

# Critical Issues in Justice and Politics

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Discussing the Present – Influencing the Future

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Department of Political Science &  
Criminal Justice

Southern Utah University



# Critical Issues in Justice and Politics

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## **Submission Information and Guidelines**

*Critical Issues in Justice and Politics* welcomes electronic submissions of scholarly, critical and constructive articles focusing on an emerging or continuing issue in justice and/or politics. We also seek review essays (reviews of recent literature on a given topic), reports of significant justice or political issues, book reviews, and position papers worthy of scholarly review and comment.

It is the editorial policy of *Critical Issues in Justice and Politics* to accept submissions from all disciplines so long as the material relates to justice and politics. We also encourage submissions from practitioners, faculty members, PhD students, MPA students and others who have an interest in the topics. We will not accept undergraduate submissions. We ask doctoral and master's students to obtain a brief letter of support from their faculty member before submitting their work to us.

### ***Simultaneous Submissions***

We prefer manuscripts that are not under review by other journals or publications. We endeavor to review all manuscripts in a timely fashion (usually within eight weeks), so simultaneous submissions are not usually necessary. We also accept only one submission per author for the current review period.

### ***Review Process***

All papers submitted for refereed publication will be sent to three (3) external reviewers. We use a blind-review process, which submits papers in anonymous format. We do rely heavily on our reviewers for insight and recommendations. All of our reviewers hold the appropriate degree and experience to qualify them for the particular project.

Reviewers are asked to evaluate manuscripts based on their scholarly competence as well as the potential contribution to appropriate theory or related areas. Authors may NOT contact reviewers during the process. Reviewer names are not disclosed unless the reviewer agrees for such disclosure.

Authors who dispute the findings or suggestions of a reviewer may submit their response in writing to the editors. Final decisions on publication remain the domain of the editorial board.

### ***Notification***

There are many reasons why we may accept or reject a particular manuscript. As an example, a particularly popular topic may see several submissions from different authors. We might only accept one (because it is the best of the group) and reject the others. We could, in other instances, not initially accept a manuscript but might consider it with some changes. Of course,

there are also times when a manuscript simply does not meet our needs. Our response to a submission will generally fall within one of the following areas:

- **Accepted for Publication** - This means the manuscript has been accepted for publication in an upcoming edition. Notification will generally include a publication date along with an agreement for publication. Publication will not occur until the agreement is signed and returned to our office.
- **Accepted with Changes** - This is a manuscript which has high interest for publication but needs changes to meet our needs. The changes, in most instances, do not reflect on the substance of the manuscript but instead focus on specific material which may be needed to make the manuscript more appealing. As an example, additional bibliographic information may be needed to verify some inference or statement within the manuscript. An agreement for publication is issued after the revisions are made. Revisions might be made by the author (if substantive) or by the editors, in which case the author must agree to the changes before publication occurs.
- **Held with Recommendations** - This is used when we are not prepared to accept a manuscript, but we believe it could have merit with substantive changes. The most common reason is that statistical or methodological information is missing or inaccurate. Authors are usually encouraged to make specific changes and resubmit the manuscript for further review.
- **Rejected with Recommendations** - A manuscript which needs extensive revision may receive this type of response. The manuscript shows some merit but needs enough change to warrant at least an initial rejection. In this case, the author is usually encouraged to consider the changes and to resubmit the manuscript when it is revised.
- **Rejected with Comments** - This category of manuscripts generally do not meet our needs for one of many reasons. It may be that the topic is simply not within our area or that the writing itself is not sufficient to support publication. This rejection often includes comments or suggestions from either the reviewers or the editorial staff.
- **Rejected without Comment** - Sometimes a manuscript is simply not for us.

Notification is made via email to the address submitted with the manuscript.

### **Manuscript Guidelines**

Submissions should be made using Microsoft Word or compatible software. Acceptable formats include .doc, .txt, or rtf. Please contact us before sending material if you are using different software.

Articles should be prepared as if for print publication. All submissions should be no longer than 7,500 words long (not counting the abstract and references) and should be double-spaced using 12-point font (Calibri or Times New Roman are preferred). Longer articles should include a statement of length that outlines the reason for the length.

Writers are required to maintain a professional, academic style in their writing. While some topics may be controversial, we will not tolerate intentional material that becomes sexist, racist, homophobic, or otherwise discriminatory. Authors addressing controversial topics should endeavor to write in a manner that best exemplifies the highest standards while still addressing the issues in question.

Tables, Diagrams, or artwork should be submitted as separate files. Only a maximum of 5 tables will be accepted. Accepted files include .jpg, .gif, .tiff, and similar standards common for academic and business publication. We do not generally use photographs or similar work unless it provides some additional resource necessary within the article.

Legal articles may use the Harvard Blue Book (A Uniform System of Citation) while other article types (social science, humanities, etc.) should use the Publication Manual of the American Psychological Association (APA Style Manual). No more than 50 references will be accepted.

An abstract should be included at both the beginning of the article and as a separate document. An abstract is a summary of a body of information in a paragraph. A descriptive abstract generally includes 100 to 350 words while an informative abstract is usually between 100 and 250 words. We ask that abstracts express the main claim or argument of a paper while including a brief description of the methods and findings employed.

#### **Submissions should include the following files:**

- 1. Abstract**

Contains the author's identification at the top-left of the paper with the abstract to follow.

- 2. Author Biographical Information**

This should include the author's name as it will appear in the publication, a list of degrees (with school information if preferred), current position (academics should include title and rank), and up to 100 words about the author.

- 3. Article or Submission**

Please do NOT include identifying information in the article. This will be the document sent to our reviewers, and we employ a blind review process.

We will reject any submissions that do not follow these rules. You may use a standard compression program (.zip is preferred) to bundle materials in one package.

## A Note from the Editors

Our goal at Southern Utah University is to ensure that our undergraduate and graduate students have an experiential education. It is our ultimate job to equip students with the necessary knowledge and skills to address social problems outside the classroom. The purpose of education, in our opinion, is to produce graduates who are more ethical, enlightened and who possess the applicable knowledge to solve practical problems. With this goal in mind, the editors would like to invite faculty members, practitioners, doctoral and master's students to submit their original works for review to future editions of *Critical Issues in Justice and Politics*.

*Critical Issues in Justice and Politics* serves as a forum for inquiring minds to delve into the topics that ail modern society. This edition addresses regional and international concerns as well as broader matters of navigating public policy and politics in an increasingly diverse and complex society.

On behalf of the rest of the editorial board at Southern Utah University, we thank you for your support of *Critical Issues in Justice and Politics*. We hope you enjoy the articles included in this edition.

Sincerely,

Dr. Bryan Burton  
Assistant Professor of Criminal Justice  
Editor, *Critical Issues in Justice and Politics*

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***"High Crimes and Misdemeanors," The Constitutional Basis for Presidential Impeachment: A Tribute to the Work of Francis Dunham Wormuth***

It is popularly believed that Congress, specifically the House of Representatives, can impeach a President of the United States for anything from treason to a simple misdemeanor, and given the fact that impeachment itself is only an accusation of wrong-doing that is true to a certain extent. But actually removing a president by the constitutional process of impeachment, in and by the United States Senate which acts as court and jury, is another matter entirely. The conviction and removal of a president must be based on rather high levels of impropriety, effectively violating the Constitution itself. What construes such a violation, however, is somewhat muddy given the two examples of actual impeachment in the history of the United States. What was the original intent of the framers of the Constitution? It is fairly clear that the original intentions of the framers considered impeachment to be the ultimate safeguard against the possibility of personal tyranny, a fail-safe measure to use a modern term, and that purpose was believed to be well defined in their use of the words "treason, bribery, or other high crimes and misdemeanors." Impeachment was not meant to be a punishment for minor offenses ("good behavior" regarding the judiciary), but a constitutional device to protect the republic from tyrannical acts including subversion of the Constitution and treason. The basis of this definition of "high crimes and misdemeanors" as nothing less than high crimes against the Constitution has roots in the framers understanding of "English precedent" including the cases against the two Stuart monarchs, Charles I and James II, and in "American practice" with the impeachment of Andrew Johnson and William Jefferson Clinton. Their meaning was quite clear, as was their intent, that such a definition was to be beyond congressional interpretation and therefore a limitation on the power of impeachment. Still, in three cases, adding the case of the threatened impeachment of Richard M. Nixon, and numerous suggestions, most recently in 2017-2018, the basis of impeachment remains open to debate. The single greatest weakness of this device to limit tyranny is that it has never actually been used to remove a president from office, and is therefore more of a theoretical remedy than one in actual practice with clear precedent. Would a president accept a verdict and actually leave office?

**G. Michael Stathis, Ph.D.  
Southern Utah University**

**Introduction<sup>1</sup>**

It is popularly believed that Congress, specifically the House of Representatives, can impeach a President of the United States for anything from treason to a simple lie, and given the fact that impeachment itself is only an accusation of wrong-doing, that is true to a certain extent. But

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<sup>1</sup>This paper is a tribute to the life and work Francis Dunham Wormuth (1909-1980), Distinguished Professor of Political Science at the University of Utah. Dr. Wormuth's earliest work focused on the origins of constitutional government in England (and later the United Kingdom) especially the importance of the English Civil War; his later, and widely respected work, dealt with the questions of constitutional government but from perspective of the Federal Constitution, Congress, the President, and the "War Power," including issues surrounding the concept of presidential impeachment.

actually removing a president by the constitutional process of impeachment, in and by the United States Senate which acts as court and jury, is another matter entirely. The conviction and removal of a president must be based on rather high levels of impropriety, effectively violating the Constitution itself. What construes such a violation, however, is somewhat muddy given the two examples of actual impeachment in the history of the United States. What was the original intent of the framers of the Constitution? For clarification we look to a variety sources but primarily the Federal Constitution, Article I, Section 3 in general, Article II, Section 4 regarding the Executive Branch, and Article III, Sect. 1 for the Judicial Branch, along with the constitutional debate in 1787, and the *Federalist Papers* (particularly numbers 45 and 69) that followed but preceded its successful ratification in 1789. It is fairly clear that the original intentions of the framers considered impeachment to be the ultimate safeguard against the possibility of personal tyranny, a fail-safe measure if you will, and that purpose was believed to be well defined in their use of the words "treason, bribery, or other high crimes and misdemeanors." Impeachment was not meant to be a punishment for minor offenses ("good behavior" regarding the judiciary), but a constitutional device to protect the republic from tyrannical acts including subversion of the Constitution and treason. The vital importance of this device is well noted in both the constitutional debate and the *Federalist Papers* by framers such as Alexander Hamilton, James Madison, and George Mason, the latter two regarding impeachment as "indispensable" to the safety of the republic in the *Federalist Papers*, while Mason emphasized in the constitutional debates that "No point is of more importance...Shall any man be above Justice?"<sup>2</sup> Arthur M. Schlesinger (2004), Jr. has also underscored the importance of impeachment,

Impeachment, on the other hand, was part of the original foundation of the American state. The Founding Fathers had placed the blunt instrument in the Constitution with every expectation that it would be used, and used most especially against Presidents.<sup>3</sup>

The basis of this definition of "high crimes and misdemeanors" as nothing less than high crimes against the Constitution and the republic has roots in the framers understanding of "English precedent" including the cases against the two Stuart monarchs, Charles I and James II, and in "American practice" with the impeachment of Andrew Johnson and William Jefferson Clinton.<sup>4</sup>

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<sup>2</sup> George Mason of Virginia also one of three final framers who refused to sign the Constitution, the other two being Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts.

<sup>3</sup> See Arthur M. Schlesinger, *The Imperial Presidency* (Boston and New York: Mariner Books, 2004), 414. It is important to note that there have been three versions of this book, the original in 1973, with new *Epilogue* in 1989, and with new *Introduction* in 2004, each revision following important developments in American history.

<sup>4</sup> Both English lawmakers and founding fathers were well aware of the example of ancient constitutions, especially Sparta and the Roman Republic. Sparta's constitution included an ancient and rudimentary form of "impeachment". Put simply, the Spartan Constitution called for an assembly (the *Apella*), a council of elders made up of older (over 60) members of the assembly and the two Spartan kings (the *Gerousia*), the two kings were nominated from two elite families in Sparta and elected by the assembly. A curious secondary part of the executive branch was a group five magistrates, elected from the assembly annually, with the authority to see to it that the constitution was being followed (the *Ephors*). This duty was especially focused on the kings who could be essentially "impeached" and removed from office for violating the constitution. Once indicted by the *Ephors*, they and 28 members of the *Gerousia*, would try the king. Only two Spartan kings were removed from office (and exiled) in this fashion, however. In Rome the two Consuls were chosen annually by and from the Senate, and that body had the power to remove a Consul (usually putting him back in his seat in the Senate), the assembly was not a factor in these proceedings. The framers were especially impressed with these examples of separation of

Their meaning was quite clear, as was their intent that such a definition was to be beyond congressional interpretation and therefore a limitation on the power of impeachment. Still, in three cases, adding the case of the threatened impeachment of Richard M. Nixon, and numerous suggestions, most recently in 2017-2018, the basis of impeachment remains open to debate, a problem the framers believed avoided by their singular language, but a language over two hundred years old, which should be clear, but clearly is not. The single greatest weakness of this device to limit tyranny is that it has never actually been used to remove a president from office.

The general thesis made by Arthur Schlesinger, Jr (2004) in his notion of an *imperial presidency* was that an erosion of the separation of powers and system of checks and balances, essentially the very backbone of the Federal Constitution of the United States, has been taking place for a very long time to the advantage of the President of the United States, a scenario that amounted to the worst nightmare of the framers, the creation of a form of personal tyranny.<sup>5</sup> According to Schlesinger this process of erosion and the ensuing growth of presidential power has been most prevalent in foreign affairs which today is most troubling given, with respects to George R. Martin and his Game of Thrones series, there seem to be a number of mad kings in the world today and they all have dragons in the form of very real nuclear weapons.

The ultimate constitutional safeguard for such an eventuality was the process of presidential impeachment, the singular power of the legislative branch over the executive branch to check the possibility of personal tyranny. In truth, however, the closest the republic has come to actualizing this safety mechanism, under these circumstances, was the threat of impeachment which led to the resignation of Richard M. Nixon in 1974. As Schlesinger put it beginning with Mason's point, "Shall any man be above Justice? George Mason had asked. Obviously not; not even a President of the United States. But bringing Presidents to justice was not all that simple."<sup>6</sup>It remains unclear if the power of Congress in this extreme context could actually work, that is, that if convicted, in and by the Senate, an American president could be removed from office. More perplexing is the simple question of what actual charges would be sufficient to condemn a president to that end? And lacking a historical example of the conviction and removal from office, would, in fact, a president accept a conviction and actually leave office?

