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The *Law and Society Journal at the University of California, Santa Barbara* (ISSN: 1942-3152), is published annually by undergraduate students at UCSB under the leadership of the Law & Society Program faculty. The Law & Society Program is an interdisciplinary major that draws faculty from the humanities and social sciences; it utilizes both a theoretical and empirical approach to the understanding of law, with courses ranging from alternative dispute resolution to human rights. The Program is designed to explore topics relevant to current issues facing the community, the nation and the world. The *Law and Society Journal at UCSB* aims to be an interdisciplinary endeavor, seeking creative and original submissions from undergraduates of all majors and disciplines in order to gain a more comprehensive outlook on contemporary law in action within our society. The *Law and Society Journal at UCSB* is an undergraduate, peer-reviewed journal highlighting outstanding undergraduate scholarship that increases the body of knowledge in this field.

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The *Law and Society Journal 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's name, major, political affiliation, race, color, national origin, religion, sex, physical abilities, age, ancestry, marital status, sexual orientation, prior publications, or pending publication offers. Works can be submitted no later than one academic calendar year from the author's commencement from UCSB. Publication in the *Law and Society Journal at UCSB* does not prohibit authors' submission 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 Journal at UCSB*, permitting the prior publication allows.

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LAW AND SOCIETY JOURNAL AT THE UNIVERSITY OF CALIFORNIA, SANTA BARBARA

LAW AND SOCIETY JOURNAL AT THE UNIVERSITY OF CALIFORNIA, SANTA BARBARA

University of California Cross-Campus Dialogue on Intimate Justice

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Spring 2009

Dear Readers:

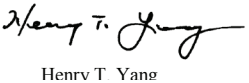
It is my pleasure to welcome you to the eighth annual edition of the *Law and Society Journal*, first print and online law and society undergraduate publication in the nation.

The *Journal* has done another superb job of highlighting the exciting work of undergraduate students at UC Santa Barbara and other UC campuses in the discipline of law and society. Th breadth and diversity of topics included in this and each edition of the *Journal* is impressive. continued acceptance of the *Journal* into law libraries nationally and abroad speaks highly abc overall quality of submissions received by the *Journal* and its rigorous selection and editorial processes.

I am proud of this body of work produced by our undergraduate students. I believe that the publication record of the student-run *Law and Society Journal* reflects the intellectual and leadership capabilities of the undergraduate student body at UC Santa Barbara.

I hope that you will join me in enjoying this publication. I wish the *Journal* continued succes the future.

Sincerely,



Henry T. Yang

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Heather Bartlett is a fourth year Literature major in the College of Creative Studies, with a love of poetry, sociology and biology. *Scared Further Into a Silent Epidemic* on rape awareness rhetoric at UC Santa Barbara is part of a bigger effort to end the silence around sexual violence whenever possible. Special thanks to Debra Guckenheimer and her class Sociology 185S: Feminist Response to Sexual Assault as well as Carole Mosley.

Courtney Cole, a Western Cherokee, is a third year Environmental Studies major with a minor in Native American and Indigenous studies. She is the current chair of the UC Santa Barbara American Indian Student Association (ASIA) and enjoys her involvement in the Native community. She also spends her time as a volunteer for a non-profit environmental law firm in Santa Barbara. Her academic interests include both environmental and Indian law, more specifically coastal and ocean law and policy as well as the implications of Native American cultures and worldviews for environmental policy. She plans to attend law school and hopes to, one day, practice law.

Kimberly Goldberg will graduate from UC Santa Barbara in the Fall of 2010 with a B.S. in Biological Sciences. After graduation she would like to go to medical school to become a doctor. Kimberly's life dream is to become an OB/GYN or work with neonatal patients. Although not usually interested in humanities subjects, she wrote *Pregnant Women and Mothers Behind Bars* for a writing class and became very intrigued by the subject. Originally from Orange County, California, Kimberly is planning to study abroad this summer though the University of Virginia's Semester at Sea program, which will focus specifically on human rights.

Angela Habibi received her B.A. dual degree from UC Santa Barbara in Law and Society and Women's Studies graduating with honors distinction within the major in 2008. She is currently working as a litigation legal assistant at a law firm in preparation for law school. Angela has studied at UC Berkeley and conducted field research abroad in nine countries through the University of Virginia's Semester at Sea program, developing a strong intellectual interest in intimate violence and domestic violence issues. The theory and academia learned from the classroom as well as

her experience abroad has fueled her passion to pursue a J.D. and promote human rights through just and equal legal representation.

Maizie Houghton began her studies at UC Santa Barbara in 2007. Fully engaged by the new challenges of academia and college life, her interests in various legal, political and sociological issues grew and developed within the Law and Society program. Initially sparked by two brilliant and provocative teachers, Eve Darian-Smith and Lisa Hajjar, Houghton aspires to someday reduce the deficiencies of legal systems that blemish the cultures of the world. Her piece, *The Northern New Mexico Lands of Life and Death*, addresses the concerns surrounding Hispanic land rights across the Southwest region of America. Born in Santa Fe, New Mexico and raised on a small farm, she not only has a geographical connection to the land but a love for its history and people. Houghton currently lives on Lake Tahoe and plans to attend the University of Connecticut in the fall of 2009.

Panos Mavrokonstantis is a third year student from Cyprus studying at UCSB this year through the EAP program. He will graduate in June 2010 from his home university – The University of Warwick, United Kingdom, with a B.Sc. in Philosophy, Politics and Economics. In the summer of 2008 he interned at the Council of the European Union in Brussels through the Permanent Representation of the Republic of Cyprus to the EU, where he followed the progress of the meetings of the Council's Political and Security Committee, as well as of other working groups, which dealt with international relations. Beyond academics, he is an avid soccer player and drummer and particularly enjoys performing with his rock band. After graduation he plans to pursue a post-graduate degree in public policy.

Scott McDonald is a fourth year History and Anthropology double major. Scott has written extensively on topics pertaining to Late Antiquity and/or the role of the law in creating social change, making the piece featured in this journal a perfect synthesis of his interests. His senior thesis in the history department analyzed ancient Armenia's place in Roman-Persian relations during the third and fourth century C.E., and his honors thesis in anthropology examined the importance of the legal backgrounds of India's

three most important nationalist figures: Gandhi, Nehru, and Ambedkar. Outside of academics, Scott is the Advocate General within Associated Students and a student Honors coordinator in the College of Letters and Science. Following graduation, Scott will be attending law school at UCLA and he hopes to pursue a career in criminal prosecution.

Stephanie Murphy, through her academic career, has slowly realized that she does not feel a particular affinity for mainstream gender roles. Her interactions with both females and males in dorms, athletics, and classes tended to fall outside of gendered social expectations. Until she took classes discussing the basis of these expectations, she did not know where her sense of difference came from. Once she understood that she could not exclusively relate to either side of the feminine/masculine dichotomy, she began using her expanded repertoire of theoretical tools to think about how this dichotomy is reinforced in every day life. She found the use of political rhetoric to play on and support arbitrary normativities intriguing, both in the case of Prop 8 and Western perspectives of 'the Muslim world.' Her submission to the Journal includes her musings on the Prop 8 campaigns, but she hopes to continue academic writing in many areas, especially in the area of comparative international law.

Brock Roverud is both a member of the class of 2009 and one of the last members of the Law & Society major. A majority of his time was spent swimming at UCSB and having the pleasure of being captain this year. He was also involved with the Student Athlete Advisory Board. Since 2005, he has enjoyed a beachfront office lifeguarding in L.A. County during the summers. He recently began an internship with the Environmental Defense Center in Santa Barbara, CA, working on a long-term project to keep Goleta beach an enjoyable and popular recreation site. He has always enjoyed the outdoors you could say, and looks to the ways in which the law can help preserve the natural world. In the future he hopes to work for the California Coastal Commission and ensure our coastlines are preserved or properly developed to best suit the public.

SANTA BARBARA COUNTY BAR FOUNDATION PAPER PRIZE AWARDS

The Santa Barbara County Bar Foundation sponsors the *Journal's* annual paper prize competition. Every UCSB submission to the *Journal* is eligible for the Santa Barbara County Bar Foundation paper prizes; first prize receives $500, second prize $200, and third prize $100. After the submissions are chosen for publication, the Editorial Board selects paper prize award winners that exemplify outstanding undergraduate scholarship.

2008-2009 SANTA BARBARA COUNTY BAR FOUNDATION PAPER PRIZE AWARD RECIPIENTS

FIRST PRIZE

THE NATIVE AMERICAN CHURCH: A MOVEMENT FROM WITHIN
Brock Roverud

SECOND PRIZE

A CRITICAL EVALUATION OF MILL'S PROPOSED LIMITS ON LEGITIMATE INTERFERENCE WITH THE INDIVIDUAL
Panos Mavrokonstantis

THIRD PRIZE

RECOGNITION WITHOUT LEGITIMATION: ABORIGONAL SUBSISTENCE AND SELF-DETERMINATION
Courtney Cole

UNIVERISTY OF CALIFORNIA CROSS-CAMPUS DIALOGUE PAPER PRIZE AWARDS

The Editorial Board has raised funds throughout the year in order to establish a paper prize competition specifically for the Cross-Campus Dialogue portion of the Journal. Every submission to the Cross-Campus Dialouge is eligible for the paper prizes; first prize receives $250, second prize $150, and third prize $100. After the submissions are chosen for publication, the Editorial Board selects paper prize award winners that exemplify outstanding undergraduate scholarship.

2008-2009 UNIVERISTY OF CALIFORNIA CROSS-CAMPUS DIALOGUE PAPER PRIZE RECIPIENTS

FIRST PRIZE

RETHINKING GENDER, SEXUALITY AND PUBLIC INTIMACY
Stephanie Murphy

SECOND PRIZE

SCARED FURTHER INTO A SILENT EPIDEMIC: RHETORIC IN RAPE AWARENESS AND PREVENTION CAMPAIGNS
Heather Bartlett

THIRD PRIZE

PREGNANT WOMEN AND MOTHERS BEHIND BARS
Kimberly Goldberg

EDITOR'S NOTE

The eighth volume of the *Law and Society Journal at the University of California Santa Barbara* evokes a bittersweet sense of both growth and accomplishment. As this year's senior editors prepare to conclude their time at UC Santa Barbara, so does the Law & Society program in which many of us grew up academically. Eight years ago, Eve Darian-Smith and ten undergraduate students recognized the need to create a forum encouraging undergraduate publication. They fulfilled their role in this development with such strong conviction and accomplishment, that now in the academic year 2008-2009 the *Journal* is not only able to publish its eighth volume, but also promise a ninth.

Our *Journal* has a history of perseverance and growth. Many of the previous editorial boards have described their efforts as striving to create a foundation solid enough to ensure the continued annual publication of the *Journal.* This year we felt strongly that we had a responsibility to commit ourselves, and our time on the *Journal,* to making the continued publication of exceptional undergraduate work absolutely certain. As another class of Law & Society Program students matriculated last June, this year the board filled its editorial positions from, not only, outside of the Law & Society program, but also from outside of the country. We committed ourselves to finding exceptional undergraduate work, from both within and beyond UC Santa Barbara.

The *Journal*, first and foremost, is a forum created for and by UC Santa Barbara undergraduates. This year, in aiming to keep the *Journal* moving in a fresh and innovative direction while maintaining its original integrity, we created an extension of the original *Journal.* This year marks the first year of the *University of California Cross-Campus Dialogue*, a new annual section of the *Journal* open to undergraduates from all University of California campuses. Each year, the editorial board will choose a new topic of discourse. For our first year we chose the topic Intimate Justice. We left our definition of Intimate Justice fairly open to student interpretation and

encouraged each to write on a topic intimate to them (i.e. sexuality, gender and racial identities, *et cetera*) and how that intimacy relates to justice, law and society. In continuing the *Journal's* newest tradition the *University of California Cross-Campus Dialogue* will give young academic California a forum to express ideas and start a conversation on contemporary state and national issues among peers while maintaining the integrity and professionalism of the University of California.

This year, we continued working towards the *Journal's* original goal of subscriptions from the top fifty law schools. Presently, the *Journal's* readership includes law schools such as UC Berkeley, UC Hastings, Yale, NYU, Stanford, Columbia, Cornell, and Northwestern. As of July 2008, all U.S. accredited law schools and many government agencies such as the Supreme Court, the Justice Department and the Federal Trade Commission have electronic access to the Journal through HeinOnline. Importantly, we also sought to widen readership among our peers at UC Santa Barbara and reach out to the entire UC community. I sincerely hope that the creation and continuation of the *University of California Cross-Campus Dialogue* will encourage students from all over the UC system to come together to foster undergraduate discourse.

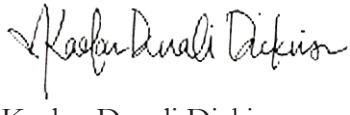
This year's topic, intimate justice, brought us pieces with immediately broad implications questioning the histories of laws allowing marital rape, and exploring the treatment of mothers and pregnant women in the United States prison system. Our chosen topic also brought us pieces that hit closer to home, discussing the rhetoric of California's Prop8 campaigns as well that of rape awareness campaigns on our very own UC Santa Barbara campus. The eighth edition also includes three pieces, which explore indigineity, and two pieces, which discuss the history of law's relationship with philosophy and religion.

I cannot conclude this letter without a heartfelt thank you to Chancellor Henry T. Yang, Vice Chancellor for Student Affairs Michael D. Young, the Office of Student Life, UCSB Associated Students,

and the Santa Barbara Bar Foundation for their continued support and commitment. Without it, the *Journal* would be unable to continue to advance undergraduate academia and exploration in the manner we currently do.

Finally, to the Editorial Board of 2008-2009: Thank you for your dedication and hard work, your late nights and your confidence in me. We committed ourselves to providing our peers with an exceptional opportunity, and you should all be very proud of the finished product. To Heidi Hoechst, our academic advisor, thank you for all the questions answered and time you spent with us. While we wish you well in your new endeavor, your encouragement and presence will be greatly missed.

I am honored to present the work of thirteen editors, eight authors and the myriad of support behind us all in the eighth volume of the *Law and Society Journal at University of California Santa Barbara.*



Kaelan Denali Dickinson
Editor-in-Chief

THE NATIVE AMERICAN CHURCH: A MOVEMENT FROM WITHIN

BROCK ROVERUD

This essay defines the Native American Church as an indigenous legal movement. Starting with the inception of the Ghost Dance during the late 19th century, Native Americans have struggled to form a religious foundation that remains faithful to their unique sense of spirituality they fulfill primarily through peyote ingestion. The U.S. government has been reluctant to recognize such a practice and has used various laws and enforcement policies, i.e. relocation and the reservation system, to criminalize this Indian religion and discourage native identity. Ironically, U.S. resistance helped drive the Native American Church to be the entity is today because a whole new pan-American identity was formed. In light of important historical, cultural, and legal contexts, peyote use in a religious setting will seem less like a criminal practice and more like a ritual that is deserving of tolerance and respect.

THE CHURCH AND THE TIPI

"The white man goes to his church and talks about Jesus, the Indian goes to his tipi and talks to Jesus"
- Quanah Parker

These simple words immediately spark controversy when they greet Christian ears and its advocates. What this quote suggests goes far beyond its mere utterance as it clearly places the "white man" and the "Indian" in two distinct sacred places, a church and a tipi. Both seemingly have the similar goal of a better understanding of Jesus Christ. However, there is a stark difference in the way a member obtains that understanding; the Native American Church (NAC) member witnesses the divine through a mind-altering experience made possible by the peyote plant, while the "white man" gathers his salvation through abstract, symbolic and discursive means.

Although the analysis can be discussed at great lengths, Parker's quote accurately frames the relationship between Native American religious

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endeavors pitted against those of Christian beliefs. To be more specific, it lays the groundwork of how the NAC continues to struggle to facilitate an indigenous legal movement, a religious revival if you will, in the midst of a current nation-state that aims to immediately suppress any notion of religious rites involving drug use. The struggle begins roughly in 1890 with the widespread inception of the Ghost Dance and peyotism among tribes, and continues to resist "general laws of applicability" over one hundred years later. Using this quote as a platform, I will uncover the cultural and legal importance behind this renewed spiritual fulfillment for Native Americans, even if the psychedelic means they exercise are consistently viewed as "heathenish Indian practices" or "evils" that directly conflict with United States and state law.[1]

In order to gain a thorough understanding of the NAC as a religious movement, a combination of anthropological, ethnographic, and historical approaches are most effective. First and foremost, it should be mentioned that these are not meant to be mutually exclusive categories for studying this complex Native American religious movement because each inevitably overlap at several junctions. Anthropological study proves beneficial in the sense that close attention to specific language is vital in deciphering genuine differences between the arguments from the indigenous side and that of the State. Not only is language identity productive in this way, but it also gives the indigenous a voice that would otherwise remain overlooked due to racist viewpoints that arise strictly from ignorance, notions of skin color, or plain misunderstanding. Mary Brave Bird, a Lakota Native, and Billy Evans Horse, a former Kiowa tribal leader, offer great insight into indigenous psychology as it pertains to religion, personal fulfillment, and the role Native Americans should play in the current political, social, and legal landscape in the United States. In Brave Bird's mind "to be sovereign means being your own entity"[2] and this hints that an indigenous view of physical sovereignty for an individual is closely tied to spiritual awareness and the state of mind that peyote use helps evoke.

In addition, looking at key efforts to pass laws prohibiting the use or possession of peyote along with relevant court cases illustrates how the State unilaterally attempts to deny American Indians religious freedoms. Since "danger of the spread of the habit" was so widely feared, numerous arrests and fines were imposed on "nearly every reservation that dared experiment with the new religion."[3] Supreme Court case Employment Division v. Smith, 494 U.S. 872 (1990) is extremely useful

1 Omer C. Stewart, "Early Efforts to Supress Peyote," in *Peyote Religion: A History* (University of Oklahoma Press: Norman and London, 1991).

2 Mary Brave Bird, interview by Christopher Wise and R. Todd, , *A Conversation with Mary Brave Bird*, American Indian Quarterly (2000): 482-493.

3 Stewart, "Efforts to Pass a Federal Law," *Peyote Religion: A History*.

in evaluating language with microscopic scrutiny at the current State level. Although the indigenous voice has been transformed into legal jargon, the arguments that Craig Dorsay puts forth on behalf of NAC members echo their spiritual sentiments and demand that religious use of peyote is protected under the First Amendment of the U.S. Constitution. Such an argument further propels my topic as it forcibly clashes the native idea of religious liberty with that of the U.S. government and begs the question of how the two can possibly harmonize.

An ethnographic angle is dire if there is going to be any attempt not only to comprehend the indigenous religious and spiritual perspective fully, but to realize how these perspectives can fit into American consciousness. First hand accounts of the religious ceremonies and the attitudes surrounding them enable the public eye to transcend negative stereotypes that soil any chance for cross-cultural religious tolerance. In his narrative, The Ghost-Dance Religion and the Sioux Outbreak of 1890, James Mooney employs a very objective and observational approach in order to give his readers a true sense of how natives behaved and functioned in religious settings on the reservations. Instead of revealing the stereotypical barbaric, savage, and threatening aspects of the Ghost Dance religion and its founder, Wovoka, Mooney uses facts his first hand account to describe the native people as peaceful, productive, and autonomous. By writing from an observational and factual approach more Americans are able to come into contact with the so-called savages to form their own opinions about these religious practices. With this approach, the general public, who otherwise had no means to come in contact with Native Americans, can do so in an educated and objective light.

Perhaps the overarching and most efficient method of viewing religious freedom as an indigenous legal movement is to look from a historical standpoint. Comparing the motives and methods behind the Ghost Dance religion with that of the Native American Church reveals striking similarities along with important differences. Laws such as the Dawes Act (1887) and the American Indian Religious Freedom Act (1978), cases like Unemployment Division v. Smith (1990), as well as the proper application of the First Amendment, display the progress Native Americans made within the courtroom from the late nineteenth century and twentieth centuries. The way the law is worded and interpreted and how this language and interpretation evolves over time show how indigenous efforts are viewed within the context and control of the State and its broader agenda to Americanize indigenous people. By looking at the social and legal landscape during the original Ghost Dance religion and the current Native American Church, will allow an understanding of this intimate religious struggle as an indigenous movement.

RELOCATION AND REFORMATION: THE MOVEMENT BEGINS

It would be difficult describing the Ghost Dance religion and the Native American Church as a religious movement without first inquiring about the legal causes that pushed Native Americans to spark a religious revival. Before the General Allotment Act, better known as the Dawes Act (1887), many Indian tribes still enjoyed cultural autonomy from various other indigenous settlements. However, with the implementation of this Act, tribes from all corners of the U.S. were forced not only to leave their homeland, but "to identify with a certain kind of property ownership, and to divest themselves of their tribal property which were both their racial inheritance and their tracts of communal land."[4] In essence, the U.S. government sought to implement a "complete Euro-American hegemony in North America" by physically and psychologically eroding the cultural ties that held indigenous groups together.[5] The tribes subject to this law were shoved into a collision with other natives that each held their own complex belief systems that had evolved over thousands of years. In addition, white Christian missionaries consistently pressured the tribes while white neighbors pressured Indians to drink their whisky. Omaha Indian Francis La Flesche recalls the common mentality which asked, "the white people drink, and why should not we?"[6] This mentality festered into a disease that quickly spread throughout reservations. Indians were heavily influenced and subjected to the use of alcohol, which furthered the disintegration of not only cultural ties, but all the way down to nuclear family ties as well; children even became afraid of their mothers who drank.[7] As a result, this sudden merge of various Indian groups propagated a pan-American identity among the tribes, and began to foster the means to initiate something tangible, something they could call their own in the face of blatant genocide. This identity made the Ghost Dance and peyote use gain popularity among newly formed Indian groups on the reservations.

With the inception of the Ghost Dance and the use of peyote, "there came a lull in all this drunkenness and lawlessness" recalls La Flesche.[8] The acquisition of their true selves had begun. The new religion

4 Michael A. Elliot, "Ethnography, Reform, and the Problem of the Real: James Mooney's Ghost Dance and the Sioux Outbreak of 1890," *American Quarterly* 50.2 (1998): 201-233.
5 Rebecca L. Robbins, "Self-Determination and Subordination The Past, Present, and Future of American Indian Governance," in *The State of Native America*, 87-112.
6 Stewart, "Efforts to Pass a Federal Law," *Peyote Religion: A History*.
7 Ibid.
8 Ibid.

was an outlet for the deep-seeded pain that infected the tribes because the peyote served as a means for Indians to understand and pray to God and Jesus within their own terms. For example, the peyote not only helped alcoholic Indians stop their drinking habits, but it helped them "think intelligently about God and their relationship to him."[9] Here, the Indian religious practices start to take a critical divergence away from the Euro-American Christian ideals that were intended for them to become "civilized" and assimilated. To prevent this, anti-peyotists cunningly sought to suppress the native religious practices by incorporating peyote into the 1897 Indian Prohibition Law, which originally aimed to control alcoholic beverages on the grounds of its intoxicating nature. The oppositional friction to the peyote practice thus set the movement in motion to establish a bona fide religion that would gain national recognition and inherit protection under federal law as the natives saw fit. By the turn of the century, it was apparent how important language and ethnocentric study were in the attempts to balance the interests of the State with the interests of Native American religion and their free exercise rights.

THE DOUBLE EDGED SWORD

What was this bona fide religion going to be? How were the Native Americans interested in using peyote for ceremonial purposes going to gain approval from the State? To answer these questions, one needs to look meticulously at the legal argumentation and specified interests of both native religious groups and the federal government. With the help of sympathetic lawyers, the peyote adversaries were able to draft the "articles of incorporation" that specified the name of the official established church through which American Indians would organize their sacraments: the Native American Church. The movement now had a name. Interestingly enough, the articles of incorporation that legitimized the NAC did not distinguish nor thoroughly define peyote and the role it would play for church members. In fact, peyote was hardly mentioned and in this way condoners of the new Church avoided setting language limitations on themselves since outright mention of the term "peyote" would make it easier for opponents to target and suppress this aspect of their beliefs under the prohibition laws. This effective tactic was the first of many for legal proponents and their Indian allies to overcome prohibitions set forth by American law. In his essay "Law and the Limits of Liberty," Robert S. Michaelson makes clear that "law holds back chaos. It restrains and divides."[10] Law definitely possesses the capacity to restrain

9 Ibid.

10 Robert S. Michaelsen, "Law and the Limits of Liberty," *Handbook of American Indian Religious Freedom*, 116-143.

and divide, as exemplified through the General Allotment Act, but it also holds the key to break the restraints. However, one must realize law as a double-edged sword and understand that law can also protect. In this sense, law not only holds back chaos, but it possesses the ability to reveal chaos and the contradictions between what the American Constitution stands for and what principles are actually upheld.

The Supreme Court case Employment Division v. Smith 494 U.S. 872 (1990) reveals the stark reality that the value of religious freedom, which is central to our belief as Americans, is extremely fragile and worth investigating with scrutiny. The case's outcome may discourage those in favor of unrestricted religious freedoms, since Smith was ultimately denied compensation as a result of being dismissed from his job for ingesting peyote. However, combing through the conversations, semantics, and arguments of Smith's lawyer, Craig Dorsay, and the pressing commentary offered by the justices, aid in understanding the various standpoints of what it should mean to have religious freedom in this country and how the NAC is effectively situated in the current nation-state. In short, Dorsay's argumentative strategy holds the key to breaking the chains that restrict indigenous religious practices.

