied messages conveyed by burning a flag are thus random and often ambiguous, so the contention that the Flag Protection Act of 1989 suppressed a particular anti-government message is invalid because there is no concrete message that can be gathered from an individual burning a flag. The dissenters ended their argument with the disputation that "the interest in allowing a speaker complete freedom of choice among alternative methods of expression is less important than the [obvious] social interest supporting the prohibition" (*Eichman* 1990: 319).

Analysis of the Injustice Done to the American Flag

The Court's decision failed to take into account what should have been a contributing factor in their decision: the social drive to protect the nation's most recognizable symbol from defacement. Congress, the self-proclaimed voice of the people, gave careful consideration to the constitutionality of the Flag Protection Act and concluded that the statute complied with the requirements set forth by the First Amendment. Such a determination by an equivalent branch of government should have been accorded consideration and deference by the Court, which is removed from public influence because of the rules of tenure. The Court has before deferred to Congress' constitutional judgments in a variety of cases, most importantly including the assessment of various statutes' validity with regards to the First Amendment. "Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress" is an archetypal quote from the decision in *Colombia Broadcasting Systems, Inc. v. Democratic National Committee* (1973: 102) in which the Court conceded that Congress should decide the fate of an FCC decision. "The customary deference accorded the judgments of Congress is certainly appropriate when...Congress specifically consider[s] the question of the Act's constitutionality," (*Rostker v. Goldberg* 1981: 64) is a policy that should have been granted accommodation in this case because the situation enumerated collates precisely with the Eichman case, but was clearly thrown by the wayside and paid no heed.

There have been several cases of legal precedence decided by the Court which upheld the Flag Protection Act. Probably the most relevant was *United States v. William Charles Cary, Jr.* (Eighth Circuit District Court Docket No. 88-5485). Cary was convicted by an Eighth Circuit Court under the Flag Protection Act for burning an American flag at an Armed Services Recruitment Center in Minneapolis, Minnesota. His conviction withstood "exacting scrutiny" and he served his prison sentence to its full extent and paid his fine in full. *Halter v. Nebraska* (1907) also upheld a prosecution for misuse of the flag and verified that it is within the government's power to pass laws concerning the treatment of the flag considering the fact that it is such a potent American symbol.

It was a grave travesty that the Court did not find sufficient proof that protecting the American Flag was first constitutional, and secondly in America's best interest. "The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited," (*Cox v. Louisiana* 1965: 563) is a fact that the majority opinion was unwilling to consider. "The right [of free speech], however, is not absolute- the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment," (*Eichman* 1990: 322) is a powerful analogy, professed by Justice Stevens in the closing statements of the *Eichman* case, to the right of

free speech the Court majority wishes to grant to violent demonstrators. It is a shame that children will still be asked to pledge allegiance to and even to fight and die for the same flag that they see thieves, vandals and hooligans burning for the simple sake of their inability to articulate personal grievances in an intelligent and civilized manner. As the intent of Congress clearly exhibited, the Flag Protection Act was not drafted to deprive protestors the right to convey their political opinion, but to protect a valued symbol of national unity and sovereignty so that the children of tomorrow will have the opportunity to value the flag as lovingly as did the veterans of yesterday.

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Bowers v. Hardwick: A Legal and Cultural Analysis

Julie Zhalkovsky

While most cases decided by the Supreme Court bear a legal significance, some are important because they bear a social and cultural significance. *Bowers v. Hardwick* (1986) is an example of a case that carries important social and cultural implications as well as legal precedent. The issue before the court in *Bowers* is a rarely enforced, mostly forgotten Georgia statute that prohibits sodomy. The court's decision to maintain the sodomy statute did little to help enforce it. It is as barely enforced now as it was before the case went to the Supreme Court. The broader impact on our society is how the Court chose to deal with the issue at hand. In deciding matters of homosexuality and privacy between two consenting adults, the Court looked beyond simple legal issues and chose to take a moral stance against what they deemed improper behavior. This had a negative impact on our society as a whole by bringing mainstream religious values and ideals into the legal system, therefore depriving people of their fundamental rights to privacy and association by instituting a system of heterosexism. Because of the criminalization of private homosexual acts, discrimination against homosexuals became legal and the gay rights movement suffered. These results greatly affected the homosexual community as well as all of society.

The cultural significance of *Bowers v. Hardwick* lies in its perpetuation of discrimination against homosexual men and women in the United States. The legal environment created by policy stemming out of *Bowers* makes it legal to deny homosexuals employment (*Shahar v. Bowers* 1997) and many other rights which are illegal to deny to other protected minorities. Because of these effects, the Supreme Court's decision in *Bowers v. Hardwick* is incorrect and harmful to our society as a whole.

Background and Facts of the Case

Michael Hardwick was arrested for violating the Georgia criminal sodomy statute after the police walked into his bedroom and witnessed a sexual act between him and another male. Both men spent ten hours in jail before they were released. The District Attorney did not press charges against either man, but reserved the right to do so in the future. The Georgia statute carries a punishment of up to twenty years for committing the offense of sodomy. Hardwick sought a declaratory judgement challenging the validity of the law. *Hardwick v. Bowers* (1985) declared the Georgia Statute unconstitutional based on precedent set by the Supreme Court in *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); *Stanley v. Georgia* (1969); and *Roe v. Wade* (1973). The Court held that the Georgia statute violated Hardwick's fundamental rights because his homosexual activities were an

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example of private and intimate association, which is beyond the reach of the State. Because several other sodomy statutes came to be challenged around the same time in different Circuits, the Supreme Court granted a writ of certiorari for the case. The Court considered the claim, and overruled the lower court by deeming the Georgia statute valid and constitutional (*Bowers v. Hardwick* 1986). A heterosexual couple, John and Mary Doe, joined Hardwick in the claim, stating that they wished to engage in the sexual activity prohibited by the sodomy statute. The Court dismissed their claim stating that they did not have standing to maintain this action. The only claim before the Supreme Court, therefore, was Hardwick's challenge of the Georgia statute as applied to homosexual sodomy (*Bowers* 1986:188).