### **The Essential Process of Presidential Impeachment**

There are actually several ways to look at the process and obligation to remove a president from office by impeachment that is expressly given to Congress in Article I, Section 3, while the penalties are enumerated in Article II, Section 4 of the Federal Constitution,

The president, vice president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.<sup>7</sup>

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powers and checks and balances. See Victor Ehrenberg, The Greek State (New York: W.W, Norton & Company, Inc., 1964), especially 54-88; Polybius, The Rise of the Roman Empire, Ian Scott-Kilvert, trans.(New York and London: Penguin Classics, 1979), 157-178 and 311-318; and George Willis Botsford and Charles Alexander Robinson, Jr., Hellenic History, 4th ed. (New York: The Macmillan Company, 1968).

<sup>5</sup> Again, note Schlesinger, The Imperial Presidency.

<sup>6</sup> *Ibid.*, 415.

<sup>7</sup> Note should be made that the Twenty Fifth Amendment, Section Four, to the Constitution provides for the removal of a president by the vote of the vice president and a majority of the cabinet secretaries if they determine

First, it is quite possible for the House of Representatives, which begins the procedure of impeachment, and the Senate, which ultimately acts as court and jury, to find "guilt" based on minor offenses. After all a "misdemeanor" could be construed to be a citation for illegal parking, jaywalking or telling a simple lie. On the surface this may seem inconsistent with the rest of the clause which identifies crimes of a much more serious nature, and so it is, or at least should be. Gerald Ford, in 1970, contended that the definition of an impeachable offense was essentially left to the discretion of Congress which it clearly is not according to the Constitution and the original intent of the framers.<sup>8</sup> Second, there is a more finite interpretation of what constitutes an impeachable offence. According to this view, impeachment was to be the constitutional machinery of last resort for the highest possible crimes for a president, subverting or conspiring to subvert the separation of powers, overriding the established checks and balance created by the Constitution, or threatening the Constitution itself. This was not to be an area for the punishment of minor offenses which, eventually, could be left to civil law.<sup>9</sup> This conclusion is well accepted, but can this intent be found?

The process, itself, is moderately simple. A member or members of the House of Representatives would present a case against the president on the floor of that body, if the motion is passed by a simple majority vote the House would then act to create formal Articles of Impeachment, which would also have to be ratified. If such a vote carries, a vote for impeachment is taken, again based on a simple majority, the case is presented to the Senate, which would act as court and jury. Effectively, the House would act as prosecutor, and the President would be defended by counsel of his or her choice. The entire proceeding would be overseen by the Chief Justice of the United States. Conviction would require a two-thirds vote of the Senate on each individual charge. If the vote carries, the punishment is removal from office, no more, no less. As shall be discussed below, only two American Presidents have been impeached and tried, Andrew Johnson and William Jefferson Clinton; both were acquitted, Johnson just barely, Clinton with some ease. Richard M. Nixon was convinced to resign rather than face the possibility of impeachment and trial.<sup>10</sup>

### **The Framers' Intent**

So much, it seems, depends on the meaning of "high crimes and misdemeanors" regarding impeachment. Can a clear definition be determined, that is, can the framers' intent be identified? There exists a general argument about whether the actual intent of the founding fathers, or more particularly those of them that actually produced the Federal Constitution, the framers, can be known after almost 200 years. On the one hand, there is doubt that such knowledge can be discerned with any certainty, on the other hand, a case can be made that such constructional

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the president is "unable to discharge the powers and duties of his office." The amendment also, in Section 1, stipulates that the vice president "shall become President" upon the president's removal from office, death, or resignation. The amendment was applied in 1974 with the resignation of Richard M. Nixon.

<sup>8</sup> See Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard University Press, 1973), 53.

<sup>9</sup> *Ibid.*

<sup>10</sup> No member of the United States' Supreme Court has ever been impeached, but numerous federal judges have been removed from office based on violation of "good behavior," a much lower bar than the necessary "high crimes" required for executive impeachment.

intent is easily found in written documents including the Constitution, the recorded debates of the Constitutional Convention (as kept by the convention's secretary James Madison), the *Federal Papers* (and what are often called the *Anti-Federalist Papers*), personal memoirs, letters, and recorded speeches.

Accordingly, it can be deduced that the single greatest fear of the framers was tyranny, whether it be of one individual, a few, or even the many as James Madison made clear in *Federalist 49*,

The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.

But it was tyranny of the one that was clearly uppermost in the minds of the framers. There had been no provision for an executive of any kind in the first constitution of the United States, the Articles of Confederation, simply an elected President of the Continental Congress. The Federal Constitution provided for a president, and a unique and complex network of separate powers and checks and balances, to prevent tyranny in the form of a legislature, a judiciary, or most importantly, an executive. In particular, both the judicial branch, as the Supreme Court, and the legislative branch, as Congress, were granted specific powers to prevent the possibility of executive abuses.<sup>11</sup>

The Judiciary was empowered with *judicial review*, arguably the most original American contribution to political thought, by which executive acts could be declared unconstitutional, and therefore immediately null and void. But the high court has historically been reluctant to use this power, more often than not siding with the executive, and very often simply invoking the *doctrine of political question*, that is, the court's learned opinion that the issue at hand is political and not exclusively a constitutional matter within its jurisdiction.

The most dramatic constitutional machinery devised to protect against the potential abuse of power by a president is the congressional power of impeachment. Impeachment was, at once, intended as a protective device to restore balance among the branches of government, and prevent individual tyranny. It was, however, never intended to punish a president or defame the office, but rather to preserve a constitutional balance. Therefore as constitutional authorities Francis D. Wormuth and Edwin B. Firmage wrote, impeachment was reserved for "public offences" that were "so egregious as to indicate gross personal corruption or so serious as to threaten the integrity of the state."<sup>12</sup> George Mason, at the Constitutional Convention in 1787, insisted that the offenses must be "great and dangerous offences," but were not limited to indictable crimes. What, then, constitutes such offences? What did the framers mean by "high crimes and misdemeanors"?

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<sup>11</sup> See Schlesinger, *The Imperial Presidency*, 1-34; and note J.D. Williams, "The Miracle at Philadelphia" (Salt Lake City: The University of Utah, 1986), especially 11-15; and of course Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (Boston and Toronto: Little, Brown and Company, 1986).

<sup>12</sup> Francis D. Wormuth, and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law*, 2nd ed. (Urbana and Chicago: University of Illinois Press, 1989), 281.

## "English Precedent" and "American Practice"

According to Francis D. Wormuth, and Edwin B. Firmage, the intended meaning of "high crimes and misdemeanors" applied by the framers, as well as their intent concerning impeachment in general, could be found in two sources "English precedent," including Magna Carta and English customary law, and American practice."<sup>13</sup> The former included English legal tradition, but also, and most importantly, application, especially the cases of King Charles I and James II. "English precedent" was particularly important in providing a clear definition of "high crimes and misdemeanors" as interpreted by the American framers. "English precedent" has established the idea of impeachment as a fundamental part of the so-called Anglo-American legal tradition.<sup>14</sup> Clear American interpretation has been limited, however, by the fact that American practice includes only rare application.

The founding fathers and the framers were well acquainted with "English precedent" regarding impeachment and "high crimes and misdemeanors" which, according to Wormuth "they understood to transcend criminal conduct."<sup>15</sup> Institutionally, "English precedent" referred specifically to the fundamental notion that a ruling or governing executive was ultimately subject to legislative authority and that Parliament was the institution for such action, as Alexander Hamilton noted in *Federalist 65*, "In Great Britain, it is the province of the House of Commons to prefer the impeachment; and the House of Lords to decide upon it." In the American application, the House of Representatives calls for impeachment, and the Senate acts upon the charges brought before it.

Prior to the "English precedent" involving Charles I it was certainly the royal view that "English precedent" only referred to lesser officials in English government, for it was held that a king could not be impeached.<sup>16</sup> But given English legal tradition, based in customary law and made explicit in Magna Carta and the case of King John, included a royal reference as well. Sir Winston Churchill noted the first victims of the "engine of impeachment" were Sir Francis Bacon who was found guilty of corruption in 1621, and the Lord Treasurer Lionel Cranfield, Earl of Middlesex (1624) who was also condemned and both were removed from office.<sup>17</sup> While English tradition (and later British tradition and law) clearly considered the monarch as crowned by the "Grace of God, there emerged necessary recognition of English custom that included the idea of king (or queen) by the will of the people and according to law. This being in stark contrast to events on the continent where the monarchs of France were simply king according to the notion of king, by divine right, meaning the law and the voice of the people (and the ideas that a king was limited by them) was

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<sup>13</sup> Ibid., 280-281. Also see Francis Dunham Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper and Brothers, Publishers, 1949).

<sup>14</sup> We do note however that for a very long time the United Kingdom as a constitutional system has recognized Parliament as its operating sovereign body with a prime minister as acting executive. The removal of a prime minister is done through a comparatively simple process involving a "vote of confidence" which has occurred many times. Changes of prime ministers can also be effected within the majority party, note the recent events surrounding the *Brexit* situation.

<sup>15</sup> Ibid., 280.

<sup>16</sup> Raoul Berger held that a good deal of what can be called "English precedent" actually referred to the impeachment of judges. See Berger, *Impeachment: The Constitutional Problems*, 7-52.

<sup>17</sup> Winston S. Churchill, *A History of the English Speaking Peoples, A New One-Volume Abridgement by Christopher Lee* (London: Cassell, 1998), 284-285.

virtually irrelevant.<sup>18</sup> This was the underlying point of the confrontation with King John in 1215, and Magna Carta that emerged from the events at Runnymede. But it is in two later historical cases where "English precedent" provided more demonstrative examples of the relationship of the monarchy, the people and the law by way of reference to "high crimes and misdemeanors," as distilled from these earlier sources, with Charles I and James II. These cases, what Patrick Henry included as the "Stuart usurpations," may not have provided precise methods for impeachment, but they did contribute significantly to an Anglo-American definition of "high crimes and misdemeanors," and certainly set an extreme standard for what became of heads of state who committed high crimes against law and state, and what to do about it.<sup>19</sup>

On two occasions, Charles I and Parliament confronted each other to settle the question of constitutional supremacy in England, the result was the English Civil Wars (1642-1651). Most Americans have little or no knowledge of the English Civil Wars or their importance along with other major historical events in the evolution of the Western Liberal Tradition and constitutional government, as Wormuth explained, "The French Revolution has not received more attention that it deserves; but in comparison disproportionately little attention has been given to the English Civil Wars of the Seventeenth Century."<sup>20</sup> In the end, 1649, Charles lost the contest and was impeached and tried by Parliament for "high crimes and misdemeanors," defined, in this instance as treason. Charles refused to recognize the proceeding in that Parliament did not represent a jury of his peers, nevertheless, he was found guilty, and beheaded in 1649, sending shock waves throughout Europe.<sup>21</sup> The principal charge against Charles Stuart was that he had made war on Parliament, and therefore had also attacked the people and realm of England as related by Wormuth,

And when the king began to raise a troop at York the two houses voted: "That whosoever the king maketh war upon the parliament, it is a breach of the trust reposed in him by his people; contrary to his oath; and tending to the dissolution of the government."<sup>22</sup>

The charge of "alleged violations of the law" leveled against the king rested on the general charge that he had made war against England. The king's "high crimes" were further compounded by the accusation that he had brought a foreign army onto English soil. In 1648, Charles was forced to resort to raising troops from Scotland. Whether this really constituted "foreign troops" was a dubious claim, which elicited a popular notion that the essence of his offenses had to do with the use of soldiers from Scotland. The charge itself was compelling but was also problematical given the fact that the Stuart line had begun in 1603 with James I, who was also James VI of Scotland. Overall, Charles disputed the charge that he had violated the law by a "high crime,"

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<sup>18</sup> Note the confirmation of this in the reign of Louis XIV who famously pronounced "Le'etat c'est moi," and the theoretical justification in Jean Bodin's *Les Six livres de la Republique* (*The Six Books of the Republic*), 1576.

<sup>19</sup> Berger, *Impeachment: The Constitutional Problems*, 99; also see William F. Swindler, *Magna Carta; Legend and Legacy* (Indianapolis and New York: The Bobbs-Merrill Company, Inc., 1965) 44-103; and note that the idea that not even a king is above the law was the underlying theme of Ridley Scott's fine film *Robin Hood*, Ridley Scott, dir., Russell Crowe, Ridley Scott, Brian Grazer, prods. (Universal Studios Entertainment, DVD, 2010).

<sup>20</sup> Wormuth, *The Origins of Modern Constitutionalism*, *Preface*, ix.

<sup>21</sup> Wormuth and Firmage, *To Chain the Dog of War*, 280-281. Also, see Wormuth, *The Royal Prerogative 1603-1649* (Ithaca: Cornell University Press, 1939), 108-122.

<sup>22</sup> See Wormuth, *The Royal Prerogative 1603-1649*, 118-119.

and Parliament's right to accuse, try and convict him.<sup>23</sup> The case set England on the road to a constitutional system, which was achieved following the Glorious Revolution of 1688, and provided additional definition to the idea that "high crimes and misdemeanors" involved not simple crimes, but indeed "high crimes" against the state.<sup>24</sup>

The case of James II was somewhat clearer given what was then the precedent of Charles Stuart who had lost the battle for political supremacy to Parliament. The paramount "high crime" of James II was an attempt to "foster Catholicism" upon England, his conviction, on a charge of treason, was based primarily on his attempt to diminish the Church of England in favor of Catholicism via a "freedom of religion" act.<sup>25</sup> George H. Sabine explained the broad significance of this act,

The bulk of Englishmen were unchangeably Protestant and after a brief experience with James were ready to decide that Protestant supremacy was essential. The speed and ease with which the "Glorious Revolution" was accomplished, though helped along by the incomparable fatuity of James, showed that more than Protestantism was settled.<sup>26</sup>

What Edward S. Corwin called his "ill-judged efforts" to "set the law aside" produced the Glorious Revolution, and a constitutional system with a king, but "a monarchy controlled by Parliament."<sup>27</sup>

Among the accepted justifications for the trial, conviction and execution of Charles Stuart, and the later trial, conviction and exile of James II are explanations according to "violations of law" and breach of popular contract, both of which include the notions of "high crimes and misdemeanors." Both monarchs were charged, generally, with "violations of the law," here to include English common law and Magna Carta, which is to say the English Constitution. Charles I had made war against England, James II had "set the law aside" to reestablish Catholicism. The notion of a violation of a contract binding people and monarch has been generally applied to each case. Both Charles I and James II held that they were monarchs by heredity, the Grace of

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<sup>23</sup> Charles insisted that Parliament had no legal right to try him according to English law, since it did not constitute a jury of his peers, which in a certain sense was true enough, "...I would know by what authority, I mean lawful authority...you presume to sit in judgment of me?" Note the fascinating portrayal, by the late Sir Alec Guinness, of Charles I and the trial in Ken Hughes' film, *Cromwell*, Ken Hughes, dir., Irving Allen, prod., screenplay by Ken Hughes (Columbia Pictures, 1970; Columbia Pictures DVD, 2003).