In light of the plaintiff's arguments in Smith, one can see that meticulous language choices offer alternatives that frame the practices of NAC on a more focused level. For instance, arguing for equal protection before the law is too general and would be futile, since the Supreme Court could hypothetically vanquish all ceremonial drug use as long as it did so in a manner that did not favor one religion over another.[11] In other words, the government may limit religious sects as long as it limited each sect equally. This logic seems extremely contradictory to the entire purpose behind religious freedoms as the State should not limit any single church. If the State achieves equality by limiting aspects of religion, it simultaneously starts limiting aspects of social and political realms as well. All of these categories make up and define us as members of society. Dorsay effectively makes a case about the specific peyote use in the particular religious ceremonial context in order to avoid making the broad and dead-end claim that the established drug laws in the U.S. are unconstitutional: "The compelling state interest is the regulation of drug abuse generally, but we do not have any evidence in this case that peyote has been abused or that it contributes to the drug abuse problem."[12] Dorsay's perspective illuminates possibilities to extend genuine religious freedom for the NAC within free exercise rights, which Michaelsen ultimately overlooks. He puts too much emphasis on the American Indian Religious Freedom Act (AIRFA), a document he even admits "has

11 Randall P. Bezanson, "Peyote: God versus Caesar Revisited," in *How Free Can Religion Be?*, 151-186 (University of Illinois Press, Urbana and Chicago).
12 Ibid, 170.

no teeth in it" and the courts have "declared that AIRFA adds nothing to the free exercise clause."[13] However, that is not to say that the free exercise clause cannot add to AIRFA. Clearly, if the Native American argument is to be successful in the eyes of the Supreme Court, it ought to be reasoned through the First Amendment while using an ethnocentric view focused on the indigenous population. Reasoning along these lines spurs the potential for progress in legislation that acknowledges Indian life and culture.

An ethnocentric standpoint allows proponents of this Indian Movement to express the genuine motivations behind the indigenous use of peyote in ceremonial contexts. By weaving an argument from an indigenous perspective within the context of the First Amendment, Dorsay epitomizes the meaning of Michaelsen's "fight from within" strategy from a strictly legal standpoint. For instance, Dorsay narrowly constructs the Indian as an individual by heeding close attention to the native belief of ultimate spiritual healing through a transcendental experience. The experience is a personal journey, one that should not be taken out of the fulfilling religious context in which it is used. After all, "the free exercise of religion means, first and foremost, the right to believe and profess whatever religion one desires" along with the performance of individual religious acts.[14] However, according to the precedent set by Reynolds v. United States 98 U.S. 145 (1878) individual acts such as bigamy or peyote ingestion, fail to fall under specified freedoms. These individual acts are interpreted broadly to violate State interests through "general rules of applicability" because peyote is believed to cause bodily harm. Dorsay attempts to dodge these "general rules" by asserting that peyote does the opposite for Indians-heals them-while simultaneously posing no threat to the greater populous. To exemplify this point, Dorsay brings to light the devastating effects that alcohol has had on Native Americans and the lack of evidence that peyote causes comparable harm. He even suggests that indigenous populations would most likely consider alcohol as a "Schedule 1" substance.[15] This approach pinpoints NAC members on a case-by-case basis as a means of "educating the majority regarding the nature and needs of the American Indian religious traditions."[16] By doing so, Dorsay essentially challenges the court to thoroughly define "general rules of applicability." According to the First Amendment, there should be no hindrance upon a given religious act if that act does not threaten the States interest in protecting the health of its citizens. Through this legal tactic, he is able to remain "within the system" because he contextualizes a general law to fit a

13 Michaelsen, "Law and the Limits of Liberty," 125.

14 Bezanson, "Peyote: God versus Caesar Revisited,"151-186.

15 Bezanson, "Peyote: God versus Caesar Revisited," 172.

16 Michaelsen, "Law and the Limits of Liberty," 125.

specific native situation. When he asserts that there is no documented evidence of harm caused "to the individual, to society at large, or the state's law enforcement efforts" by peyote within the careful construct of a religious ceremony, he meticulously places Native Americans in a context that demands individual liberty from the Constitution.[17] Religious liberty should include the right to practice as well as the right to believe. It is also to Dorsay's advantage to avoid general, sweeping claims that peyote is not harmful because arguing against laws in universal terms "would satisfy the strictest of constitutional scrutiny."[18] Unfortunately for the defendants in Smith, Justice Scalia used the same logic that Chief Justice Frankfurter used in Reynolds over one hundred years earlier, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[19]

The opinion appears bleak for the NAC and Indian religious culture in general. It is interesting that the terms "political society," "citizen," and "political responsibilities" are interpreted to include Indians who have been ostracized from white society and prohibited from taking part in many aspects of political life. Nonetheless, the narrow view Dorsay initiated in Smith resonated in Washington as Congress voted to add an Amendment to the 1978 AIRFA in 1994. While the original Act was interpreted "to apply primarily to procedures in dealing with Indians, and not to add anything of substance to their free exercise rights under the First Amendment," the amendment in 1994 gave Indians explicit legal authority to use peyote within "bona fide religious ceremonial purposes" and stated that such practices "shall not be prohibited by the United States or any State."[20, 21] As improvement, the Indians had some "substance" to AIRFA now that peyote use was considered lawful by a national legislative body. Michaelsen does not give enough credit to the outcome of the Smith case, citing that the U.S. Supreme Court reached an unfavorable conclusion for Indians who wish to be afforded protection under the "good faith" argument alone. However, he makes a good pooint because the Smith case displays the Supreme Court's tendency to lean away from entanglements between Church and State. Congress' laws can only go as far as the Supreme Court interprets those laws. Unfortunately, Michaelson's view appears one-sided as it only looks at the case's outcome with no inquiry to the underlying strategies laid out on behalf of Native religious ceremonies. As a result of his flaw, Michaelsen

17 Bezanson, "Peyote: God versus Caesar Revisited," 174.

18 Ibid, 174.

19 *Reynolds v. United States*, 98 U.S. 145 (1878).

20 Michaelsen, "Law and the Limits of Liberty," 125.

21 American Indian Religious Freedom Act
Amendments of 1994. Sec.2(5)b1.

suggests Native Americans should steer clear of the Establishment and Free Exercise Clause and should work through other legal avenues, such as equal protection before the law.[22] Yet, as mentioned before, equal protection arguments usually limit freedoms rather than expand them. The free exercise argument set forth by Dorsay propels the movement forward and sets the tone for future laws to keep in mind the specific nature of Native American Church practices.

WE ARE ALL CHILDREN OF THE CREATOR: THE INDIGENOUS VOICE

As effective and proper as legal argumentation and language is for advancing this religious movement, solely taking this into account would go against the very essence of understanding Native American religious practices. In order to properly identify how ceremonial peyote is used and how its hallucinogenic properties fit into the broader context of the State, one needs to lend an ear to the Indian communities affected. The Indians who use peyote to obtain a spiritual level that encourages a religious experience of great significance, ultimately embody the concept of individual willpower and the "fight from within."

Brave Bird, echoes the core differences between white and indigenous understandings of spirituality, religion, and sovereignty from a native perspective. She makes a firm connection among spirituality, individuality, and sovereignty as the necessary means for a unified movement: "to be sovereign means being your own entity, to take your own sovereignty…if you form unity, you can make a strong movement within yourself."[23] She suggests that a movement cannot commence without some sort of peace within the individual. Claiming personal sovereignty and feeling a sense of pride is the first step toward any successful movement. When the Indians were relocated and sent to reservations in 1887, their cultures were torn and their sense of self-determination was reduced to the dust they now live on: "the Indians are practically a doomed race, and none realize it better than themselves."[24] In his ethnographic study of the Lakota and the Ghost Dance, Mooney attests to the hindered Indian spirits through careful scientific observation and attributes the causes of the quick religious spread to factors such as

22 Michaelsen, "Law and the Limits of Liberty," 125.
23 Mary Brave Bird, interview by Christopher Wise and R. Todd, , *A Conversation with Mary Brave Bird*, American Indian Quarterly (2000): 482-493.
24 James P. Boyd, *Recent Indian Wars, Under the Lead of Sitting Bull, and Other Chiefs; with A Full Account of the Messiah Craze, and Ghost Dances* (Philadelphia Publishers Union, 1891).

"unrest of the conservative element under the decay of the old life."[25] It was the Ghost Dance that sparked the inner fire to be strong again and build the foundation for the movement. Brave Bird takes a traditionalist approach to Native American spirituality and religion, denouncing harsh federal efforts to accommodate natives under U.S. sovereignty. Brave Bird's view that an indigenous movement starts within oneself is key to understanding the motives behind native religious practices and their ability to transcend the scope of European understanding.

Brave Bird's idea that a movement can "start from within" is shared among Indian religious leaders from various areas. For instance, the Native American Church posts a "statement of understanding" on their website describing the goal of sacramental peyote use as "opening portals to reality."[26] However, this sacrament alone is not sufficient to achieve spiritual or personal growth; one must use these portals to become aware of being, because "all things flow from the existential awareness of being here."[27] Such close adherence to the self directly coincides with the peyote use and the intense feelings of euphoria and self-worth it brings. The "statement of understanding" affirms Brave Bird's mentality: "If you heal the Spirit, you heal the body, and to be yourself is a step in the right direction."[28] However, as Kiowa Tribal Leader Evans Horse explains, the next step is to take tenacious action in the public realm. When asked about the greatest threats to Indian nations, Evans Horse essentially bridges the views of Michaelsen and Brave Bird, asserting that Americans and Indians inherently think different but this does not mean we cannot learn to think like one another.[29] When Evans Horse suggests that anyone can "cross over in their thinking" while at the same time "remain what you are," Evans Horse sends a message to Native Americans that they can and will succeed in the current state despite a long and arduous history of setbacks, limitations, and boundaries. The psychological scars of a fractured culture left by history are enough for some Indians to denounce thinking cross-culturally and further separate themselves from any hint of "white" mentality. His statements resemble Parker's quote, since ideas of Christianity are scrambled within the context of the Native American Church, essentially crossing over two seemingly different religions to show their common characteristics. According to Evans Horse, the inner

25 James Mooney, *The Ghost Dance Religion and the Sioux Outbreak of 1890* (The University of Chicago Press, 1965).

26 Néishté, *Native American Church*, http://www.NativeAmericanChurch.com/peyote.html.

27 Ibid.

28 Ibid.

29 Billy Evans Horse, interview by Luke E. Lassiter, , *Who Am I? I Am the One Who Sits in the Middle: A Conversation with Billy Evans Horse. Former Tribal Chairman(1982-1986, 1994-1998)*, 11.

movement begins with "the initiative, the willpower, and the energy to take that first step, that one step is going to launch you in the direction you want to go."[30] The "energy" that Evans Horse mentions is not the energy typically thought of when the body is set in motion. Rather, it is an energizing force that rests deep within the individual and their relationship with their spirit. Once one finds self-manifestation, the energy to take that first step and push for change is omnipresent. Stressing this individual spiritual freedom in the particular setting of the NAC religious ceremony against the U.S.'s central document constitutes the "living in both worlds" that Evans Horse mentions. It attempts to spread knowledge of the ritual in hope of promoting universal understanding for Indians and their place in the State as subjects of "general rules of applicability."

"THE AIR WE BREATHE"

"Truth is like the air we breathe, we cannot live without it. Many things present themselves to fragment each one of us away from the truth."[31] This quote exemplifies the indigenous perspective and the relative nature of religion and knowledge. The second sentence is especially important and represents the idea that religion is necessary to preserve individual freedom yet, there are many outside forces acting upon the individual that camouflage genuine freedom. In essence, the religious movement that started as the Ghost Dance and transformed to the Native American Church continues well into today. In fact, indigenous religious struggles began long before the Ghost Dance, making it all the more difficult to map the progress this movement has made. This essay serves to establish the proper framework to assess religious freedom, particularly Indian peyote ingestion, and asks further questions. Looking at religious freedoms and the NAC as a movement toward those freedoms through anthropological, historical, and ethnographical means is a reliable indication of how we can assess Native Americans in our current nation-state.

The combination of anthropological, historical, and ethnographical approaches is helpful to understanding the progress of the NAC against the backdrop of the U.S. federal policy in a number of ways. For one, the multiple approaches help explore the guarantees and fundamental questions of "free exercise" and "establishment" of the First Amendment in terms of the State and the NAC. It immediately becomes clear that the First Amendment clauses are not as straightforward as they appear and there are often disagreements on the federal level as to their meaning. For instance, Congress made an explicit amendment to AIRFA that declared peyote use within the context of a religious ceremony lawful-

30 Ibid, *11*.

31 Néishté, http://www.NativeAmericanChurch.com/peyote.html.

a definite move in the right direction for Indians. However, Supreme Court interpretations are still hesitant to diverge from precedents from the late nineteenth century. It becomes apparent how the concrete meaning of the First Amendment is left to nine Supreme Court justices and the theories produced on cultural understandings are usually extremely ambiguous.

In order to find the "truth" it was an extremely useful step to view Indians from an observational and scientific standpoint. The anthropological and ethnographic methods demonstrated by Mooney eased the quest and suggested looking at the reservations first-hand. This would help put some of the fragments together and put an end to commonly-held racist beliefs surrounding Indian practices that peyote use was invariably "the 'root' of all evil."[32] With the help of Mooney and others, one can see that peyote does not promote violence, as believed, but offers spiritual healing and a feeling of self worth for the participant. The State possesses a valid interest in protecting its citizens from a mind-altering drug with the potential for overuse. However, the government's interest in regulating illegal drugs can only override the free exercise guarantee if it can be proven that these harms occur in the specific situation, and failure to apply the drug laws in such a way would certainly misconstrue the intentions of those laws. As ethnographic research shows, no such harms have ever been reported from peyote ingestion within the specific context of the Native American Church setting. This is the argument Dorsay laid out for the Supreme Court, which picked up enough momentum to echo within the 1994 AIRFA amendment.

The most interesting aspect that stems from this situation is the contradiction between separation of Church and State, in theory and in practice. It seems the very act of making any sort of legislation in favor or against religion contradicts this fundamental rule. The idea that members of Congress, all of whom come from various religious, political, and social backgrounds, can cast a vote to legally define a religious practice goes against all principles of equality and freedom. Neutral interpretive bodies like the Supreme Court can effectively negate progressive laws like the 1994 AIRFA amendment because any ruling in favor of a specific religion may be viewed as radical judicial activism. Given this, separation of Church and State is a hindrance toward "truth" because such a separation "fragments" our philosophy of complete religious freedom. Perhaps a State that actively promotes and supports various religious beliefs is necessary protection for a democratic society such as the U.S.. As long as the specific contexts are taken into account, with the State interest still in mind, there should be enough room for religious participants to freely exercise acts and beliefs. Hopefully, indigenous voices are heard as a result of their "fight from within," so that knowledge is produced and their unconventional practice may be better understood. Perhaps one day the Indian and the white man may realize their religious similarities, rather than their differences, so the

32 Stewart, "Early Efforts to Supress Peyote," *Peyote Religion: A History*, 128.

Church and tipi can learn to respect one another in an environment with little government influence.

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RECOGNITION WITHOUT LEGITIMATION: ABORIGINAL SUBSISTENCE AND SELF-DETERMINATION

COURTNEY COLE

The practice of whaling is a tradition central to the Makah people. Additionally, whaling is a source of spirituality and pride in the Makah nation. Members believe that various current problems in their community can be attributed to a loss of the whaling tradition. The International Whaling Committee (IWC) regulates all whaling and addresses certain needs of indigenous peoples by delineating Aboriginal Subsistence Whaling as separate from commercial whaling. However, the IWC declares that all aboriginal whaling shall be conducted under national legislation. In this manner, the Makah nation is legally subordinated to the United States and is not recognized as self-determining. This assumption is problematic, as the Makah nation has proved capable of self-regulation. The international stage is constructed, by virtue of the plurinational qualities of the United Nations, as a plurinational space able to recognize and legitimize indigenous claims to self-determination.

INTRODUCTION AND RATIONALE

This paper explores the Makah nation and their legal struggle to maintain traditional whaling as a case study for a larger interpretation of indigenous peoples on the international stage. Part II of the paper, "Background Information," provides historical information on the International Whaling Commission (IWC) and Aboriginal Subsistence Whaling (ASW), as well as on the cultural and legal significance of Makah whaling. Two articles are especially significant in the development of this part because they contribute to the Native voice, the most valuable source of information when exploring indigenous peoples. The first of these articles, "Makah Whaling Tradition", by the Makah Cultural and Research Center, gives insight into the extent to which "whaling and

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whales are central to Makah culture."[1] The second article, titled "The Makah Indian Tribe and Whaling: Questions and Answers" and written by the Makah Tribal Council and Whaling Commission, illustrates ways in which the Makah are self-regulating their whaling practices. The existence of organizations such as the Makah Whaling Commission and their implementation of policies such as a "highly detailed whale management plan," bring into question the necessity of involvement by the United States in regulating Makah whaling.[2]

Part III of the paper, "Analysis," is divided into two sections. Section A explores the relationship between the Makah nation and the IWC and questions that relationship in terms of its representation of indigenous rights. An important source in this section is the Schedule, the founding document of the IWC. By requiring "national legislation" of the United States to regulate ASW, as established in the Schedule, the IWC is limiting the Makah right to self-determination.[3] This introduces a distinction that is important throughout the paper, the distinction between the recognition of indigenous rights and the legitimation of those rights. Section B explores the international stage as a plurinational space -- a space that encompasses many nations, each with their own ideas about what constitutes 'indigenous' and their own indigenous policies. It continues by investigating how those ideas and policies fit together into an international body such as the United Nations and the capacity of that body to serve the concerns of indigenous peoples.

THE MAKAH AND WHALING: CULTURAL

People of the Makah nation of the Olympic Penninsula in the state of northwestern Washington have practiced whaling for at least 1500 years and it is central to their culture. Preparations for, as well as the practice of, a whale hunt are deeply spiritual and decidedly steeped in tradition. Citing songs as a traditional medium, members of the Makah nation explain, "Songs eased the paddling. Songs welcomed the whale to the village; welcomed the returning hunters and praised the power that made it all possible."[4] An immense pride is derived from adherence to

1 Makah Cultural and Research Center, "Makah Whaling Tradition," Makah Cultural and Research Center, http://www.makah.com/whalingtradition.html.

2 Makah Tribal Council and Whaling Commission, "The Makah Indian Tribe and Whaling: Questions and Answers," Makah Tribal Council and Whaling Commission, http://www.makah.com/makahwhalingqa.pdf.

3 The International Whaling Commission, 59th Session, "International Convention for the Regulation of Whaling, 1946: Schedule," May 2007, Official Record (2007), 155.

4 Makah Cultural and Research Center, "Makah Whaling Tradition."

tradition, and maintaining ways of the past helps the Makah to fortify a place in the present. While the Makah have been subjected to various forms of cultural genocide since European contact in the late 1700s, the cultural identity forged by tradition helps the Makah to present themselves as a people very much alive. Makah Tribal members illustrate this strong connection between past and present: "We are all that our past has generously bestowed upon us in knowledge, respect, beliefs, customs, and values. We are what our living culture dictates and what the present adds through the passage and changes of time."[5] Members of the Makah nation believe that various problems currently experienced in their community can be contributed to a loss of the whaling tradition. As described by the Makah Tribal Council, "many Makah feel that our health problems result, in some degree, to the loss of our traditional diet of seafood and marine mammal meat…Many of us also believe that the problems besetting our young people stem from [a] lack of discipline and pride. We believe that the restoration of whaling will help to restore that discipline and pride."[6]

The Makah are proud of their history as whale hunters and especially proud of the characteristics of their people illustrated by the whale hunt. One such characteristic is generosity, which is described here by Makah elder Tom Parker: "Whales are big, you know. I give credit to our Native people. They were generous. They want to help one another. Whatever you got, you…share with your people."[7] Traditionally, when a whale was killed, meat and blubber were distributed among Tribal members, guaranteeing not only the sustenance of individuals, but of the tribe as a whole. This generosity is practiced among the Makah to this day and contributes to a measure of wealth not commonly conceptualized outside of Native societies – one that says "we are rich by measure of how much we give, not by what we gain."[8] Another of these characteristics is inventiveness. "Whale hunting required more than courage," Makah Tribal members explain, "it demanded strength and remarkable technological knowledge."[9] The inventiveness of their ancestors serves as a source of great pride and today motivates the Makah in the legal struggle to protect their ancient practice of whaling.[10]

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5 *Listening to Our Ancestors: The Art of Native Life Along the North Pacific Coast*, (Washington D.C.: National Geographic, 2005), 40.
6 Makah Cultural and Research Center, "The Makah Indian Tribe and Whaling."
7 *Listening to Our Ancestors: The Art of Native Life Along the North Pacific Coast*, 32.
8 Ibid, 29.
9 Ibid, 31.
10 Ibid, 34.

THE MAKAH AND WHALING: LEGAL

Legal relations between the Makah nation and the United States of America began in 1855 with the Treaty of Neah Bay. In the treaty, the Makah ceded most of their territory in order to permanently secure "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations."[11] It is the only treaty with such a clause written explicitly into it.[12]A brief timeline of US-Makah legal relations since 1855 in regard to whaling is included in Table 1.

Table 1. Abridged Chronology of Major Events Related to Makah Whale Hunt (To May 2008)[13]

1855	U.S. Government and Makah Tribe enter into Treaty of Neah Bay
1920s	Makah cease whaling after commercial whaling decimates the eastern North Pacific (ENP) gray whale population
1946	U.S. signs the International Convention for the Regulation of Whaling (ICRW). The ICRW creates the International Whaling Commission (IWC) to implement the Schedule. The IWC amends the Schedule to impose a complete ban on the taking or killing of gray whales, but includes an aboriginal subsistence exception "when the meat and products of such are to be used exclusively for local consumption by the aborigines."

11 U.S. Department of the Interior, "Treaty with the Makah, 1855" in *Indian Affairs: Laws and Treaties*, comp. and ed. Charles J. Kappler (Washington : Government Printing Office, 1904), Article 4.
12 Makah Cultural and Research Center, "Recent Makah Whaling," http://www.makah.com/whalingrecent.html.
13 Source: (based on) United States National Marine Fisheries Service, "Chronology of Major Events Related to the Makah Tribal Whale Hunt," (Seattle: United States Department of Commerce: National Oceanic and Atmospheric Administration, 2008).

1949	The Whaling Convention Act (WCA) is enacted to domestically implement the ICRW, prohibiting violation of the ICRW, the Schedule, or any regulation implemented by the Secretary of Commerce (16 U.S.C. 916 *et seq.*).
June 2, 1970	Gray whales are among the baleen whales listed as "endangered" under the U.S. Endnagered Species Conservation Act, precursor to the Endangered Species Act (ESA).
1972	The Marine Mammal Protection Act (MMPA) is enacted. Under the MMPA, the National Marine Fisheries Service (NMFS) is responsible for the conservation of 147 stocks of whales, dolphins, and porpoises as well as seals, sea lions, and fur seals, including the ENP gray whale (16 U.S.C. 1316 *et seq.*).
June 16, 1994	ENP gray whales are removed from the Federal Endangered Species list after a determination that the population has "recovered to near its estimated original population size and is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range." (59 FR 31094).
October 18, 1997	IWC sets a catch limit of 620 ENP gray whales for 1998 through 2002. The Russian Federation (acting on behalf of the Chukotkan people for a total of 600 whales) and the United States (acting on behalf of the Makah tribe for a total of 20 whales) submit needs statements to the IWC.

April 6, 1998	NMFS allocates the quota to the Makah for limited hunts in 1999 under the WCA (63 FR 16701).
May 17, 1999	Makah hunt, strike, and land one ENP gray whale.
May 2002	IWC sets a catch limit of 620 ENP gray whales for 2003 through 2007. The Russian Federation (acting on behalf of the Chukotkan people for a total of 600 whales) and the United States (acting on behalf of the Makah tribe for a total of 20 whales) submit needs statements to the IWC.
February 14, 2005	NMFS receives the Makah Tribe's request for a waiver of the MMPA's take moratorium, including a letter of transmittal, tribal resolution 17-05, Appendix A Needs Statement for 2002, and Appendix B Treaty of Neah Bay.
May 9, 2008	NMFS announces the release of a draft Environmental Impact Statement (EIS) concerning the Makah Tribe's request to continue treaty right subsistence hunting of ENP gray whales.

THE IWC AND ASW

In 1946, the International Convention for the Regulation of Whaling (ICRW) established The International Whaling Commission (IWC), with the intent to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."[14] Today, the IWC is considered "the sole international body

14 United States National Marine Fisheries Service, "Chronology of Major Events Related to the Makah Tribal Whale Hunt," (Seattle: United States Department of Commerce: National Oceanic and Atmospheric Administration, 2008).

with authority to regulate all forms of whaling" and boasts 83 member nations.[15] The IWC addresses the needs of indigenous peoples through its delineation of aboriginal subsistence whaling (ASW) as separate from commercial whaling.[16] ASW is defined by the IWC as being characterized by the following three objectives: "[to] ensure the risks of extinction [are] not seriously increased (highest priority); [to] enable harvests in perpetuity appropriate to cultural and nutritional requirements; [and, to] maintain stocks at highest net recruitment level and if below that ensure that they move towards it."[17] In order to be awarded an ASW quota, a party must prove that they possess certain needs to whale. Within IWC protocol, requests are made to the IWC with regard to catch limits (the number of whales that can be legally taken within a given time period) "based on cultural and nutritional needs."[18] The ASW quota granted to the Makah in 1997, which provided access to 80 whales in a period of four years, proved that they met all of these criteria and therefore had legitimate subsistence-based, as opposed to commercial-based, interests in whaling.[19]

THE MAKAH AND THE IWC

While the IWC represents an important component of the recognition of indigenous peoples by bodies of international law, the accuracy of its representation of indigenous rights remains in question. The act of Makah whaling was legally recognized on the international stage with the reception of an ASW quota in 1997. By establishing that the Makah possessed legitimate subsistence-based interests in whaling, the ASW quota also recognized the cultural importance of whaling to the Makah in the context of international law. However, while this recognition is important, it does not imply that the IWC views indigenous

15 Scott Smullen, "Whaling Commission Approves Combined Russian – Makah Gray Whale Quota: Russian – Alaskan Native Bowhead Quota Also Approved," October 23, 1997, U.S. Delegation News.
16 It is important to note that the IWC uses the term 'aboriginal' to denote any indigenous population.
17 The International Whaling Commission, "Aboriginal Subsistence Whaling," The International Whaling Commission, http://www.iwcoffice.org/conservation/aboriginal.htm.
18 United States National Marine Fisheries Service, "Draft Environmental Impact Statement for Proposed Authorization of the Makah Whale Hunt," (Seattle: United States Department of Commerce: National Oceanic and Atmospheric Administration, 2008), 1-21.
19 The International Whaling Commission, "Catch Limits For Aboriginal Subsistence Whaling," http://www.iwcoffice.org/conservation/table_aboriginal.htm.

nations such as the Makah as self-determining. In fact, the IWC delineates that "all aboriginal whaling shall be conducted under national legislation that accords with this [section of the IWC Schedule]."[20] In this case, "national" refers to the United States government, as opposed to a Tribal government, implying a legal subordination of indigenous peoples to the government of the United States. By demanding the United States' involvement, the IWC is limiting the rights of the Makah to exist outside of the context of colonization.