The petitioner in the case, Attorney General of Georgia Michael J. Bowers stated in his brief to the Supreme Court that homosexual sodomy is not included in the right to privacy because it is condemned as immoral under Judeo-Christian laws and values. Bowers also stated that no universal principle of morality teaches that homosexuality is acceptable conduct. This belief means that the sexual acts associated with homosexuality are unacceptable and that the Georgia sodomy statute has roots in tradition and morality. Thus, according to the statement of the petitioner, homosexuality is not a historically protected and accepted way of life and there is no fundamental right to homosexual sodomy because fundamental rights must be rooted in traditions and moral values of the people.

The brief of the respondent relied on the fundamental right to privacy of all the citizens of the United States as granted by past Supreme Court decisions such as *Roe v. Wade* (1973) and *Griswold v. Connecticut* (1965). Due to this right to privacy, the brief argued, a heightened scrutiny must be applied in dealing with the Georgia sodomy statute. The brief of the respondent also stated that there is a fundamental right to have the private home be protected against unjustified State intrusion. It stated that if this statute is deemed constitutional, the state of Georgia will have the power to extend its criminal law into the very bedrooms of its citizens, to break up even wholly consensual, non-commercial sexual relations between willing adults. (*Bowers* Brief of the Respondent 1986). The respondent urged the Court to not only focus on homosexual sodomy, maintaining that the Georgia statute applied to all sodomy, performed by homosexual as well as heterosexual people.

The Supreme Court overruled the Appellate Court' judgment and affirmed the constitutionality of the Georgia sodomy statute in question, stating that the Constitution did not confer a fundamental right upon homosexuals to engage in sodomy (*Bowers* 1986:190-191). The Court also stated that the fact that the homosexual conduct occurs in the home does not affect the result (195-196), and that sodomy laws have value because they uphold morality of the citizenry (196).

The Reasoning of the Supreme Court

The Supreme Court declared the Georgia sodomy law to be constitutional on the basis that homosexual sodomy is not a fundamental right protected by the Constitution and that it may be regulated at the discretion of the states. Interestingly enough, the statute in question does not only apply to homosexual men and women, but to all citizens of Georgia engaging in "sexual act[s] involving the sex organs of one person and the mouth or anus of another" (Georgia Ann. Code 1984). This does not distinguish homosexual sodomy from heterosexual sodomy. However, the Court dismissed the claim of the heterosexual married couple that sued along with Hardwick. Because of this, the case became solely about the right of homosexuals to engage in sodomy, and therefore, their fundamental rights to association and privacy. A case solely concerned with homosexuality opens itself to moral judgments because of historical condemnation of homosexuality. The Court used these moral judgments to determine the outcome of this case.

The majority rejected the argument that there is a fundamental right to homosexual sodomy because there is a history of rejection and non-acceptance of such practice, and therefore no tradition of the value of such behavior. Although other cases based on morally unacceptable behavior determined that a sphere of privacy surrounded intimate association, the past cases dealing with this issue deal with matters of the family, such as child rearing, marriage, and procreation. The Court reasoned that since homosexuality does not have any connection to family, marriage, or procreation, the constitutional right to privacy does not apply (*Bowers* 1986:191). This sets a high water mark for determining substantive due process regarding privacy and intimate issues. The Court stated in *Bowers*, "the right to privacy stops here" (Rubenfeld 1989:747). The Court deemed that homosexual conduct does not fall under the protection of the home because other sexual crimes such as prostitution, incest, and child molestation are also subject to prosecution even though they may occur in the privacy of the home. The reasoning of the majority was that if homosexual sodomy falls under the classification of intimate association, then so do the other sexual crimes that need to be prosecuted even though they occur in the home. They were "unwilling to start down that road" (*Bowers* 1986:195-196).

This comparison of homosexuality with sexual crimes such as incest and prostitution effectively labels homosexuality as deviant behavior. If a person is a homosexual, he or she has a propensity to engage in deviant criminal behavior and therefore becomes inherently deviant. In this fashion, homosexuality itself, not the act of sodomy, comes under legal attack (Halley 1990:1734-1735). Because there ceases to be any distinction between homosexual identity and homosexual acts, a person may be labeled a criminal and treated as such although they are not prosecuted for the crime of

sodomy itself. Because "homosexual sodomy" has become "homosexuals as sodomy" an acknowledgement of gay identity is an admission of membership in a criminal class (Halley 1990:1734-1735). This clearly perpetuates heterosexist norms and beliefs through law and the wording of the decision in *Bowers*.

Statements and connotations of morality and traditional values permeate the majority opinion in this case. What seems to be a simple case that deals with an obscure statute, becomes a question of values and morals imposed by the Supreme Court, which states that "the law…is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed" (*Bowers* 1986:196). By this statement, the Court likens the case to an issue of morality and not an issue of law, superceding the right to privacy with the duty to maintain moral order.

Impact of *Bowers v. Hardwick* on the Socio-Legal Environment

Legal scholars as well as civil rights organizations anticipated the broad social and legal implications of this case. Along with the briefs filed by the petitioner and respondent, six *amicus curiae* briefs were filed for the consideration of the Supreme Court. An *amicus* brief is a brief filed in the Court by a separate person or organization, which has an interest in the case. They represent the interest groups involved in the case, and show the broader stakes in question.