<sup>24</sup> See Berger's extensive discussion on "High Crimes and Misdemeanors" in [Impeachment: The Constitutional Problems](#), 53-102.

<sup>25</sup> Parliament chose to exile James II, importing his daughter Mary and her husband William of Orange to serve as England's first constitutional monarchs. James, himself, and many, many of his supporters, disagreed with the impeachment and exile, forming the Jacobite conspiracy to return a Stuart king to the throne (a line that began when James VI of Scotland succeeded Elizabeth I in 1603 and became James I of England) which continued up to and beyond the Treaty of Union on May 1, 1707 joining England and Scotland, effectively beginning the history of the United Kingdom. The tragic culmination of the Jacobite rising (Jacob being the Latin version of the name James) were the events of 1745 and the attempt by Bonnie Prince Charlie, Charles Edward, the grandson of James II, to rally Catholics, Scottish Highland clans and others sympathetic to the Jacobite cause which was more or less crushed at the Battle of Culloden in Scotland, April 16, 1746, and severe English reprisals that followed. See Wormuth, [The Origins of Modern Constitutionalism](#).

<sup>26</sup> See Georg H. Sabine, [A History of Political Theory](#), 3rd. (New York: Holt, Rinehart and Winston, 1965), 517.

<sup>27</sup> See *ibid.*; and Edward S. Corwin, [The Constitution and What it Means Today](#), 1974 ed. (Princeton: Princeton University Press, 1974), 128 and 160.

God, and the law, and therefore could not be tried by Parliament, while Parliament argued violations of the law, England's constitution. Given the contractual theory of government that was emerging in England, it could certainly be argued that the actions of Charles and James represented clear breaches of popular contracts (constitutions). The notion of government by contract had become fundamental to two English theorists, Thomas Hobbes and John Locke. But only Locke's interpretation, which came later, would actually justify the removal of a sovereign.<sup>28</sup> Hobbes, of course, would not have supported the popular right to remove a monarch.<sup>29</sup>

The American example of executive leadership was to be a limited one, at once part of a concept of separation of powers and checks and balances with the clear notion that among James Madison's possible examples of tyranny, personal tyranny, that of a president, would ultimately be the worst of all scenarios. With this in mind, the congressional power of impeachment was intended as the best final safeguard, and it was meant to be utilized.

Clearly, not everyone has seen the powers of the president in exactly the same context. The idea of a limited executive can be traced to the Constitutional Convention (1787), the Constitution, and most importantly the restraint of the first President of the United States, George Washington. Others from Alexander Hamilton to Richard Cheney, have supported the idea of an expansive set of executive powers. Some have suggested the prerogative to take extraordinary, meaning beyond the limits of the Constitution in emergency situations including Abraham Lincoln, Woodrow Wilson, Franklin Delano Roosevelt, Harry S. Truman, John F. Kennedy, Lyndon B. Johnson, Richard M. Nixon, Ronald Reagan, George H.W. Bush, and George W. Bush. Some, including the current president, have even embraced Nixon's infamous dictum, "When the President does it that means it is not illegal."<sup>30</sup> All of this in the immense shadow of what was clearly original intent, a limited executive; indeed, Nixon's view and comment would have horrified most of the framers.

In two cases, the framers of the American Federal Constitution had dramatic precedents for what constituted a "high crime" against the state. But here it should also be mentioned that while the American framers accepted "English precedent" as a basis for impeachment, initially they were very uneasy about the process itself which involved a political-legal act by a legislative body, as Gordon Wood recorded,

Some Americans, like Jefferson, moreover, could never quite reconcile themselves to the idea that anyone-high official or not-could be tried by an extraordinary court outside of the regular rules of law.<sup>31</sup>

It was also feared that what should be a strict matter of constitutional law could easily be politicized according to the agenda of particular political parties.<sup>32</sup> This reluctance may explain

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<sup>28</sup> It is important to note how Thomas Jefferson effectively turned "English precedent" and the work of Locke upside down to justify a rebellion against a monarch, George III, who had breached his contractual agreement with his subjects in the colonies, in the Declaration of Independence.

<sup>29</sup> See Sabine, A History of Political Theory, 429-434, 455-476, and 517-551; and Wormuth, The Origins of Modern Constitutionalism; also note Thomas Hobbes, Leviathan (London: Collier Books, 1969); and John Locke, Two Treatises of Government (New York: Hafner Press, 1969).

<sup>30</sup> In Nixon's extended interview with David Frost on May 19, 1977, see below.

<sup>31</sup> Gordon Wood, The Creation of the American Republic, 1776-1787 (New York and London: W.W. Norton and Company, 1969), 143.

<sup>32</sup> See Berger, Impeachment: The Constitutional Problems, 94-102.

in part, why impeachment has been invoked so rarely in American history, and why, even recently, there is hesitation among the public and Congress, to support the use of this power.

"American practice" has been defined by an absence of action more than any defining examples. Two points are clear, however, that debate in the Constitutional Convention about impeachment concentrated on the president, and that in such cases the power was to be restrained,

The records make quite plain that the Framers, far from proposing to confer illimitable power to impeach and convict, intended to confer a *limited* power.<sup>33</sup>

In fact, only two American presidents, Johnson and Clinton, have been impeached. Both were acquitted, underscoring the idea that this was to be a restrained power, it has been that. But it leaves open a glaring question; will it actually be possible to remove a president from office as the framers intended, and as the ultimate safeguard against personal tyranny?

Andrew Johnson was impeached in the House of Representatives, but was acquitted by what amounted to one vote, it being necessary for a two-thirds majority to convict (there was a majority but it was shy of the constitutional number). He was accused of failing to fully execute the law according to the "Take Care Clause" (Article II, Section 3). In fact, the case was quite political, focusing on assertions that Johnson had not carried through sufficiently with more emphatic policies of Reconstruction.<sup>34</sup>

William Jefferson Clinton, likewise, was impeached in the House, and was acquitted with comparative ease. He was accused of charges of perjury (actually two charges of perjury), abuse of power, and obstruction of justice, all stemming from his affair with a White House intern as referred to in the House Articles of Impeachment. The Senate considered two charges as "high crimes and misdemeanors," one charge of perjury, and the charge of obstruction of justice. The Senate tied 50-50 on the count of obstruction, and counted 55-45 in a vote on perjury acquitting Clinton of that charge, thus sparing him from removal from office.<sup>35</sup>

It should also be noted that both in the later Twentieth Century and the early Twenty-First Century, Congress has not warranted a large number of presidential abuses as worthy of the definition "high crimes and misdemeanors." This, despite a rather large number of questionable presidential actions and scandals, most of which involved foreign policy. Two of them led to the two greatest disasters in the history of American foreign policy, the Vietnam War and the Third Gulf War.<sup>36</sup> These incidents include John F. Kennedy's use of expanded powers during the Cuban Missile Crisis, Lyndon B. Johnson's manipulation of the Gulf of Tonkin "emergency" in Vietnam, Richard M. Nixon's secret bombing and invasion of neutral Cambodia, and his involvement in what is collectively known as the Watergate Scandal (for which Articles of Impeachment were

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<sup>33</sup> Ibid., 86 and 100.

<sup>34</sup> See Schlesinger, *The Imperial Presidency*, 71-74.

<sup>35</sup> Here it might be noted that the House of Representatives heard several members introduce a resolution to impeach Ronald Reagan for institutional usurpation of the congressional war power in the invasion of Grenada in 1984, but nothing came of it. See Wormuth and Firmage, *To Chain the Dog of War*, 282.

<sup>36</sup> Since 1980 there have actually been three wars in the Persian Gulf, each called "The Gulf War" at one time. The First Gulf War followed Iraq's invasion of Iran, 1980-1988; the Second Gulf War followed Iraq's occupation of Kuwait and its eventual liberation, 1990-1991; the Third Gulf War instigated by unwarranted fears of Iraqi weapons of mass destruction (WMD), 2003-2011. See G. Michael Stathis, "The Dynamics of Power in the Persian Gulf" (Cedar City, Southern Utah University, 2016), 13-26.

drawn up and approved in Senate committee, see below), Ronald Reagan's illegal arms sales to Iran and the illegal transfers of funds from those sales to the Contra rebels in the Iran-Contra Scandal (including his denials that these events even took place), the invasion of Grenada, George H.W. Bush's invasion of Panama, and his blanket pardon of several individuals indicted in the Iran-Contra affair which could be listed as an abuse of power since he was implicated in that scandal, William Jefferson Clinton's bombing of Iraq on several occasions, Georg W. Bush's invasion of Iraq based on dubious claims of Iraqi weapons of mass destruction, and Barack Obama's involvement in NATO air strikes against Libya. There is little question that every one of these example could be interpreted as abuses of executive authority which in some cases were indeed considered by some to be "impeachable."<sup>37</sup>

In fact, in foreign affairs alone, it could be suggested that nine of the last eleven presidents (and possibly all of them) could have been charged with "high crimes and misdemeanors" in their disregard of the Constitution's designation of the "war power," a singular Congressional power via Article I, Section 8, but were not so accused.<sup>38</sup> This absence of action on the part of Congress could be construed to mean that these presidential offenses were not significant or dangerous enough to justify impeachment. Of all of these cases only Nixon's gross abuse of presidential power, and obstruction of justice seemed to warrant serious consideration. The full text of Articles of Impeachment were passed by the House Judiciary Committee (July 27, 1974) but were never voted on by the full House of Representatives. Still, it is not completely clear whether they would have been applied if Nixon had not been the first President of the United States to resign in disgrace. Nixon continued to argue that he had committed no crime against the Constitution, insisting, "I am not a crook."<sup>39</sup>

On September 8, 1974, President Gerald Ford issued a presidential pardon of Nixon which he accepted. By accepting, the pardon Nixon also accepted an admission of guilt regarding the charges pardoned, despite this Nixon continued his contentions that he had committed no constitutional offence until his death in 1994. Neither the compilation of the Articles of Impeachment in the House of Representatives, Nixon's resignation nor the details of the pardon

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<sup>37</sup> A number of sources can be suggested for details regarding the constitutional issues in these incidents including Schlesinger, The Imperial Presidency; Wormuth, "The Vietnam War: The President Versus the Constitution" in The Vietnam War and International Law, ed. by Richard Falk, 2 vols. (Princeton: Princeton University Press, 1969): II: 711-803; Wormuth, "The Nixon Theory of the War Power: A Critique," University of California Law Review 60 (1972): 623-703; Wormuth and Firmage, To Chain the Dog of War; Stanley Kutler, ed., Watergate: The Fall of Richard M. Nixon (St. James: Brandywine Press, 1987), and Abuse of Power: The New Nixon Tapes (New York: Touchstone, 1997); Berger, Impeachment: The Constitutional Problems; Haynes Johnson, Sleepwalking Through History: America in the Reagan Years (New York: Anchor Books, 1992); The Tower Commission Report (New York: Bantam Books/Time Books, 1987); The Pentagon Papers (Toronto, London, and New York: Bantam Books, Inc., 1971); The Starr Report: The Official Report of the Independent Counsel's Investigation of the President (Toronto: Prima Lifestyles, 1998); and Stathis, "The Dynamics of Power in the Persian Gulf."

<sup>38</sup> Note David Gray Adler, "The President's War Making Power" in William Lasser, ed., Perspectives on American Government: A Comprehensive Reader (Lexington and Toronto: D.C. Heath and Company, 1992); and David Gray Adler and Larry N George eds., The Constitution and the Conduct of American Foreign Policy: Essays in Law and History (Lawrence: University Press of Kansas, 1996).

<sup>39</sup> Nixon's beliefs as to what a president could and could not do were well summarized in his infamous statement made in a television interview with David Frost (May 19, 1977), "When the President does it that means that it is not illegal." See Schlesinger, The Imperial Presidency, 421.

did anything to clarify what would be necessary to remove a president for "high crimes and misdemeanors."

### "High Crimes" or Simple Misdemeanors?

Francis D. Wormuth and Edwin B. Firmage seemed to concede that something short of a "high crime" in the form of treason could be interpreted from both "English precedent" and "American practice," as mentioned specifically in Article II of the Constitution along with bribery. Wormuth and Firmage quoted the revered expert on English law, Sir William Blackstone, who included as a "high misdemeanor" the notion of "maladministration" by "high officers...in public trust and employment."<sup>40</sup> In the latter case Wormuth and Firmage looked to former Justice Joseph Story, who referred to "political offenses" which grew "out of personal misconduct, or gross neglect or usurpation, or habitual disregard of the public interest, in the charge of the duties of the public office."<sup>41</sup> Chief Justice John Marshall suggested in his majority opinion in *Marbury v. Madison* (1803) that "political character" and a president's "own conscience" should be considered in questions regarding impeachment.<sup>42</sup> Edward S. Corwin noted that a president's "personal responsibility seems to be simply his accountability."<sup>43</sup>

Wormuth and Firmage determined that what actually can be included as impeachable offenses could be "reduced to three broad categories" within the contexts of "English precedent" and American practice,"

- (1) exceeding the constitutional bound of the powers of the office in derogation of the powers of another branch of the government
- (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper or for personal gain.<sup>44</sup>

These "broad categories" certainly include the concept of a "high misdemeanor," but are also general enough to suggest that Congress could determine that lesser offenses apply. That, of course, was not the meaning supported by Wormuth and Firmage who noted the sublime irony in the fact that Congress chose not to include some of the most "egregious usurpations," namely actions in Vietnam and Cambodia, in the Articles of Impeachment against Nixon.<sup>45</sup> With impeachment, as in many cases, what the Constitution says is not the problem, but rather what it means. Unfortunately, the meaning of "high crimes and misdemeanors" seems open to Congressional interpretation.