As Glenn T. Morris states in "International Law and Politics: Toward a Right to Self-Determinism for Indigenous Peoples," any of several factors could establish Native nations in the United States as legally decolonized and, therefore are self-determining bodies according to the principles of international law. Examples of these factors relevant to the Makah include "the fact that a treaty relationship exists between the United States and indigenous nations [and] the fact that indigenous nations within the U.S. retain defined and separate land bases and continue to exercise some degree of self government."[21] However, as Morris shows, sovereignty has not historically been granted to indigenous nations due to a "reluctance of states to redefine the constructs of self-determination to include indigenous enclaves."[22] This "reluctance" is illustrated by the IWC in its demand for the United States' judicial involvement in Makah whaling; in keeping with international precedent, the IWC is only recognizing ASW within the context of established colonial powers.

The assumption that the Makah are only justified in the practice of whaling under the supervision of the government of the United States, and not of their Tribal governments, is highly problematic. The Makah have illustrated that they are capable of self-representation and self-regulation. For example, the Makah Whaling Commission has stipulated that they will "only permit whaling if there is an unmet subsistence or cultural need for whale in the community" and has developed a "detailed whale management plan" with these provisions:

> 1) strict reporting requirements; 2) area restrictions designed to ensure [the Makah] did not impact the Pacific Coast Feeding Aggregation; 3) a prohibition against the taking of suckling calves or female whales accompanied by calves; 4) a prohibition against the sale of any whale meat or products except for traditional native handicrafts; 5) National Marine Fisheries Service monitoring of the hunt; and 6) prosecution of any Tribal

20 The International Whaling Commission, " Schedule," 155.

21 Morris, "International Law and Politics," 57.

22 Ibid, 75.

> whalers who violate Tribal regulations adopted to carry out the terms of the moratorium of understanding with the National Marine Fisheries Service.[23]

The exhaustive detail of this document serves as proof that, not only, are the Makah capable of self-regulation, but that they understand the need for it. Also, the work of the Makah to compile complicated legal documents such as a request for a waiver of the Marine Mammal Protection Act, which includes the further imposition of self-regulation by "limit[ing] the number of struck and lost whales to no more than three in any calendar year" when the ASW quota allows them four, further illustrates the ability of the Makah to regulate Tribal whaling.[24]

By demanding the involvement of the United States the IWC is recognizing, but not legitimating the right of the Makah nation to whale – a practice that has become commonplace in relations between colonial powers and indigenous nations. Recognition of the sovereignty of indigenous nations in the United States has important implications in terms of international relations. While Makah whaling is legally recognized by the IWC, it is not legally legitimated without intervention by the United States. Establishment of the Makah nation as self-determining would grant legal authority to discontinue the involvement of the United States and dramatically redefine relations with the IWC. The Makah case illustrates interesting points about the implementation of indigenous claims to sovereignty on the international stage.

THE INTERNATIONAL STAGE

Glen T. Morris' article, "International Law and Politics: Toward a Right to Self-Determinism for Indigenous Peoples" is a central text in describing the importance of international law in the self-determination of indigenous peoples. Morris names the United Nations as a key organ in the application of international rights of self-determination to indigenous peoples. An analysis of how Morris uses documents of the United Nations to develop his central argument tells of the recognition and legitimation of indigenous peoples on the international stage. Morris states that the "right to self-determination" was recognized in the founding document of the United Nations, the United Nations Charter.[25] However, while he speaks of the 'right to self-determination,' he does not

23 Makah Cultural and Research Center, "The Makah Indian Tribe and Whaling."

24 United States National Marine Fisheries Service, "Overview of the Makah Indian Tribe's Waiver Request," (Seattle: United States Department of Commerce: National Oceanic and Atmospheric Administration, 2008).

25 Morris, "International Law and Politics," 73.

refer directly to the concept of equal rights. Every time the words 'self-determination' are mentioned in the Charter of the United Nations, they are immediately preceded by the words 'equal rights' to read "equal rights and self-determination."[26] This insinuates that the two are inseparable and that equal rights are not wholly provided without self-determination. Using the term 'equal rights' brings the issue of self-determination into the realm of human rights and further protects indigenous nations under international law of the United Nations.

The phrase, "to encourage respect for human rights and for fundamental freedoms for all," is used in the Charter of the United Nations in reference to the concept of the sacred trust, which ensures "territories whose peoples have not yet attained a full measure of self-government" the right to decolonization.[27] Through the use of identical language, the Charter of the United Nations places the right to decolonization within the realm of human rights just as it does the right to self-determination. While Morris does illustrate that "the law of decolonization and the right to self-determination exist as established rules of international law," he does not apply the frame of equal rights or human rights to either entity.[28] Including this point would have greatly improved Morris' argument, especially as he problematizes colonialist efforts of the United States toward indigenous nations and offers international law as a tool of resolve. By noting the fact that these claims to self-determination and decolonization exist in the realm of human rights, additional protection under international law of the United Nations is ensured and, therefore, access of Native nations to international law is expanded.

The connection between human rights and the self-determination and decolonization of indigenous peoples is further explored in the draft proposal for a Declaration on Indigenous Rights by Erica-Irene A. Daes and the United Nations Commission on Human Rights in 1988. While Morris begins by framing the indigenous struggle as one of human rights when he cites the "justness…of extending internationally recognized rights to indigenous people," his continuing arguments, in which he cites the draft proposal, are a misrepresentation of Daes' intent.[29] Morris states that the draft proposal, by nature of a failure to "explicitly mention the right to self-determination," does not allow indigenous peoples "to be recognized as having standing under international law other than as individuals in human rights proceedings."[30]

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26 United Nations General Assembly, *The Charter of the United Nations*, (New York City: United Nations Publication Board, 1946), I(1)2 and IX(55).

27 Ibid, XII (76), XI (73).

28 Morris, "International Law and Politics," 74.

29 Ibid, 77.

30 Ibid, 77.

On the contrary, it is the tie to human rights, as expressed by Daes, which further invites indigenous claims to self-determination into the realm of international law. By the logic formulated above connecting the concepts of self-determination and decolonization to human rights, and as cited in the Charter of the United Nations, Daes does include the right to self-determination through her direct reference to the Charter as well as through her use of plain language, such as the phrase "human rights and fundamental freedoms," taken directly from the Charter.[31] Other connections to the concept of self-determination also exist within the draft proposal including a paragraph stating, "indigenous people should be free to manage their own affairs," which parallels a widely accepted definition of self-determination.[32]

Morris states that the draft proposal "refuses to recognize the international nature of disputes between states and indigenous nations."[33] A refusal to see the connection between Daes' work and the UN Charter, as illustrated here, creates an ambiguity that allows for justification of the fact that the draft proposal has been largely ignored by colonialist nations as a valid legal development. This justification legitimizes the state's ignorance of declarations of indigenous rights and fails to hold the state accountable. It is this lack of accountability that ensures the continued denial of human rights to indigenous peoples. The legal extension of human rights, including self-determination and decolonization, to indigenous peoples can only occur when the claims of indigenous nations are recognized *and* legitimated; colonist nations must be held accountable according to declarations of indigenous rights. It is these declarations, drafted by and for indigenous peoples the world over, that will move our global community toward the "international peace and security" that serves as an aspiration of the United Nations. [34]

This analysis of the United Nations helps to illustrate the power of the international stage in legitimizing indigenous claims. When contrasted with the multicultural ideology employed by many individual nations in their policies concerning indigenous peoples, the plurinational ideology exercised on the international stage clearly establishes its appropriateness in dealing with the claims of indigenous nations. As Emma Kowal explains in "The Politics of the Gap: Indigenous Australians, Liberal Multiculturalism, and the End of the Self-Determination Era,"

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31 United Nations Economic and Social Council. *Discrimination Against Indigenous Populations*, II (1)1.

32 Robert J. Miller, "Tribal Cultural Self-Determination and the Makah Whaling Culture," *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, ed. Joanne Barker (Lincoln: University of Nebraska Press, 2005), 123.

33 Morris, "International Law and Politics," 77.

34 United Nations General Assembly, *The Charter of the United Nations*, I(1)1.

multiculturalism strives to "reconcile the rights of a recognized minority to be 'culturally different' and to maintain those differences over time with the generic rights of the citizen."[35] By adopting these ideologies, individual nations are recognizing multiple cultures, but are not legitimating multiple nations by giving them legal recognition and, therefore, legal standing. It is this legal standing that would provide indigenous nations with the power necessary to implement their claims to sovereignty. Recognition without legitimation of indigenous claims is one of the largest problems with a multicultural ideology and because multiculturalism is exercised by many individual nations, including the United States, legal avenues for indigenous claims are severely limited.

While multiculturalism is concerned with an explicit recognition of cultural difference, plurinationalism recognizes and legitimates the "mosaic," as described by Suzana Sawyer in *Crude Chronicles: Indigenous Politics, Multinational Oil and Neoliberalism in Ecuador*. Sawyer defines the term 'mosaic' as "an organism or one of its parts composed of cells of more than one genotype" and uses it as a metaphor for the plurinational state.[36] Similarly, a founding principle of the United Nations, as expressed in the Charter, is that its existence as an organization is based on the "sovereign equality of all of its members."[37] It is this recognition of the sovereignty of each nation and the legitimation of the legal power derived from that sovereignty that illustrates a plurinational ideology within the United Nations. By presenting their claims as sovereign nations on the international stage, and demanding "the indigenous right…be adapted in the normative practice of the law," indigenous peoples will ensure the recognition and legitimation that have historically been denied by individual nations.[38]

Conclusion And Evaluation

The Makah Nation and their legal struggle to maintain traditional whaling represents a larger contention—that of indigenous peoples on the international stage. Information from the Makah nation was essential to an evaluation of the relationship between the Makah and the IWC, as it established the immense cultural importance of Tribal whaling. By drawing attention to the IWC's stipulation that the United States legally regulate Makah ASW, a larger concern, the recognition of indigenous claims to self-determination without the legitimation of those claims on the international stage, is presented. The international stage is constructed by virtue of the

35 Kowal, "The Politics of the Gap," 203.

36 Sawyer, *Crude Chronicles*, 211.

37 United Nations General Assembly, *The Charter of the United Nations*, Opening Lines.

38 Confederation of Indigenous Nationalities of Ecuador (CONAIE) National Constituent Assembly, "The Plurinational State," January 1998, NativeWeb, http://conaie.nativeweb.org/assembly/assembly4.html.

plurinational qualities of the United Nations as a space to recognize *and* legitimize indigenous claims to self-determination. Therefore, it is deemed the most appropriate setting for indigenous claims to self-determination to be heard.

One limit of this approach is that while the international stage has characteristics of a plurinational space, plurinationality is a very recent concept. It was legally implemented for the first time in September 2008 when Ecuador "addresse[d] demand for [a] 'plurinational' state" in its new constitution.[39] Further research of plurinationality in general and the international stage as a plurinational space is necessary. However, if plurinationality is successfully employed by Ecuador, it will set a precedent for the legitimation of indigenous rights and the reception of indigenous concerns. The international stage should be constructed as a space that encompasses many nations, each with their own ideas about what constitutes 'indigenous' and their own indigenous policies. It is interesting to consider how these ideas and policies fit together into an international body and to question the capacity of that body to serve the concerns of indigenous peoples---most appropriately in terms of its benefit to indigenous legal movements by increasing legal avenues for indigenous peoples.

39 Kintto Lucas, "Ecuador: New Constitution Addresses Demand for 'Plurinational' State," May 5, 2008, InterPress Service, http://latinamericasolidarity.org/?q=node/49.

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THE NORTHERN NEW MEXICO LANDS OF LIFE AND DEATH

MAIZIE HOUGHTON

This paper will outline the history and context of the legal battle over land rights that have persisted since the year 1854 in the state of New Mexico. By engaging with the indigenous legal movement of New Mexico Land Grant Reform, led by the radical group, Tierra o Muerte, I will address how the members of this movement have been absorbed into their surrounding nation, found connections with the ideologies and actions of other movements, and continue to seek reparation for past injustices. Through the analysis of a variety of primary and secondary sources, with consideration of contrasting frameworks, I hope to illustrate the struggles of one group of people who have demonstrated nostalgia for their way of life prior to United States interference. I will discuss the competing discourses of indigineity, develop my own theories within identity politics, and apply these views to the Mexican inhabitants of America's Southwest, referred to as Norteños. The movement to address lasting grievances with the American government reveals the determination of a people through a history of struggle and exploitation.

INTRODUCTION

The Treaty of Guadalupe Hidalgo ended the Mexican-American War in 1848 and resulted in the acquisition of vast new territories by the United States federal government. The United States of America fills the past of the American Southwest with rich historical legacies of a multiplicity of Native American tribes, Spanish colonial settlement and subsequent conquest under the Manifest Destiny. In adherence with the negotiated terms of the peace treaty with the Republic of Mexico, the United States promised to recognize the validity of existing land grants, formerly issued by Spain and Mexico in the new American territory. The Unites States broke these promises only a few years later when the federal government seized possession of thousands of disputed acres. With particular focus on the land that comprises the state of New Mexico, where the government took control of nearly one third of the state,

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the war over land has amassed to bitter controversy and struggle. The descendants of the Spanish Conquistadors, who began settling the area in the sixteenth century, have struggled to recover from being stripped of the land that was their home, as well as their source of economic survival and subsistence. Over a century later, the devastation from the intrusion of greed and infringement of land rights is still apparent among the communities of the region. The controversial issue of land rights that continues to evoke resentment and conflict has fueled legal, militant and community action to regain and salvage native control of the land. The New Mexico Land Grant War developed a voice of unified struggle, a group of people and a way of life, referred to as "Tierra o Muerte," or "Land or Death" in translation. The Norteño way of life collapsed when they were severed from the land. Many Norteños would rather have their blood spilled on the soil than to live separated from it; this is the essence of their struggle.

OBJECTIVE AND METHODOLOGICAL APPROACH

There is conflicting information in researching claims that stand in opposition to the agenda of the state. This information was inherently present in the accounts of historical events. Cross-references were needed on multiple sources to validate conflicting information. The review of legal documents, court cases and hearings served as an excellent source to investigate government involvement. To balance the claims of the state and to ensure the voice of the indigenous people is preserved, I utilize recorded speeches of group members, autobiographies, testimonies, research of various experts and scholarly articles. Many of the secondary sources I use have based their arguments and research solely on either the legislative material or the statements and evidence given by people. To combat this approach, I investigate both sides of the arguments, examine both historical and present conditions of the communities, and use empirical data to draw my conclusions.

As a methodological approach to investigation, connect and put into conversation a multitude of ideas, opinions and research. Breaking away from the formulaic popular discourses on indigenous people, I look at indigineity in an innovative way and question the implications and consequences of this classification. To tackle the issues surrounding the struggles of the Norteño people, address the themes of American expansion, the bending of legal language, the influence of political rhetoric, the importance of land, the development of economic policies, the use of armed resistance, cultural pluralism, assimilation and racial relations to fully understand how the individuals of this indigenous group attempt to retain their inherited lifestyle and cultural identity despite their integration into the United States. Through a thorough investigation of

the New Mexico Land Grant War and the history of a region that is so deeply intertwined with the actions of the federal government, I question the impacts of American law, institution and society on the Norteño people and the Tierra o Muerte movement.

HISTORY OF TREATIES, THEIR REINTERPRETATION AND LAND SEIZURE

To better comprehend the legal movement, the current conditions of northern New Mexico, and the complex density of the conflicting legal claims made by both the United States government and the Norteño people, I will present the background of this subject. Beginning in the year 1680, the Spanish royal crown issued land grants to individuals and communities to reinforce the colony, to promote the development of the frontier, and to create a distancing neutral area from hostile Indian tribes and the encroachment of American settlement. By Spanish law, individuals were given small parcels of land to build their homes on and the lands surrounding the small towns were designated as communal land, called *ejidos*. The communal land generally contained about ninety percent of the land appropriated by each grant in its entirety and was consequently the most essential element to the success of each group. Unlike private allotments, under Spanish law, this land could not be sold. In 1821, Mexico gained Independence from Spain and continued the same policy of land grants until 1846. In total both countries issued approximately three hundred grants, all in accordance with international and local laws. These practices influenced local customs and practices of the settlers.[1]

The Mexican-American War broke out following the United States annexation of Texas and ensued for two years. Formally ending the war, on February 2, 1848, a peace treaty was signed in the city of Guadalupe Hidalgo. Included in its provisions, Mexico ceded fifty-five percent of its total land, including the land of the Gadsden Purchase of 1853 and the United States gained substantial land territory for the compensatory price of fifteen million dollars. Conditions of the treaty also granted the protection of both civil and property rights to the Mexican nationals that chose to remain.[2] Article VII clearly articulates the American promises to the new Mexican-American settlers:

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1 Untied States Government Accountability Office. *The Investigative Arm of Congress; Treaty of Guadalupe Hidalgo and Background.* http://www.gao.gov/guadalupe/bckgrd.htm, 5.

2 Historical Documents in the United States History. "The Treaty of Guadalupe Hidalgo (1848)," http://www.historicaldocuments.com/TreatyofGuadalupeHidalgo.htm, 2.

> Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, retaining the property which they possess in the said territories.., without their being subjected to any contribution, tax, or charge…In the said territories, property of every kind, now belonging to Mexicans shall be inviolably respected. The present owners, the heirs of these and all Mexicans who may here-after acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belong to citizens of the U.S.[3]

The words of the Treaty of Guadalupe Hidalgo could not express the recognition and honor of the existing land claims any more blatantly. It was imperative that the above Article not only guaranteed the protection of Mexican land grants for the existing settlers, but also for generations to come. Both countries later signed the *Protocol of Querétaro*, which was an additional clarification to confirm the legitimacy of land grants established by Mexican law.[4] These promised rights of liberty, property and protection met their demise less than a decade later.

EXPANSION: STOLEN BY THE MANIFEST DESTINY

The policy of manifest destiny, the destined right, or even duty, too overspread the continent, was the driving force behind the rapid expansion of settlement, embedded in the nation's legislation and influenced the American sentiment of entitlement. The early American treatment of Native American and Hispanic settlers is proof of the American belief that they had a "god give right" to the land and its resources. During the first half of the eighteenth century, in accordance with the deceitful policies of territorial expansion by colonial powers of the era, the federal government devised a number of procedures to circumvent the provisions of both agreements. United States Congress enacted legislation in 1854 that established the Office of Surveyor General of New Mexico. This office was created to verify the ownership and property interests of land parcels by proof of deeds, titles and

3 U.S. Senate. *Treaty with the Republic of Mexico; Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*. Library of Congress. http://memory.loc.gov/ cgibin/ampage?collId =llsl&fileName=009/llsl009.db&recNum=975, 929.

4 Historical Documents in US History, "The Treaty of Guadalupe Hidalgo," 8.

other documentation. The surveyors then made recommendations to Congress to issue a patent of ownership if the grant was confirmed. In the case of rejection, Congress seized the land as property of the federal United States property. Of the two hundred and ninety-five grants questioned, the operations of this office approved only sixty-four grants during their time instated.[5] The procedure of the Surveyor General was incredibly flawed. There was no provision for due process of the law; only the investigators presented their case to Congress because there was no notice to opposing parties; some land grants were confirmed to incorrect people; some communal land was confirmed wrongly to private ownership, and often the number of acres confirmed were in excess to maximize Congressional gains.[6] Contingent upon these erroneous rulings and out of this defective foundation arose a judicial tribunal. For the adjudication of the remaining claims, the Court of Private Land Claims was established in 1891.[7] From this court, an appeal reached the Supreme court in the precedent setting court case of 1897, *United States v. Sandoval et al.,* 167 U.S. 278. The ruling declared all communal land grants to be invalid and thereby awarded the United States forty thousand square miles of land. From the report issued by the Government Accountability Office in 2007, approximately fifty-two percent of all land grants issued throughout New Mexico were classified as community land grants.[8] The federal government rationalized this acquisition by arguing that the communal land had belonged to the government of Mexico, who had ceded the land under the Treaty of Guadalupe Hidalgo and, therefore, had transferred ownership to the United States.[9] This reinterpretation of the treaty, legal maneuvering and manipulation of legal language marked

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5 U.S. Senate. Committee on Forests and Public Land Management on Energy and Natural Resources Guadalupe-Hidalgo Treaty and Land Claims Act of 1998 Hearing (Washington, 1999), 3.

6 U.S. House. Subcommittee on General Oversight and Investigations of the Committee on Interior and Insular Affairs. *Status of Community Land Grants in Northern New Mexico* Hearing (Washington, 1988), 6.

7 U.S. Government Accountability Office. Report to Congressional Requesters, *Treaty of Guadalupe Hidalgo, Findings and Possible Options Regarding Outstanding Community Land Grant Claims in New Mexico* (Washington: June 2004), http://www.gao.gov/new.items/d0459.pdf, 9.

8 U.S. GAO, Treaty of Guadalupe Hidalgo, 19.

9 Struckman, Robert. "New Airing for Old Grievances about South West Lands." *Christian Science Monitor* 93, no. 69 (2001), http://web.ebscohost.com/ehost/detail ?vid=3&hid=8&sid=2ecd23b1-2a7c-4d25-a30e-3eaec28efa62%40 sessionmgr103&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#db=mih&AN=4155381.

the beginning of a disgraceful period of injustice.

The *Sandoval* decision is often criticized as a convenient misconstruction of Spanish Colonial Land Grant Law that shows the deficiencies of Congress to acknowledge foreign concepts like communal land. The failure of colonial western governments to embrace or to understand particular ideas they perceived as "primitive" can be explained by the fact that many cultures of western influence were, and continue to be, deeply entrenched with the notions of private property and ownership. I will later relate this misunderstanding of communal land for the sake of acquisition by the United States in a global context to the history of the legal justification fabricated by the British to colonize the land of the Aboriginal peoples in the colonization and foundation of Australia.[10] The American use and maneuvering of legal language in the Land Grant War is also comparable to the series of treaties made with Native Americans to obtain the lands previously inhabited by tribal nations. In the series of treaties made by American settlers with Native Americans, including the Dawes Act (General Allotment Act of 1887), the United States government's use of ambiguous or interpretive legal language to achieve disreputable goals is also apparent. In accordance with the *Sandoval* ruling, all communal lands were transferred to the federal government to later be developed, and designated for the preservation of wildlife, or sold for profit to land speculators. In addition to taking a majority of their land, despite the previous promise not to impose taxation on the specified land in Article VIII of the treaty,[11] the United States collected taxes and then proceeded to deliberately and gradually drive people off their ranches and grazing pastures. Many subsequent land grants processed by the Court of Private Land Claims ruled in favor of government control until 1904. The confirmed validity of land claims made by Norteños represented only six percent of the acreage of the processed land. In contrast, the same court in California, established forty years prior to that of New Mexico, confirmed seventy-three percent of the claimed acreage.[12]

Across all of the former Mexican territory, which includes parts of present day Texas, New Mexico, Colorado, Arizona and California, land remains in dispute. The most notable improprieties occurred in the territory of New Mexico and have created the greatest lingering of distrust, anger and loss.[13] The vast loss of available land represented a significant blow to the morale of the people, especially in an economy

10 Darian-Smith, Eve. "Gabo, Gabo, (We Don't Understand): Aborigines in Australia Today," *Melbourne Historical Journal.* (Australia, 1987), 67-69.

11 U.S. Senate. Treaty with the Republic of Mexico, 930.

12 U.S. House, *Status of Community Land Grants* Hearing, 6-9.

13 Struckman, "New Airing for Old Grievances," 2.

dependent on land for ranching and raising livestock.[14] The devastation of the problematic precedent set by *Sandoval* is apparent in public sentiment, the region's exceptionally low rates of education and high rates of poverty, drug addiction and crime. An article published in a local New Mexico newspaper traces these problems and an overall sense of bereavement back to people's severed relationship with the land, or as cited by reporters, what mental health experts call "historical trauma."[15] In the wake of land loss, cultural destruction is a common phenomenon, also with Native Americans. There is a clear correspondence between the government's actions against the Norteños for the acquisition of land and wealth and the ensuing consequences that can be drawn to all communities who have suffered from the dispossession of their land by colonial powers.

Heirs, scholars and legal experts continue to argue that the loss of Mexican control over the land is a direct result of the United States' failure to uphold the provisions agreed upon in the Treaty of Guadalupe Hidalgo. The original Mexican inhabitants of New Mexico, estimated to be one hundred thousand in population, feared their subjugation as conquered peoples. When the status of statehood was granted in 1912, a state Constitution that included a unique Bill of Rights was written with the intention to subdue fears of discriminatory practices and prejudices against the Hispanic, Catholic populations.[16] This document reflects the multicultural facets and unique history of the state. The state Constitution never alleviated the tensions of the Land Grant War. The Norteño farmers, who believed they have been deprived of their livelihoods, asserted that the government stole their land, sort to make profit from their loss, or did little to protect their land rights from land speculators. It is from the historical context of social and economic oppression that the fight for the return of ancestral lands grew into a movement that called for accountability and compensation on the part of the federal government.

A Movement Embedded In Unrest And Economic Turbulence

The resistance to internal colonial conditions of subordination, legal powerlessness and mistreatment of Mexican Americans grew when members of the effected communities began to assume leadership

14 U.S. GAO, Treaty of Guadalupe Hidalgo, 9.

15 Greg Hanson and Jonathan Thompson. "Tierra o Muerte." *High Country News*, (2006). http://www.hcn.org/issues/319/16203, 2.