Among the five briefs filed in favor of the respondent was a brief from the American Psychological Association and the American Public Health Association. They stated that homosexuality was not a disorder and cannot be cured. They also stated that homosexuality is not a lifestyle choice, but something that is determined in a person by the age of three and is irreversible. Because homosexuality is not a lifestyle choice, as commonly believed by mainstream religious organizations, but an inherent trait, homosexual men and women should be treated in the same manner as any other person, including having the same fundamental rights to privacy and intimate association. According to the American Psychological Association and the American Public Health Association, the freedom to express intimacy through sexual conduct is important to the psychological health of individuals, including homosexual individuals, and if law prohibits that intimacy, it poses harm. Procreation and perpetuation of the family is not the only acceptable form of intimate association. Because homosexual couples cannot have a traditional family, does not mean they cannot have any familial or intimate ties. Modern families have come to include homosexual couples and their adopted children (Michaelson 2000:1561). If the law curtails intimate association simply because traditional religious values are not upheld, this imposes on the mental health of those individuals who are denied the right to have intimate contact.

The Catholic League for Religious and Civil Rights filed

the only brief on the behalf of the petitioner. As a religious organization, they argued that the right to privacy, which is applied only to family matters, should not cover homosexual sodomy. Because homosexual men and women cannot marry or procreate, their relationships do not further the traditional institution of family, and therefore are not part of the fundamental protection from state intrusion into the bedroom. The Catholic League also argued that since traditional Anglo-American tradition and law does not support homosexual behavior it carries with it no fundamental rights to privacy.

The *amicus curiae* briefs give some insight into the broader implications of the decision in this case. Because the Court took a highly moral road to defending the constitutionality of the Georgia sodomy statute, *Bowers v. Hardwick* stands as the high water mark for substantive due process in legislation pertaining to morality. The Supreme Court uses *Bowers* to reinforce matters that could be construed as immoral. For example, in the case of *Michael H. v. Gerald D*. (1988) where the issue was the parental rights of an adulterous father, the Court referred to *Bowers* when it said that there is no historical protection for adulterous behavior. Adultery, like homosexuality is considered immoral and therefore subject to legal measures. In *Planned Parenthood v. Casey* (1992), a case in which the Court upheld abortion rights, the dissent by Chief Justice Rehnquist attempted to classify abortion as immoral and therefore grouped with other immoral acts such as sodomy in *Bowers*, not with fundamental rights such as in *Roe v. Wade* (1973). Justice Rehnquist stated that, because homosexual sodomy in *Bowers* did not fall under strict scrutiny, then neither should abortion in this case (*Casey* 1992:940,953). This is an example of how the Supreme Court may use *Bowers* in the future to limit abortion rights and those rights in general that may be morally suspect.

While most subsequent Supreme Court cases rely on *Bowers v. Hardwick* for guidelines of substantive due process, they do not address issues of homosexuality. Only one subsequent Supreme Court Decision since *Bowers* has addressed homosexuality. In *Romer v. Evans* (1996), a state constitutional amendment banning gay rights ordinances was deemed unconstitutional, which is seemingly contrary to the precedent set in *Bowers*. However, *Romer* was based on different grounds, and while the decision was a victory for homosexual men and women, it only barely grazes *Bowers*. In his dissent to the decision in *Romer*, Justice Scalia stated that the decision "places prestige of this institution behind a proposition that opposition to homosexuality is as reprehensible as racial or religious bias" (*Romer* 1996:636). This is evidence of a turn in social climate of the United States. While the Court cautiously did not overturn *Bowers*, it weakened the argument that homosexuality is immoral and not deserving of protection.

Bowers's focus on only homosexual sodomy had a tremendous impact on the gay rights movement. The gay and lesbian community has been largely ostracized and discriminated against because of the Judeo-Christian views that homosexuality is immoral.

The gay rights movement sought to remedy this, but when the *Bowers* decision was handed down, it set a legal precedent for such discrimination. This affected the gay-rights movement because, "in the years following *Bowers*, courts across the country declined to find constitutional violations in gay-rights cases, often reasoning that because sodomy could be criminalized, discrimination against sodomizers was constitutional" (Michaelson 2000:1569). An example of such discrimination is evident in *Woodward v. United States* (1989), where the Federal Circuit Court allowed a discharge of a navy seaman because he was gay. The majority opinion states, "After *Bowers* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm" (*Woodward* 1989:1076).

Shahar v. Bowers (1997) is another example. The case, which went before the 11th Circuit Court of Appeals, deals with a woman fired from a governmental position because she was a lesbian. The Attorney General of Georgia dismissed this woman from his office because she had a propensity to engage in sodomy, therefore presenting conflict with enforcement of the sodomy statute held constitutional in *Bowers*. She also created a "bad appearance" for the Attorney General Office (*Shahar* 1997:1105-1111). This case is an example of discrimination against homosexuals made legal by the *Bowers* decision. The 11th Circuit Court held that under the *Bowers* precedent, there was no wrongful action committed by the Attorney General of Georgia.

The subsequent case history determined by the *Bowers v. Hardwick* decision shows how that case has negatively affected the socio-legal environment of the United States by instituting a system of legal discrimination against homosexual men and women.

The Cultural Impact of *Bowers v. Hardwick*

While *Bowers v. Hardwick* set a legal precedent that negatively impacts our government by maintaining legal discrimination, the larger impact on our society comes with the cultural connotations of the case. Because the case focuses only on homosexual sodomy and does not take a broader view to encompass heterosexual sodomy as well, the case has been labeled the "gay case" and therefore can be used as a support for feelings of homophobia in the population. The *Bowers* decision, therefore, "is a judicial attempt to legitimize the homophobic tradition and intolerance of minority sexual practices" (Tharpes 1987:541). Homophobia comes across to the larger population as acceptable and supported by law because of the precedent set by the case. This is unacceptable because it is mentally and sometimes physically harmful to a significant portion of the population who are entitled to protection from these harms.