In April 1970, then Congressman Gerald R. Ford supported impeachment proceedings for Justice William O. Douglas. He substantiated his call by the suggestion that an "impeachable offense" could be anything that the House of Representatives, with the support of the Senate, said it was. In his critique of this incident, Raoul Berger emphasized that Ford had "laid claim to an illimitable power that rings strangely in American ears. For illimitable power is alien to a

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<sup>40</sup> See Wormuth and Firmage, *To Chain the Dog of War*, 280-281.

<sup>41</sup> As quoted in *ibid.*, 281.

<sup>42</sup> "Good behavior" is indeed listed as a possible impeachable offense, but only for federal judges and members of the Supreme Court in Article II, Section 1, as noted above.

<sup>43</sup> See Corwin, *The Constitution and what It Means Today*, 160.

<sup>44</sup> Wormuth and Firmage, *To Chain the Dog of War*, 281.

<sup>45</sup> *Ibid.*

Constitution that was designed to fence all power about."<sup>46</sup> Berger's point is beyond doubt, the framers intended impeachment to be a necessary safeguard, but still a limited power. The source of that limitation was to be found in the founders' understanding of "high crimes and misdemeanors." In 1974, Berger declared that this meaning was not open to congressional interpretation because it was this very definition that provided the necessary limitation "If 'high crimes and misdemeanors' had an ascertainable content at the time the Constitution was adopted, that content furnishes the boundaries of the power."<sup>47</sup>

Alexis de Tocqueville once warned of the possible tendency of political executives in democracies to expand their given powers, especially in the name of national emergencies.<sup>48</sup> Arthur M. Schlesinger, Jr. remarked that Nixon presented an "ironic fulfillment of Toqueville's prophecy" when he "became the first to profess the monarchical doctrine that the sovereign can do no wrong."<sup>49</sup> Perhaps more than any American president, Nixon accentuated the wisdom of the framers in their inclusion of the power of impeachment in the Federal Constitution. On the one hand, the threat of impeachment forced the end of a constitutional crisis in 1974. On the other hand, however, the fact that Nixon was allowed to resign cast doubt on the entire concept. If the offenses committed by Nixon were not sufficient to remove him from office by impeachment, then what crimes do fit the framers' notion of "high crimes and misdemeanors"? While the meaning of "high crimes and misdemeanors" can be debated, there is less room to argue about the meaning of "treason" and "bribery". Indeed, of the two, the latter needs little clarification or interpretation. "Bribery" for any purpose would clearly be an impeachable offence significant enough to remove a president from office, especially if it is seen as part of an attempted "cover-up," or conspiracy to "cover-up," in which case it would be part of an attempt at "obstruction of justice" or "conspiracy to commit obstruction of justice," which figured into the discussions of impeachment for two presidents: Nixon and Clinton.

### **Impeachment and Political Factions, or Parties**

A clear limitation of the power of impeachment, and one largely unforeseen by the framers, is that of political parties. In 1787, the potential for political divisions based on what was known then as factional divisions was considered, but certainly the framers had no idea the extent to

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<sup>46</sup> Berger, Impeachment: The Constitutional Problems, 53.

<sup>47</sup> *Ibid.*, 87.

<sup>48</sup> Ironically, Congress conferred such a dubious "emergency power" on the President of the United States with the War Powers Act (or Resolution) in 1973 (not unlike the power of *magister populi* or limited dictatorship for up to six months in the Roman Republic) which was vetoed by Richard M. Nixon, but the act was made law when both the House and Senate voted to override the president's veto. The resolution allows the president to declare an emergency and if he informs Congress within 48 hours he would then have 60 days to deal with the emergency. In the case that this is not time enough to end the emergency, the president could extend the period for an additional 30 days by simply informing Congress of that intent. Following what might be a 90 day period, the president would then have to seek further authorization from Congress in the form of a resolution or a full declaration of war. No president has used this power, although there have been references to it. Every Republican executive has followed what became known as the Nixon/Rehnquist Defense, that the act represents an unconstitutional restriction of presidential power. If ever used, and subsequently challenged in federal courts, it is likely to be found unconstitutional, on the grounds that it represents an illegal surrender of a constitutional power (the War Power, Article I, Section 8) from one branch to another. But put simply the very idea of a president with unlimited power for even 60-90 days would have amounted to a nightmare for the framers.

<sup>49</sup> Schlesinger, The Imperial Presidency, 421.

which factions and parties would eventually divide the United States. Indeed, divisions that have divided the republic since the 1960s and the Civil Right Movement and especially the Vietnam War have created a divide that truly threatens the very survival of the country. Dove vs. Hawk, Liberal vs. Conservative, Democrat vs. Republican, on almost every level, but most visibly in the Congress, political partisanship has ground American government almost to a halt.<sup>50</sup> What the framers also barely understood is how this would limit the possibilities of considering impeachment as a practical tool to fend off the threat of tyranny. "Political" considerations came into play in every American scenario where impeachment was considered or used, certainly involving Johnson, Clinton, and Nixon, but also Reagan, Bush (G.W.), and the current president. One thing has been certain, that the chances of a vote of impeachment is difficult when the opposing party of a sitting president controls Congress, but if the parties of the president and Congress are the same, the possibility of impeachment goes immediately from difficult to highly unlikely. Just as the necessary constitutional violations were to be beyond the interpretation of Congress, so, impeachment was designed to be above party or factional loyalties. Again, one more reason why presidential impeachment has occurred so rarely. Does this mean that a potential tyrant, or violator of the Constitution is more palatable if he, or she, is of one's own political party?

### **The Final Problem<sup>51</sup>**

Finally, it must be asked, beyond the issue of the ultimate meaning of "Treason, Bribery, or other high Crimes and Misdemeanors," and the possibility of a reticence in Congress to apply them because of political loyalties or other divisive complications, there is the last question, would a president heed an impeachment, and if it came to it, would he or she abide by the ruling of the Senate to step down from office? If a president was so bold as to commit questionable acts, would he or she not also be confident enough to question both the accusations presented by the House of Representatives in the impeachment, and the final decision of the Senate? Put simply what if a president refused the judgement and refused to leave office? By law, this would seem a rather unnecessary query, but note the conviction of Charles I who refused to recognize the legal grounds of his impeachment and the validity of the court that tried him, to say nothing about the final verdict and punishment. Also, consider, Richard M. Nixon ridiculed possible charges against him and accepted resignation rather than trial, all the while insisting his innocence. Can a president be forced to stand trial, and if convicted how, if that president refuses the verdict, do you go about removing a president from office? In that final regard it has never been done, and therefore, it remains an act well founded in law, to be sure, but not in fact; there exists no constitutional precedent.

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<sup>50</sup> Fear of these divisions as well as other areas that divided America including race, caused Robert F. Kennedy to remark in spring of 1968, just weeks before his own assassination, "If the division continues, we're going to have nothing but chaos and havoc here in the United States." As quoted in Christopher Mathews, [Bobby Kennedy: A Raging Spirit](#) (New York and London: Simon & Schuster, 2017), 337.

<sup>51</sup> With humble apologies to Sir Arthur Conan Doyle.

## Conclusion

Benjamin Franklin remarked that without the process of impeachment to check presidential abuses of power, there would be only one possible alternative, "assassination", but that, he said, would deprive the president of both his life and "the opportunity of vindicating his character."<sup>52</sup>

With the power of impeachment, the people of the United States are armed with marvelous constitutional machinery to prevent presidential tyranny, but are also left without a precise definition of "high crimes and misdemeanors" necessary to set it in motion. It is abundantly clear, however, that the process of impeachment was to be limited and was not to be invoked for political or other capricious motives as Alexander Hamilton warned that it could be in *Federalist 65*, "there will always be the greatest danger, that the decision will be regulated more by the comparative strength of the parties than by the real demonstration of innocence or guilt." Nor was it to be used for simple criminal acts, criminal law could be invoked following a term of office or following removal from office. Impeachment was designed, according to "English precedent" and "American practice," as the ultimate and final means of restoring a constitutional balance of power when upset by the actions of a president, and it is such a threat to the Constitution, and the separation of powers it created, that one is best able to perceive the framers' conception of "high crimes and misdemeanors".

According to "English precedent," the level of offense implied by "high crimes and misdemeanors" was quite clear. The cases of the Stuart Kings, Charles I and James II, involved nothing less than "violations of law," making war against England, and setting the law aside, high crimes indeed. It was the intent of the framers that the American constitutional equivalent in the impeachment process be based on offenses equally severe. It is also clear that they meant the definition of "high crimes and misdemeanors" to be beyond politically influenced congressional interpretations, otherwise, what was meant to be a constitutional safeguard against presidential abuse of power, or in its extreme presidential tyranny, could create equally tyrannical power in Congress. The President of the United States was to be restrained by constitutional sanction of impeachment, but, likewise, Congress too had to be restrained. The limits of the power of Congress to impeach and remove a president was to be found in the definition of "high crimes and misdemeanors" which was understood to be outside its ability to interpret. Clearly, there is much less doubt about the meaning of "treason" and "bribery". Above all, the founders intended that a system of separation of powers and checks and balances be preserved; this was, in fact, the primary purpose for impeachment. But given over two hundred years of history, no American president has been convicted and removed by impeachment, leaving the power and process in mere theoretical form, a partially moot power given deep party divisions and loyalties.

The full extent of the power of presidential impeachment, and exactly what specific offenses would apply, will never really be known until a president is impeached, tried, found guilty, and actually removed from office, creating an established constitutional precedent for conviction and removal from office; the law, and its intent, alone, have not proven to be sufficient to such ends. At some point, Congress must act according to the power created by the Constitution. Removing a president by impeachment cannot remain an untested power; it must be applied according to its full constitutional purpose, as the framers clearly intended, otherwise it remains at best a simple warning, and at worst a passive form of constitutional window-dressing.

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<sup>52</sup> As related in Schlesinger, *The Imperial Presidency*, 414-415.

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## ***Denouncing Racist State Violence: “Fuck the Police!” as Parrhesiastic Exclamation<sup>1</sup>***

“Fuck the police!” is explosive, incendiary and divisive. It is a forceful statement that is often interpreted as either affront or galvanizer. Its provocative character, however, obscures its nature and intention making understandings of its motivation and meaning largely absent from its wake. In this paper, I interrogate “Fuck the police!” beyond the supposedly obvious expression of unambiguous rage it announces. Drawing on Michel Foucault’s research on the ancient notion of *parrhesia* (the practice of courageous truth-telling), I delineate and employ *parrhesia* as an analytic framework for making sense of this loaded exclamation. Using a case study approach, my reading of “Fuck the police!” suggests it be understood as an abolitionist denunciation of racist state violence. In an era of inflammatory political rhetoric, careful deconstruction of vulgar expressions is of particular interest (and need); especially when emancipatory exclamations risk being confused with arrogant bluster.

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### **Prologue: N.W.A. and the Genesis of an Emancipatory Exclamation**

The tension was palpable when court was called into session. Before he was able to take his seat, Judge Andre Romelle Young was forced to call thrice for order in the courtroom. It was (and still is) extremely rare for the police to stand trial for their misconduct, so those in attendance had difficulty managing their anticipation. After a few brief introductory formalities, Judge “Dre” instructed the prosecuting team to begin. The first accuser stood and confirmed loyalty to a preamble: “I swear to tell the truth, the whole truth and nothing but the truth.” Then, with force and conviction, O’Shea Jackson (1988) initiated his censure:

Fuck the police! Comin’ straight from the underground  
A young nigga got it bad ‘cause I’m brown;  
and not the other color so police think  
they have the authority to kill a minority.

With the album release of *Straight Outta Compton*, Los Angeles based rap group N.W.A. brought “Fuck the police!” into popular culture and political discourse. The most notorious track on the album, “Fuck tha Police,” was intended as a protest song in denunciation of racial profiling and police brutality, while also expressing approval of violent refusals of the police occupation in their city. In response to the controversy it set off at the time of the song’s release, O’Shea Jackson (a member of the group whose rap moniker is Ice Cube) clarified the nature and intention of the lyrics by stating, “There is a lot of resentment of police because if you are Black you get picked on a lot...The song is a way to get out aggression” (Hochman, 1989). More recently, Jackson reiterated what he sees as the heart of the song’s message: “We wanted to highlight the

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<sup>1</sup>This work is dedicated to Jerry Watts, who refused to accept an early version of this work and demand I attend to the case at hand with more rigor. I’d like to thank Jayne Mooney and the anonymous reviewers. Your critical feedback improves my analysis and understanding of the issues involved.

excessive force and the humiliation that we go through in these situations...so the audience can know why we wrote 'Fuck tha Police,' and they can feel the same way" (Carter, 2015). In so many words, the song was intended as a documentary presentation of the social conditions in Compton as well as a condemnation of the police terror that characterizes life in such locales.

### Introduction

Nearly 30 years after N.W.A.'s excoriation of the police, "Fuck the police!" continues to resonate with marginalized people of color whose experiences with the police remain defined by prejudice and violence (Chaney & Robertson, 2013; Edgar, 2016). Today, however, the expression has moved out of the fictionalized courtroom the song's performers created and into the real-world where social movements activists scream it out as a rallying cry against injustice (Moore, 2015). Yet, due to its explosive and incendiary nature, it is often dismissed as immature vulgarity.

While some see the exclamation as a galvanizer of progressive social action, others equally view it as an affront to justice and social order. More often than not, "Fuck the police!" is dismissed as being an expression of arrogant bluster and unambiguous rage. Its provocative character, then, obscures its nature and intention making nuanced understandings of its motivation and meaning largely absent from its wake. Yet, despite its status as one of the most provocative political speech acts in recent memory, few theoretical explorations of "Fuck the police!" exist (c.f. Edgar, 2016).