16 Lux, Guillermo. "The New Mexico Constitution and the Treat of Guadalupe Hidalgo." (Las Vegas, NM: New Mexico Highlands University) http://academic.udayton.edu/Race/02rights/guadalu2.htm, 4-5.

for the unification of their struggles. In spite of limited populations and resources, the conflicts and the organized efforts for solutions have impacted the politics, culture, language, and economies of the Southwest. The specific organizations of the rebellion are a part of a larger movement in America to address old grievances and are significant to the acknowledgment of Spanish legacy in the region. The fundamental leaders of various organizations have orchestrated resistance against the losses of land that occurred through legal fraud, administrative error and commercial speculation. The fight to reclaim land in New Mexico first began in the 1880's by the group, *Las Gorras Blancas*, "the white hats", who wore white hoods and stormed through the night on horseback, cutting fences and burning the fields of lost lands in protest.[17] During the twentieth century, a group known as *La Mano Negra*, "the black hand", continued the same forms of intimidation and painted their ominous symbol of "black hands" on the property of outsiders. A group called the *Abiquiu Cooperation* made a bold statement by mailing eviction notices to the "Anglos" (Anglo-Saxon residents) living on Spanish and Mexican land grant properties to show they were not welcome.[18] Both groups employed guerilla tactics and according to one resident of Santa Fe County, intermittent acts of violence continued until 1926.[19]

As anger and tensions escalated in the 1960's, Reies López Tijerina founded the radical organization *Alianza Federal de Mercede*s, which translates to *The Federal Alliance of Land Grant Heirs*. This group was fundamental in the rural struggle for advocacy and recognition of the Norteño's aspiration for the return of land to legitimate heirs. Led by the slogan "Justice is our creed and the land is our heritage," members sought to redress their claims in the court systems by filing lawsuits, appealing decisions and pursuing legal admission despite futile results. In desperation, many members turned to a militant approach of resistance with the use of property sentries and armed vigilante acts of defiance.[20] *Alianza*, now referred to as "Tierra o Muerte," embraced the leverage provided by armed resistance, which is similar to other legal movements of indigenous people that also turned to violence for the recognition of their respective grievances when the courts

17 Frank Clifford. "The Continental Divide Trail," *The APF Reporter*, Alicia Patterson Foundation (2000), http://www.aliciapatterson.org/APF1903 /Clifford/Clifford.html, 6.

18 David Correia, "Rousers of the Rabble in the New Mexico Land Grant War: La Alianza Federal De Mercedes and the Violence of the State." *Antipode* 40, no. 4, 561-583, (2008), http://www3.interscience.wiley.com/cgibin/fulltext/121391054/PDFSTART.

19 Navaro, Armando, *Mexicano Political Experience in Occupied Aztlan: Struggles and Change* (Walnut Creek, CA: Rowman Altamira Inc., 2005), 115.

20 Navaro, "*Mexicano Political Experience,"* 103.

repeatedly demonstrated general disregard or contempt. Native American authors, Smith and Warrior, in the narrative *Like a Hurricane*, illustrate one example of this use of aggression, by indigenous peoples. The two authors cover their peoples' activism in the nineteen month take over of Alcatraz island beginning on November, 20, 1969. They discuss the Trail of Broken Treaties, the resultant wave of bloody insurgency and military confrontation between the American government and the Sioux Indians at Custer, South Dakota in February of 1973, and other efforts of the American Indian Movement. Gaining unprecedented visibility and attention to their cause, their use of direct action was a means to get their voices heard and find solutions for the people and politics of their reservations.[21] Violent direct action also changed the direction of the Norteño struggle for recognition during a period of change, civil rights and anti-government sentiment.

TIERRA AMARILLA COURTHOUSE RAID

The frustrations and animosity of a hundred years of struggle reached an apex of clashing objectives when the movement of Tierra o Muerte gained momentum. Following the harassment and arrests of Alianza members by local law enforcement, who intended to disrupt the operations of the organization, the movement gained national attention when they retaliated. Hostilities between Norteños and local authorities climaxed on June 5, 1967, which is often romanticized as a gun battle of the wild "feudal West."[22] Armed with semi-automatic assault weapons, dynamite and hunting rifles, twenty members of Alianza descended upon the Rio Arriba Country courthouse, in what was later infamously known as the "Tierra Amarilla Courthouse Raid." The nineteen men and one woman intended to liberate their imprisoned members and to make a civilian arrest of the District Attorney Alfonso Sanchez, a chief instigator of the group's aggravation who repeatedly tried to prosecute them as communists and agitators. Although Sanchez was not in the courthouse that afternoon, a gun battle took place and resulted in the shooting and wounding of one New Mexico state police officer and one county jailer. Federal troops were called in by the governor as the group fled into the surrounding mountains with two hostages. Led by Moises Morales, he and most of the group members (including Tijerina) were later caught, apprehended and served prisons sentences of two years. The legacy of this raid remains as an important part of the rebellious identity of the

21 Smith, Paul Chaat and Robert Warrior. *Like a Hurricane* (New York: The News Press, 1996), 2, 29, 111.

22 Nabokov, Peter. "Chicano Power in Feudal West." *Nation* 225, no. 11 (1977), http://web.ebscohost.com/ehost/pdf?vid=4&hid=107&sid=45e5ec6f-9221-44d9-89ae-4f3a3508b99b%40sessionmgr108, 337.

communities of the region. A billboard was constructed by the side of the highway in Tierra Amarilla that displays the faces of Morales and the words "Tierra o Muerte." The sign continues to carry the message of the movement and explains to outsiders that the Norteños remain willing to die for the land of their ancestors.

EL BANDITO REVOLUTIONARIO TIJERINA AND THE EXPOSITION OF CHICANERY

Born in 1926 Reies López Tijerina, founded of Tierra o Muerte, was the most influential claimant and petitioner for the land rights of Norteños. As a pastor, an alleged communist, and a fugitive in flight from Arizona law enforcement, he and his family traveled to Monroe, New Mexico in the 1950's, where he learned of the land grant wars and empathized with the troubles of the landless Mexican farmers and ranchers. He proceeded to travel to Mexico to research the claims, where he was most influenced by "Las leyes de las Indias," which had previously governed the American portion of the Spanish Empire for three hundred years. Upon returning to the United States, Tijerina settled in the small town of Tierra Amarilla, where locals informed him of the significant land lost to corrupt politicians in collaboration with land grant speculators and the federal government itself under the veil of the Forest Service.[23] The county of Rio Arriba, where the town Tierra Amarilla is located, lost sixty percent of the total land, which was previously designated for communally use, when the Surveyor General incorrectly reported and issued the land as a private grant to Congress.[24] The chicanery of local politicians became exposed when Tijerina publicized the operations of the "Santa Fe Ring," a powerful group of attorneys, a majority of Republican government officials of the state capital, and wealthy ranchers. This coalition was led by Tomas B. Carton, the same man who received six hundred thousand acres when the Tierra Amarilla communal land grant was mistakenly transferred to a private land claim by the Surveyor General. Members of this group worked to systematically dispossess the land grantees of their claims from 1848 until 1904, amassing fortunes through fraudulent land deals.[25]

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23 Tijerina, Reies López. *They Called Me "King Tiger": My Struggle for the Land and Our Rights*, ed. José Angel Gutiérrez (Houston, TX: Arte Público, 1978) 18-22.
24 U.S. House. Subcommittee on General Oversight and Investigations of the Committee on Interior and Insular Affairs. *Status of Community Land Grants in Northern New Mexico* Hearing (Washington, 1988), 7-8.
25 Vigil, Ernesto B. The Crusade fro Justice; Account of Chicano Militancy and the Government's War on Dissent (Madison: University of Wisconsin Press, 1999), 35.

The other factor that contributed to major losses of land for the residents of Rio Arriba county was the take over by the National Forest Service. The United States Bureau of Land Management (B.L.M.) and the United States Forest Service were supported by local and state officials in their conservationist movement to gain control over thousands of acres of disputed land. Both of the federal departments sought to protect the region's natural wildlife through prohibitions of hunting, grazing and fishing (all of the Norteño's main sources of economic subsistence) on "federally owned land." They fought to reduce the impacts of ranching and hunting that caused desertification, erosion and environmental destruction. The farmers, who raised and herded livestock, were blamed as the culprits of these processes and were vilified by environmentalists.[26] The debate over the values of wildlife preservation or rural community land use continues to persist across landscapes of the United States. By denying the use of land for agriculture to New Mexican inhabitants, the government under the auspices of protecting the environment has made major profits off the same lands from logging and selling timber, as well as from oil and gas royalties. The original landowners of the region did not receive any compensatory payments.[27] The frustrations of those obstructed from land use came to a head in the San Joaquin Valley of the Carson National Forest in 1966. In an act of direct defiance, a group of ranchers cut impeding fences to feed their sheep on the land that had been used for grazing for almost three hundred years. This led to an armed occupation and confrontations with forest rangers.[28] Although the men were convicted for trespassing and the occupation was ultimately ineffective, the actions of the desperate ranchers helped to bring the land grant wars to the forefront of political consciousness. The records of officials from local, state and federal levels during the twentieth century expose their manipulation and exploitation of the Norteño people and New Mexican land.

In 1963, on the one hundred and fifteenth year anniversary of the signing of the Treaty of Guadalupe Hidalgo, Tijerina drafted the first proclamation of Alianza Federal de Mercedes. With an emphasis on education of rights, the group sought to inform the descendants of the heirs who received the Spanish and Mexican issued land grants about their grievances by publishing weekly updates in the local paper, sending letters and publications to various government departments, raising awareness of the issues and promoting the heritage of Native New Mexicans. In 1964, there were six thousand group members and by 1966 Alianza membership

26 Sargent, Frederic O., Jose Rivera and Maria Varela, *Rural Environmental Planning for Sustainable Communities* (Washington: Island Press, 1991), 197.
27 Struckman, Robert, "New Airing for Old Grievances," 4.
28 Correia, "Rousers of the Rabble in NM," 567.

had increased to twenty thousand.[29] Despite the momentous support and increased following, division within the movement arose; socioeconomic status and position on armed resistance became the major dividing factors, as further explained below.

CULTURAL AND ECONOMIC ASSIMILATION

The first emerging political dichotomy within the group was the formation of two groups: those who wished to acculturate and those who wished to remain separate from the perceived "American" or "Anglo" culture. Advocators of assimilation saw integration as a chance to overcome cultural differences and prosper within the society that surrounded them. Others sought to retain their ways of life and cultural heritage. Armando Navaro comments on the cultural tensions present for Mexican Americans:

> The Nuevos Mexicanos could be called 'cultural pluralists' who acculturated by adapting to some of the value, beliefs, norms and even symbols of white society; while they sought to retain their Mexicanidad, such as their language, customs, food and music. Those who tried to assimilate, or who "wanted to be white," sought to integrate themselves into white society and adopted its superstructure of institutions, laws and political practices.[30]

Navaro depicts the separation of resistance to or support of assimilation along racial lines. The cultural pluralism, or efforts of a minority group to maintain their unique cultural identities within a larger society, that Navaro refers to, emerges out of the Norteño's struggle to balance their Hispanic identities with outside and internal pressures to assimilate. This difference was often generational and is still apparent today. Throughout the documentary entitled *Tierra o Muerte*, the division within the Norteño population is clear. While many try to salvage the agricultural, self-sustaining lifestyle of their ancestors, conversely, some encourage the introduction of a "White man's resort economy," or the development of ski resorts and other tourist attractions to stimulate the region's poverty stricken economy. In the town and surrounding valley of Chama, the same region that once produced the most wool in the country[31], about eighty percent of the income is now from tourism. Many of the farms, businesses and cooperative organizations of northern New Mexico have been studied as model communities for

29 Correia, "Rousers of the Rabble in NM," 572.

30 Navaro, Mexicano Political Experience, 124.

31 Hay, Andrew. "Espanola and Rio Arriba County." *New Mexico Business Service Industry Journal*, http://findarticles.com/p/articles/mi_m5092/is_n3_v21/ai_19 405484, 1997, 3.

retention of agricultural life and refusal to commercialize.[32] An elderly woman, who was born and lived her entire life in Chama, regretted, "You can stop progress. We're not anti-development, we would just like to see development that doesn't hurt the culture, the environment or the people who are here." While overcoming resistance to change, the words of this resident show the remorse and fear of outside development.[33] The documentary's narration and testimonies depict the shadow cast on the people by the land grant war and articulates how some view the reclamation of the commons as their only hope for economic survival, while others see conflict over the grant as obstinacy to a vital economy.

Much of the landscape is now subdivided, fenced off and blemished by buildings. Ubaldo Velasquez is an Alianza sympathizer and a direct descendant of an original recipient of a land grant issued by the Spanish territorial governor in 1766. In an interview in 2000 with reporter Frank Clifford, Velasquez pointed to the area where the rivers Rio Puerco and Rio Chama converge. In reference to upcoming developments, he stated: "There. That's where they are going to build. People from California, Texas, New York, all over."[34] Velasquez is one among many Norteños forced to watch their land of vast, empty beauty transform into resorts, vacation condos and weekend homes of the rich.

THE AGITATION OF VIOLENCE AND RACES

Increasing dichotomy within Alianza and its sympathizers grew in the debate on the militant approaches of its leaders. Tijerina, who had seen and participated in the ineffectual court processes to address claims, was known to encourage the people to defend their land at all costs, even if it meant militarily. Tijerina's involvement in the Tierra Amarilla Courthouse Raid and subsequent jail sentence only further developed an image of violent nature. For his involvements in the movement, Tijerina was commonly depicted as a lawless bandit and an agitator. The United States Senator, Joseph Montoya, accused Tijerina of being a "rabble-rousing, creator of false hopes, who sparked violence and set back racial relations as an enemy of the U.S." [35] Montoya's words show how the issue of land use became racialized within a rhetoric that encouraged the public to be passive and to ignore the flawed past actions of the government. Supporters of the Hispanic claims of the land battles became torn on the issue of the use of violence as a course of action. In David Correia's thesis, entitled "Rousers of the Rabble," he argues:

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32 Sargent, et al. Rural Environmental Planning, 196.

33 *Tierra o Muerte,* VHS. University of California Extension Ctr. For Media & Independent Learning, (Berkley: KBDI-IV Production, 1992).

34 Clifford, "The Continental Divide," 9.

35 Tijerina, They Called Me "King Tiger," 102.

> Violence has been at the very center of the politics of racialized territoriality in New Mexico. From the Spanish conquistadors through the Pueblo revolt and Indian Wars to the 1846 invasion of Mexico by the United States, violence has shaped the contours of territorial control in New Mexico and has been a key strategy of the state in maintaining a racialized spatial order.[36]

Correia directly points to racial divisions as a characterizing dynamic in the social, legal and political activity within New Mexico. Although Tijerina and other members of Alianza attracted national attention by relying on covert and frequently violent strategies to reestablish territorial control, ironically, these same members also worked to establish connections to non-violent and passive resistance advocator Dr. Martin Luther King. Tijerina and King joined together as a collective voice of the oppressed people of the United States, especially for the oppressed colored people. The struggles of Tierra o Muerte became united under the fight for racial equality but concurrently became divided over the issue of the use of force as a tool for rebellion.

THE IMPORTANCE OF LAND AND ITS "PRIMITIVE" PERCEPTIONS

Moises Morales pointed toward the mountains and, with distain, said "The land is being bought up and fenced off. Our people can't go hunting and fishing. Without land, what hope is there?"[37] The changes Morales speaks of are due to the unexpected, post-treaty reevaluation of the legitimacy of communal lands by Congress. There is a correlation between the United States treatment of the indigenous Hispanics and the British conquest, occupation and colonization of Aboriginal Australia. This demonstrates the limited space for communality in western ideology. The Aborigines survived in small, nomadic hunter-gatherer groups and therefore, their culture did not permit concepts of land ownership. Under the Commonwealth of England and the concept of Terra Nullius (the Latin expression of "land belonging to no one"), the English fabricated the legal fiction that justifies the Australian nation, established under the "right by occupation." Author Eve Darian-Smith supports this view in her essay, "Gabo, Gabo, (We Don't Understand): Aborigines in Australia Today," by inferring that this tendency was purely a political maneuver to gain land rights and legal power. This discourse,

36 Correia, "Rousers of the Rabble in NM," 567.

37 Struckman, Robert, "New Airing for Old Grievances," 2.

she explains, is "a certain will or intention to understand, in some cases to control, manipulate, even to incorporate, what is a manifestly different world…is produced and exists in an uneven exchange with various kinds of power."[38] This "legal" incorporation of Australia into the British Empire is greatly similar to the "legal" reinterpretation of the Treaty of Guadalupe Hidalgo by the United States; both fabrications resulted in substantial gains of territory and resources for the "legally sophisticated" powers, and both gains were made from loss by the previous inhabitants. By failing to acknowledge the indigenous conceptions of land and communal value in the absence of ownership, these legal maneuvers undermine and devalue indigenous way of life.

Another likeness between the two contexts became apparent upon viewing of Australian Prime Minster, Kenneth Rudd's national apology to the Aborigines (and the Torres Strait Islanders) to reconcile the injustices committed by the British. Last year in the "Native American Commemoration Ceremony," on the anniversary date of the signing of the Treaty of Guadalupe Hidalgo, New Mexico state congressman Tom Udall, delivered a speech. He first acknowledged the belief that some residents held that the "federal government had failed to honor their commitments," but not one sentence later, either in ignorance or dishonesty, he stated that "Many Mexicans, who became American citizens as a result of the treaty, lost all right and title to their lands." After invalidating Hispanic land claims, he contradictory continued to apologize for the "sad chapter in American history" and made a "promise to bring justice to this issue."[39] Both men, Udall and Rudd, acknowledged the history of conflict and made an official apology, but neither took any sincere steps to get closer to reaching viable solutions or to working on a tangible plan.

INCORPORATION IN TO THE U.S. NATION STATE

The structure of the previously prosperous and simple Norteño way of life has crumbled. The Norteño communities, surrounded and exceedingly encroached upon by foreign cultures, continue to resist the sanctions imposed by the federal government and the pressures to assimilate to economic policy. Defiance by cultural isolation, coupled with the loss of land as a provider of economic survival, has led the resisting communities to a social and economic plummet. Poverty is now the dominant economy. For example, Rio Arriba County has one of the highest rates of welfare dependency in the nation. The same county has the highest heroine addiction and overdose rate in the country. This epidemic has increased criminal

38 Darian-Smith, "Gabo, Gabo, (We Don't Understand)," 67-69.

39 Untied States Government Accountability Office. *The Investigative Arm of Congress; Treaty of Guadalupe Hidalgo and Background.* http://www.tomudall.house.gov/index.php?option=com_content&task=view&id=449&Itemid=1, 2007, 1.

activity, driven people away in fear and reduced the available funding for programs like education and healthcare, which in turn, increase the risk of individuals for drug use and crime. In a hearing to strategize the combat of heroine addiction, Laurie Robinson, the Assistant Attorney General, Department of Justice, commented that although, "rural communities may face the same crime-related problems as large urban areas, they confront unique hurdles in effectively addressing crime and drug problems like geographic remoteness, scarce resources and distance from criminal justice services and treatments."[40] The devastation caused by outside influences of drugs, alcohol and crime disproportionately affects rural communities and small towns, like those of the northern part of the state. This desolation is commonly found across the nation's Native American tribes as well. The similarities between how Native Americans and the Mexican American settlers have been affected by the governing policies of the United States, foreign cultural differences and pressures to assimilate are remarkable.

Another issue of cultural destruction is the mass exodus of young people from their towns. If young people do not leave, in search of a better quality of education, employment and living, many see no other way out of the poverty, addiction and recession that plague their families. In pursuing the central question of how this indigenous group fits into the modern nation state and its political system, the people have either managed meager survival, given into assimilation or fallen into desolation. America asserts itself as a multicultural nation with an ideology of racial, cultural and ethnic diversity within the demographics of its borders. However, in examining current living conditions of its people, the United States must question its tolerance of diversity.

Globally, across indigenous movements, the tactics of movement leaders and members, their interactions with their respective colonial occupants and governances, and the recognition or reparations allotted to the movements are distinctly similar to the relations between the Norteños and the United States. From her research in ethnographic studies of Aborigines, author Emma Kowel comments on the dynamic ties between reparation and segregation:

> Through their emergence as a protest against marginalization or subordination, politicized identities because dependent on their own exclusion to remain salient… Liberal multiculturalism is, in a sense, an oxymoron because the universalism of liberalism can only be recognized through "an economy of inclusion

40 U.S. Senate. Committee on Appropriations. *Rio Arriba County Strategy to Combat Heroin Addiction* Hearing (Washington, 1999), 6.

and exclusion.[41]

Kowel points to reparations meant to help and compensate the losses and suffering of a people as the major marginalizing factor that keeps indigenous peoples powerless and separated from mainstream equal opportunity. She raises the question of the "dilemma of social improvement," is striving for liberation actually a threat to the self-determination of a people? It is possible that without the theft of their land, the induction of toxic elements of unfamiliar ethos and societies, and the liberal federal aid that perpetuates a system of dependence, the Norteño people would be able to regain their stability and success.

INDIGINEITY REDEFINED

Initially, I was hesitant to research the topic of indigineity of Mexican Americans, because of the obvious view that the Native American Pueblo tribes hold the "indigenous title" of the Southwest. In competing discourses, the divisions of indigineity are often matters of judgment, and define many social, economic and cultural consequences of law. Recently the United Nations developed a criteria for understanding and defining indigenous peoples that included: self-identification, historical continuity with pre-colonial and/or pre-settler societies, a strong link to territories and surrounding natural resources, distinct social, economic or political systems, as well as a distinct language, culture and belief system that categorize them as non-dominant groups of society.[42] It is true that in strict adherence to this definition, the Mexican American people in question, the descendants of Spanish colonizers, are not identifiable as indigenous. In addition to the fact that a large portion of Norteños are of mixed Indian and Hispanic racial descent, or Mestizo, there are two persuading arguments that give substantial evidence to verify their indigineity and, therefore, the granting of political recognition and the respectful identification of an autonomous peoples.

Under the first theory of indigienity, called the *Theory of War and Conquest*, the lines that designate between "native" and "conquering" peoples are blurred by the fact that peoples have claimed areas of land as territories, invaded, fought, conquered and colonized the lands and resources of other people dating past recorded history. To put this idea in the context of North America, the Spanish Conquistadors were perceived

41 Kowal, Emma. "The Politics of the Gap: Indigenous Australians, Liberal Multiculturalism, and the End of the Self-Determination Era." *American Anthropologist* 110, no. 3 (Australia: University of Melbourne, 2008), 343.
42 United Nations, Resolution by General Assembly. *Declaration on the Rights of Indigenous Peoples* (Geneva: United Nations, 2008) http://www.uweb.ucsb.edu /~clearwater/UN%20indigenous%20rights.pdf, 1-4.

as a "colonial force," by the Native Americans who already inhabited the land. Then numerous generations later, after the Spanish descendants settled, they perceived the colonizers of the new nation of the United States in the same manner. Therefore, both groups became "conquered" or "subjugated" peoples. Although at different times, both were obliged under the same force of colonizing domination.

Another method to demonstrate the qualification of Norteños as an indigenous people is the *Theory of Adam and Eve Migration*. From scientific knowledge about human evolution, the first humans originated in an area of Africa and followed patterns of migration and settlement, developing societies and establishing communities. In the scope of the timeline of human evolution, the use of the most recent couple hundred years to decide the answer to "who got here first?" seems illogical and arbitrary. If one considers the descendants of Native American's to be indigenous to land, why not also the descendants of Spanish explorers who migrated there at a later date? The treatment and relations of small, distinctive groups to the dominating governing bodies are very much influenced by the recognition of indigenous status; the authority of such a group increases, by their "natives" status as deserving of proper land rights, able to command more protection of civil liberties and in some cases, the allocation of reparations. To ground this in evidence, one example of the benefits of recognition is the federal government's acknowledgment of Indian national sovereignty. This came hand in hand with increased gains in fiscal compensation and the restoration of pride and dignity.

CONCLUSION

The studying of this movement has brought up questions surrounding the identity of indigineity, and the purposes of its definition. Regardless of the opportunity for monetary gain, the Norteños are deserving of a title that expresses their continued demonstration of utmost resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples in the face of economic and social hardship. Drawing upon documents, court cases, legislation, relevant personal accounts and secondary analysis of land reform, I have further analyzed the contributing historical occurrences and investigated the causes of the contemporary status of land titles. Under scrutiny, the incongruities of claims of entitlement to the land by the government and the indigenous Hispanic people, have revealed the government's crooked manipulations of the legal system. The dispute is still very much alive, as communities attempt to rebuild their dreams from the ground up. This is a fate that is inseparable from the fate of the land.

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An Influential Letter: Examining Constantine's Decision To Grant Judicial Authority To Bishops

Scott McDonald

An Influential Letter: Examining Constantine's Decision to Grant Judicial Authority to Bishops is an analysis of a critical turning point in the history of the Christian religion. The paper focuses on a letter sent by Emperor Constantine to one of his provincial administrators in which he grants legal authority to Christian bishops. The decision meant that Christian bishops were no longer limited to unofficial dispute resolution and mediation regarding problems with Church doctrine or conflicts between Church members, but they now had the ability to rule on matters traditionally left to Roman courts. This paper proposes that Constantine's letter brought about significant changes for a church that had been molded by centuries of political oppression, and which now had to adjust to its new role of being the spiritual top dog. This adjustment in turn affected the larger society of the Roman world during Late Antiquity, as traditional Roman religion lost ground politically and culturally to Christianity.