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Legislation From the Past Speaks to Us Today:
The Mundt- Nixon Bill

Roger J. Thompson

> *He who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee.*
>
> *Friedrich Nietzsche*

"There exist in the United States and elsewhere in the world terrorist groups. Many are part of international terrorist networks. These networks and groups engage in kidnappings, extortion, and other acts of violence" (Littman 1975:33-34). Surprisingly, that declaration was not made in the aftermath of the devastating terrorist attacks on the World Trade Center and the Pentagon. It was made half a century earlier by the Senate Internal Security Subcommittee. Such rhetorical declarations inspired fear among the populous, extracted attention from the media, and furthered the ambitions of politicians sitting on the committee. Representatives Karl Mundt of South Dakota and Richard Nixon of California engineered a House bill that extorted national paranoia for personal gain. Nixon was hailed by some of his colleagues, such as Representative Ben F. Jensen, as "one of the greatest patriots in all American history" (Congressional Record 1951:A4295-A8014). James Madison wrote in Federalist Paper No. 41 that, "Security against foreign danger is one of the primitive objects of civil society" (Littman 1975:19). In light of Madison's remark, Nixon and Mundt were merely indulging in their civic duty. But perhaps they should have listened to different echoes from the past, such as the apparently faint voice of Benjamin Franklin who wrote in 1759, "They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety" (Ignatief 2001:21). As we enter a new era of national insecurity, it becomes imperative that we listen to the past; that we do not ignore the wise voice of Franklin.

Of course it was not al Qaeda who sponsored and funded these alleged terrorist organizations in the 1950s, but Marxist-Leninists governments. On May 21, 1948, the U.S. House of Representatives overwhelmingly passed the Mundt-Nixon bill. It was the product of mass hysteria, an imaginative media, and unscrupulous politicians hoping to capitalize off public sentiment at the expense of others' civil liberties. The Mundt-Nixon Bill, or the Subversive Activities Control Bill, embodies the essence of how the Cold War affected domestic public policy in the United States. But perhaps more importantly, it has come to symbolize policy making in the United States when under the duress of an internal threat and the resolve of a shaken public. In such circumstances, the line between civil liberties and security bends, fractures, and occasionally even disappears. A poll taken after the September 11 attacks reinforces this

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idea – seventy percent of Americans are willing to give up some of their civil liberties in exchange for greater security (Morin 2002: A7).

Nixon learned from the Russian Revolution that a minority of dedicated revolutionaries could effectively usurp the government's authority. Nixon helped investigate a union that had been on strike for ten months against the Allis-Chalmers Manufacturing Company in Milwaukee. He examined how a small group of communists came to dominate an 8,700-member union "by clever parliamentary tactics, violence, intimidation, and dishonest ballot counting." In actuality, communists in leadership positions in various unions had more to do with their initial interest in creating them with the intention of improving working conditions and wages. Yet, "Nixon became convinced that small numbers of Communists were capable of controlling large unions," and perhaps capable of controlling larger organizations altogether (Gellman 1999:115). His solution was legislation to force Communists into the "sunlight" and destroy the subversive philosophy by selling democracy and the American way of life (Gellman 1999:115).

The bill symbolically declared, "That anyone who wanted to establish a totalitarian government in the United States under a foreign power was guilty of a crime" (Gellman 1999:115). Members of the Communist Party were required to register with the Attorney General. Federal employees could not participate in the Communist Party and could not "knowingly hire" any of its members. Furthermore, the U.S. government denied passports to its members in an effort to restrict their travel. There were no benefits for Communists to register with the government; their liberties would be revoked as a result of their political associations. Under the Mundt-Nixon Bill, Communists became less inclined to emerge into the sunlight and more inclined to clandestinely conduct their operations and meetings.

Nixon wrote years later in his memoirs that he did not want to outlaw the Communist Party. "I believed that this approach would be inefficient and counterproductive. The practical effect of outlawing the party would only be to drive the hard core of true believers underground. I thought it made more sense to drive the Communist Party into the open so that we could know who its members were" (Nixon 1978:46). But Nixon was not driving anyone into the open – he failed to see that requiring Communists to register with the Attorney General would also drive them underground. This should have been apparent to Nixon, considering he received a plethora of letters from the Communist Party specifically stating that, "If the bill became law, the party would not register under it and expose its members to police persecution and blacklisting" (Gellman 1999:162).

Irwin Gellman (1999) observed that Nixon "reflected the opinions of a significant portion of American society that was anxious about the growing Red menace" (160). In many respects, this is true. By December of 1949, Americans favored outlawing Communism by a margin of four to one (Rose 1999:221). NBC Radio, for

instance, canceled the fall premiere of the *The Aldrich Family* because a member of its cast was suspected of being a party-liner ("The Heat's On" 1950:13). Another poll revealed that in the event of a war with the Soviet Union, most Americans agreed that it would be acceptable to imprison those who subscribe to Communist ideology. Still, 13 percent of the public even "approved of shooting or hanging" every communist (Rose 1999:221). In the first week of September in 1950, Harry L. Warner called a second half-hour midday break at his Hollywood studio. For thirty minutes, he lectured to "two thousand executives, stars, and technicians on the evils of communism" (Rose 1999:219). Communism was a popular issue and, like Senator Joseph McCarthy, Nixon knew it (Gellman 1999:176).

"I advocate these restraints on Communism," argued Senator Mundt, also co-author of the bill, "as I advocated restraints on the Bunds whose activities were guided by Hitler." Mundt went on to argue that, "communists in this country are guilty of sabotage, propaganda, against the interests of the United States in time of war, physical abuse during elections (and murder) plus hundreds of crimes such as draft dodging, passport faking, perjury and lesser crimes" (Gellman 1999:114). The political leadership's latest attempt to subvert the rights of its own citizens under the guise of legislation intended to prevent subversion was nothing new. Even without new legislation, communists were already barred from federal employment *vis-à-vis* "loyalty tests." They were barred from teaching in many schools and colleges; from jobs in the defense industry; and in some cities and states, they were even barred from the ballot ("U.S. Communists" 1950).