In this paper, I remedy this lack of understanding by employing *parrhesia*, the practice of courageous truth-telling (Foucault, 2001, 2010, 2011), as an analytic framework for unpacking "Fuck the police!" That is, disempowered communities of color often wield the expression as an abolitionist exclamation in denunciation of racist state violence. Moving toward this heterodox understanding of "Fuck the police!", this paper proceeds as follows:

In the next section I offer a methodological note, which is followed by a narrative vignette of the case under examination. Next, I present a review of Michel Foucault's research on the ancient notion of *parrhesia* in order to construct an analytic framework for making sense of the anti-police expression at the heart of the case study. In the penultimate section, I make clear the *parrhesiastic* nature of the incident in order to illuminate what lies beyond the schism "Fuck the police!" tends to create. I conclude this paper by suggesting this reading not only encourages the recognition of courageous speech but also prompts residents of a democratic society to have the courage to listen—especially when emancipatory exclamations are too often confused with arrogant bluster.

### "Fuck the police!" as a Text for Hermeneutic Interpretation

"Fuck the police!" is a widely used expression, but it should first be understood as a single speech act. Speech acts exist within rhetorical contexts. Analysis of this expression, then, must address questions about who, when, where, how and why. Consider, for example, the different implications when "Fuck the police!" is shouted in the midst of a picket line at police headquarters and when "Fuck the police!" is spoken during an academic panel on transgressive studies in criminology. Not just that, as one of the most provocative political speech acts in recent memory, analyses of "Fuck the police!" must also attend to the speech act's unique sociological context, which is comprised of history, biography, politics, economics and ideology. This is all to

say that interrogation of “Fuck the police!” requires that it first be localized so as to unpack context specific dynamics operating where it is uttered.

To this end, this article offers a case study analysis of a specific instance where “Fuck the police!” provoked a zealous reaction from those with power. I make use of publicly available documentary data (raw video recordings, newspaper articles, open letters from individuals and organizations, and public statements from elected officials) to construct a holistic and context sensitive narrative reproduction of the confrontation.

I employed “Burke’s Pentad for Rhetoric” (Burke, 1945) as a guide for constructing the narrative vignette and analyzing the data. This approach is centrally concerned with motive (the reasons why people do what they do). According to Burke, one can begin to uncover motive in action and discourse by addressing five concerns: (1) Scene. Where is the act happening? What is the background situation? (2) Agent. Who is involved in the action? What are their roles? (3) Act. What happened? What is going on? (4) Agency. How do the agents act? By what means do they act? (5) Purpose. Why do these agents act? What do they want? In addition to and across these foci, I maintained a sociological awareness. As mentioned above, the overlapping of broader considerations with questions that are context specific is requisite for comprehensive analysis of speech acts.

Treating this speech act as a text, I analyzed the case using a hermeneutic circle of interpretation. Hermeneutics focusses on interpreting texts and meaningful material with(in) their larger contexts. The hermeneutic circle of interpretation is a method of analysis that treats “every interpretation [as] layered in and dependent on other interpretations, like a series of dolls that fit one inside the other and then another and another” (Patton, 2002: 497). Charles Taylor (quoted in Mantzavinos, 2016) explains hermeneutic circles of interpretation as follows:

What we are trying to establish is a certain reading of texts or expressions, and what we appeal to as our grounds for this reading can only be other readings. The circle can also be put in terms of part-whole relations: we are trying to establish a reading for the whole [con]text, and for this we appeal to readings of its partial expressions; and yet because we are dealing with meaning, with making sense, where expressions only make sense or not in relation to others, and ultimately of the whole.

In a sentence, making sense of “Fuck the police!” is made possible by localizing the focus to one specific instance where it was uttered so as to allow its interrogation with and within broader social/political/historical dynamics; dynamics that are best comprehended in relation to revelations emanating from the unpacking of a single instance. In the next section, I provide a narrative rendering of one such instance.

### **“Fuck the Police!” in the Chambers of Government**

While quietly preparing his notes for the October 7, 2014 city council meeting, “Mr. Bijan” (a pseudonym) was approached by City Manager David Cavazos and Chief of Police Carlos Rojas. They asked Mr. Bijan, a Santa Ana, California resident who planned to speak during the public comment portion of the meeting, to remove his hat because the message on its front panel offended the councilmembers. Mr. Bijan declined the request, later stating, “I came here to talk about the police abuse that I’ve experienced with the Santa Ana Police Department. I don’t feel

like I have to take [my hat] off. It's a meeting for the public and I'm allowed to be here with my hat" (Molina, 2014).

Mr. Bijan is a member of Copwatch Santa Ana, an all-volunteer, horizontally-organized collective of individuals that aims to deter police from behaving unlawfully as well as provide documentation that might hold them accountable when they do (Toch, 2012). The collective's primary activities include observing and documenting police activity within the confines of the law.

A few days prior to the city council meeting, Mr. Bijan and his colleague performed their Copwatch duties while standing on a public sidewalk near a busy intersection. The police on-scene were visibly annoyed by the young men and proceeded to antagonize them with racial slurs and patronizing epithets. Eventually, Mr. Bijan and his colleague were unlawfully detained, searched and arrested. Once inside the patrol unit, the officers launched psychological attacks against the young men, implying that severe violence and pain would follow. They were released several hours later without charges (Copwatch, 2014). It was this, and accounts of other abuses, that Mr. Bijan wanted to submit to his elected officials. He would not be afforded the opportunity.

Moments after Mr. Bijan declined the request for the removal of his hat, Santa Ana Mayor Miguel Pulido entered the chamber. Aware of the situation at hand, he immediately ordered Mr. Bijan to take off his hat. Silence communicated Mr. Bijan's refusal to comply. With an identical swiftness with which he had entered the room, Mayor Pulido demanded the chamber be emptied. He called for a recess and ordered those in attendance to exit the building "so that the police [could] deal with the issue" (VoiceofOCvideo, 2014). Many people correctly recognized the mayor was issuing a thinly veiled threat: Mr. Bijan's unmoving to demands for obedience, which Martinot (2014) has shown to be central for understanding murders by the police, would be cause for him to be forcefully dealt with. Rather than leave the young man alone to receive undue violence, almost two-dozen attendees opted to remain seated. The situation quickly escalated.

Within a few minutes, a police officer made an announcement to the group: "We're asking that you clear the room, and we will continue to ask you. If this room is not cleared within 30 minutes, so that we can address the issue, then we will have no choice but to arrest all of you" (VoiceofOCvideo, 2014). Several people inquired about the law they were in supposed violation. Commotion ensued when the police were unable to cite one.

Confusion and frustration led to shouting matches. Some of the back-and-forth between the police and residents devolved into childishness. For example, one exchange between a police officer and a male attendee with a pony-tail hairstyle played out as follows:

Attendee: Why do we have to leave?

Officer: [Motioning toward Mr. Bijan] Because wearing that hat is offensive.

Attendee: I think your presence is offensive.

Officer: I think your hair offensive.

Seemingly annoyed with the hold up, Councilwoman Michelle Martinez emerged from the private room to which she and the rest of the city council had withdrawn. In an attempt to suggest comity as grounds for quelling resistance to illegitimate state demands for obedience, she presented Mr. Bijan with a line of questions. Her strategy, though, had the opposite effect as the climax of the tumult occurred in response to her inquiry.

With polite sincerity—and from behind a half-dozen armed police officers—she asked, “Why don’t you just take off your hat? That’s all we’re asking. Your hat is disrespectful to the chamber, it’s disrespectful to our police officers, it’s disrespectful to the people at home who want to wait—” An ally to Copwatch Santa Ana cut her off mid-sentence.

“—What happened to Edgar Arzate was disrespectful! What happened to Edgar Arzate was disrespectful!” (VoiceofOCvideo, 2014). The young man’s shouts silenced the chamber; not because of the decibel of his rebut, but rather because many in attendance planned to speak out against the recent increase of high-profile cases of wanton police violence in their city and across the country—Edgar Arzate being the most recent and one of the most reproachable. So, the young man’s rebuttal effectively conjured images of why many were there in the first place. The silence the young man generated, then, was actually a moment of reflection.

Edgar Arzate surrendered. Home surveillance footage shows that he complied with Santa Ana police officers when he lay face-down sprawled across the lawn. An FBI investigation would later acknowledge that the ensuing incident constituted a “felonious assault” and an “excessive use of force” (Molina, 2014).

The first officer to reach Arzate executed a violent knee-drop to the young man’s lower back, then delivered pounding, closed-fist blows to Arzate’s head and neck. As the beating commenced, a second officer handcuffed the young man. Simultaneously, a third and fourth officer reached the scene. The third delivered his own knee-drop, while the fourth hammered away at Arzate’s legs with his baton—all the while punches continued to rain down. In the video (HuffPost, 2014) two officers on the opposite side of a fence look up and appear to notice the surveillance camera. Then, they say something to the officers beating Arzate, who quickly move him out of view. Residents would later report having heard labored screams echo down the street: “Help me! Help me! Help me!”

Back at the city council meeting, a moment of reflection ended and the young man who interrupted Councilwoman Martinez received the attention of the entire chamber. Recognizing he had the floor, he proceeded with a diatribe against the violence meted out by the police against his friends and neighbors. He called into question the legitimacy of a city council that would react so severely to a hat while at the same time blindly support those who carry out callous acts of violence. He ended his tirade with the message on Mr. Bijan’s hat. The attendees accepted his speech with a round of applause.

Eventually, tempers cooled and Mayor Pulido returned to the chamber to commence the meeting. Noticing Mr. Bijan continued to wear his hat, the mayor asked the young man, “Alright, are you ready to either take off your hat or leave the meeting?” (VoiceofOCvideo, 2014). A silent stare down. The mayor continued, “This would be your third and final warning.” More silence. The mayor concluded, “Seeing as that is not the case, we’re just not going to be able to conduct the meeting tonight, so I’m just going to adjourn until the next regularly scheduled meeting. For the record, this meeting did not start.” Then, the councilmembers followed the mayor out of the chamber, Mr. Bijan still donning his black hat with his truth about the police emblazoned across its front panel: “Fuck the police!”

### **Foucault on *Parrhesia***

It is not enough to say that vulgarity and offensiveness have no place in the chambers of city hall. We are here confronted with problems much greater than etiquette and decorum. That

democratic exchange was abandoned in response to a pithy message prompts us to make sense of this case beyond respectability and decency. Michel Foucault's research on the ancient notion of *parrhesia* is particularly helpful for this task.

In his final lectures at the Collège de France and the University of California, Berkeley, Michel Foucault traced the emergence and evolution of *parrhesia* (Foucault, 2001, 2010, 2011). Early on, he refers to it as a "spidery kind of notion" because he found no single, precise meaning for this "rich, ambiguous and difficult notion" (Foucault, 2010: 43-45). Put simply, the nature and character of *parrhesia* has been multiple.

Nonetheless, a common feature across the centuries of its usage has been its place as one of several "modalities of truth-telling" (Foucault, 2011: 11). For my purposes here, I focus on *parrhesia* as form of political proclamation. Before I delineate the core features of political *parrhesia*, first consider Foucault's summary:

...*parrhesia* is a verbal activity in which a speaker expresses his personal relationship to truth, and risks his life because he recognizes truth-telling as a duty to improve or help other people (as well as himself). In *parrhesia*, the speaker uses his freedom and chooses frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy (Foucault, 2001: 19-20).

In so many words, *Parrhesia* is the political and ethical practice of "fearless speech" (Foucault, 2011: 2). Walters (2014: 279) puts it well:

In its political version, *parrhesia* is exemplified by the citizen who speaks critically in front of a tyrant or an assembly, voicing truth he or she feels needs to be heard, and risking the wrath of the sovereign or people in doing so...As a consequence, there is always the hope in *parrhesia* that this frank speech will have a positive impact on the affairs of the community..."

More concisely, one can say that political *parrhesia* is speaking truth to power for everyone's sake. With this general understanding in mind, the remainder of this section delineates the core characteristics of *parrhesiastic* speech as political discourse.

### *Frankness*

The *parrhesiastes*, s/he who uses *parrhesia*, says everything that is on her/his mind. In a sense, *parrhesia* is full disclosure or, as Foucault puts it, "a complete and exact account of what he has in mind so that the audience is able to comprehend exactly what the speaker thinks" (Foucault, 2001: 12). Frankness, in other words, is making abundantly clear to the audience the *parrhesiastes'* position on the matter at hand. Most importantly, though, is the mode through which *parrhesiastes* go about pressing upon the audience this position.

For in *parrhesia*, the speaker makes it manifestly clear and obvious that what he says is his *own* opinion. And he does this by avoiding any kind of rhetorical form which would veil what he thinks. Instead, the *parrhesiastes* uses the most direct words and forms of expression he can find. Whereas rhetoric provides the speaker with technical devices to help him prevail upon the minds of his audience (*regardless* of the rhetorician's own opinion concerning what he says), in *parrhesia*, the *parrhesiastes* acts on

other people's minds by showing them as directly as possible what he actually believes (Foucault, 2001: 12).

Notice, then, that frankness is about both the speaker's relationship with what s/he says (what is said is also the speaker's opinion) as well as the mode of communication. While *parrhesiastes* may use rhetorical methods, rhetorical persuasion is not the objective nor purpose of *parrhesia*. Instead, the *parrhesiastes* "throws the truth in the face of his interlocutor, a truth which is so violent, so abrupt, and said in such a peremptory and definitive way that the person facing him can only fall silent, or choke with fury, or change to a different register" (Foucault, 2010: 54). *Parrhesia*, then, does not require the crafting of a rationally structured argument. Nor does the *parrhesiastes'* speech need to be indexed toward persuasion; s/he "is basically concerned with telling the truth as quickly, loudly, and clearly as possible" (Foucault, 2010: 55).

### *Truth*

Space limitation does not allow for a review of postmodern critiques of "truth," but suffice it to say that *parrhesiastes* have no doubt that they speak the truth. Not only do they articulate their beliefs on a matter, but also those beliefs coincide exactly with the truth of the matter. Foucault puts it with more sophistication: "*parrhesia* consists in a particular kind of speech which claims to tell the truth and in which the person who tells the truth also proclaims that he is telling the truth and clearly identifies himself as the enunciator of this true proposition or true propositions" (Foucault, 2010: 55: 192). Said incrementally, *parrhesiastes* know the truth; *parrhesiastes* tell the truth; *parrhesiastes* believe they are telling the truth when they say it. The *parrhesiastes'* opinion, in other words, is also the truth and s/he knows it is true (Foucault, 2001: 14). Jonathan Simon both clarifies the aspect of truth as well as transitions to the next characteristic. The *parrhesiastes'* truth "comes uniquely from her self and her experience and is directed critically at a listener whose power places the speaker in potential danger" (Simon, 2005: 1422).