Introduction

Christianity has arguably undergone the most profound changes of any religion in history. What began as a small sect of Judaism became something almost completely unrecognizable in the span of a few centuries. The persecutions, secret meetings, and disunity of the early Church were replaced by a powerful organization that stood alone as the Western world's last remaining central political entity by the time the Roman Empire fell. These changes were not all brought about haphazardly along with the spread of Christianity, but were instead the result of a concerted effort made by Church officials and Roman politicians designed to create a unified, powerful entity that could influence all aspects of life guided by Christian theology. One critical development that was representative of this effort was the Emperor Constantine's decision to grant judicial power to bishops in 318 C.E. This decision, as well as others that went along with it, marked a crucial point in the trend of moving political power

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that had previously belonged to the Roman government to the Church. The importance of the Emperor Constantine instituting this shift in the role of the Church was best described by Harold Drake in *Constantine and the Bishops* as, "The casual acceptance of this dramatic reversal is testimony to the extraordinary impact of this emperor's reign, during which relations between Church and state had not only changed from cold to warm but indeed had become intertwined in ways that are not yet fully untangled.[1]

Nowhere is this dramatic reversal more obvious than in Constantine's letter to the Prefect Ablabius, where he reiterated his order that bishops be granted judicial power by arguing Christian law was higher than any other. Though the power of the Church would wax and wane in the years following this decision, Constantine's extension of judicial authority to bishops would forever alter Christianity by imbuing it with political as well as spiritual power, and by adding a level of unity and centrality to church structure that had previously been lacking. By examining the relevant aspects of Constantine's background, his purpose in drafting the letter, and the primary sources demonstrating the impact created by Constantine's decision, this paper will unravel the complexities surrounding Constantine's intertwining of Church and state.

BACKGROUND OF CONSTANTINE

Central to this discussion is the background of Constantine himself. After all, in order to address how the fusing of the Christian religion and the Roman government affected the development of the early church, we must first analyze the intentions and motivations of the man largely responsible for that fusion. Unfortunately, any attempt at examining a figure with the moniker of "the Great" in their name is bound to have complications, and in the case of Constantine those complications are multiplied by the intermixing of his religious legend and historical reality. Undoubtedly, Constantine's fabled conversion to Christianity on the eve of the battle of the Milivan bridge in 312 C.E. has been a source of great controversy in the academic community.[2] The nature of this debate is largely irrelevant however, as whether or not Constantine's conversion was personally genuine or just a political ploy is unimportant. Additionally, as Drake points out in *Constantine and the Bishops,* it is very possible that there were both political and spiritual motivations at play.[3] Instead, what is important about Constantine's

1 Harold Drake, *Constantine and the Bishops: The Politics of Intolerance* (Johns Hopkins Press 2000) 8.

2 Jose G. Gomez, "The Conversion of Constantine" (MA Thesis, CSUDH, 2004) 14.

3 Drake, *Constantine and the Bishops*.

personal life are those things that help explain his conversion to Christianity and his later policies which transformed it from a persecuted faith to the Empire's favored religion.

The first of these relevant influences was Constantine's father Constantius. Constantius' military background and political prominence as one of the four rulers under Diocletian's tetrarchy were crucial factors that provided his son with the background necessary to achieve power within the Roman Empire. More importantly, Constantius may have held views on Christianity that were uncommon for his time. Though he did allow for the destruction of Christian churches during the persecutions of Diocletian, the chronicler wrote that Constantius preserved "that true temple of God, which is the human body," implying that Constantius may have protected the Christians themselves.[4] Eusebius, bishop of Caesara, also regarded Constantine's father as a friend of Christianity and gave him high praise, but still only mentioned his unwillingness to kill Christians.[5] Though this leniency may not be strong enough evidence to assert that Constantius was completely tolerant of Christians, it still provides important insight into the early attitude that Constantine may have developed towards Christianity.[6] While Constantius' possible toleration of Christians is pertinent, it only goes so far in explaining why Constantine chose to convert to Christianity or why he merged the religion with the Western Roman government a few years later. To fully examine these decisions we must look deeper into the letter itself, analyzing both its language and substance in order to determine what Constantine intended.

PURPOSE OF LETTER TO PREFECT ABLABIUS

Many of the changes that Constantine brought about following his conversion were part of an effort to unify the Church, and to do this he had to work with the existing church structure which was made up of bishops. Other than calling councils of the bishops (like that of Nicaea) designed to end internal doctrinal debate, Constantine also vested a large degree of legal power in them as well. The elements of this power were described by Constantine in the aforementioned letter to his prefect Ablabius in 318 C.E. In the letter, the Emperor states that the rulings of bishops are final and unalterable, their testimony is always to be accepted, and either party involved in a case has the right

4 Lactantius, *On the Deaths of the Persecutors*, Chapter XV, J. Vanderspoel, http://www.acs.ucalgary.ca/~vandersp/Courses/texts/lactant/lactperf.html.
5 Eusebius, *Life of Constantine*, http://www.fordham.edu/halsall/basis/vita-constantine.html, Chapter XIII, Bagster translation.
6 E.D. Digeser, *Lactantius, Constantine, and the Rome Res Publica,* (UCSB Dissertation, 1996), 322.

for a bishop to hear it at any point.[7] Constantine also puts forth the idea that Christian law is higher than any other form in the document.[8] There are two layers of purpose underlying this document. The first is to clarify, as the context of the letter reveals, that there had been some question as to the Emperor's stance on this issue previously. It is the second purpose, which is more intriguing: why did Constantine decide to grant legal powers to bishops? From both this source and other primary documents we can speculate that Constantine's rationale was based on an intermixing of genuine religious belief (or at least the desire to give off that impression) and political machinations. After all, by granting bishops this kind of authority, Constantine was assuring that Christians would never be persecuted under Roman law again. In addition, he was giving Christians a distinct advantage under the law as a whole, thus expressing patronage to those who shared his faith. While this act may have been religiously inspired, it also made good political sense, since Constantine was attempting to expand his role in the Church. By granting legal power to bishops, the Emperor was ensuring their loyalty, and they would in turn ensure the loyalty of their followers.[9]

The clarifying purpose of this document becomes obvious in the opening lines of the letter. When Constantine writes "And so because you wanted us to provide you with this information, we are again promulgating the programme of the salutary law we previously issued," we realize that this law has already been issued.[10] What is more interesting here is the question of why did the Prefect Ablabius request this information again? Ablabius was a figure of some importance during the reign of Constantine, especially in the field of law, as he appeared in other letters addressed to him by the Emperor, one of the last involving divorce law.[11] It seems unlikely that Ablabius needed this clarification due to any genuine misunderstanding of the Emperor's order, as the brevity of this letter limits its usefulness in that regard. Two other explanations for this clarification seem more likely. Either Ablabius had heard of the new law and was unsure of whether it was genuine, or he was expressing a subtle form of protest by asking for clarification. The latter is understandable, as this law did take away some of the judicial power of Prefects like Ablabius.

Though the purpose of the clarification aspect of the letter is important, it is Constantine's intentions for the actual judicial power he

7 A.D. Lee, *Pagans and Christians in Late Antiquity* (London: Routledge 200), *Sirmondian Constitutions I*, pg.218-220.

8 Ibid.

9 Professor Digeser, Lecture, Thursday May 10th.

10 Lee, *Sirmondian Constitutions*, 219.

11 Judith Evan Grubbs, *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford: Clarendon Press, 1995) 319.

invested in the bishops that is truly crucial to our understanding of the document. In *The Life of Constantine,* Eusebius described Constantine's interaction with the bishops after his conversion. According to Eusebius, the Emperor "distinguished them with the highest possible respect and honor, showing them favor in deed and word" and he "bore a share of their deliberations".[12] Though Eusebius' agenda as a bishop himself is evident throughout the work, *The Life of Constantine* still provides critical information about why Constantine provided this authority to his bishops. By engendering himself to the bishops and exercising his power as pontifex maximus subtly, Constantine succeeded in ensuring the loyalty of these early Christian leaders.[13] This underlying purpose of his letter to the Prefect would ultimately have an enormous impact on the development of Christianity.

BROAD IMPLICATIONS OF LETTER FOR THE EARLY CHURCH

In order to examine how the decision to give judicial power to bishops affected the early church, we must first determine the nature of the Church in the years leading up to the reign of Constantine. Unlike what would begin to appear after Constantine, the Christianity of the first through third centuries C.E. was a religion struggling to define itself as a faith that was considered outside of acceptable Roman society. Though the Romans were masters of adopting and incorporating new faiths into their own, as was evident with their pilfering of the Carthaginian pantheon head during the Punic wars and their integration of Mithraism, Christianity itself was not seen as acceptable.[14, 15] This outsider status was brought on by Christians' refusal to sacrifice and their acknowledgement of only one God, two things that rankled Roman society. At first this only caused members of the faith to suffer through small-scale localized persecutions like those described by the bishop Firmilian in his letter to the bishop Cyprian.[16] The first empire-wide persecutions came with the reign of the emperor Decius around 250 C.E. From the persecutions

12 Eusebius, *Life of Constantine*, Chapter XLII - XLIV, http://www.fordham.edu/halsall/basis/vita-constantine.html.

13 Rupke and Ando, ed., *Religion and Law in Classical Rome, Revolution from the Top?,* Karl Leo Noethlichs, (Stuttgart: Franz Steiner Verlag 2006), 117.

14 Lecture, Elizabth Digeser, University of California, Santa Barbara, History 114A.

15 *Two Documents on Mithraism,* in *Paganism and Christianity*, compiled by Ramsay Macmullen and Eugene Lane (Minneapolis: Fortress Press 1992), 72-74.

16 Firmilian, *Localized persecution and church division in Pagans and Christians in Late Antiquity*, compiled by A.D. Lee (London: Routledge 2000), 48.

of Decius we can see the importance of sacrifice as one of the primary rallying points against Christians. Suspected individuals were forced to document public sacrifices in order to avoid punishment, something a true Christian would be unwilling to do.[17] In one document from the late third century, a local magistrate lays out his seizure of church goods, of which there were only a few bronze objects.[18] From this account we see how the persecutions highlight the overall weakness of the Christian church, which did not have even basic property rights. This reality would be carried on into the Great Persecutions of Diocletian and his tetrarchy at the start of the fourth century.

Status as a fringe faith and the organized attacks against it were not the only aspect of early Christianity that changed dramatically in later years. The very manner in which the church was organized and the values it taught also evolved from earlier, unfamiliar forms. In a second century document the Christian apologist Tertullian struggled to make Christianity appear as something familiar to the predominant Roman/Mediterranean culture, a "club" of sorts where members donated willingly.[19] This attempt would come to greatly contrast with later church documents (and even some contemporary ones) that sharply criticized Roman traditions. For instance, by the end of the fourth century some bishops were relishing in stories of physical miracles against the pagans, as was the case in city of Apamea as described by Theodoretus.[20] Such a dramatic shift in the attitude of Christians toward those who did not share their faith was indicative of the changes that took hold of the religion. It is unsurprising that apologists like Tertullian were increasingly uncommon by the time of Constantine's conversion.

Despite enormous differences between the early church and the form it would later take, the one crucial commonality that directly links not only to this document, but also the overall evolution of Christianity were the bishops. While bishops would not begin to take on real political power within the Empire until the advent of reforms like the one described in Constantine's letter to Ablabius, their role in the church made them the perfect tool to change the nature of Christianity. This idea becomes evident with the onset of the Arian controversy. In a letter written by Constantine to Arius and the bishop Alexander who excommunicated him, Constantine attempted to end the differences between the two by himself.[21] When this failed, Constantine was forced

17 *Certificates of sacrifice from the Decian Persecution* in A.D. Lee, 50-51.

18 Aurelius Serenos, *Documentary Evidence from the first phase of persecution*, Lee, 70-71.

19 Tertullian, *Christian Organization and activities* in A.D. Lee, 37.

20 Theodoretus, *Anti-Pagan Miracles* in *Paganism and Christianity*, compiled by Ramsay Macmullen and Eugene Lane (Minneapolis: Fortress Press 1992), 286.

21 Eusbesius, *Constantine and the Ariian Controversy* in A.D. Lee, 87.

to draw upon the power of the bishops by convening a council at Nicea in order to unify the doctrine. This event is significant for two reasons. First, it reveals how Constantine's conversion and endorsement of Christianity has introduced him as a sort of central power figure in the religion. This merging of political power and the Christian faith was a huge shift for the early church. Secondly, despite Constantine's own power he still decided to use the bishops in order to apply his desire for unification of the faith.[22] In the light of this reality, the fact that Constantine gave strong judicial powers to the bishop is unsurprising. Not only did he grant authority to individuals who were becoming more powerful than his own prefects in some communities, he gave them a taste of what his support could mean.

These developments can be seen in much of the documentary evidence following the reign of Constantine. Nowhere are the effects of Constantine's momentous decisions more evident than in the reign of Justinian, emperor of the Eastern Empire from 527 to 565. While Constantine had been tolerant of most other religions, even while he deeply involved himself in the inner workings of the Christian church, his empowerment of Christianity laid the groundwork for the dramatic events of pagan persecution that took place under Justinian. Those individuals identified as pagans in the region of Sardis soon found themselves being persecuted by the empire soon after Justinian's ascension to power.[23] One of the last remaining cults of Isis, often considered an early monotheistic influence, was also destroyed during the reign of Justinian.[24] These aggressive displays of the Eastern Imperial government actively enforcing the idea that Christianity was the only true faith have strong roots in the decisions made by Constantine, including his ruling that Christian law was higher than any other.

Another critical result of those efforts expressed by Constantine in his letter was the emergence of a more central tradition in Christianity, one that in many ways set the stage for the office of Pope. From Eusebius' description of Constantine's behavior at the council of Nicaea it is clear that he was not only responsible for the calling of the meeting, but was also the most prominent figure in its proceedings.[25] This influential role would not be completely emulated by any Emperor following Constantine (likely due to the fact that many of Constantine's successors in the East and West did not follow his Nicene creed), but would come again in the form of a spiritual turned political leader named Gregory during the sixth century. Gregory the Great's organized campaigns against the

22 Harold Drake, *Constantine and the Bishops: The Politics of Intolerance* (Johns Hopkins Press 2000).

23 *Persecutions of Pagans in Sixth-century Sardis,* Lee, 136-7.

24 Procopius, *Wars*, in Lee, 140-141.

25 Eusebius, *Life of Constantine,* Chapter X.

Lombards, as well as his mission to re-evangelize Britain, are actions strikingly similar to the policies that previously only Emperor's had been able to implement.[26] This meant that it was a Christian spiritual leader, arguably the first Pope, who would inherit the combined spiritual and political power that Constantine had established, albeit in a completely different manner.

The letter to Prefect Abblabius represented something even more significant than just a political power shift within the relationship between Rome and the church. We need look no further than the language used by Constantine to find this important development: "All cases therefore, whether dealt with under praetorian law or civil, are to be confirmed by the law of lasting permanence when finalized by the judgment of bishops."[27] This idea that Christian law was of lasting permanence, or somehow higher than any other form of law, became a central part of the Church development. It was this idea, and the reforms that went hand in hand with it, that served to shape the Christian church more than any other development. It was now Christians who were passing laws regulating the lives of pagans, something exemplified in the *Theodosian Code* of 428.[28] This combination of traditional Roman law with Christian law started by Constantine is one of the most profound holdovers from ancient times, one that can still be seen in our own modern legal codes and in the current state of relations between the church and state.

CONCLUSION

There are few figures who have done as much to influence the path that the Christian religion would take as Constantine did when he declared that judicial power be granted to bishops. The fact that his grounds for this decision were based upon both a genuine belief that Christian law was higher than all others and part of his plan for reshaping the political structure of the church and empire makes his role all the more intriguing. But whatever one's views on the nature of Constantine's faith may be, it is clear that his merging of Christian law and Roman political power set the stage for a transformation of the church that would take it from being a tiny, persecuted faith and transform it into the dominant force in the Western world for centuries to come.

26 Bede, *Church History* in Lee, 142.

27 Constantine, *The judicial power of Bishops* in A.D. Lee, 219.

28 *Provisions in the Theodosian Code against Pagan Survivals* in Macmullen and Lane, 284-285.

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A Critical Evaluation of Mill's Proposed Limits On Legitimate Interference With The Individual

Panos Mavrokonstantis

The theoretical foundations of the legal framework of contemporary liberal societies can be attributed to the notable philosophical contributions of various thinkers of the 19th century, one of which is John Stuart Mill. Mill formulated a highly influential conception of individual liberty which emphasized the need to impose limits on legitimate interference with the individual. However, despite the undeniable influence of his proposed limits, his theory has not been without critique. This paper outlines Mill's account of the notion of individual liberty and the proposed limits which should be imposed on legitimate interference with the individual. It then provides a critical evaluation of these proposed limits and concludes that they suffer from inherent flaws and inconsistencies which limit the plausibility of their implementation.

Introduction

John Stuart Mill is classified as one of the most influential philosophers of his era, whose profound contribution to 19th century political and philosophical thought was paramount in contextualizing liberal ideals. Although the scope of his work was not limited to the narrow spectrum of politics or philosophy, one of Mill's most influential theoretical developments was his thesis on the principle of individual liberty and its nature in a functioning society in his work *On Liberty*. In this text, Mill identifies the justifications for the primacy of individual liberty and formulates the societal conditions in which such liberty can be realized and protected. Mill's focus is on the nature and boundaries of individual liberty, whose central importance entails the need for protection through the enforcement of limitations on the legitimate interference with the individual. The contribution of Mill to this issue is invaluable. The diachronic debate over the nature and limits of individual liberty is of central importance to the underlying philosophy of the moral, legal and governmental systems on which modern societies function and so undeniably is an issue as prominent today as when it was initially

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developed.

The purpose of this essay is to critically evaluate Mill's proposed limits on legitimate interference with the individual. The first section of this essay will evaluate some of the key notions utilized by Mill in the development of his main arguments in *On Liberty*, which will serve as the foundation of the investigation of the relation between interference and the individual. The next section will examine Mill's three concepts of liberty, identifying the environment in which Mill's free individual should be allowed to operate. This will be followed by an analysis of the Millian principle of liberty through an inspection of Mill's celebrated 'harm principle,' which provides the applicative framework for the concepts of liberty. The next section will identify Mill's proposals on the legitimate interference with the individual in relation to education and the government. The penultimate section will provide a critical evaluation of Mill's proposed limits on legitimate interference with the individual through the analysis of various counter-arguments to Mill's thesis. The final section will offer a personal evaluation of Mill's argument, concluding that Mill's proposed limits on legitimate interference with the individual suffer from inherent flaws and inconsistencies, which render implausible the practical implementation of his proposals.

KEY NOTIONS

An appropriate starting point prior to embarking on the analysis of Mill's proposed limitations on legitimate interference with the individual is to evaluate some key notions which are central to Mill's thesis, such as the terms *individual*, *liberty* and *constraint*.

The concept of the *individual* is of paramount importance, as it is upon this entity that Mill's argument is structured. To comprehend the importance ascribed to the individual by Mill, one should consider that from a philosophical perspective, only individuals can be free. Mill's individual, however, is not solely a single person, but specifically a self-developed individual. As Mill argues, "Where not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress."[1] Therefore, Mill's individual is more than a sole person – Mill's individual is one, which has the capacity to distinguish himself from traditions, customs or culture, and define his own wants.

Another concept on which Mill philosophizes is the notion of *liberty*, which in the context of his writing is defined as "Civil or Social Liberty: the nature and limits of the power which can be legitimately

1 John Stuart Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill: On Liberty and Other Essays 2nd ed.* Oxford: Oxford University Press, 1998, 63.

exercised by society over the individual."[2] This is of central importance to Mill's argument, as his thesis is an attempt to examine the limits which can or should be placed on the freedom of individuals who desire to act in accordance with the determination of their will.

Mill defines limitations upon the liberty of individuals as *constraints*. For instance, in modern democracies, constraints on liberty are institutionalized and imposed on the individual through the legal system. Furthermore, besides the avenue of the legal system, individual liberty may also be curtailed by governmental intervention. Under democratic governance, liberty is perceived to be provided to the individual by the government. In the same way as a government acts in order to provide and protect individual liberty, it may also act in ways in which actually limit this liberty. For Mill, the systems of law and government are two integrated, significant societal establishments enshrined into civilized society, which may threaten individual liberty. It comes as no surprise that Mill's proposed limitations on legitimate interference with the individual, which will be analyzed in this essay, heavily target these institutions.

Mill's Concepts Of Liberty

Mill's proposed limits on legitimate interference with the individual are initially articulated through the development of his three concepts of liberty, whose implications are cardinal to the notion of legitimate interference with the individual.

The first concept of liberty identified by Mill is the liberty of thought and opinion. According to Mill, "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[3] Therefore, Mill emphatically argues that limiting someone's expression of thought is illegitimate, however unpopular that opinion may be. No one has the right, whether the government through laws, or individuals through public opinion and disapproval, to infringe upon an individual's freedom of expression, as any perception may be true. Through freedom of expression, minority views are protected against the "tyranny of the majority."[4] Mill believes that "all silencing of discussion is an assumption of infallibility" and so is *ab initio* illegitimate due to the simple fact that human beings are fallible.[5] Thus, they "have no authority to decide the question for all mankind, and exclude every other person from the means of judging" because no one can be absolutely certain that his perception

2 Ibid, 5.
3 Ibid, 21.
4 Ibid, 8.
5 Ibid, 22.

is correct.[6] Mill highlights this with his reference to evolving conceptions of religion, offering the example of persecutions which took place in the past over beliefs which are now conceived to be true.

In the same way, limitations on expression contain the danger of silencing true opinions. By dismissing opinions we are essentially "robbing the human race; posterity as well as the generation" of the opportunity to develop through plurality and diversity in opinions.[7] Therefore, individuals should enjoy freedom of thought and expression because it results in positive externalities for society. The interaction of various strands of opinion is a necessary condition for the elimination of error and for the development of a more holistic and robust comprehension of the foundations on which truths are based. Furthermore, even in the case where an opinion is accepted to be true, a lack of continuous Socratic cross-examination of contrasting viewpoints of an opinion will render any perceived truth a "dead dogma, not a living truth."[8]

The second concept of liberty identified by Mill is the "liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like."[9] This concept is directly related to the concept of liberty of thought and opinion, as Mill attempts to outline the boundaries in which an individual can legitimately act upon his opinions without encountering social stigmatization or legal persecution. Mill advocates that an individual should be free to act upon his opinions, but in contrast to his concept of liberty of thought and expression, he prescribes some limits to the scope of this freedom. Mill argues that whilst an individual is entitled to express his opinion, irrespective of how popular it may or may not be, he should not be free to act upon it in cases where it may harm other individuals or in ways which are "a nuisance to other people."[10] Therefore, Mill makes an important distinction between self-regarding and other-regarding actions. Self-regarding actions are actions, which have no effect on any individual other than but the actor himself, and so belong to the private sphere. Other-regarding actions are those actions taken by an individual, which also affect other individuals besides the actor, and so belong to the public sphere.

Mill argues that "over himself, over his own body and mind, the individual is sovereign" and so stipulates that within the private sphere, an individual is autonomous.[11] However "foolish, perverse, or wrong" an action is perceived to be, an individual should enjoy the freedom to

6 Ibid, 22.
7 Ibid, 21.
8 Ibid, 40.
9 Ibid, 17.
10 Ibid, 63.
11 Ibid, 14.

carry it out, provided that it is a self-regarding action.[12] This extends to immoral or harmful actions, whose implementation should not be obstructed through governmental regulation, unless they are deemed harmful to other individuals. Imposing limitations on self-regarding choices and actions of individuals is illegitimate, because, according to Mill, the private sphere is not the state's concern or responsibility. A modern world application of this approach is the issue of drug usage. Mill's approach entails that an individual should be free to use drugs, provided that in so doing he does not harm others, for example through theft or violence in order to obtain the substance. This illustrates Mill's critique of paternalism, as he rejects "the idea that government should exercise the role of a parent" seeing it as an illegitimate intrusion in the private sphere of self-developed individuals, who do not require moral guidance.[13] He argues that the only justifiable reaction to self-regarding actions of individuals is "advice, instruction, persuasion and avoidance by other people."[14]

A crucial implication of Mill's concept on the freedom of action is that the freedom to act, albeit within the prescribed limits, enables the expression of individuality, which for Mill is paramount to social progress. Freedom over actions which do not harm others allows for "different experiments of living" which facilitates individuals to break away from customs and conformity.[15] Nonconformity results in the societal identification of individuals' dissimilarities. Through this diversity, individual and social progress is achieved, not only through the identification of one's own weaknesses but also through the exemplification of the possible benefits of integrating the positive features of each individual.

The third concept of liberty identified by Mill is the freedom of association. Following from the concept of freedom of actions, Mill advocated that individuals should enjoy the "freedom to unite, for any purpose not involving harm to others."[16] Therefore according to Mill, individuals should enjoy the liberty to freely form or join groups, whether for hobbies, political debate, or even for dissent with the government. However, as the purpose of such groups should not involve the cause of harm to others, the Millian system would exclude from the list of legitimate groups any collective entity whose intentions could be considered harmful to others, such as groups seeking to overthrow

12 Ibid, 17.

13 Paul Kelly, *J.S. Mill On Liberty, Political Thinkers: From Socrates to the Present*, Oxford: Oxford University Press, 2003, 336.

14 Mill, On Liberty, in John Gray, ed., John Stuart Mill: On Liberty and Other Essays 2nd ed., 105.

15 Ibid, 63.

16 Ibid, 17.

the government. Within the realm of legitimacy however, government legislation against lawful groups should be limited.

THE HARM PRINCIPLE

The conglomeration of all three concepts of liberty is preponderant for the protection of individual liberty. As Mill argues, "no society in which these liberties are not, on the whole, respected, is free," and propounds, as a direct implication of the aforementioned concepts of liberty, his celebrated harm principle.[17] This principle of liberty provides the applicative framework through which true individual liberty may be realized. Mill's harm principle is based on the notion that:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[18]

The harm principle is the central underlying factor of all three concepts of liberty. However, Mill places several constraints upon the operation of the harm principle. Exempt from Mill's individual who is entitled to liberty within the boundaries outlined by the harm principle are children and individuals incapable of taking care of themselves, who "must be protected against their own actions as well as against external injury" as they are unable to protect themselves.[19] Mill also excludes barbarian societies and argues, "despotism is a legitimate mode of government" in such cases, given that the end is their betterment, as uncivilized, undeveloped individuals are not sovereign over their self.[20] Only developed individuals are entitled to liberty, which may be granted to barbarian nations following the rule of benevolent dictators who will assist in their people's self-development.