An attempt to defeat the legislation was made by The National Committee to Defeat the Mundt Bill. This relatively benign committee was thoroughly investigated by the House Committee on Un-American Activities, or HUAC. During their investigation, HUAC went to great lengths to expose a connection between the lobbyists and the Communist Party. The United States' official portrayal of the Communist party is that its objective is to overthrow the United States government by "force and violence" (U.S. House of Representatives' Committee on Un-American Activities 1950:4). The inference made by HUAC in its report is that no credence can be given to lobbyists who violate the very laws it lobbies against.

The lobby group, regardless of its political affiliations, exaggerated the effects of the Mundt-Nixon bill almost as much as legislators exaggerated its necessity. The lobbyists felt the Mundt-Nixon bill would "put into effect in the United States the infamous Nazi decrees invoked by Hitler when he seized power in 1933, thus placing the American people under the yoke of 'legal' fascism" (U.S. House of Representatives 1950:6). They also felt that it would label persons or groups opposed to Jim Crow, anti-Semitism, and lynching as "subversive" and thus allow the government to restrict those groups' civil liberties. Most dramatically, it "would outlaw the First Amendment" (U.S. House of Representatives 1950:7). The *People's World* brazenly wrote: "The

fight against the Mundt-Nixon bill is the first line of defense of American democracy!" (Gellman 1999:162).

The far left was not the only voice in America arguing against the bill. Nixon's opponent in the upcoming congressional elections, Stephen I. Zetterberg, felt the bill sanctioned "guilt by association." He added: "If we are to keep America free, we should not allow Americans to be condemned simply because they belong to any organization or club, or simply because they think differently from others of us" (Gellman 1999:162). Nixon advised his political allies to use Zetterberg's opposition against him; he knew there was great political capital in anti-subversive legislation.

Others questioned the legislation. Mayor William O'Dwyer of New York, a Catholic and war veteran, was strongly opposed to Communism and felt Mundt-Nixon inhibited freedom "to discuss and criticize, freely and openly" (Gellman 1999:162). D.F. Bulwert, a lifelong Republican, wrote to Nixon that he was renouncing his party affiliation as a result of Mundt-Nixon. "You and the Republican Party," he angrily wrote, "are nothing but an un-American crew of Fascist bastards bent upon ruining the last free country in the world." The proposal would, "Hitlerize America using a few thousand measly Reds as an excuse" (Gellman 1999:166).

On May 21, 1948, the House passed Mundt-Nixon with a victory of 319 to 58, but the bill died because the Senate never took action (Nixon 1978:47). Two years later, the bill was re-introduced in response to President Truman's proposal for new legislation dealing with Communists ("Communist Control" 1950). When the bill was reintroduced, it was expanded to require all literature or broadcast produced by an organization officially labeled as Communist to state: "Disseminated by———, a Communist Organization" or "The following program is sponsored by ———, a Communist Organization" ("Examples" 1950). Representative Ben. F. Jensen of Iowa remarked that, "had the bill become law at that time [referring to when it was passed by the House in 1948], many more of these Red rascals still running at large would have been silenced long ago, and above all, fine American boys would not be shedding their blood on foreign soil today" (81st Cong. 1951:A4295-A8014). Representative Jensen naively thought the Korean War could have been avoided had only legislation been passed to expose and crush the communist threat before it infected Korea.

Senator Mundt argued that the bill actually guarded democracy at home. "We need to emphasize the protection of the individual against local usurpers or dictators" (81st Cong. 1951:A4295-A8014). Yet the bill restricted the travel of self-proclaimed Communists by denying passports, putting restrictions on their place of employment, forbidding them from entering into certain positions of leadership, and treating a political ideology as "an outright international conspiracy to overthrow democracy throughout the world." Proponents claimed, "The Constitution did not seek to deny the country the right to defend itself against those who would destroy it and that the measure

proposed nothing that would infringe upon the civil liberties of 'any decent and loyal American.'" At the same time, opponents such as Representative John S. Wood denounced it as "thought control" and "unconstitutional" ("Bill" 1950).

When the House passed the bill again, with an even greater victory of 354 to 20, Nixon was "Praised for Service in Control of Reds" ("Nixon Praised" 1950). Not everyone was content. Representative Usher L. Burdick accused the House of "legislating in a spirit of hysteria" ("Communist Control" 1950). In many respects, the latter may have been more accurate. Shortly after it passed, Los Angeles County attempted to immediately duplicate some of the bill's requirements even before it was put into federal law. The Los Angeles County Board of Supervisors passed an emergency ordinance "requiring all Communists or Communist sympathizers…to register at the sheriff's office after September 1st or face a $500 fine and six months in jail for each day's failure to register" ("The Heat's On" 1950). Few Americans sympathized with Los Angeles Communists for having to endure public scrutiny and special status as a result of their political ideology. The fact that it was "an emergency ordinance" also reveals the absurdity of the public's perception of the Red threat.

Unlike in 1948, the Senate took action on Mundt-Nixon. For three weeks, senators debated whether or not they should accept or amend the House bill. Senator Pat McCarran decided to submit a new bill that contained "some of the provisions" that Mundt-Nixon had but with one harsh addition referred to as the "Emergency Detention Act of 1950" (*Internal Security Act* 1950:35). Lisle Rose (1999) calls it the "concentration-camp clause" (220). The bill reads: "The detention of persons who there is reasonable ground to believe *probably* will commit or conspire with others to commit espionage or sabotage is, in a time of internal security emergency, essential to the common defense and to the safety and security of the territory, people, and the Constitution of the United States of America" (*Internal Security Act* 1950:37). Under this act, that person shall not be fined more than $10,000 or "imprisoned not more than ten years, or both" (*Internal Security Act* 1950:46).