### *Danger*

There can be no *parrhesia* without danger. Because *parrhesia* negates flattery and untruthfulness, *parrhesiastic* speech always entails a degree of danger. The *parrhesiastes* accepts that s/he enters into a field of undefined risks. On this point, Foucault is clear:

We should look for *parrhesia* in the effect that its specific truth-telling may have on the speaker, in the possible backlash on the speaker from the effect it has on the interlocutor. In other words, telling the truth [] opens up a space of risk for the person who tells the truth; it opens up a danger, a peril, in which the speaker's very life will be at stake, and it is this that constitutes *parrhesia* (Foucault, 2010: 56).

Of course, the risk involved is not always a mortal one, but the *parrhesiastes* accepts that the undefined price (i.e. the risk involved) may include death. Notice, then, *parrhesia* is about the relationship between the *parrhesiastes* and (an)other person(s), but also about the relationship of the *parrhesiastes* to him/herself. On the former point, *parrhesiastes* elicit a response from others; on the latter point, the *parrhesiastes* "prefers himself as a truth-teller than as a living being who is false to himself" (Foucault, 2001: 17). Before moving on, the following quote begins to uncover the nature of the danger involved, as well as transitions to the next characteristic.

*Parrhesia*, therefore, is to be situated in what binds the speaker to the fact that what he says is the truth, and to the consequences which follow from the fact that he has told the truth. In these scenes [where Plato addresses Dionysius, the tyrant of Syracuse,] are people who practice *parrhesia* inasmuch as they actually, presently, tell the truth, and in telling the truth lay themselves open to the risk of having to pay the price, or a certain price, for having done so (Foucault, 2001: 56).

### *Criticism*

The fourth characteristic of *parrhesia* is criticism. Here, Foucault is clear: “*Parrhesia* is a form of criticism...The *parrhesiastes* is always less powerful than the one with whom he speaks. The *parrhesia* comes from ‘below,’ as it were, and is directed ‘above’” (Foucault, 2001: 17-18). Elsewhere, Foucault discusses *parrhesia* and the inequality of power at greater length. Priming his audience at the Collège de France for his explication of this characteristic of *parrhesia*, he asks, “What can the poor, unfortunate, weak, and powerless do, those who have only their tears...when they are the victim of injustice?”

They can do only one thing: turn against the one with power...In this discourse of injustice proclaimed by the weak against the powerful there is at once a way of emphasizing one’s own right, and also a way of challenging the all-powerful with the truth of his injustice, of jousting with him as it were...Now this discourse of injustice, which in the mouth of the weak emphasizes the injustice of the strong, has a name (Foucault, 2010: 133).

Clearly, that name is *parrhesia*. So, *parrhesia* exists within a profoundly unequal situation between those with power and those without. In the absence of material or institutional means of retaliation, no way to fight back or take revenge, people resort to speaking truth to power. *Parrhesia* is the “imprecation of the weak against the strong, the weak calling for justice against the strong who oppresses him or her” (Foucault, 2010: 153). Importantly, as the next and final characteristic shows, the cry of the powerless is not completely out of self-interest.

### *Duty*

People have the freedom to remain silent, to say nothing in the face of injustice. The *parrhesiastes* chooses to speak because s/he feels that it is her/his duty. The *parrhesiastes* is neither forced nor coerced to speak out; s/he chooses “moral duty instead of self-interest and moral apathy” (Foucault, 2001: 20). With *parrhesia*, the *parrhesiastes* makes clear that his or her mode of being is defined as a person whose constitution of self entails a relationship with others. *Parrhesiastic* speech is the formulation and acceptance of a general interest.

In this form of truth-telling, an individual obligates him/herself to telling the truth and thus “show[s] how [s/he] is constituted as subject in the relationship to self and the relationship to others” (Foucault, 2010: 42). Later in the same passage, Foucault puts it slightly differently, yet his reiteration better highlights what he believes can be gleaned from his research on *parrhesia*. He would like his audience to learn something about “...truth-telling in the procedures of government and the constitution of [an] individual as subject for himself and for others.” The *parrhesiastes* obligates him/herself to a general interest for the benefit of self and others.

### **“Fuck the police!” as *Parrhesiastic* Exclamation Denouncing Racist State Violence**

Michel Foucault’s work on the ancient notion of political *parrhesia* offers an analytic framework for interrogating the case at hand. With this framework, it is possible to look beyond the schism “Fuck the police!” leaves in its wake; to examine its meaning unencumbered by hegemonic propriety; to make sense of its motivation unshackled by orthodox. This section considers the extent to which declaring “Fuck the police!” in the procedures of government—in this case, a city council meeting—may be considered *parrhesiastic*.

#### *Frankness*

“Fuck the police!” The proclamation under consideration is made up of three words and an exclamation mark. One is hard-pressed to imagine another statement as frank as this. In a single breath, “Fuck the police!” throws in the face of its listener, in a clear, quick and loud manner, exactly what the speaker thinks. Fuck: a verb to express anger, contempt or rejection (as in “fuck off”). The police: the primary institution responsible for maintaining the interests of the state (e.g. consumer conformity, criminal laws, hegemonic notions of social order), thus legitimized in its use of violence. Brought together as an exclamation, it cannot be more clear. To shout “Fuck the police!” is to shout “I cry out in anger, contempt and rejection of the premier institution of state-sponsored violence; the police can fuck off; our society should do away with the police.” Unequivocally, abolitionists exclaim their belief.

#### *Truth*

Is it true that our society should do away with the police? For people living at the margins of US social structures, instances of police misconduct and brutality are not uncommon (Miller & Davis, 2008). The historical and contemporary ubiquity of police terror—from beatings and killings to chronic intimidation and harassment—has led many in these locales to view the police with fear, mistrust and disdain (Chaney & Robertson, 2015; Perry, 2006). Rather than agents of peace and servants of the people, the police are often seen as “the strong arm of supposed law and order whose ultimate purpose is to instill fear and submission” (Copwatch, 2014). For people like Mr. Bijan—those who possess a visceral understanding of the unjust violence of the police—there is no doubt that their abolitionist stance is the true stance.

#### *Danger*

There is likely no other speech act more dangerous than “Fuck the police!” Absolutely, this forceful denunciation risks provoking fatal reactions. Consider, for example, that Edgar Arzate was lying face-down when he was beat to a pulp; that Oscar Grant was handcuffed when he was executed with a bullet to his back; that Sandra Band was under police custody when she was hung to death (i.e. lynched); that Tamir Rice was playing in the park when he was swiftly murdered. These tragic cases, as well as countless others, make clear that provocation is not necessary for the police to beat and kill with impunity. Without a doubt, “Fuck the police!” risks activating the unrestrained savagery of the police.

### *Criticism*

Our contemporary moment, facilitated by the ubiquity of mobile cameras and social media, is plagued by high-profile cases of police brutality. Wanton police violence has reignited critical discussions about the nature and purpose of American policing. Often, these discussions revolve around questions about rogue officers, hyper-violent police subcultures, or institutional inadequacies in reference to training protocols. No doubt, these problems deserve remedying. That being said, abolitionists whom shout “Fuck the police!” know well that these issues and the focus on them prospectively obscure the deeper nature of the problem: instances of police brutality are not aberrations, they are functions of a US policing institution that exists within a paradigm of militarized racialized warfare (Rodríguez, 2012).

The roots of US policing extend to the patrol units in the antebellum south that maintained chattel slavery, the mercenary agents of repression in urban cities whom facilitated the control of the “dangerous classes” and the vigilante frontiersmen who functioned as a colonizing force against native people. In each of these previous manifestations, the intended purpose of the police has been to animate and enact racist violence in service to the state (Singh, 2014). Racialization facilitated and legitimated the enslavement of Africans, the hyper-exploitation of the lower classes, and the genocidal policies toward native people. Today, the primary targets of the barbarism of the police are people of color and people who are, in one manner or another, racialized (Isenberg, 2016). Specific instances of police brutality, though horrendous as they, are not the impetus for the criticism manifest in “Fuck the police!” It is the underlying brutality of the police, the longstanding problem of racist state violence—which the police animate and enact—that *parrhesiastes* find fault with.

### *Duty*

Do those who exclaim “Fuck the police!” do so out of feelings of moral duty? Are their cries motivated by a sense of obligation to a general interest? With their courageous truth-telling, do they announce a hope that their speech will have a positive impact on the affairs of the community? Yes. Take into mind the following statement from the collective:

Copwatch Santa Ana believes that observing police activity is a crucial first step in organizing toward radical self-determination and building an effective self-defense against state-sponsored violence...The Santa Ana police literally put people in cages but they also convince many to live in cages of their own that are made out of fear. If we desire to take back our lives from the chokehold of all systems of social control, including the prison world the police maintain, we must abolish all its incarnations and end our enslavement (Copwatch, 2014).

### **Conclusion**

“Fuck the Police!” is vulgar and jarring. “Fuck the Police!” is explosive and incendiary. However, dismissing it because of these characteristics misses the nature and intention of the message. Disregarding the political essence of the exclamation ignores its motivation and meaning. Too often, “Fuck the police!” and the *parrhesiastes* who wield it are disqualified from so-called legitimate political discourse.

In an attempt to remedy this misrecognition, this paper reviewed Michel Foucault's research on political *parrhesia* to construct an analytic framework for making sense of a case study where "Fuck the police!" incited a confrontation between agents of the state and its subjects. Treating "Fuck the police!" in this instance as a text for hermeneutic interpretation, I presented a reading of it as abolitionist *parrhesiastic* speech denouncing racist state violence. That is, the *parrhesiastes* whom wields this loaded exclamation is denouncing the inherent brutality of the police; not simply police brutality.

Freedom of speech is one of the core principles of democracy. It is a constitutional guarantee that each may have her/his say. However, democracy is in peril when the heralds and flatterers of power are commended while the radical truth-tellers are condemned. When savage violence is customary and blind support for those who mete it out dominates, the *parrhesiastes* takes upon her/himself the duty of speaking out. It is not enough for residents of a democratic society to defend freedom of speech. Residents of a democratic must recognize speech of freedom. When *parrhesiastes* have the courage to speak, the rest of us must have the courage to listen. "Fuck the police!", like all *parrhesiastic* speech, is intended to disrupt and discomfort the interlocutor. If the problem of US policing is to be remedied, the meaning and motivation that imbues this emancipatory exclamation must register. Comprehending "Fuck the police!" as nothing more than arrogant bluster leaves the inherent problem of racist state violence untouched.

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## ***(Mis)recognition, Faltering Cosmopolitanism: Theories of Social Diversity and the City***

The article outlines a framework for the study of entwined recognition and redistribution claims. It firstly examines the applicability of the concepts of inclusive multiculturalism and recognition to the study of immigrant groups and, secondly, develops a framework for the understanding of immigrant recognition claims and political identities. The article concludes with an examination of the intersections between cosmopolitanism and immigrant claims.

The article upholds Fraser's notion of misrecognition as status subordination and her conclusion that there should be no recognition without redistribution. In light of the literature on inclusive multiculturalism, Fraser's (2007) (and related theorists'; See Lovell 2007) theoretical frameworks of recognition/redistribution/representation are, however, found to be weak within the contexts of complex urban diversity given that they do not safeguard from nationalism and particularism. This in spite of the fact that the theories represent a form of distancing from the identity model of recognition. Beyond the idea that the theory of recognition is limited by violations of justice related to redistribution, this article argues for transformative aspects of recognition that would lead to the broadening of identities to include multiple, hybrid, and cosmopolitan identifications in the urban environment. Arguing for inclusion within institutions, the article suggests that both just representation and broader participation are needed for immigrant group inclusion. The realization of institutional incorporation would link issues of the recognition and representation of, and redistribution to, immigrant groups; that is, it would not only make the state more responsive and sensitive to the issues affecting these groups but would at the same time contribute to the restructuring of those of its institutional mechanisms that had at least in part been created as barriers. The measure of multiculturalism in the global city can further be the capacity of diverse groups to transform recognition projects into urban policies that would further restructure the underlying causes of residential segregation and spatial exclusion. This may not entail a new "radical change in the meaning of race" (Foner 2000, 224) but it would mean a movement toward a "post-racist" city.

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### **Introduction**

The separation of families at the U.S. border with Mexico, the planning of a border wall, and the exclusionary Muslim travel ban raise questions regarding the standing of newcomers and notions of difference. In Europe multiculturalism is proclaimed a failure and an enemy of the welfare state, as well as a spur to the rise of those fearing the loss of cultural hegemony. These phenomena necessitate a re-evaluation of Fraser's theory of recognition/redistribution/representation, and this article does so through the lens of the social inclusion of immigrants in cities.<sup>1</sup>

The key argument in this article concerns the ways in which immigrant claims for recognition and redistribution are entwined. Immigrants can be subject to cultural domination,

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<sup>1</sup> I thank Ira Katznelson and John Mollenkopf for discussions of this point.

nonrecognition, and disrespect; social justice claims, however, cannot be reduced to misrecognition even if the politics of recognition "capture[s] the important cultural, symbolic, and evaluative dimensions of social struggles to overcome demeaning, denigrating, and hate-based evaluative patterns aimed at certain groups and which function to deny their members an equal role in social life" (Zurn 2003, 5). Two other conjointly reinforcing dynamics of maldistribution and misrepresentation additionally impact justice (Fraser 2007), however, as will be shown, not to an equal degree and not always in the same circumstances; thus the scope and dimensions of interrelationship among misrecognition, maldistribution, misrepresentation are crucial (see Zurn 2003).

The objectives of this article are first of all to investigate the constellation of multicultural inclusion and the city, to review briefly Fraser's recognition/redistribution/representation triad, and to draw relevant conclusions for the scope of immigrant rights. The argument then proceeds by focusing on immigrants, recognition, and social suffering, deepening further the conceptual framework for the study of recognition in the case of immigrant groups and examining immigrant recognition claims and political identities. The article concludes by drawing implications for urban cosmopolitanism.