Mill also makes a distinction within other-regarding actions between those, which merely affect others, and those, which directly affect the interests of others. A harmful other-regarding action is defined by Mill as "any part of a person's conduct [which] affects prejudicially the interests of others."[21] Furthermore, he argues that harming others is a necessary but not sufficient reason for interference with the individual,

17 Ibid, 17.
18 Ibid, 14.
19 Ibid, 14.
20 Ibid, 15.
21 Ibid, 83.

as the complete case must appeal to utility.

This notion is exemplified with his endorsement of laissez-faire politics, which serves to illustrate the conditions where even other-regarding activities of individuals may not be considered as harmful to others. This concept is typified by Mill's reference to the free market. He argues that, although there are winners and losers in the market on behalf of suppliers, a supplier selling a commodity cheaper than a competitor cannot be blamed for the 'harm' done to his competitor through the consequential loss of his competitor's earnings. On utilitarian grounds, the result of this outcome is beneficial to society as a whole and so nullifies any justification for government intervention. Therefore, since the majority of individuals prosper from the 'harm' caused by the free market, the harm incurred by an individual supplier is not sufficient to call for legitimate interference through market regulations on behalf of the government. Intervention, however, is justified in cases where producers affect the supply in ways, which limit the ability of the consumers to purchase commodities. In this case, the liberty of the individual consumer is encroached by such practices, with a modern example being the formation of cartels, and so government intervention would be considered a legitimate form of interference in such a case.

Mill's Proposals On Legitimate Interference With The Individual

Mill proposes a range of specific limitations on legitimate interference with the individual and offers a range of "specimens of application" which are indicative of the implications of the applicative framework of his harm principle.[22] Owing to the value he placed on individuality, Mill gave great emphasis on outlining his proposals on legitimate interference with the individual in relation to the sphere of education, which he considered to be the cornerstone of individual and societal cultivation and betterment. As Mill argued, "a general state education is a mere contrivance for moulding people to be exactly like one another" which consequently threatened individual freedom and diversity.[23] In line with the Godwinian notion that state education merely provides the opportunity for the government to "strengthen its hands and perpetuate its institutions" at the detriment of individual liberty, Mill proposed limitations on governmental control of education and consequently of individuals.[24] He believed that "an education established and controlled by the state should only exist, if it exist at all, as one

22 Ibid, 105.

23 Ibid, 117.

24 Joel Spring. *Wheels in the Head: Educational Philosophies of Authority, Freedom and Culture from Socrates to Paulo Freire*. New York: McGraw-Hill, 1994.

among many competing experiments."[25] He was therefore vehemently opposed to state education, preferring instead a parent-funded system. He supported the creation of a range of education systems, with compulsory education consisting of fines for parents whose children were unable to read at a predefined age. For older ages he proposed a system of voluntary subject selection, enabling students to acquire knowledge beyond the basics in accordance with their interests. To limit the state's interference with the individual through the "improper influence over opinion," Mill envisaged curriculums and examinations restricted exclusively to positive science and facts.[26] This allows students to acquire knowledge of debatable issues such as religion without the obligation of expressing a belief in any specific doctrine, which would otherwise be censored to follow the official line of the government or Church.

Furthermore, in the context of the limits of legitimate interference with the individual in relation to children and their development, Mill made a far more radical proposal. He suggested the implementation of legal scrutiny of marriages, which would be allowed only if both parties could prove that they had the resources to support future offspring. Mill argued that this intrusive claim is legitimate because it is simply enforcing the harm principle, as "procreation under such circumstances harms others – primarily the self that has to endure such a life."[27]

Mill also placed constraints on the government in terms of the extent to which it should interfere with the individual in order to provide assistance and act, not as a restraining, but as an enabling institution. Mill argues against such government intervention and adduces three objections with which he substantiates his stance.

Firstly, in accordance with his view on the supremacy of a laissez-faire approach, he argued in favor of free trade and the enforcement of limitations upon government regulation of business and trade. He believed that interference actually restricts the liberty of individuals who engage in trade. For example, temperance laws or laws banning poisons or drugs violate the individual's right to buy and consume any commodity he desires. Provided that consumption of such products does not cause harm to others, any "individual should have a right to spend his income as he wishes on any good which can be used in ways harmless to other people."[28] Similarly, Mill objects to the enforcement of taxes on alcohol as a means to curb consumption, because this method "constitute[s] a

25 Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill: On Liberty and Other Essays 2nd ed.*, 105.

26 Ibid, 118.

27 Iain Hampsher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx*, (Oxford: Blackwell, 1995), 382.

28 Jonathan Riley, *Mill on Liberty* (London: Routledge, 1998), 117.

form of prohibition that falls differentially on the poor" and interferes with their individual liberty.[29]

Secondly, he argues that by limiting government interference, individuals are left to order their affairs themselves, which contributes to the moral and intellectual development of society. Mill fervently advocates that "what the State can usefully do is to make itself a central depository and active circulator and diffuser" and simply reduce its role to that of the coordinator of the interactions of the various experiments in living.[30]

Thirdly, Mill argues against government interference as a means to restrict the growth of its power and influence to unnecessary and potentially dangerous levels. If such restrictions are not imposed, then "not all the freedom of the press and popular constitution of the legislature would make this or any other country free otherwise than in name."[31] Thus, Mill argues that the growth in governmental power may ultimately result in the control by government of all aspects of private life, harming individual freedom through the subservience of society to the government.

A Critical Evaluation Of Mill's Proposals

Mill's thesis on the principle of liberty and the consequent limitations on legitimate interference with the individual have been criticized from a wide range of perspectives. Primarily, several scholars are concerned with the vagueness which characterizes Mill's harm principle, as "harm can be experienced in all sorts of ways and clearly cannot be confined to physical hurt," which leaves it open to numerous interpretations.[32] D.J. Brown argues, "there is a tension in Mill's theory of liberty as to what counts as conduct harmful to others."[33] While Andrew Levine notes that "what counts as an interest that can be harmed depends on prevailing norms and practices" and accuses Mill of presenting an account of harm which is neither trans-historical nor trans-social.[34] Levine actually believes that no such account may exist, because the meaning of 'harm' cannot be absolute in definition but ultimately depends on

29 Hampsher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx*, 381.

30 Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill: On Liberty and Other Essays 2nd ed.*, 121.

31 Ibid, 123.

32 Hampsher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx*, 369.

33 D.G. Brown, "Mill on Liberty and Morality," *The Philosophical Review* 81, (1972): 133.

34 Andrew Levine, *Engaging Political Philosophy: From Hobbes to Rawls*, (Oxford: Blackwell, 2002), 161.

what people perceive harm to be in the context of their individual experiences.

Levine develops his critique by reference to the issue of individuals' legitimate interests. He argues that the method of determination of such legitimate interests is problematic, because the classification of the legitimacy of interests is purely subjective, rendering impossible any attempt to formulate an explicit framework which would enable society to practically implement the harm principle. As Levine argues, "legitimacy is a context-dependant standard, an artifact of the norms, practices, and expectations that the principle of liberty is supposed to critically assess" but fails to do so because it ultimately depends on vague concepts which have unclear and variable definitions.[35] Therefore, Levine argues that the very principle on which Mill's proposed limits on the legitimate interference with the individual are based is flawed, because the definition of harm depends on the identification of individuals' legitimate interests, which cannot be universally explicitly defined. This critique is also echoed by John Gray, who believes that Mill's harm principle is far from the "one very simple principle" which Mill looked to enunciate.[36] Given that "conceptions of harm, and in particular judgments about the relative severity of harms, vary with different moral outlooks," Mill's thesis fails to provide a useful guide to policy regarding legitimate interference with the individual, as it is inherently flawed and incomplete.[37]

A further criticism from Gray concerns the demarcation of the private sphere of individuals, whose explicit determination is cardinal to the application of the harm principle. Gray argues that the distinction between self-regarding and other-regarding actions is too vague and essentially non-existent. As Gray points out, "a sphere of self-regarding actions that affect only (or even primarily) the agent himself either does not exist, or is small and trivial."[38] If the distinction between self-regarding and other-regarding actions cannot be made, then the fundamental concept of the harm principle essentially collapses, as it is deemed incongruous in providing the framework on which a realistic policy approach could be modeled. It can be argued that due to the fact that individuals do not live solitary lives in isolation from others, supra-individual interaction is ultimately an inherent feature of modern civilization and so any individual action will indeed affect others.

35 Ibid, 162.

36 Mill, *On Liberty*, in John Gray, ed., *John Stuart Mill: On Liberty and Other Essays 2nd ed.*, 13.

37 John Gray, Introduction in John Gray, ed., J.S. Mill: On Liberty and Other Essays. Oxford: Oxford University Press, 1998, xviii.

38 Ibid, xvii.

Consequently, Mill's thesis "presupposes what does not exist."[39]

Mill's case, however, has not remained undefended. J.C. Rees, a proponent of Mill, supports that the harm principle survives this criticism because Mill did not present other-regarding actions merely as those actions, which simply affect others. Mill allowed for the cases where individual actions may *indirectly* affect others, and argued that self-regarding actions were explicitly "those actions which do not affect the *interests* of others."[40] According to Rees, "a person may be affected by another's behavior without his interests being affected" and that this suffices to adequately distinguish self-regarding from other-regarding actions.[41] However, C.L. Ten doubts whether Mill meant for the distinction between the notions of effects and interests in the way Rees advocates. Furthermore, it should be noted that in *Utilitarianism*, Mill argued that, "Laws and social arrangements should place the happiness, or (as speaking practically it may be called) the interest of every individual, as nearly as possible with the interest of the whole."[42] Hence, he defined interests as happiness. Therefore, if one accepts that the meaning for Mill of the word 'interest' was consistent throughout the writings of both *Utilitarianism* and *On Liberty*, then the concept of 'affecting other individuals' interests' is equated to the concept of 'affecting other individuals' happiness,' which appears to be significantly similar, if not identical, to the concept of simply 'affecting other individuals,' falsifying Rees' defense.[43]

For the skeptic who may find this criticism inadequate, Rees' defense may also be nullified on the grounds that the fundamental concept incorporated in his argument in formulating his defense – i.e. individual interests - is inherently flawed, due to the obscurity which overshadows the Millian conception of individual interests. A defense of the Millian principle which is heavily based on a highly disputed issue such as that of the nature and specification of individual interests does not cast away any of the many doubts fostered as a result of the arguments of Mill's critics. On the contrary, it casts even more doubts about the plausibility of the principle itself.

A further criticism of Mill's thesis is the identification of an inherent problem in the division between liberty of thought and opinion, and the liberty of action. As Hampsher-Monk argues, this arises by Mill's inclusion in the context of the liberty of thought and opinion, the liberty to publish and express opinions, as Mill argues that plurality and

39 John Gray, *Mill on Liberty: A Defense 2nd ed.,* London: Routledge, 1996,

40 C.L. Ten, "Mill on Self-Regarding Actions," *Philosophy*, 1968, 29.

41 J.C. Rees, "A Re-Reading of Mill *On Liberty*," *John Gray and G.W. Smith, ed. J.S. Mill: On Liberty in Focus*. London: Routledge, 1991, 174.

42 John Stuart Mill, *Utilitarianism 4th ed.*, in Roger Crisp, ed., *J.S. Mill: Utilitarianism*, Oxford: Oxford University Press, 1998, 64.

43 Ten, "Mill on Self-Regarding Actions," *Philosophy*, 30.

diversity lead to individual and social improvement. However, the practice of expressing an opinion, whether orally or through publications is in itself an act, which leads to an inconsistency with Mill's concepts of liberty. Based on his principle of liberty of actions, Mill proposes restrictions on actions, which harm others, and so by the same token restrictions should be placed on the expression of ideas that harm others. This contradicts his first concept of liberty concerning freedom of expression, thus creating an inconsistency in his argument.[44]

Mill's thesis can also be attacked on the grounds that it is culturally elitist and exclusive, as it deems that backward nations are not entitled to enjoy individual freedom within the scope of the harm principle. Specifically, the differentiation between 'barbarian' and 'civilised' people can be criticised on the grounds that it simply condemns individuals to a life under despotic rule and encroachment of individual liberty simply because they happened to be born in a so called barbarian society. This disregards the common humanity, which unites all human beings regardless of the societal conditions into which one is born. Specifically, Mill could be accused of trying to impose the cultural values of his own society on others which by his standards are considered backward, ignoring the fact that the value of any culture is a highly subjective issue which does not allow for any justified hierarchical ranking of cultures or societies. Indeed, individuals naturally tend to consider their own culture superior to others, as the formulation of the moral concepts of each individual is heavily influenced by the societal conditions prevalent in each society, hindering the comprehension of dissimilar cultures.

Mill's elitist convictions are also identified through his proposals on the education system and their implications on the right of marriage and reproduction. A practical implementation in the modern world of the ban on the marriage of couples which cannot prove their ability to finance their children's education would be considered extreme and highly intrusive, greatly restricting individual liberty rather than protecting it. Mill's proposals can be attacked on the grounds that they do not provide an equal opportunity to people to marry and reproduce for the mere sake of avoiding state education, thereby discriminating against individuals and punishing them for their poverty without actually offering a viable alternative. Moreover, the denial of the "very existence to the self being protected from harm" – in this case the unborn baby who would otherwise not be entitled to education if born into a poor family – could be criticized as the most serious violation of individual liberty, contradicting Mill's liberal legacy.[45] Indeed, E.G. West argues that, "Mill's individual in the end therefore is not perfectly free, but to some extend manipulated by the Victorian intellectual paternalism of JS

44 Hampsher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx*, 369.

45 Paul Kelly, J.S. Mill On Liberty, Political Thinkers: From Socrates to the Present, 382.

Mill himself and his own educated middle class."[46] Thus, far from limiting legitimate interference with the individual, Mill's proposals could be seen as merely replacing them with the limitations of his own intellectual class. Furthermore, Mill's proposals can also be criticized as a failure to realize that such a restriction on marriage and reproduction would ultimately restrict not only the population growth but also the labor force, thereby impeding economic growth and consequently overall utility.

Mill's proposed limits on legitimate interference with the individual have also been criticized as being founded upon an inherently false account of individuality, and are therefore lacking the potential for a realistic implementation. A conservative critique is offered by James Fitzjames Stephen who rejects the trust Mill places on man's benevolence or progressiveness. Stephen argues that by nature, "an enormous mass of bad and indifferent people" will always exist.[47] Therefore, he considers unjust the freedom granted by Mill, as tolerance will not lead to dialogue and self-development but rather to indefinite conflict, and proposes a Hobbesian enforcement of restrictions as a means to maintain peaceful societal relations.

Mill's account of individuality can also be challenged from an egalitarian perspective. Given that Mill's principle of liberty inherently revolves around "the institution of private property," which constitutes the personification of individual sovereignty, egalitarians would argue that it is the existence of private property and the need to protect it from others which provides the pretext to government authorities to interfere with individual liberty.[48] In a society founded upon common ownership where the "sense of solidarity with one's fellows" dwarfs the need for expression of individuality through private property, no such need for intervention will exist and therefore true liberty will be realized.[49]

Lastly, one could criticize Mill's account of the limited role of the government, considering it an attack on the modern welfare state. Although neo-liberals would support Mill's views, Keynesian welfarists would argue that Mill's proposals would actually increase the limitations on individual liberty, because "unrestrained capitalism does not give

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46 E.G. West, "Liberty and Education: John Stuart Mill's Dilemma," *Philosophy*, 1965, 142.

47 James Fitzjames Stephen, *Liberty, Equality Fraternity*, in R.J. White, ed., *Liberty, Equality, Fraternity,* (London: Cambridge University Press, 1967), 72.

48 Richard M. Ebeling, "John Stuart Mill and the Three Dangers to Liberty," http://www.fff.org/freedom/0601b.asp.

49 Geoffrey Klempner, "Ethical Dialogue and the limits of Tolerance," Shap Conference 1998, Philosophical Society of England, http://klempner.freeshell.org/articles/tolerance.html.

each individual the same opportunities for self-realization."[50] Thus, an individual can enjoy true freedom only if he is aided by a welfare state, the role of which is to enable its citizens to pursue their individual interests and achieve self development.

CONCLUSION

To conclude, this essay has offered a critical evaluation of Mill's proposed limitations on legitimate interference with the individual, through the analysis of Mill's principle of liberty and the subsequent examination of the plethora of counter-arguments expressed by Mill's critics. Although Mill's arguments concerning the sphere and scope of individual liberty may appear reasonable at first sight, a closer introspection confirms the fallacies revealed by the array of Mill's critics. Mill's thesis does not survive the criticism because it suffers from inherent flaws and inconsistencies, which consequently render his arguments invalid. Besides the inadequacies outlined by the counter-arguments of rival ideological camps, a significant limitation of Mill's doctrine which severely hampers its justifiability is the cultural elitism which it implicitly strives to promote, a characteristic clearly at odds with the libertarian legacy of the harm principle. Instead of outlining the limits on legitimate interference with the individual, it actually seeks to legitimize the imposition of restrictions on individuals who do not belong to the entitled societal groups identified by Mill, thereby limiting the right to individual liberty to a selective few.

Mill's failure to develop a convincing and justifiable doctrine ultimately resides in his nebulous account of the concept of harm and moreover in the erroneous structuring of his argument upon a preconceived but unjustified assumption that self-regarding actions can explicitly and homogeneously be demarcated from other-regarding actions. Therefore, although Mill's doctrine concerns an issue of diachronic importance and relevance, its justifiability and practicality is severely impeded by the significant flaws on which it is structured. Mill's doctrine therefore fails to provide a useful framework upon which to formulate policy directives, as the inherent flaws residing in the underlying foundation of the harm principle consequently make its practical implication implausible.

50 Andrew Heywood, *Political Ideologies: An Introduction 2nd ed.*, London: McMillan Press, 1998, 57.

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RETHINKING GENDER, SEXUALITY, AND PUBLIC INTIMACY

STEPHANIE MURPHY

This paper briefly examines the language used in the YES and NO on Proposition 8 campaigns in the 2008 California state elections. Incorporating queer theory and Andrea Smith's formulation of reproductive justice, this essay discards standard mainstream rhetoric around gender and sexuality. Instead, a framework of intimate justice can provide a new, more meaningful system of publicly talking about the complex, highly personal intersection of gender and sexuality in the individual.

Leading up to the November 4, 2008 elections, a plethora of easily digestible slogans were hurled at voters about California's Proposition 8 from both the "YES on 8" and "NO on 8" campaigns. Passing Prop 8 amended California's constitution to say, "Only marriage between a man and a woman is valid or recognized in California."[1] Inaccurate, misguided debates centered on generalizations like "It's just wrong" and "Protect our families" diminished the value of the amendment. Sexuality, morality, and privacy are complex topics incapable of being addressed with such broad sweeping declarations. These slogans remove their constitutive processes and contexts, and in doing so, intentionally negate space for critical analysis. In "Beyond Pro-Choice Versus Pro-Life: Women of Color and Reproductive Justice," Andrea Smith highlights the problems of talking about intimate decisions, such as childbearing, with the limited rhetoric of pro-choice and pro-life. Choices regarding birth control and family planning depend on access to economic and social resources. Concentrating on "choice" as a solution disadvantages poor women and women of color because of systemic inequality that limits those resources. Instead of working out constructive solutions, political lobbyists and ideologues dictate policy changes that negatively affect womens' options for reproductive education and health. Smith argues that expanding how we think and talk about abortion to include the broader category of "reproductive justice" will significantly benefit more women than the

1 ProtectMarriage.com, "Yes on 8 Protect Marriage: Restoring Marriage and Protecting California Children," http://www.protectmarriage.com.

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pro-choice/pro-life political maneuvering has.[2]

Engaging this idea of justice beyond the scope of political strategizing can help change how our society thinks about non-heteronormative identities. I borrow from M. Jaqui Alexander and Amy Brandzel to define heteronormativity in the context of this essay.[3] Heternormativity is mainstream valuing of only two rigid genders and the one resulting sexuality: the feminine, the masculine, and heterosexuality. Marriage involves a complex commitment to another person as well as some level of acceptance of these social constructions of gendered power and inequality. The latter consignment can be hugely problematic for people who feel that their gender or sexuality is not recognized in the traditional institution of marriage. The stigma attached to being outside of heteronormative genders or sexuality makes difference seem unusual, and even 'perverse.' Restricting personal expression of the self compromises the potential of individuality and opportunities for meaningful social participation. The current interchangeability of gendered, biological, and sexualized language harms homosexuals, heterosexuals, and everyone in between by reinforcing skewed perspectives of 'normality.' I want to reopen critical space around these vocabularies to address the persistent, institutionalized gender roles and hierarchies surrounding the gay marriage debate. To change the Prop 8 rhetoric, I will throw out the pro- and anti-gay marriage binary and focus on *intimate justice* as a tool for substantive equality incorporating multiple sexualities and genders.

To begin with, the Prop 8 discussion blatantly disregards gender inequality by extracting the institution of marriage from its history. On the YES side, the official ballot argument called for voters to "restore the definition of marriage to what…human history has understood marriage to be."[4] For anyone who has taken a history class, this phrase strikes an odd chord. How can something as value-laden as marriage have a standard conception over the entire course of human history? Even if we change this phrase to "the history of the United States in the past century," marriage has not been consistently defined. In the 20th century, marriage entailed a veritable minefield of gender roles that socially disabled married women. Before the 1934 Equal Nationality Act, "coverture" stripped a married woman of her property – including her own legal identity – to give to her husband.[5] Aside from being terribly sexist, this piece of legislation illustrates how socially constructed concepts like marriage change over time. The Equal Nationality Act

2 A. Smith, "Beyond Pro-Choice Versus Pro-Life: Women of Color and Reproductive Justice." *NWSA JOURNAL*, 17 (2005): 119-140.

3 Amy Brandzel, "Queering Citizenship?: Same-Sex Marriage and the State," *GLQ*. 11.2 (2005): 174.

4 ProtectMarriage.com.

5 Brandzel, "Queering Citizenship?: Same-Sex Marriage and the State," 174.

also provides a counterexample for the NO campaign, which asserted that marriage is an "institution that conveys dignity and respect to the lifetime commitment of any couple."[6] The elegant phrase tempts a concurring reader to whole-heartedly accept this rosy picture, but it does not accurately describe marriage. Women are no longer subordinated to their husbands with 'coverture,' but welfare incentives and domestic abuse – both modern aspects of marriage – are not conducive to the mutually supportive relationship the NO campaign projected. Divorcing idealized notions of marriage from its history as an institution and its current manifestations conceals a record of gross gender inequality and obfuscates critical analysis.

Part of the concomitant legal reasoning with coverture involved the conception of the household as a political unit. The husband, as the representative of that unit, controlled the activities of the household as he saw fit. Whatever happened 'behind closed doors' was the jurisdiction of the patriarch, including domestic abuse. Even absent violence in the home, public interference could not extend into the husband's 'privacy.' Married women had neither legal autonomy nor access to public intervention, their lives as 'domestics' were completely controlled by their husbands. The combination of societal expectations and the law effectively covered up female personhood.

Rhetoric invoking private and public realms of society also appeared in the YES and NO campaigns. Language adopted from past gendered hierarchies by pundits in the gay marriage debate continues discrimination against non-normative identities. Both campaigns framed homosexuality in terms of privacy rights, conceding private space to 'homosexual' practices while reserving public space for 'heterosexual practices.' The underlying logic of where homosexuals 'belong' has been recycled from rhetoric designating the domestic sphere as the 'natural' space for women. Heteronormative discomfort with homosexual acts relies on a blanket code of 'decency' that suggests homosexuality must be hidden, but our contemporary society also feels discomfort with overt discriminatory language; from this formula, the homosexual's "right to their private lives" emerges.[7] Other rhetoric in the YES campaign played on fears of homosexuality leaving the private realm. Calls to "protect our children" beg the questions, "From What?"[8] Apparently, passing Prop 8 keeps information about homosexuality out of public schools, an incredibly valuable site of social reproduction. The YES campaign suggested that once homosexuality escapes the 'gay lifestyle' arena, it will "force" non-heteronormative values on "us."[9] These words have

6 www.noonprop8.com.

7 ProtectMarriage.com.

8 Ibid.

9 Ibid.

incredibly strong implications. 'Force' implies an unlawful takeover (i.e. 'judicial activism' legalizing gay marriage), while 'protect' implies the just, even righteous, defense (Proposition 8) against that force. 'Us' denotes an exclusive category, separating out those who don't adhere to 'appropriate' public behavior.

An animated video on the YES campaign's website clearly distinguished between 'us' and 'homosexuals' through two couples: Jan & Tom, a married heterosexual couple, and Dan & Michael, a same-sex couple.[10] To help voters realize the merits of Prop 8, a series of "facts" are periodically proclaimed in bold text. However, underneath the words, the illustrations send other messages about correct conceptions of gender and sexuality. To depict the "traditional family values" Prop 8 aims to preserve, the YES campaign describes the lifestyles of Jan & Tom, including routine activities. "Tom mows the lawn on Saturdays; Jan likes to cook."[11] On the other hand, Dan and Michael are flat characters, identified solely as a same-sex couple. According to the video, they're afforded the "same rights" as Jan and Tom despite their subjection to different laws. They're seen participating in public neighborhood activities such as barbequing and dog-sitting, but left devoid of individualities that might hint at a non-heteronormative image.

This image of public heteronormativity and hidden homosexuality speaks volumes on the lack of social and critical space for the expression of alternative identities. Typical heteronormative responses to homosexual relationships, such as "Who's the woman/man in the relationship?" exemplify the confusion that results from trying to maintain gender roles within non-traditional relationships. Instead of unpacking the social necessity of assigning people to gender roles, discourse has turned to terms like 'same-sex couples,' and 'homosexuals.' By replacing 'woman' and 'man' with biological language, the performative aspect of gender is lost. Gender becomes biologically determined, and then sexuality derives from biology instead of individuality. Interestingly, performance reemerges in social discussions when individual rights are based on appearing heterosexual. Terms like 'homosexual' and 'heterosexual' distinguish between those who look 'straight' and those who do not for the purpose of deciding who belongs in the social fabric. The family unit is often considered an essential 'building block' of society because it ensures the safe passage of 'values' and gender roles to future generations. The exclusion of Dan & Michael from marriage and family relies on their public identity as homosexuals and thus reaffirms heteronormativity.