"The Congress of the United States," Senator Humphrey passionately conveyed during a four-hour speech, "will regret the day it ever passes S. 4037… It will prove to be one of the darkest pages in American history" (Rose 1999:221). In an attempt to seek a compromise, McCarran added some constitutional guarantees to those detained. Upon hearing the compromise, Senator Lucas remarked, "We'll have signs on our concentration camps. They'll read, 'It's not comfortable, but it's constitutional'" (Rose 1999:221). Astonishingly, the McCarran Act passed by a large margin. The Communists, for their part, vowed never to register. Mr. Foster, who was part of the U.S. Communist leadership, fervently remarked, "We shall be doing what other progressive, but persecuted, minority movements have done before us in this country—among them the patriotic forces in our Revolution of national liberation, the abolitionists of Civil War times and trade unionists in the big

trustified, unorganized industries only a few years back, when to be known as a union member meant to court instant discharge" ("U.S. Communists" 1950).

In 1948, as an antidote to the perceived Communist agenda, the United States government legitimately denied some fundamental rights to certain citizens based on their political beliefs. The fall of China to communists, the detonation of the atomic bomb by the Soviet Union, and the Korean War all added to the rapidly building momentum of paranoia. These events, in combination with an extensive history of anti-communism and a form of government diametrically opposed to communist ideology, led Nixon to create an animal that eventually transformed into the Internal Security Act of 1950. The United States, a nation unwavering in its commitment to democracy and freedom of speech, was willing to curtail some of those freedoms because it was being crushed under the weight of its own fear. Truman, after Mundt-Nixon passed, questioned its constitutionality. In a wise statement he cautioned: "We must be eternally vigilant against those who would undermine freedom in the name of security" ("Examples" 1950). He went on to veto the Internal Security Act of 1950, calling it legislation that makes "a mockery of the Bill of Rights and of our claims to stand for freedom in the world" (81st Cong., 15629-32). Perhaps he speaks to us today. Nixon, in a nationwide radio broadcast, defended the bill, saying it "enhance[d] the Attorney General's arsenal in the battle against Communist penetration" (Gellman 1999:164). Those words sound somewhat familiar – except today it is not "Communist penetration" but terrorism; it is not the Internal Security Act but the USA Patriot Act; it is not then but now.

The USA Patriot Act allows non-citizens to be apprehended and deported if they belong to an organization the government considers affiliated with a terrorist organization. Furthermore, it vastly expands the legal limitations to eavesdropping on private conversations and e-mail. The government can enter and search private property, provided a warrant is issued, without notifying the owner (Weinstein 2002:A1). In a statistic reminiscent of McCarthyism's hysteria, one in four Americans is in favor of random searches of anyone who appears Arab or Muslim (Morin 2002:A07). Since September 11, more than a thousand non-citizens mysteriously disappeared from their daily lives. Only now are some trickling out of their detention centers and sharing their horror stories (Serrano 2001:A4). By listening to the past, we will be more aware and thus better equipped to prevent real terrorists from hijacking the Bill of Rights and crashing it into all we hold sacred – freedom.

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The Powers That Be:
The American Endeavor to Suppress Black Political Voices

Eric W. Buetzow

Throughout the history of America, the suppression of black political power has taken numerous structural and institutional forms. But the most disconcerting is that which involves direct abuse of power by publicly funded government agencies. The American government has used silencing mechanisms involving espionage, framing, threats, forgery, and even assassination to "neutralize" Black voices and ideas, thus further advancing political interests. Moreover, federal government agencies have abused and violated the laws, the Constitution, and the civil rights and liberties of many citizens in order to achieve a goal of quelling political ideas and movements of Blacks, as they usually opposed those of the rich white authorities that run America. Specifically, the secretive practices of the United States FBI and CIA are particularly disturbing, not to mention unlawful. By admittedly spying on and disrupting selected political groups in America, the FBI assumed the role of "political police," often acting as judge, jury, and executioner. They allocated to themselves the authority to decide which groups were acceptable and which were "a threat." The government, in acting in such a secretive manner, completely undermined the political process that is fundamental in maintaining the primacy of democratic principles in the American political system. Procedural justice and civil liberties were compromised in the name of protecting the dominant views of the ruling. These assertions will be explored through a historical examination and analysis of U.S. government practices, which, funded by American tax dollars, sought with great resolve to subdue the robust yet desperate political voices of African Americans.

Foremost, almost all Blacks in early America experienced blatant structural and institutional racism. But even from early on in the history of the nation, and particularly early on, namely the 18th and 19th centuries, the authorities specifically targeted Blacks assuming leadership roles, and took drastic measures to silence fervent Black voices. One such early case is that of David Walker. Walker is known primarily as the revolutionary writer and lecturer who boldly stabbed at the practice of slavery. In 1829, his 75-page

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article, "Appeal to the Coloured Citizens of the World," was published. In the article, he urges slaves to rise up and kill their masters, as he states that it is their duty (Sellman 2000). It was risky enough to publish the article in the North where abolitionist sentiment was increasing, but Walker then promoted the spreading and smuggling of the "Appeal" into the South. Shortly after, the Georgia State Legislature placed a price of $10,000 on the head of the radical writer if he was captured alive, $1,000 if he was dead (Sellman 2000). Within less than a year of the publication of his radical article, Walker was dead. His body found in the doorway of his secondhand clothing store, poison being the suspected reason for death (Microsoft Corporation 1999). The radical, extremist voice of Walker was successfully silenced, thus preventing him from ensuing any further damage to white supremacy in America.