### **Inclusive multiculturalism, cosmopolitanism, and the city**

The model of "inclusive multiculturalism"<sup>2</sup> has been articulated during the 1990s in the fields of political and social theory, sociology, and immigration studies and its various strands included "the politics of recognition"<sup>3</sup> (Taylor 1992, 1994), "cultural pluralism" (Parekh 1998), "the politics of difference" (Young 1989/1990), and "multicultural incorporation" (Kymlicka and Norman 2000, 1995).<sup>4</sup> "Inclusive multiculturalism" assumes that for minority groups to flourish in liberal western democracies they require not only the opportunities created through the redistribution of state resources, but also the more positive forms of cultural, ethnic, racial, linguistic, and gender recognition, and various forms of additional accommodation (for example, redistricting in the context of political participation) that would facilitate incorporation into the larger society (see Kymlicka and Norman 2000, 1995; Taylor 1992, 1994; Parekh 1998; Modood 1997, 2000; Baubock 1994). The argument leaves open to democratic deliberation both the definition of additional

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<sup>2</sup> An additional distinction in urban case study research has also been made between "corporate or managed multiculturalism" and "incorporatist multiculturalism"; the former focused on the position of minorities and defined by the government and the law, the latter directed towards social inclusion and assuming a more active role of communities in negotiating their social identities (Rogers in Vertovec, ed. 1999, 209/251-210/252). Spatial equivalents of the former would be special districts or enclaves, while diverse urban neighborhoods would be constitutive of the latter. Inclusive multiculturalism, in contrast to this view, refers to a mode of accommodation that applies to both ethnically distinct neighborhoods, as long as they are not subject to involuntary segregation, and diverse areas, and concerns interactions between the scope of multiculturalism defined by the law or government policy and the participatory role of communities in negotiating their space in the city and their role as citizens.

<sup>3</sup> *Recognition* is respect for group identity and acknowledgement of cultural commitments of members of other groups (Taylor 1992, 1994, Parekh 1998, Young 1989/1990, Kymlicka and Norman 2000, 1995, Joppke and Lukes, eds. 1999). I thank Ira Katznelson for a discussion of this point.

<sup>4</sup> Not all of these terms can be used interchangeably, and there is significant debate about whether, for example, the use of the term "cultural pluralism" mutes the meanings associated with multiculturalism. The term inclusive multiculturalism is from Spinner-Halev in Joppke and Lukes, ed. (1999); it embraces various strands of the theory (though different from "thick" multiculturalism as defined in subsequent paragraphs above).

accommodations and the exact scope of positive forms of recognition (including, for example, whether the U.S. ought to recognize all languages as official). Presented as a challenge to the assimilation model, the inclusive multiculturalist arguments assume thus, first, that the inclusion of new groups is dependent not only upon the distribution of power and resources but thus primarily upon full recognition ranging from meaningful symbolic to substantive (Taylor 1994; Honneth 1995). Second, selected theorists assume that there is, at least to an extent, a desire on the part of groups to integrate into mainstream society, although stronger forms of multiculturalism would also argue for the acceptance of those groups who desire only minimal contact with others or with the state (see Spinner-Halev 1999). This distinguishes inclusive multiculturalism from other models such as the “millet” system (in Parekh’s terminology) in which groups simply prefer to be left alone and to retain full authority over their members. Third, theorists of inclusive multiculturalism argue that the state should be willing to open up to multicultural integration and that the polity should be willing to change or at least to be willing to expand its understanding of citizenship that would become more embracing (as elaborated in the works of Parekh, Kymlicka, and Baubock, for example; this again distinguishes it from the assimilation model).<sup>5</sup> Reasonable accommodation practices can further aid a society in determining a range of acceptable forms of cultural practice and thus charting its limits of toleration of difference (Parekh, cited in Vertovec 1999, see xxiii), although pluralist states may either pursue interventionist multiculturalist policies (either via state multiculturalism, for example in Canada, or within specific sectors, for example in Britain and the Netherlands) or tolerate differences without state support for “the maintenance of ethnic cultures” (as is the case in the U.S.) (Castles (1995) in Vertovec, ed., 1999, 301, [11]). (And, indeed, it is not always clear what constitutes *reasonable* under reasonable accommodation.) In either model, both the pluralist state would move towards fuller inclusion, but also the groups, while maintaining their identities, or some crucial aspects of identities, over time, would move in the advanced stages of incorporation towards more “universal” notions of citizenship. This latter point distinguishes inclusive multiculturalism from other “thicker” forms of multiculturalism not focused on inclusion into a polity. The concern here is thus with multiculturalism’s “modes of multiple and cross-cutting group engagement and representation,” rather than with its supposedly purely culturalist forms (see Vertovec 1996, 66), even if Parekh’s notion that multiculturalism in the making is negotiated through an “intercommunal dialogue aimed at evolving a reasonable consensus” (Parekh, 1996) may be too farfetched. We should, however, keep in mind that these proposals were in response to community leadership co-optation and patronage. Optimistic calls to “create frameworks allowing for the maintenance of complex, multiple ... identities... [and] “a renewed place for groups representatives and organizations within and in relationship to the public domain” (Vertovec in Vertovec, ed., 1999, 60/233, also Parekh cited in *ibid* 61/231) rarely specify the policies needed to achieve these goals.

Finally, the theorists assume that a multiplicity of cultures does not threaten a polity with a bland cultural homogeneity (which is in fact less of a threat than a lack of unity or strong national identity), but rather opens it up to possibilities of cosmopolitanism(s) (Waldron 1995) and related struggles

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<sup>5</sup> This section provides only a short summary of inclusive multiculturalism arguments. Other frameworks for group inclusion such as bifurcation and consociationalism are not discussed here.

against the reifications of group differences.<sup>6</sup> Thus, and of particular relevance for theories of immigrant integration, “individuals are moves within particular cultures and to that extent they are shared and collective rather than solitary and individualized” (ibid. 158). Through interactions with native-born identities, as well as those of other minorities, migrant groups can foster within large cities possibilities for a “rooted cosmopolitanism” that have the potential to overcome the cosmopolitanism’s elite bias and question its placelessness (in contrast thus to the global elites who reside, to use Castells’s terms, in the “space of flows” rather than in the “space of places”). This thesis is relevant in the case of individuals who pose challenges within the group, and who, with their multiple identifications, shape hybrid identities (a concept tied to negative stereotypes of inauthenticity by the Chicago School (Bodemann, 2007, 4)), or applicable to individuals disabled from, or substantively incapable of, citizenship. In contrast, hybridity, which can be viewed as one of the dimensions of cosmopolitanism, can be seen as a positive characteristic, presumably encouraged under the conditions of urban diversity to which migration contributes (Waldron, 1995); nevertheless, this theory of cosmopolitanism remains on the level of abstraction unable to substantively bridge the gap between an exposure to diversity and social inclusion. Untested by empirical research in urban environments, class or racial dimensions (including connections between economic conditions, network options, and individualized choice) of theories of hybridity and cosmopolitanism remain unclear, leaving open the question whether hybrid identities are a matter of the enlightened choices of the privileged few (e.g. elite cosmopolitanism). In contrast, the urban represents “the supremely visible manifestation of difference and heterogeneity placed together” (Amin 2006, 1009); the “urban ethic [can be] imagined as an ever widening habit of solidarity built around different dimensions of the urban common weal” (Amin 2006, 1009) and the good city (in an inclusive multicultural sense) can be the site of “progressive politics of well-being and emancipation [created] out of multiplicity and difference and from the particularity of the urban experience” (Amin 2006, 1012). This accords with Fincher and Iveron’s (2008) notion of the “right to encounter” with the strangers in the city (13). The city can thus be understood a key space for multicultural and, even to a certain extent, transnational identities (See Baubock, cited in Amin 2006, 1012).

### **Fraser's recognition/redistribution/representation**

The inclusive multiculturalism examined here combines in Fraser’s terminology “an antiessentialist multiculturalism with the struggle for social equality” (Fraser and Naples 2004). The issue here is Habermas’ notion of justice as “an ongoing deliberative process of social inclusion” (Lara and Fine 2007, 36) to which Fraser added a feminist lens, noting further how the bourgeois public sphere excluded women and other groups from active citizenship (Lara and Fine 2007, 37-38) and from the right to participatory parity (2007, 38). Lawson (2008) finds that Fraser’s argument resembles “a utopian schema” and I.M. Young “charged Fraser with a form of ‘dual systems’ thinking founded on a problematic separation of the ‘cultural’ from the ‘material’ that had long since been discredited in feminist as well as in socialist theory (I.M. Young 1997),

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<sup>6</sup> An argument could be made that this cosmopolitanism is also an outcome of the assimilation model (for example, New York City in the early twentieth century), but inclusive multiculturalism would address the crucial failure of that framework through recognizing racial minorities, as well as offering different conceptions of cosmopolitanism rather than just one of “melting” into one shared cultural “pot”.

which Fraser saw as "a necessary analytical distinction" (Lovell 2007, 1, 4). Fraser has, however, updated her two-dimensional theory of justice to "become three-dimensional, incorporating the political dimension of representation, alongside the economic dimension of distribution and the cultural dimension of recognition" (Fraser 2007, 19).

Fraser's theory might be viewed as possibly applicable to the case of immigrant rights -- witness for example the "hysterical demonization of asylum seekers" in the UK and Europe (Lister 2007, 172) who are in Fraser's words "being routinely maligned or disparaged in stereotypic public cultural representations and/or everyday life interactions" (Fraser 1997 cited in Lister 2007, 172). Lister reveals both the socioeconomic and the cultural roots of disparagement of asylum seekers behind which she locates "differential exclusion" and "the erosion of social rights" (2007, 172). Lister seeks a "convincing politics of solidarity in difference" (2007, 173) and this article will probe the extent to which this can perhaps be located in the urban environment.

This article, first, upholds Fraser's notion of misrecognition as status subordination and her conclusion that there should be no recognition without redistribution. In light of the literature on inclusive multiculturalism, however, Fraser's (and related theorists') theoretical framework of recognition/redistribution/representation is found to be weak within the contexts of complex urban diversity given that it does not safeguard from nationalism, especially given Fraser's focus on global contexts of political representation (even though Fraser distances herself from the identity model of recognition (see Busbridge (2017, 57)). Second, beyond the idea that the theory of recognition is limited by violations of justice related to redistribution, this article argues for transformative aspects of recognition that would lead to the broadening of identities to include multiple, hybrid, and cosmopolitan identifications in the urban environment. Finally, the article demonstrates difficulties in remedying the misrepresentation of groups via political representatives in local communities and emphasizes the pivotal significance of institutional inclusion.

### **Immigrants, recognition and social suffering**

McNay (2008) argues that one of the ways in which power relations have shaped consciousness could be seen perhaps in the acceptance of social suffering; this could be applied to immigrant groups as an explicit cost of inclusion, thus for instance, the first generation narratives of meaningful sacrifice for the purpose of the benefit of the second/third generation, or the social practices that relinquish selected rights, social or political, supposedly in exchange for (or simply by favoring solely) economic benefits. This is not typical of other types of groups seeking recognition. This mode is re-enforced, if not always entirely constituted, by the global economic system (for example, by the pressures to accept longer work hours, physically exhausting, or lower paid labor), the structures of discrimination (for example, positing virtuous immigrants against disenfranchised minorities), and also historically, by the political elites (for example, the ways in which political machines used the migrant vote in exchange for public services or jobs). It is unclear what remedies would recognition theory prescribe in these cases, especially given that this condition seems close to Bourdieu's notion of "the internalization of symbolic violence" (279).

Further, some members may share with ethnic groups (by this I mean, nationalities in this context) a sense of pride and respect associated with certain cultural practices that they would like to maintain, and might thus be less inclined towards transformative identities (Fraser 2005).

Their redistributive and recognition claims can be seen as closely related, not simply in the sense that every recognition claim includes a redistributive claim, but might be conditioned by voluntary migration (except in the case of refugees and forced exiles) and predominant economic incorporation goals. The close relatedness of the recognition and redistribution needs of these groups suggests that the aim of these claims is better inclusion, which sharply distinguishes them from groups whose cultural “survival,” according to some theorists, is threatened by “misrecognition” (Taylor 1992) (for example, arguably, Hasidic Jewish groups). But this relationship is also problematic as recognition claims posed in this context might include weak redistributive justice claims even if those claims would address their needs to a significant extent. The reverse can be true as well, as misrecognition can be a trigger of claims for social equality.

### **The processes of multicultural accommodation: conceptual framework for the study of recognition in the case of immigrant groups**

Kymlicka states that while both assimilation and inclusive multiculturalism are focused on integrating diverse groups into common social and political institutions, the latter differs from the former because “it does not have the intent or expectation of eliminating other cultural differences between subgroups within the state” (Kymlicka and Norman 2000, 14). It should, however, be added that assimilation does not necessarily have to be coercive, as some theorists of multiculturalism would argue, although the latter boast greater capacities to address discrimination by offering adequate recognition, accommodation, and inclusion to groups rather than by expanding individual opportunities.<sup>7</sup> Habermas, however, proposes two levels of assimilation-- “autonomy of the citizens... institutionalized in the recipient society and the way the ‘public use of reason’ is practiced there” (1994, 228)” and second, assimilation as “ethical cultural integration” that has a profound impact on the “collective identity of the immigrants’ culture.” Habermas is concerned with the justification of assimilation as safeguarding society from separatism, fundamentalism and segmentation--by limiting the extent to which assimilation could go (1994, 229). The first level of assimilation is of relevance to this article, while the second could be seen as problematic within the context of, for example, immigrant enclaves in London and New York.

Discourses on national loyalties might emphasize essentialist characteristics, the prescribed modes of belonging or practices to a national community, thus implicitly or explicitly setting the norms for adequate citizenship in cultural terms. Reed-Danahey and Brettell, for example, perceive the very notion of citizenship as a “repetitive, surveilled performance of national belonging” (2008, 25)--a paradigm that appears behind some of the new assimilationist and also nationalist projects. The strongest claims for the prevalence of a single nationality evoke the loyalty of citizens, including “risking one’s life” (cited in Aleinikoff and Klusmeyer, 2001 p. 71), that is, by defending the state in the case of warfare<sup>8</sup> (and warfare itself has also been one of the

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<sup>7</sup> Even when this approach has been promoted (for example, in the French polity for individual members of previously excluded groups) it didn’t eliminate discrimination, and has certainly has limited group recognition.