Unfortunately, the NO campaign reflects these exclusionary principles with heteronormative, privacy-oriented language while bringing in new assumptions about social inequality. The NO on 8 campaign

10 Ibid.

11 Ibid.

asserted "government has no business telling us what to do in our private lives."[12] Although "equality, freedom and fairness for all"[13] seems inclusive, the grandiosity of the phrase disguised its problematic nature. The most innocuous revision would insert the words "for all who want to get married," but this still veils the influence of heteronormativity. The message of the NO campaign would be more accurately captured with words that promise marriage to those "who look and act according to appropriate heterosexual gender norms."

Akin to women subjected to the 'coverture' law, homosexuals lose political agency through such language and the cover-up it reinforces. The YES campaign expects homosexuals to blend in by keeping their sexuality private while disallowing them from becoming legally recognized. The NO campaign supports gay couples, but only so far as they conform to heteronormative relationship roles. Deceptive language emphasizing freedom in privacy acts as the 'coverture' of homosexuality. Together, social expectations of private sexuality and legal limitations on public personal expression cover up homosexual identities.

Acceptance of private homosexual acts while using 'all' to include non-normative identities in heteronormative expectations suggests that sexuality only happens in private space. Gender and sexuality mutually constitute individual identity, while reified, dichotomized gender expectations are based on assumptions of heterosexuality. Idealized masculinity and femininity serve to distinguish biological sex after we cover our genitals so that males and females can tell who they are 'supposed to be' attracted to and mate with. Sexuality, however, is not only expressed in private and attraction to another person is not only based on one's genitals. As such, homosexuality and queerness challenge social expectations of physical attraction and social constructions of gender. If it is possible for individuals to not fit into heterosexual expectations, it is also possible that individuals do not fit into constructed gender binaries. The heavily publicized arguments surrounding gay marriage avoided these contestations.

I propose that, collectively and individually, American society needs to reject the pro- and anti-gay marriage debate and reframe questions about gender and sexuality with a goal of intimate justice. Allowances for private alternative sexualities deny that people perform their gender and sexuality everywhere: in daily interactions with friends, family, neighbors, and strangers. That being said, these public interactions are not sexual, but they are intimate acts. Simply talking to another human involves personal investment of the self as well as acceptance of the other's self; this is intimacy. By strictly dictating what kinds of identities can legitimately interact in public life, heteronormative society overlooks

12 www.noonprop8.com.

13 Ibid.

a myriad of meaningful perspectives and opportunities for beneficial social intimacies. Rights-based discourse respects the individual, and justice lives and breathes when every person can safely exercise the right to express themselves. Together, these definitions of intimacy and justice will form a new type of discourse on *intimate justice*: the deliverance of an undeniable right to express individual forms of intimacy in public. When Americans can talk about the value of their own and others' personal, nuanced identity performances, intimate justice will move from the abstract into reality.

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Scared Further Into A Silent Epidemic: Rhetoric In Rape Awareness And Prevention Campaigns

Heather Bartlett

This paper analyzes the rhetoric used by rape awareness campaigns at UCSB. Specifically, it looks at how these university campaigns conform to a culture that blames victims and shrouds the issue of sexual assault in silence.

It is time to end my silence. I have been unprivileged enough to have seen two sides; I have been there, and back. I got the call from Georgina when she was raped. And Megan told me over lunch. Two of my best friends, just like that, in our first year of college. I knew I had to do something, so I joined a rape awareness group on my campus but soon quit, frustrated with the bureaucracy, paper shuffling and repetition of things I already knew. Do not leave your drink unattended! Something was not right. Then it happened to me. I went through the medical examinations and legal processes that collegiate women are forebodingly warned about from resident-hall RAs who know rape will still happen no matter how closely drinks are watched. Before my experience, I considered rape awareness material inadequate; afterward, it became simply laughable. I have to tell you why. Judith Herman said it best in *Trauma and Recovery,* "The ordinary response to atrocities is to banish them from consciousness. Certain violations of the social contract are too terrible to utter aloud: this is the meaning of the word *unspeakable.* Atrocities however, refuse to be buried."[1]

Rape prevention campaigns on the UCSB campus are actually a flawed form of awareness. Rape education is woefully inadequate. Despite perhaps having some of the best intentions, awareness-raising and educational anti-rape campaigns at UCSB engage in active victim-blaming and have actually strengthened the unspeakability surrounding rape as they create the illusion of progress while the majority of our campus remains in the dark over the issue. Irony abounds through campaigns such as "It Affects Me" that seek to raise awareness about a topic that

1 Judith Lewis Herman, *Trauma and Recovery : The Aftermath of Violence--From Domestic Abuse to Political Terror.* (New York, NY: Basic Books, 1997), 3.

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they are unwilling to name.

Activists, such as feminist-fighter Andrea Dworkin, have been concerned with rape prevention since the Women's Rights Movement began. In 1983 Dworkin gave a landmark speech at the Midwest Regional Conference of the National Organization for Changing Men in which she said:

> It is astonishing that in all our worlds of feminism and antisexism we never talk seriously about ending rape. Ending it. Stopping it. No more. No more rape. In the back of our minds, are we holding on to its inevitability as the last preserve of the biological? Do we think that it is always going to exist no matter what we do? All of our political actions are lies if we don't make a commitment to ending the practice of rape. This commitment has to be political. It has to be serious. It has to be systematic. It has to be public. It can't be self-indulgent.[2]

Dworkin's statement is truly astonishing when one stops to think about it. We cry "end the war" and "cure aids," but never "stop rape." As a society, we cry very little about rape at all, even as it looms, affecting more people than we will ever know.

Statistics from the FBI and the National Crime Victimization Survey range from an estimated 11 to 28 rapes each hour.[3] That amounts to 95,136 to 247,730 rapes a year in the United States alone.[4] The National Organization for Women states, "it's estimated that two to six times that many women are raped [each year], but do not report it."[5] Statistics regarding sexual assault are generally taken to be unreliable and underreported.[6] The critical issue is that rape, due to its unspoken nature, is accepted within our society at all. One woman raped is one

2 Andrea Dworkin, "I Want a Twenty-Four-Hour Truce," Midwest Regional Conference of the National Organization for Changing Men, Midwest Regional Conference, St. Paul. Fall 1983. Transforming a Rape Culture. ed. Emilie Buchwald, Pamela Fletcher and Martha Roth. Minneapolis: Milkweed Editions (2005): 13-21.

3 Emilie Buchwald Pamela R. Fletcher, and Martha Roth. "Are We Really Living in a Rape Culture?" *Transforming a Rape Culture*. Ed. Emilie Buchwald, Pamela R. Fletcher and Martha Roth. (Minneapolis, MN: Milkweed Editions, 2005), 5.

4 Ibid, 5.

5 National Organization for Women. "Violence Against Women in the United States." 1995. http://www.now.org/issues/violence/stats.html.

6 Buchwald, "Are We Really Living in a Rape Culture?" *Transforming a Rape Culture*. Ed. (Minneapolis, MN: Milkweed Editions, 2005), 5.

too many. 90,000 are too, too many. Dworkin put this sentiment well when she said:

> We use statistics not to try to quantify the injuries, but to convince the world that those injuries even exist. Those statistics are not abstractions. It is easy to say, "Ah, the statistics, somebody writes them up one way and somebody writes them up another way." That's true. But I hear about the rapes one by one by one by one by one, which is also how they happen. Those statistics are not abstract to me. Every three minutes a woman is being raped... There is nothing abstract about it. It is happening right now as I am speaking.[7]

Dworkin's pointed questions open critical dialogue on the threat of sexual violence against women, and target central problematic myths prevalent in the general perception of rape, such as the argument that rape is a biological function, and therefore somehow natural and thus, forgivable. Dworkin also has answers. Although they are assertively and clearly delivered, the actual to-do's necessary to end rape remain mysterious. All we know is that we must end rape politically, publicly, systematically and without self-indulgence, but we are never told exactly what this means.

Dworkin's speech became a cornerstone of feminist literature regarding rape. One part of her speech which was made particularly public and formed the slogan and subsequent rape-prevention campaign "I Want a Truce" came from one excerpt of Dworkin's speech:

> And I want one day of respite, one day off, one day in which no new bodies are piled up, one day in which no new agony is added to the old, and I am asking you to give it to me. And how could I ask you for less: it is so little. Even in wars, there are days of truce. Go and organize a truce. Stop your side for one day. I want a twenty-four-hour truce during which there is no rape.[8]

Dworkin's ideas are littered with discrepancies. For one, if Dworkin, as a woman is asking for what women want, why does she ask for so little? Further, how many women believe she might save with this demand for a truce? The term 'truce' is not applicable here except to continue Dworkin's use of war imagery that weaves throughout her speech in order to establish herself as a credible and authoritative fighter. Dworkin

7 Dworkin, "I Want a Twenty-Four-Hour Truce," *Transforming a Rape Culture.* (Minneapolis: Milkweed Editions, 2005), 19.
8 Ibid, 21.

states:

> As a feminist, I carry the rape of all the women I've talked to over the past ten years personally with me. As a woman, I carry my own rape with me. Do you remember pictures that you've seen of European cities during the plague, where there were wheelbarrows that would go along and people would just pick up corpses and throw them in? Well, that is what it is like knowing about rape. Piles and piles and piles of bodies that have whole lives and human names and human faces.[9]

In this excerpt Dworkin, does not rely only on her authority and background in feminism. Because she bears the burden of first-hand experience with rape she is wise to it. Dworkin uses her experience to relate to both the topic and her audience. She wraps up with a simple, horrifying, yet familiar image of the bubonic plague, which she winds into a rhetorical metaphor; rape is the silent epidemic that plagues society. And so, among images of sickness and war, activists searched for the scorching battle-cry to champion the anti-rape movement.

The "I Want a Truce Campaign" stretches nationwide. At UCSB, the campaign is an annual event that seeks to "raise awareness about the constant threat of rape and sexual assault that college women face. In order to receive a T-shirt, people are asked to sign a pledge saying that they will not sexually assault anyone or participate in rape culture [for one weekend]."[10] Suddenly people all over campus are wearing t-shirts that read "I Want a Truce." While I believe this serves as a strong showing of solidarity for survivors of assault, the slogan is out of context and even offensive. "Truce" implies war waged on both sides, and I do not think rape, one of the most devastating and widespread crimes committed by men against women, should ever imply that women are engaged or provoking a sexual war with men. The slogan does not address sexual assault as the topic of the campaign. When read in context, "I want a truce," seems more akin to a begging plea than anything else. Dworkin's request for a truce calls to mind an implausible image of men worldwide, organizing a truce to stop violence against women for just twenty-four hours. As if eradicating rape, even for twenty-four hours were that simple. Either Dworkin really thinks one gender is capable of collectively organizing a stop to sexual violence in all of its reaches and realms or she is simply trying to make a point.

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9 Ibid, 21.

10 University of California Santa Barbara, "Educational Campaigns," *Women's Center, UCSB*. 27 Aug. 2008. http://www.sa.ucsb.edu/women%27scenter/services/educationalcampaigns.aspx.

"I Want a Truce," is a strikingly similar campaign to "It Affects Me." Both groups hand out sloganized t-shirts on our campus and others. Just like the "I Want a Truce" campaign, "It Affects Me" fails to name exactly what affects people. The "Take Back the Night" campaign claims to challenge violence against women, but also avoids explicitly naming their cause. The only rape prevention campaign that outwardly addresses the topic is "Men Against Rape." This organization's membership at UCSB has continually fluctuated during the last several years. At times they have had as few as one member. This trend is incredibly telling as to the taboo nature of rape and its "unspeakability."

Herman writes that "remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims."[11] There is a desperate necessity for our society to call rape by its name. The necessary discourse on sexual violence to which few can comfortably contribute must go above and beyond healing our wounded. As a society, we still need to provide women with immediate help on a day-to-day basis, and kick-start our criminal justice system by tackling more rape cases and put rapists behind bars. Unfortunately so many women do not come forward. The Bureau of Justice estimated that:

> Only 36 percent of rapes, 34 percent of attempted rapes, and 26 percent of sexual assaults were reported to the police. Thus, even as recently as 2002, a majority of women were choosing not to report these crimes and were not treated for their injuries. The reason they cited for not reporting included keeping the assault as a personal matter, fear of reprisal, and protecting the offender.[12]

Emilie Buchwald argues that we live in a "rape culture."[13] One symptom of this culture is the incredible difficulties women face when choosing whether to report a crime of sexual assault. Herman reinforces this by stating that, "those who attempt to describe the atrocities they have witnessed also risk their own credibility. To speak publicly about one's

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11 Judith Lewis Herman, Trauma and Recovery : The Aftermath of Violence--From Domestic Abuse to Political Terror, (New York, NY: Basic Books, 1997), 1.

12 United States Department of Justice Federal Bureau of Investigation. "Forcible Rape: Crime in the United States 2005." *Crime in the United States 2005*. http://http://www.fbi.gov/ucr/05cius/offenses/violent_crime/forcible_rape.html.

13 Buchwald, "Are We Really Living in a Rape Culture?" *Transforming a Rape Culture*. Ed. (Minneapolis, MN: Milkweed Editions, 2005), 5.

knowledge of atrocities is to invite the stigma that attaches to victims."[14] However, it is simpler than this. We live in a society so intimidated by the idea of rape and of acknowledging it around us that even our awareness-raising groups, on a liberal college campuse, refrain from using terminology necessary to report sexual assault. Where are the banners that read "End the Silence on Sexual Violence"?

The challenge of reporting sexual assault does not end with the police report. Once a woman becomes the victim of a rapist, she enters the "virgin vs. vamp" binary. In *Virgin or Vamp: How the Press Covers Sex Crimes* Helen Benedict argues:

> As a result of the rape myths, a sex crime victim tends to be squeezed into one of two images – she is either pure and innocent, a true victim attacked by monsters – the "virgin" of my title – or she is a wanton female who provoked the assailant with her sexuality – the "vamp". These two puritanical images are at least as ancient as the Bible. They can be found in the story of Eve as temptress and corruptor (the "vamp"), and in the later Victorian ideal of women as pure and uninterested in sex (the "virgin"). Indeed rape is often seen as punishment for women who dare to be sexual at all.[15]

The "virgin vs. vamp" binary is just one of many that are used to oversimplify a frightening occurrence in our society. For if we come to terms with the frequency with which sexual violence occurs in our society, it means danger potentially surrounds us as women. For men, it means acknowledging perpetrators of sexual violence in their ranks. A woman is a virgin or a vamp. She is a victim or a survivor. All the name-calling and labeling of women only serves to distract from the actual problem of identifying the rapist. Helen Moffet illustrates this in her academic article *Stemming the Tide: Countering Public Narratives of Sexual Violence*, in which she writes:

> When we are faced with scenarios in which we cannot ignore the rapist, we resort to classifying him as a 'monster', some psychopath 'out there'. We are deeply invested in the notion that the rapist *is not like us* – someone, some*thing* that is beyond the bounds of humanity, a howling, drooling, perverted maniac…[there is] a trend of constantly pushing

14 Herman, Trauma and Recovery : The Aftermath of Violence--From Domestic Abuse to Political Terror, (New York, NY: Basic Books, 1997), 2.
15 Helen Benedict, *Virgin or Vamp: How the Press Covers Sex Crimes*, (New York: Oxford UP, 1992), 18-19.

> the rapist to the bounds of society, in order not to have to recognize the one in our workplace, our home, our bed.[16]

Considering this, one should not be surprised that an estimated two thirds of sexual violence goes unreported. The Rape, Assault and Incest National Network reports that approximately seventy-three percent of rape victims know their assailant and only six percent of rapists ever spend a day in jail. It is a commonly held belief that if a woman knows her "assailant" she is less likely to report him; most rape is acquaintance rape. What image goes through the mind of a woman who is raped by her "friend" who does not resemble the "drooling, perverted maniac?" A woman might question how people will respond to her if she points him out as a rapist. Many people would just rather not believe the woman who reports rape, so that they too can avoid processing the extent of sexual violence going on today.

Within society there exists stigmas, which blame women for the rape they suffer. Because of this a woman may believe that before she can even think of reporting sexual violence, she must consider how closely she has followed the warnings and guidance against sexual assault, particularly in college. The rules for preventing rape are, not only prevalent among rape awareness campaigns, they are also discussed at many schools' (including UCSB's) freshman orientations.
The do's and don'ts include:

- Never leave a drink unattended.
- Stay with friends or have someone know where you are at all times.
- Know your own limits.
- Be assertive.
- Never walk alone at night, etc.

Terri Alderfer, a columnist at the McGill Tribune writes:

> Realistically, if women were to attempt avoiding all situations where they could encounter sexual assault, it would become impossible to live a normal life. Because victims most likely know their attacker, it does not matter that they avoid walking alone at night or cover themselves up when going out, if the real danger is waiting for them at home.[17]

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16 Helen Moffett, "Stemming the Tide: Countering Public Narratives of Sexual Violence," *Womankind Worldwide* (2003).
17 Terri Alderfer, "Sexual Assault: Rhetoric and Reality," *The McGill Tribune*. March 27, 2007. http://media.www.mcgilltribune.com/media/storage/paper234/news/2007/03/27/ features/sexual.assault.rhetoric.and.reality-2792249.shtml.

This points out the other sad reality of the do's and don'ts binary. This preventative measure blames victims. It also leaves women completely unprepared for the reality that acquaintance rape is a much more common occurrence, and as such, no acknowledgment of preventative measures will fully prepare potential rape victims. Educational campaigns backwardly provide the victims with information rather than building an awareness aimed at the perpatrator, such as "Sexual harassment and assault are crimes."

Marcelle Kosman, coordinator at the Sexual Assault Centre of McGill's Students' Society (SACOMSS) states that the center "does not offer tips about how to avoid rape or assault [because] by providing someone with tips on how to prevent sexual assault, you're suggesting that if someone is sexually assaulted, they didn't follow that advice closely enough…it continues to blame the person who has been sexually assaulted."[18] Therefore, it is sadly telling to me that the Rape Prevention Education Program (RPEP) at UCSB has online, in their Informational flyers section the following: "Things You Can Do to Help Yourself," including tips for recovering from assault, not prevention; "Information About Your Rights," including both victim-preparation and victim-blaming, as well as the most thorough section on the website – the "what to do" of sexual assault; "Sexual Assault and College Students, which states that "1 in 4 women are victims of rape or attempted rape"; and "Where to Get Help," aimed at the audience recovering from assult, not rape prevention.[19] The tips that the Women's Center has for fighting rape culture merely serve to illustrate that they have few and limited answers, and take no concrete stance. The majority of resources on the PREP website may serve an important job in aiding women that have been assaulted. However, no real rape prevention occurs or is even discussed in this forum. Are things as bleak as Dworkin wondered when she pointed out our society never "talks seriously about ending rape?"

Despite the biases working against survivors of sexual assault, the voicing of rape and its aftermath is essential to the Anti-Rape Movement and rape prevention. The only way to relinquish the strength of the 'taboo' nature of rape is to put voice out there and feel safe doing so. The silence that engulfs rape is what makes it a silent epidemic in our society and particularly on college campuses. Rape can and should be spoken about.

I have succeeded in my goal if I have raised awareness about the sexual assault awareness raising, or lack thereof, at UCSB. It is important

18 Ibid.

19 University of California Santa Barbara, "Educational Campaigns," *Women's Center, UCSB*. 27 Aug. 2008. http://www.sa.ucsb.edu/women%27scenter/services/educationalcampaigns.aspx.

to acknowledge the campaigns on our campus for the beneficial methods of showing solidarity with survivors, but to be aware of the lack of resources aimed at rape prevention as well. The prevention and education campaigns that do exist fail in two of the most basic goals of a sexual violence awareness campaign. First, campaigns such as "I Want a Truce," "Take Back the Night" and "It Affects Me" fail to acknowledge and react to the taboo nature of discussing rape. Their failure to use adequate language limits the discourse the campaign aims to instigate. Secondly, consciousness-raising websites and flyers used by Women's Centers and the various campaigns use terminology that blames the victims who once accepted, are eagerly forgotten. One of the most difficult tasks a survivor of assault must do is speak out about the unspeakable. It is the responsibility of collegiate educational campaigns to help enable discussions of sexual violence; they must start by naming sexual violence on our campus and breaking the silence.

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PREGNANT WOMEN AND MOTHERS BEHIND BARS

KIMBERLY GOLDBERG

It is a well-known fact the United States prison system is overpopulated. With so many diverse people within the system, basic human rights can be over looked. One issue that is being brought to the forefront of reform are the rights of pregnant women who are incarcerated. Although some believe that these women should not be treated differently because of their personal circumstances, a new federal law has been passed to ensure that the both unborn children of incarcerated pregnant women and the mothers themselves are not in danger. This paper discusses both the past federal legislation pertaining to pregnant women in prison prior to shift in 2008 and problems that newly passed federal legislation overlooks.

In September 2005, Samantha Luther, a pregnant inmate in Wisconsin, was rushed to the hospital in handcuffs and leg shackles to have her labor induced two weeks prior to her due date. Luther's restraints were left on even after the doctor ruptured her amniotic sac and asked her to pace the hallway for several hours to start the labor going. "It was so humiliating. My ankles were raw," said Luther. The guards left her shackled to the bed up until the point she needed them off in order to push her baby out of her.

- Samantha Luther, twenty-one, serving time for a drug offense and for violating her probation[1]

Stories such as Luther's were quite common until recently when the Federal Bureau of Prisons passed a law against the shackling of pregnant prisoners absent extenuating circumstances. When the law passed on October 6, 2008 steps were taken to correct the injustice that pregnant inmates have experienced for years. Although the passing of the new federal law is a step towards women gaining the rights they deserve, it remains vague and does little for the overall well being of pregnant women in prison.

Statistics show that low-income women are more likely to have children at a younger age and also have more children over the span of

1 Amnesty International USA, "Stop Violence Against Women," http://www.amnestyusa.org/women/custody/shackling.html.

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their lifetimes than women in a higher income bracket.[2] Statistics also show that the majority of women in prison are from low-income areas.[3] According to a United States Justice Department report in 1999, five percent of female prisoners arrive at prisons pregnant.[4] Most of these pregnancies are considered high-risk pregnancies because the mothers have used drugs.[5] Federal and state policies did not take the physical condition of imprisoned women into consideration before 2008. Federal law was vague and the state laws varied greatly from state-to-state. For the remainder of this paper I will refer to the federal law in place before 2008 (*p5538.04 Escorted Trips 12/23/96*) as *Escorted Trips I* and the new federal law in place after 2008 (*p5538.05 Escorted Trips 10/06/08*) as *Escorted Trips II*.

THE OLD FEDERAL LAW: ESCORTED TRIPS I

Federal legislation is purposefully vague in order to allow states to pass laws concerning prisons at their own discretion. *Escorted Trips I* states that all women must be screened for pregnancy upon admission to a prison and must inform the prison immediately if they suspect they have become pregnant at any time during their sentence. According to the Federal Bureau of Prisons, women are only to give birth in a hospital if it is deemed as absolutely necessary.[6] If deemed unnecessary, women give birth in the medical wards of the prison. Federal legislation does not state how long the woman is allowed to stay with her infant and thus, this issue is left up to the state to decide.

Escorted Trips I includes specific rules about the destination of the newborn after being taken away from the mother. Arrangements

2 Russell Sage Foundation. "Average Number of Children per Household by Income Quintile." https://www.russellsage.org/chartbook/householdform/figure4.5/view?searchterm=average number of children per household.

3 Beyondmedia Education, "Women in Prison Fact Sheet 2008," *Women in Prison: A Site for Resistance*, http://www.womenandprison.org/facts-stats.html.

4 Adam Liptak, "Prisons Often Shackle Pregnant Inmates in Labor," *The New York Times,* March 2, 2006, http://www.nytimes.com/2006/03/02/national/02shackles.html?_r=1.

5 Elizabeth D. Hutchinson, Dimensions of Human Behavior: The Changing Life Course. 3rd ed (Thousand Oaks: Sage, 2007), 90.

6 Federal Bureau of Prisons, "Female Offenders," http://www.bop.gov/inmate_programs/female.jsp.

for the newborn are made by social services regardless of whether the baby is sent home with a family member, put up for adoption, or placed in the foster care system. Alternatively, *Escorted Trips I* also provides a program called Mothers and Infants Nurturing Together (MINT) that allows an incarcerated expectant mother to stay in a community for two months prior to her due date and three months after the birth to care for her baby. However this program is limited to women who meet specific requirements. In order to apply to the MINT program a woman must be within her last three months of pregnancy, have less than five more years on her sentence, and be eligible for a leave of absence from prison. If a woman participates in this program, she must also assume financial responsibility for her child's medical care; this can prove difficult as the majority of women in prison come from a low-income bracket and, without the aid of prison officials, will have a hard time finding a job because of their criminal record.[7] Prior to applying to MINT, the inmate must also have selected a custodian to take care of her child after the designated three months.[8] While MINT seems helpful for new mothers and their infants, it forces mothers through a cumbersome application process. The federal government does not release information on how many women are able to participate in the program. Additionally, it is not made public how many women the program can actually accommodate. It may indeed be very few. According to a 1980 study, of the women who did not get into this program, only forty-five percent were able to get visits with their children.[9] This is a relatively small number considering the fact that two-thirds of women in prison are mothers.[10]

Federal law is also specific about a prisoner's right to an abortion. According to federal law, all prisoners have the right to choose to have an abortion. However, the government will not pay for the abortion unless the mother's life is in danger. If a prisoner does have the funds to terminate her pregnancy, the government must pay for the means of transportation to the clinic and pay for the officers to accompany the inmate.[11] If the prisoner is not able to pay for an abortion, she must carry her pregnancy to term. Regardless of whether the inmate is unable to pay for the abortion or not, she should not be barred from a right afforded to women because of her incarceration. Escorted Trips I does

7 Ibid.

8 Ibid.

9 Lori Williams and Sandy Schulte-Day, "Pregnant in Prison: The Incarcerated Woman's Experience: A Preliminary Descriptive Study," *Journal of Correctional Health Care 12.2* (2006): 78-88. http://jcx.sagepub.com/cgi/reprint/12/2/78, 80.