Subsequently, the federal U.S. government also became involved in such activity through the Federal Bureau of Investigation (FBI). One of the very first targets of the FBI was Black Nationalist leader Marcus Garvey. In efforts to "neutralize" Garvey in 1919, J. Edgar Hoover, then the Director of the FBI, wrote that the federal government should use vast amounts of legal resources to make a case, *any* case against Garvey and make him *appear* guilty. The primary provocation for this treatment was Garvey's "agitating of the negro movement" (Churchill and Vander Wall 1990). Despite their efforts and numerous other charges, the best the FBI could conjure up was a minor mail fraud conviction. But this conviction was sufficient in removing Garvey from the political sphere, as he was sent to an Atlanta federal prison. This also qualified him to be deported as an "undesirable alien." Consequently, he was deported from the United States in 1927 (O'Reilly 1994). The publicly funded FBI, originally created as a means of ensuring justice in the United States, now played an official role in ridding the country of political opposition to the views of the rich white powers that controlled America…and this was merely the beginning.

Further scrutiny can be focused on the infamous COINTELPRO operations, or counterintelligence programs of the FBI, which specifically targeted blacks. On August 25, 1967, the FBI officially launched a formal "counterintelligence" campaign against "black hate groups" (Carson 1994: 48). Agents were given authority to "expose, disrupt, misdirect, or otherwise neutralize the activities of Black nationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters" (Carson 1994: 48). In essence, COINTELPRO served to

disrupt and block political activity that departed from orthodoxy, or stood in opposition to state or federal authority. The agents that executed these programs were often ordered to forge documents, spy, and harass their targets (Blackstock 1988).

The political group that was most targeted and sought after by the FBI through COINTELPRO operations was the Black Panther Party (BPP). This was mainly because the government felt that the BPP posed the biggest threat of successfully commencing a united black liberation movement (Churchill and Vander Wall 1990). The BPP formed in 1966 and grew rather quickly, catching the concerned eye of the federal government through the FBI. An even greater concern to them was the party's ability to attract the attention and support of other black "extremist" political groups. The first of such activity was the engineering of a merger in 1968 with the Student Nonviolent Coordinating Committee (SNCC), a political organization formed in 1960 by black college students who were dedicated to overturning segregation in the South and giving young blacks a stronger voice in the civil rights movement (O'Reilly 1994; Microsoft Corporation 1999). This marked the joining of the two strongest radical black groups in the nation, which quickly prompted COINTELPRO action. The FBI had soon fabricated letters and documents, successfully creating the false impression that Stokely Carmichael, who had been designated honorary BPP Prime Minister, was actually an undercover CIA operative (Blackstock 1998). Fearing for his life, Carmichael fled the country. The Black Panther-SNCC alliance was successfully broken up. The federal government continued to execute their own non-public policies in America, allocating themselves powers that specifically violated the U.S. Constitution and federal laws. This list includes freedom of expression, freedom of assembly, equal protection under the law, libel, invasion of privacy, illegal search and seizure, …and the list continues. It is imperative to be mindful of the fact that one of the main functions of the U.S. Constitution is to protect the American people from exactly this type of activity.

Moreover, the FBI also pitted the Panthers against other radical black groups. With means of prevention in mind, Hoover and the FBI decided to set the BPP against the United Slaves, a California Black nationalist group. This would also help the FBI in weakening the influence of both groups. Released COINTELPRO documents show that Hoover, in order to "provoke a vendetta" between the two groups, proposed writing a fictional, anonymous letter to the United Slaves divulging a BPP plot to kill their leader, Ron Karenga (Blackstock 1998). In addition, an onslaught of

defamatory cartoons of both groups was released by the Bureau, intensifying the tension between them. The tension escalated to a breaking point in 1969 when two LA Panthers were gunned down and killed inside UCLA's Campbell Hall by three United Slaves members (O'Reilly 1994; Churchhill and Vanderwall 1990). The government pitted Black political groups against each other, essentially to let them destroy each other, or at least to weaken them and the legitimacy of their cause. This was yet another mechanism for silencing the radical black voices.

Additionally, the FBI soon resorted to raw acts of violence and murder against the Panther Party. Behind the façade of investigative police work, a team of federal agents raided the Chicago BPP headquarters and killed two Panther leaders, Fred Hampton and Mark Clark. The Panthers who were not killed in the raid were beaten and arrested for "aggressive assault" and "attempted murder" of the raiding agents, even though none of them fired a single shot (Churchill and Vander Wall 1990). Here, the federal government took liberties with American lives, proving that the FBI was willing and highly capable of committing murder to further their political agenda. The government's war with the Panthers continued. The FBI's shoot-outs, beatings, arrests, trials, and continued harassment critically injured the party. By the early 1970s, the blows continuously dealt by the FBI became too much to overcome and the Black Panther Party collapsed. The government program against the BPP had succeeded, creating one more stepping-stone of success in ridding America of political freedom and minority voices.

Furthermore, throughout this same time period, the government and the Bureau had invested in ongoing counter-intelligence efforts against other political groups and leaders as well. They began surveillance on the Nation of Islam (NoI) and their leader, Elijah Muhammed. This monitoring was justified on the grounds that NoI members "disavow allegiance to the United States" and "are taught not to obey the laws of the United States" (Churchill and Vander Wall 1996: 96). The famous Black activist Malcolm X, also known as Malcolm Little, was a strong member of the group and one of Elijah Muhammad's head lieutenants, but Malcolm X decided to break away from the NoI in March of 1964. He then founded a separate church, the Muslim Mosque, Inc., as well as the Organization of Afro-American Unity (OAAU) (Carson 1991). Again, the FBI became concerned with the potential for these organizations to align with other strong groups. The Bureau undertook actions to block the development of alliances between the OAAU and white radical organizations such as the Socialist Workers

Party (Churchill and Vander Wall 1990). Once again, the money of the American taxpayers was hard at work.

Yet the ultimate silencing mechanism was yet to come. During a speech in Harlem on the night of February 21, 1965, Malcolm X was assassinated. By this time, the federal government had compiled at least 2,300 pages of material in just one of its files on him, the NoI and OAAU (O'Reilly 1994). The government alleges Malcolm X was murdered by his former NoI colleagues as a result of inter-group fighting, which supposedly was the cause of his parting from the organization. In addition, the NoI was apparently angry at Malcolm's establishment of rival groups (Carson 1991). But released COINTELPRO documents reveal that the NoI resentment did not "just happen," rather, it had "been developed" by deliberate FBI actions (Churchill and Vander Wall 1996: 103). They achieved this state of tension through the "sparking of acrimonious debates within the organization," as well as other tactics intended to cultivate internal disagreements (Churchill and Vander Wall 1996: 103). Four days after the assassination of Malcom X, the FBI removed him from their Security Index (Carson 1991). To this day no one has been held legally accountable for the murder of Malcolm X, but one FBI agent wrote that he revered the murder as something of a model for "successful" counterintelligence operations (Churchill and Vander Wall 1990; Carson 1991). The bottom line is that, at least on some level, the American government was responsible for the death of Malcom X. Even if a government agent did not pull the trigger or order a hit, which has never been ruled out, by intentionally and maliciously provoking factional fighting, the federal government is undoubtedly an underlying cause of the premature end to the life of Malcom X. Kenneth O'Reilly (1994), historian and author of *Racial Matters* and *Black Americans: The FBI Files*, writes that Hoover and his men "in effect, did their best to incite the killing short of actually pulling triggers" (7).

Unsurprisingly, the FBI also took aim on one of the most influential Black activists in our nation's history, Reverend Dr. Martin Luther King Jr. He first drew their attention with his formation of the Southern Christian Leadership Conference (SCLC), a nonviolent Black civil rights organization. One of the group's primary concerns was Black voting rights in the South. Within a year of King's founding of the SCLC, a personal file had been opened on him. Before long the FBI had broken into every SCLC office, as well as Dr. King's house, and bugged and wiretapped the insides (O'Reilly 1994). In a 1963 FBI document, the Bureau wrote that their actions were necessary because their civil rights activism was posing a

direct threat to "the established order of the U.S" (Churchill and Vander Wall 1996: 96). Following King's "I Have a Dream" speech, on August 28, 1963, FBI official William C. Sullivan wrote the following:

> We must mark [King] now, if we have not before as the most dangerous Negro in the future of this nation from the standpoint of communism, the Negro, and national security…it may be unrealistic to limit [our actions against King] to legalistic proofs that would stand up in court or before congressional committees. (Churchill and Vander Wall 1996: 96)

Soon after, the Bureau attempted to destroy his credibility and ultimately his remarkable influence on political activity in America. They took "highlights" of King from their surveillance tapes and used them to create a tape that contained evidence of King engaging in sexual acts with prostitutes, attempting to destroy his character and make a mockery of his status as a reverend (O'Reilly 1994). The FBI then sent a copy of the tape to King anonymously, accompanied with a letter urging him to commit suicide before his acceptance of the Nobel Prize, for if he didn't, the tapes would be made public (Pepper 1995). Apparently blackmail was permissible if exercised by those in official government positions. But despite the dirty tactics, King disregarded the letter. Fortunately, the fabricated tapes were refused by the news media, killing the FBI's plan to eliminate the influence King possessed in America's political arena.

But the war on Martin Luther King Jr. was far from over. On April 4, 1968, Reverend Dr. Martin Luther King Jr. was shot dead. A man by the name of James Earl Ray was arrested and convicted of the murder. But overwhelming evidence points elsewhere; directly at the federal government of the United States. First, following the assassination, using taxpayer money, the government footed the bill for thousands of dollars of bar tabs for one of the state's principle witnesses, Charles Stephens. Stephens then changed his original descriptions of the assassin from an anonymous black man to James Earl Ray (O'Reilly 1994; Lane and Gregory 1993). Also, none of Ray's defense attorneys have ever been allowed to examine the alleged murder weapon, and FBI and the House Select Committee on Assassinations were unable to verify that Ray's rifle was the murder weapon (Lane and Gregory 1993). These facts are merely the beginning. The large amount of

evidence against U.S. government agencies in King's death caused the House Select Committee on Assassinations in 1978 to conclude that there was a 95% probability that King was killed by a conspiracy (Pepper 1995). The U.S. government successfully eliminated one of the greatest black leaders this country has ever seen, not only victimizing King, but also James Earl Ray and every citizen of the United States. Democracy, due process, and the most primary of American principles were completely disregarded and trampled, as a dominant few exercised their views through their own autocratic means.

In conclusion, the federal government is forever linked to African-American history through suppression of black political power and black leaders. The FBI and other agencies have been able to infiltrate and disrupt black political activity in America, eliminating the notion of political freedom. This is a direct result of the power structure that makes up the American political system. As illustrated time and again through agencies such as the FBI, the government has been able to influence political outcome. Those in power have been able to violate the very laws that they put forth to govern the country, as well as the civil liberties and rights of citizens, in order to promote their political ideas. Clearly, the government has lied, blackmailed, fabricated documents, and even murdered in its "programs" to counter growing black political strength. Primarily, it is vital to recognize the public nature of the government and their actions, as they are financed by tax dollars and therefore, powered by the money of the citizens. Democracy, being the foundation of America as a nation, ensures that the will of the people, which includes the voices of *all* people, will have the opportunity and the ability to be expressed. Thus, it is simply a reversion to aristocracy when a small group of individuals can set aside the Constitution and force their views on the country. Through their extensive control of information and their ability to act covertly, the American government can continue to serve the interests of the few elites who maintain political and authoritative clout, and continue to belittle and undermine the most fundamental and indispensable principles to the American model of democracy.

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