10 Ibid, 80.

11 Federal Bureau of Prisons, "Female Offenders."

not pay for abortions so many incarcerated women are forced to have a child against their will.

Other than the specific laws about care for the newborn and payment of abortions, *Escorted Trips I* does not require states to follow many strict policies. This leaves the care of pregnant women in prison to the discretion of state governments.

STATE LAWS

State laws regarding the care of pregnant inmates vary greatly from state to state and also from prison to prison within each state. In general, good health care can only be found in larger state prisons.[12] Almost all states have general policies regarding pregnant inmates, but those policies are not explicitly articulated in the law and can therefore be violated by corrections departments without many consequences. Unwritten policies also allow guards and escorts to vary their behavior towards inmates on a case-by-case basis. This practice prevents pregnant inmates from obtaining many basic rights. For example, if a guard holds a grudge against a particular inmate, there are no laws protecting her from receiving harsher treatment than how the guard would treat an inmate they do not hold a grudge against.

Just as *Escorted Trips I* can hinder a women's right to choose to terminate her pregnancy so can states' laws. Because state prison systems are so bureaucratic, some inmates have problems obtaining an abortion while in prison. Louisiana inmate, Victoria W., was hindered by bureaucracy and forced to carry her pregnancy to term. On July 28, 1999 Victoria was sent to prison and received a routine physical in which she was told she was pregnant. Victoria immediately told the staff that she wished to terminate the pregnancy. She was told that in order to get the procedure she must get a lawyer and a court order authorizing the abortion. She attempted to obtain the court order, but could not. By the time she was released from prison she was twenty-five weeks pregnant and unable to legally obtain an abortion in the state of Louisiana.[13] This example, where a state law prevents the inmate from obtaining an abortion demonstrates why the federal law must be more specific about inmate abortions to make sure that all states follow the

12 Hutchinson, *Dimensions of Human Behavior: The Changing Life Course. 3rd ed*, 90.

13 Center for Reproductive Rights, "Inmate Forced to Carry Pregnancy to Term Files an Appeal with the Fifth Circuit." http://209.85.173.132/search?q=cache:algg1Uk2gAoJ:www.reproductiverights.org/pr_03_0218laprisoner.html+pregnancy+in+prison+abortion&hl=en&ct=clnk&cd=2&gl=us.

same procedures and allow female inmates their right to an abortion.

Until such a law is passed, states are left to pass laws at their own discretion, including laws about how to care for prisoners while they are pregnant. Forty-one states allow the use of restraints on pregnant women and twenty-three states allow the use of shackles on women during labor.[14] Arkansas, Illinois, and Missouri have written laws allowing women to be restrained during labor, but not during active labor.[15] Only two states, California and Illinois, have specific laws banning the shackling of prisoners during active labor; Illinois passed this law in 2000 and California did so in January of 2006.[16] California's law bans the shackling of prisoners during labor, delivery and recovery.[17] However, California does not have specific laws about the shackling of pregnant inmates during transportation or escorted medical visits.[18]

California is one of the few states that have specific laws about placement of the newborn child. California State law gives inmates two to three days with the newborn baby. Before the inmate is taken back to prison and the baby is taken to its prearranged placement. Similar to *Escorted Trips I*, California State law requires social services to place the child in their new homes.[19] If the mother would like to remain with her baby, California allows children less than two years of age to stay with their mother as long as the mother does not exhibit any misconduct.[20] This is also contingent on the availability of room in the prison's mother-baby unit. Once the child is over two years of age, there are no special visitation rights that allow the child to visit their mother in prison. To counteract the lack of visitation rights, California funds Mother and

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14 Amnesty International USA, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women- A State-by-State Survey of Policies and Practices in the USA*, (New York: Amnesty International Publications, 2001), 8.

15 Ibid, 8.

16 Brendan Coyne, "Report Finds Few Protections for Pregnant Prisoners," *The New Standard*, March 6, 2006, http://newstandardnews.net/content/index.cfm/items/2895.

17 Liptak, "Prisons Often Shackle Pregnant Inmates in Labor."

18 Amnesty International USA, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women- A State-by-State Survey of Policies and Practices in the USA*, 61.

19 Williams and Schulte-Day, "Pregnant in Prison: The Incarcerated Woman's Experience: Preliminary Descriptive Study," 79.

20 Amnesty International USA, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women- A State-by-State Survey of Policies and Practices in the USA*, 62.

Child Residency Programs as well as parenting programs for incarcerated mothers.

One of these state programs is The Community Prison Mother Program that allows children up to six years old to live in a housing community of ninety-four female inmates and their children for up to six years. Similar to MINT, this program also includes requirements to participation. These women must either have been the primary caregiver before incarceration, or have been pregnant upon arrest to apply for this program. They must also have less than six years on their sentence.[21] This California state program is well thought out because it allows mothers to raise their children while serving their sentence, stops additional children from being thrown into the foster care system and places less strain on the state to find temporary homes for prisoners' children. While the accommodation ability of MINT is unpublished, Amnesty International claims that the Mother and Child Residency Program only has room for ninety-four inmates.[22] While nationally, five percent of women entering prison are already pregnant, this program, only in effect in California, barely puts a dent in the population it attempts to help.[23]

THE NEW FEDERAL LAW: ESCORTED TRIPS II

The efforts of many organizations, such as Amnesty International USA, have worked to correct the injustices that pregnant inmates face. Fortunately these organizations have been successful to some extent. On October 6, 2008 the federal government passed a law in order to ensure that all women have basic human rights. Now all states must follow the same federal policies regarding incarcerated pregnant women. On this date, the Federal Bureau of Prisons released a document stating that no restraints may be used on a pregnant prisoner unless there is a risk of escape or a threat that the prisoner will cause harm to herself or staff. In the case of an extremely violent prisoner, restraints may be used, but they must be the least restrictive. The new law also bans the use of a control belt, a device that administers an electrical shock when triggered, as a restraint on any pregnant women. The law explicitly states that this belt is not to be used on a pregnant prisoner for any trips outside the prison regardless of whether the trip is for medical purposes or not.[24] The new federal law is both a progressive and a positive step for the basic rights of humanity.

21 Ibid, 62.

22 Ibid, 62.

23 Liptak, "Prisons Often Shackle Pregnant Inmates in Labor."

24 United States Department of Justice, "Escorted Trips,"
http://www.aclu.org/pdfs/prison/bop_policy_escorted_trips_p5538_05.pdf.

ARGUMENTS FOR THE NEW LAW

Many who believe *Escorted Trips II* ensures women in prison will receive basic human rights support the legislation. The stress that pregnant women face in prison will, not only affect their well being, but also the well being of the baby.[25] The use of shackles, prohibited as a restrain in *Escorted Trips II*, can be harmful to both the mother and baby because, according to Assemblywoman Sally J. Leiber, "It presents risks not only for the inmate giving birth, but also for the infant."[26] Pregnancy is already a painful process and a woman needs to be unrestrained so she can move into different positions.[27] One inmate in Arkansas who was restrained during labor complains of having "lasting back pain and damage to her sciatic nerve," because of the restraints. Another argument against the use of the restraints is the potential of the mother falling during transportation to the hospital.[28] If a woman is handcuffed and shackled, it is probable that she will fall and injure her baby because of her inability to catch herself. According to William F. Schulz, the executive director of Amnesty International U.S.A., the use of shackles on pregnant inmates is, "the perfect example of rule-following at the expense of common sense."[29] In his opinion shackling a woman in labor is, "almost as stupid as shackling someone in a coma."[30] However, some argue that the use of shackles should be used on a basis of individual history. If a woman presents no threat of escaping or harming anyone, she should not be put in restraints.[31] This is exactly what the new federal law states. It explicitly bans the use of restraints on all pregnant women with the only exception being if the prisoner has a history of extreme violence or presents a significant threat of escaping.[32] Because of the trauma caused by shackling a pregnant prisoner, many believe that the new law grants pregnant prisoners the basic human rights that they deserve.

ARGUMENTS AGAINST THE NEW LAW

Although many people pushed to enact the new federal law, some believe prisoners should not be treated differently because of their

25 Hutchinson, *Dimensions of Human Behavior: The Changing Life Course. 3rd ed*, 90.
26 Amnesty International USA, "Stop Violence Against Women."
27 Ibid.
28 Liptak, "Prisons Often Shackle Pregnant Inmates in Labor."
29 Ibid.
30 Ibid.
31 Ibid.
32 United States Department of Justice, "Escorted Trips."

personal situation. The care of prisoners is expensive and much of this cost is covered by taxpayer money. Many argue that because the majority of women in prison are poor, they are actually receiving better services for their pregnancy than they would outside of prison. They receive better nutrition and access to professional medical and recovery care.[33] A 2005 study showed that the birth weights of babies were higher for those that were born to women in the prison system than the birth weights of babies born to women outside of the prison system.[34] The study also made a positive correlation between lengths of time served while pregnant and newborn birth weights. The results of the study argued that the longer the woman was pregnant and in prison, the higher the birth weight of her baby.[35] Out of prison, low-income women may not get the nutrition that they need. This leads to a baby with a low birth weight. Low birth weight increases the chance of death within the first year as well as the chance of the child having a disability.[36] Many opponents believe that pregnant inmates are already better off in prison than they would be outside and the laws should therefore be left as they were.

Some also argue that the shackling of women during labor is not inhumane because these women are prisoners. Spokeswoman for the Arkansas Department of Corrections, Dina Tyler demonstrates this opinion by claiming that, "Though these are pregnant women, they are still convicted felons, and sometimes violent in nature. There have been instances when we've had a female inmate try to hurt hospital staff during delivery."[37]

Opponents also object to policies that result in the preferential treatment of pregnant inmates. On September 27, 2008 an article in the LA Times told the story of a woman who was released from serving her sentence early because she found out she was pregnant. In February 2007, Heather Hulsey, a twenty-two year old former college student, was sentenced to six years and four months in prison for running over seventy-one year old Ronald Shlensky while driving drunk. After serving a short time in prison Hulsey discovered that she was pregnant. The judge ordered her out of jail and into a residential substance abuse program. The judge residing over the trial made his decision so that the mother

33 Hutchinson, *Dimensions of Human Behavior: The Changing Life Course. 3rd ed*, 90.

34 Ibid, 90.

35 Ibid, 90.

36 Amy N. Marlow, "Low Birth Weight Infant," *Healthline*, The Gale Group, http://www.healthline.com/galecontent/low-birth-weight-infant.

37 Liptak, "Prisons Often Shackle Pregnant Inmates in Labor."

and child would be able to stay together.[38] This case is an example of a woman who received special treatment because she became pregnant. It sets a precedent for judges to let pregnant women out of their sentences early. Critiques of this judge's decision argue that this case could give other women incentive to become pregnant in order to receive a "get out of jail free card."[39]

CONCLUSION

Despite all of the counter arguments, *Escorted Trips II* should be celebrated because it is a step toward securing basic human rights for prisoners. Although this new law has made progress with regard to the shackling of pregnant inmates, there are still problems regarding the lack of programs available to mothers in prison. Women in prison need to be able to have the choice of an abortion readily available to them. If a woman does not want to terminate her pregnancy, she should be able to have mother-child bonding time before the baby is taken away. Programs such as MINT make mother-child bonding possible, however, the program needs to be able to accommodate the majority of mothers in prison. For those women who already have children upon entering prison, programs must be set up to allow their children to visit. It would also help if programs were put in place to help new mothers learn how to care for their newborns. More federal laws must be enacted before prisoners receive some of the most basic human rights that people outside of the prison system take for granted.

38 Steve Chawkins, "Pregnancy Alters Sentence in Crash," *The Los Angeles Times*, September 27, 2008, sec. B1.

39 Ibid.

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MARITAL-RAPE: THE CULTURAL AND LEGAL IMPLICATIONS OF INTIMATE VIOLENCE

ANGELA HABIBI

The long-term psychological effects on survivors of intimate and domestic violence are often devastating and shattering to their personhood, stripping them of the safety they are entitled to feel within intimate relationships. The unique circumstances of perpetration by one's own spouse calls into question whether or not the government may enter into the privacy of the home in order to save the lives of spouse-victims.

There is a complex entanglement between the law and culture, as they are two important concepts that go hand and hand within society. People have the ability to make sense of culture through the law because of its orderly and definite foundation whereas culture is "never neat, bounded, or complete."[1] Culture is a multilayered sphere, differing on many grounds including intersectional factors such as nationality, social location, etc. The idea of privacy in American culture is a demonstration of Naomi Mezey's concept of the law as culture. As America practices a norm of separating the private sector from public matters such as those of the state, there exists the idea that laws and Amendments relating to the protection of personhood and privacy serve as a mirror to society. But Mezey argues that law is one of the factors that constitute culture and that the two are inseparable.[2]

The law has meaning-making power through social practices and institutions while cultural factors may influence legal practices and law making. The law shapes the social world similarly to the manner through which the world shapes and creates the law.[3] In this sense of the law as culture, society affects the creation and implementation of laws and the laws influence society. Amendments such as the First with the privacy of beliefs, the Third with the privacy against soldiers in the home, the Fourth, which protects privacy of possessions against unreasonable searches and

1 Naomi Mezey, "Law as Culture," *Cultural Analysis, Cultural Studies, and the Law*, ed. Austin Sarat & Jonathan Simon (Durham: Duke University Press, 2003), 43.

2 Ibid, 45.

3 Ibid, 45.

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seizures, and the Fifth, which protects against privacy of information and self incrimination demonstrate this connection between law and culture. The relationship between law and society and the concept of privacy are even more precise in the discussion of domestic violence.

Domestic violence, also referred to as battery or spousal abuse, is a term used to describe physical, emotional, or sexual abuse among people in an intimate or familial relationship. This abuse does not need visible markers to demonstrate that it has occurred and in many instances is shown with the analogy of the boiled frog.[4] The boiled frog phenomenon is such that if a frog is placed in a pot of cold water and the temperature is slowly increased, causing the water to gradually heat, the frog will stay in the pot. However, if the frog is placed in boiling water, it will immediately react to the heat and jump out.[5] The boiled frog analogy relates to tolerance and change in relation to domestic violence in terms of the tolerance the victim displays for the violent or abusive aspects of an intimate relationship. If the abuse is gradual, it is more likely that the person will tolerate it, similar to the frog's tolerance of warmer water temperatures. However, if the abuse is sudden, it is likely that the abused individual will react more strongly. Unfortunately, domestic violence is a gradual behavior, making it progressively more difficult to escape. Additionally, the act of domestic violence varies across cultures, and although it is widely demonstrated, explanations why the behavior occurrences differ according to culture.

The discussion of domestic violence has been extended into the realm of rape and marital rape, in particular, through understanding the cultural and legal implications involved in the discussion on rape violence. Until recently marital rape was not prosecuted because doing so would mean dismantling the traditionally preserved sanctity and privacy of marriage. Prior to cultural acceptance of prosecuting marital rape, when a woman said 'I do' in her marriage vows, she implicitly agreed to sexual relations with her spouse. The phrase 'I do' suggests her acceptance of any treatment within the covert realm of marriage. The acceptance of such treatment in marriage questions whether domestic violence within a marriage or intimate relationship can be justified under the umbrella of 'I do' in providing an on-going consent to perpetration by one's own spouse.[6] From the 17th through the 19th centuries courts adhered to Sir Matthew Hale's doctrine that a husband cannot be guilty of rape

4 Noel M. Tichy and David O. Ulrich, SMR Forum: The Leadership Challenge—A call for the Transformational Leader. *Sloan Management Review*, (Fall 1984), 60.

5 Ibid, 60.

6 Morgan Lee Woolley "Marital Rape: A Unique Blend of Domestic Violence and Non Marital Rape Issues." *Hastings Women's Law Journal.* Summer, 2007, 1.

committed by him upon his lawful wife because in her matrimonial vows, she has given consent to sexual relations and cannot retract this consent.[7] Opponents of this doctrine argue that legal protection from unwanted sexual relations is a natural right, regardless of marital status.[8] For marital rape laws to be successful, lawmakers must reassess traditional notions of implied consent through marriage vows as well as the difficulty of attaining the evidentiary proof necessary for prosecution of one's own spouse.[9]

Throughout the 19th century, most Americans could not comprehend the idea of a husband raping his wife. This was due to the widely accepted assertion that through marriage, the husband and wife assumed one legal identity before the law. It was considered impossible for a woman to prosecute her husband in such a circumstance because of their consolidated identity. This "doctrine of coverture gave husbands legal control over their wives" and as a result of their legal oneness, a husband would be unlikely to go to court and testify against himself on behalf of his wife.[10]

By televising rape trials, the mass media are allowed to set standards for what constitutes rape. According to Lynn Comerford, "the discourses surrounding rape, rape law, and televised rape trials contribute to the definition of gender."[11] Rape is more than physical sex. It is a violent crime with long-term psychological affects. The psychological consequences resulting from marital rape such as loss of autonomy, loss of integrity, and long-term post-traumatic stress are just as high, if not higher than stranger rape because of the familiarity and history with the perpetrator.[12] These psychological consequences are often more serious than stranger rape because of the heightened possibility of recurrence.[13] Stranger rape is often caught in a tension between evidentiary proof and consent, and by homogenizing marital rape under the category of stranger rape, there is a failure to account for the unique circumstance of sexual assault by one's own spouse.[14] Further, tangling marital rape

7 Ibid, 4.
8 Ibid, 1.
9 Ibid, 2.
10 Ibid, 4.
11 Lynn Comerford, "Channel Surfing for Rape and Resistance on Court TV," *Transgressing Discourses, ed. Michael Huspek and Gary P. Radford* (Albany: New York Press, 1997), 245.
12 David Finkelhor and Kersti Yllo, "License to Rape: Sexual Abuse of Wives." (1985), 242.
13 Angela Brown-Miller, *To Have and To Hurt.* Westport, CT. Praeger Publishers. 1952, 169.
14 Woolley, "Marital Rape: A Unique Blend of Domestic Violence and Non Marital Rape Issues," 2.

into the frameworks of stranger rape does not account for the physical and psychological trauma of being raped by someone who has vowed to love and honor their spouse.[15]

In both rape and other forms of domestic violence, women are most often the victims of the violence committed by intimates.[16] Marital rape researcher David Finkelhor explains that there are a number of ways that women can be tricked or pressured into having sex. He outlines four different forms of coercion in marital rape: social coercion, interpersonal coercion, threatened physical coercion, and physical coercion. Women face social coercion when they feel pressured to have sex with their husbands in order to fit within the social construction of a good wife and fulfill their duty as a wife to perform sexual activities. In interpersonal coercion, although a woman is not violently threatened to have sex, her emotions are targeted as she feels bad that her husband will be angry and fears he may deprive her of comforts or necessities, such as money, food, or their home if she does not comply. An example of this is when the husband threatens to have an affair if she does not obey. Finkelhor suggests, "[women] have sex to avoid the implied threat of unpleasantness or conflict with their husbands."[17] Interpersonal coercion may be very traumatic for a woman who is compelled to engage in sexual activity with her husband because she is dependent on him. It can cause anxiety, depression, and may be increasingly overwhelming due to the husband's persistence for sex. Finkelhor states that she may find the threats "humiliating, psychologically debilitating, and shattering to her sense of self-confidence and self-esteem."[18] This form of coercion, even when threats are minor, is demeaning for the woman in terms of forcing her to have sex in exchange for respectful or even ordinary treatment from her husband.

The act of threatened physical coercion can be a blatant threat or an implied threat that the woman will be somehow hurt, or even killed if she does not participate in the sexual action. Physical coercion, then, is actually being hit or physically harmed in order to force cooperation. This form of coercion is the type most often identified in stranger rape. Moreover, in marital rape, sometimes a woman's "sense of duty is so internalized that they are not at all in touch with any sense of unpleasantness connected to [sex]" which makes coercion difficult to identify.[19]

In a United States survey of thirty women in San Francisco, marital rape researcher and sociologist, Diana Russell found that

15 Ibid, 2.

16 Ibid, 3.

17 Finkelhor, "License to Rape: Sexual Abuse of Wives," 238.

18 Ibid, 238.

19 Ibid, 238.

"approximately one in every seven women who had ever been married was willing to disclose an experience of sexual assault by their husbands."[20] Further, out of the nine hundred women she interviewed, about eight percent had been raped by their husband.[21] The survey showed that husband rapists "are almost equally likely to come from the upper middle, middle, and lower social classes."[22] This shows that marital rape is not limited to one particular level of income or group. Additionally, by defining rape as non-marital coerced intercourse, many states "immunized husbands from prosecution as late as 1977."[23] Even when marital rape is recognized as a crime in states, "husbands are rarely prosecuted and convicted."[24] An example of this is in the South Carolina case *State v. Crawford* (1992), in which despite facts ascertained at trial that stated that the husband tied up his wife during the alleged marital rape and did not untie her after he left the house, the husband sent her apologetic letters from prison before trial, and that the couple planned to separate the night of the alleged marital rape, it took the "eight-woman and four-man jury less than an hour to find the husband not-guilty" because jurors felt there was not enough evidence to convict the husband.[25] The victim's response was that if it had been a stranger rape, he would have been found guilty but because it was her husband, it was "ok." This case illustrates how the victim was reliant on outside law enforcement and the court for protection but because of family and marital privacy, the court withheld protection. According to legal scholar Morgan Lee Woolley, "courts and police are often reluctant to pierce the veil of privacy regarding sexual matters as they are seen as the heart of marital and familial relations."[26] Most rape statutes pertain to stranger rape and define rape as coerced intercourse with a woman that is not one's wife, creating marital rape exemptions for husbands leading to decisions similar to *State v. Crawford.*

In the mid-1970s, after unsuccessful prosecutions of marital rape, Nebraska became the first state to abolish the marital rape exemption. In the groundbreaking case of *People v. Liberta* (1984), the husband defendant argued that he could not and should not be prosecuted for rape and sodomy against the female because he was married to the

20 Diana E.H. Russell "Husbands Who Rape Their Wives," *Rape in Marriage 119*, (1990), 239.

21 Woolley, "Marital Rape: A Unique Blend of Domestic Violence and Non Marital Rape Issues," 5.

22 Russell, "Husbands Who Rape Their Wives," *Rape in Marriage 119,* 241.

23 Russell, "Husbands Who Rape Their Wives," *Rape in Marriage 119,* 241.

24 Ibid, 241.

25 Ibid, 242.

26 Woolley, "Marital Rape: A Unique Blend of Domestic Violence and Non Marital Rape Issues," 4.

accuser, even though they were living apart. *Liberta* claimed that because the rape statute only burdened males outside the marital exemption and did not apply to females, it violated the equal protection clause of the U.S. Constitution.[27] The court held that there was no difference between marital and non-marital rape and found that the marital rape exemption was unconstitutional, thus denouncing the "Hale doctrine of implied consent as justification for the marital rape exemption."[28] The court also held that implying consent through marriage is absurd because of the bodily and psychological harm rape causes the victim. This decision still stands and regulates marital rape as a gender-neutral activity of coercion of spouses.

Following legal precedent, states have implemented laws to protect each individual within marriage. Through cases such as *Liberta* it is shown that through time, marital rape has been recognized as a punishable crime and that marital exemption is widely rejected. No longer does compliance mean consent in marital rape.[29] Despite it being against the law in all 50 states for a husband to rape his wife, "thirty two states [still] continue to exempt spouses accused of rape from prosecution under certain circumstances," such as cohabitation, or only threatening and not physically harming a partner.[30] This shows that there is still much work to be done in the realm of rights for marital rape victims and the prosecution of their perpetrators.

Marital rape proves detrimental for the victim because of the long term negative effects it causes including the loss of personhood and feelings of autonomy. Still, there is much research to be conducted as to why many do not report instances of marital rape and why some states still do not find marital rape equally punishable to stranger rape. In 2003, Professor Michelle Anderson showed that "only twenty-four states and the District of Columbia have completely removed the marital rape exemption afforded to husbands."[31] Additionally, she illustrated the remaining twenty-six states demonstrate hurdles for prosecuting marital rape.

Successful combat of marital rape requires more than just legislation prohibiting it. Public awareness of victim's rights, police

27 Woolley, "Marital Rape: A Unique Blend of Domestic Violence and Non Marital Rape Issues," 5.

28 Ibid, 5.

29 Peter Westen "Commentary: Some Common Confusions About Consent in Rape Cases," *The Ohio State Journal of Criminal Law*, Fall 2004.

30 Natalie J Sokoloff, Barbara Raffel and Jeanne Flavin, "The Criminal Law and Women," The Criminal Justice and Women, 3rd Edition, (New York: McGraw Hill, 2004), 22.

31 Woolley, "Marital Rape: A Unique Blend of Domestic Violence and Non Marital Rape Issues," 5.

response, support networks, and more are necessary to show that marital rape is not allowed by any means.[32] Victims must also report instances of marital rape in order to prevent it from recurring. Resources that familiarize victims with their rights for protection against marital rape and sexual abuse are also crucial. Due to the uniqueness of the problem, marital rape must not be lumped into any one category. Further, it must be properly criminalized across the states and steps must be taken to change the law in action as well as in legal language. Thus, courts must take marital rape cases seriously and not allow offenders to escape with little to no sanctioning. In 1993, the United Nations recognized marital rape as a human rights violation.[33] Violence in the form of marital rape is a manifestation of traditional and historical inequality of power between men and women, and through empowering victims of marital rape with resources, support networks, and legal protection, marital rape can and will no longer be a pervasive problem in the United States.

32 Ibid, 10.

33 Ibid, 8.

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