<sup>8</sup> A contrasting example would be the most recent recruiting of immigrants with temporary visas into the Army with the lure of American citizenship in six months. In this example, it is mostly lower-income Latino immigrants, under threat of deportation or unemployment, who are recruited for their military service to the country, and required to fulfill the obligation of possibly even sacrificing one's life of the country (by being sent to international war zones) in order to obtain citizenship.

major causes of refugee and immigration streams outside of many of the states where the need to exercise this type of loyalty is mandated). It should be noted that the strongest claims for strong (national) identity are grounded in democracy, specifically the kind of citizenship democracy demands.<sup>9</sup>

In contrast, inclusive multiculturalism might imply further that recognition claims of immigrant groups could be directed towards universalist or grounded cosmopolitan aspects of citizenship rather than particularistic and potentially group-exclusionary practices, thus forestalling the development of nationalism. In a possible conceptual estimate (scenario) of the processes of multicultural inclusion, as the mainstream society accommodates the cultural needs of a minority group, the group shifts accordingly subscribing to the mainstream society contract, although this process is under present conditions complicated by the fact that immigration streams in both Europe and the US are becoming more culturally separate, suggesting thus the increasing severance of immigration communities from one another and also from the mainstream society.

The minority group in this case, however, does not merge into mainstream society, even though this scenario expects that the group proceeds on a slow, gradual, and ambiguous path towards inclusive multiculturalism or alternatively a form of assimilation or incorporation. Seemingly paradoxically, the results of recognition can in the subsequent stages of incorporation in fact be even assimilation. This process further questions 'acculturation',<sup>10</sup> as its elite members switch codes, 'acculturated' *and* particularistic (to the extent allowed) within the mainstream institutions, but ethnically conscious within their own enclaves or group member circles. The poor and the excluded remain 'unacculturated' within the mainstream but may subscribe to other marginal cultures excluded from the mainstream society. Furthermore, multicultural accommodation could in this scenario then be seen as either a phase (e.g. temporary arrangements) or a bargain that a specific group accepts paying the cost of primary group institutional membership, while institutions pay the cost of altered institutional and social structures in exchange for control over groups that otherwise might present challenges to citizenship, cohesion, or socially stable conditions. This would safeguard institutions from undesirable effects of nationalist or particularistic outcomes following the articulation of cultural claims, although it would not resolve the problem of the socially marginalized group members even if forms of discrimination might be abated if structurally assimilated members together with the embedded elites exert powerful pressure on behalf of the group. But we cannot assume that pressures of those assimilated members on mainstream institutions would continue on behalf of the marginalized members of the group. The structurally assimilated members can be one of the chief proponents of multicultural inclusion, as has been seen in British minority politics, but the detachment of leadership from the marginalized members of the group is so apparent in many cases that it would be difficult to envision that this form of representation would remedy exclusion and residential segregation,<sup>11</sup> as has been the case in American examples. While

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<sup>9</sup> I thank Maria G. Kowalski for this point.

<sup>10</sup> This term may appropriate negative connotations related to coerced alterations of cultural identities and practices.

<sup>11</sup> See, for example, the Anti-Discrimination Center's and Social Explorer's most recent maps that illustrate persistent housing segregation in the U.S. in spite of the diversification of population, validating Massey and Denton's conclusions regarding residential segregation in *American Apartheid* (1993). Social Explorer "New Interactive Maps Illustrate

Fraser's slogan "no recognition without redistribution" might ring true for the politics of immigrant incorporation, injuries of misrepresentation are perhaps more difficult to remedy (also concluded by Lovell 2007, 13).

One argument in political theory is that we cannot impose on immigrants more than what is necessary for the sustaining of the republic but at the same time we can impose more on immigrants than on birthright citizens (Appiah in Pickus 1998, 44). This argument can be extended to suggest that we could require participatory commitments on the part of new immigrants although these citizenship obligations ought not to be seen as a mandatory draft into community participation. While Appiah is correct in that requirements imposed on immigrants reveal fears of disunity and even territorial disintegration, the multiculturalism debate has shown further that accommodation of numerous particularistic recognition claims in many cases also leads to disunity. Participation per se cannot ensure unity, secure the inclusion of all groups, or preserve the republic.

If understood as "recognition of the need for special laws, institutions and social policies to overcome barriers to full participation" (Castles 1995, 303), inclusive multiculturalism in essence assumes active citizenship, one that would empower groups to fully participate. In the context of mere nominal multicultural accommodation (e.g. representative leadership, sought by the redistributionist school of thought), the participatory framework would be limited, elite or political entrepreneurs promoted (although the tentative beneficiaries of these policies may be broader, the structurally assimilated minority (and majority, directly or indirectly), elite may dominate the construction of cultural claims). In the multiculturalist inclusion paradigm (that would go beyond mere accommodation), participation is both elite and non-elite driven, and may as well be channeled towards mainstream institutions but may too encounter a more difficult task of safeguarding against nationalist or fundamentalist tendencies (as well as recognition-motivated protest movements of different types) and Fraser's theory does not remedy this problem. Benhabib argues that "successfully integrated minorities at some point may *rediscover* their separate and unique histories, and retrieve a separate path out of what seemed a common journey (2002, 63)" -- suggesting that inclusion of cultural claims in the initial phases, may lead to separatism in the latter stages, as group members seek to opt out as in the "thick" multicultural scenarios.

In the model outlined here this would be the outcome of the nominal multicultural accommodation that does not seek "modes multiple and cross-cutting group engagement and representation" (see Vertovec 1996, 66), as noted above. Members could thus stay embedded based on the nominal representation but opt for their separate paths by detaching from the group. But recent crises of multiculturalism suggest further that in fact a common journey has also become more contested on the part of the state actors who would in theory be focused on incorporation, thus in fact pressing minorities onto a separate path of their preferred choice (including forms of nationalism or fundamentalism which may include petitioning for self-governance, self-exclusion, economic control of group members, increasing restrictions on exit, eradication of hybridity--all manifested in spatial seclusion, lack of spatial assimilation, or enclave

resource depletion other than for protecting particularistic group interests<sup>12</sup>). Thus, in other words, the rediscovery of “separate and unique histories” may not be merely the impetus of the group, but rather a result of the state pressure. This is thus opposed to the noted trajectory of groups moving in the direction of incorporation--rather, the state and mainstream society actors press groups into seclusion and separation, using perhaps their multicultural claims as an excuse. Castles seems to suggest that interventions in the early stages of migration may preempt these scenarios via “policies which accept permanent settlement and family reunion” (Castles (1995) 306 [16]) and that “grant permanent immigrants full rights in all social spheres” (Castles (1995) 307 [17]).

Theorists of assimilation (Gordon 2005) argued that civic assimilation equaled absence of value and power conflict, which assumed a cohesive civic structure in which ethnic differences are diminished to such an extent that neither a community’s values nor its power dynamics are influenced by ethnic differences --a scenario difficult to envision even in the ideal type societies. Instead, in cases where political systems are based on ethnic competition, groups lobby for their plural claims (translating culture into an interest group agenda item), often creating unsustainable and but sometimes viable coalitions without experiencing civic assimilation to an equal degree. Civic assimilation is contested in both variants of multicultural accommodation (selected multicultural arrangements for a specific aspect of a group culture) or substantive inclusive multiculturalism, perhaps even more so than 'acculturation,' which under conditions of multiculturalism includes forms of hybridity, absent from the assimilation framework. Gordon (2005) has argued that cultural assimilation can happen even if no other type of assimilation occurs; in contrast, structural assimilation facilitates other forms of assimilation, as all distinctive values disappear (which has not happened even in the earlier immigrant streams in the U.S.)--a much contested paradigm. In contrast, immigrant groups of today can opt to resist cultural assimilation as a manner of pressuring institutions to facilitate specific forms of structural assimilation, which can then take place without the need for the acceptance of cultural assimilation (rather, multicultural accommodation). Thus, we can contrast the structurally assimilated *culturalist* elites that lobby for structural and to a much lesser extent cultural inclusion (Indian and Pakistani elites in London, Dominicans in New York) and the structurally and culturally excluded marginal members of the group who have minimal access to attitude or behavior receptional assimilation in the labor market and for whom identificational assimilation with the mainstream society is disabled (e.g., Bangladeshis in the Tower Hamlets neighborhood in London), while the middles classes are experiencing forms of gradual structural assimilation into a particular segment of society (e.g. Caribbean blacks and the public sector employment in London and New York).

To synthesize this overview, in the context of immigrant inclusion, this article makes two further points. First, the shift from assimilation discourses to cultural rights and transnational practices offers two distinct trajectories: on the one hand, a greater scope of engagement with different loyalties and multiple identities, and on the other, for their challenge by the emphasis on distinct cultural rights. Although de-emphasis of economic integration could be seen as one of the chief shortcomings of the inclusive multicultural paradigm, the emphasis on distinct

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<sup>12</sup> Money laundering businesses for the IRA in the former Irish enclave in the Bronx, for example, rather than ethnic niche investments.

cultural rights is mostly associated with the failures of multiculturalism in spite of the fact that recent research emphasizes that multiculturalist policies promote “hyphenated or nested identities” and that immigrants in countries with extensive multicultural policies have higher levels of political and social trust for Canadian immigrants (Wright and Bloemraad 2012, 88). Importantly, this may not be true for European countries, as immigrants with the highest levels of satisfaction are in France, a country with a historically strong emphasis on assimilation.<sup>13</sup> Nevertheless, Werbner finds that “despite its apparently tenuous, apolitical invisibility, ‘everyday multiculturalism’ in many cases works as a cohesive force which resists and transcends fragmentation and division” (cited in Pratsinakis et al. 2015, 2); these research findings support the thesis “that ethnic concentration and diversity plays a positive role” (Pratsinakis et al. 2015, 14). In addition to everyday multiculturalism, ‘living multiculturalism’ “opens up the possibility of convivial social relations, defined through light touch sociality and togetherness across ethnic differences involving encounter, engagement, negotiation, competencies and sometimes tensions too as people live multiculturalism” (Bennett et al. 2016, 2).

To return to the discussion of recognition, thus, McNay critiques recognition as a concept that a) “effaces the diversity of political conflicts by falsely unifying them as manifestations of a basic ontological struggle,” (294) and b) seeks “indirect routes of power that connect specific identity formations to the often invisible structures underlying them” (294). Yet while point a) is perceptive in the critique of the ontological basis, it also neglects the significance of the relationships between the supposedly ontological claims that in fact appear to derive from one source, given their explicitly *political* articulations as socio-cultural urban identities (e.g. by Muslim groups in British or French cities) and the nexus between that articulation (in relation to state policies) and the group’s status subordination. Importantly, status subordination also occurs within groups (Zurn 2003, 16), as Zurn points out regarding Fraser’s theory: “[a]ccording to the status model, then, misrecognition arises not merely from cultural and symbolic slights, but only from those anchored in social institutions that systematically deny members of denigrated groups equal opportunities for participation in social life. Thus, legitimate recognition struggles are seen as those aimed at changing institutionalized patterns of cultural value that subordinate certain persons and groups in such a way that they are denied the opportunity to participate in social life on an equal basis” (Zurn 2003, 8-9). A relational analysis of group-state relations would be needed to evaluate whether a construction of a supposedly ontological claim stems from the select interests or strata within the group or whether it is constructed as such in response to the state institutions or policies (Blomeraad’s research (2006), for example, suggests that the latter is the case). McNay’s point b) appears too broad an application of Bourdieu’s habitus<sup>14</sup>, that in itself fails to answer the questions that McNay argued were neglected in other theorist’s accounts.<sup>15</sup> (And in the case of the undocumented immigrants who are additionally

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<sup>13</sup> I thank Maria G. Kowalski for this reference.

<sup>14</sup> Bourdieu’s concept of habitus, as a “set of durable physical and psychological dispositions that define a subject’s embodied being in the world” (Bourdieu, cited in McNay 2008, 279) can be applied to critique of the subjectivism implicit in Honneth’s theory of recognition, and Fraser’s neglect of the experiential or interpretative perspectives of identity construction.

<sup>15</sup> Thus McNay never responds to the following critique, other than by using illustrative examples of Bourdieu’s class-specific emotional dispositions. “Even if it were possible, for example, to tell whether it is economic deprivation or lack of social recognition that is the principal motivation behind social action, this would tell us little

criminalized by the wearing of ankle bracelets, my research on participants in sanctuary practices in New York found the relevance of Honneth's concern regarding the "subjective, psychological levels [in] which these injustices are so damaging, and... [regarding his] reference [to] injustice to well-being and the capacity to pursue 'the good life'" (cited in Lovell 2007, 12)). This presses me to return to the important point that the theory of recognition seems to imply a gap between the individual's need for recognition and the group context from which that need could be derived and thus that recognition claims fill this gap (or glue the individual to the group that needs to be reapplied to hold the group together thus suggesting that recognition claims need replenishing to fully succeed).<sup>16</sup> The difficult issue is thus the application of the concept of recognition in the case of immigrant groups where 'misrecognition' may be derived from a complex intersection of racial and ethnic identity, language, religious, and cultural practices.

### **Immigrant recognition claims and political identities**

According to Tully, recognition and redistribution are "aspects of political struggles" (2000, 469) and not necessarily distinct concepts. Further, there is no definitive answer to the question of recognition, as it is necessarily shaped by a democratic process. The question is, however, how transformative this process can be and the extent to which citizens have access to the negotiation of the rules of recognition. The faith in the capacity of democratic process to transform recognition claims becomes perhaps more illusory, anticipating that the process of presenting recognition claims will create a broader sense of belonging and diminish injustice at the same time. But in spite of the asymmetries of power of groups claiming recognition, there are few alternatives to this process, if we are to accept as one of the aims of democracy the "freedom to question and challenge" (2000, 472, 475), which can have an empowering effect in spite of the barriers that groups may encounter. This theory, however, leaves matters of injustice to resolution by potential counterclaims insufficiently addressing contestation and indeed, the implied (in)capacities to resolve injustice through contestation. The case for recognition is perhaps the strongest in the case of oppressed groups, who need to be "reconnected with society" (Emcke 2000, 493), even if it would be wrong to assume that so much of a minority identity is derived from the context of oppression, or to encourage these groups through recognition processes to build their identities solely from that oppression (see, Markell 2000, 498).

Recognition claims might even have higher capacity to mobilize political struggles than redistributive needs, but they may in some cases derive from a structural opening rather than be

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about why individuals act in some circumstances rather than others, and why it is some individuals rather than others who act faced with the same circumstances" (McNay 288).

<sup>16</sup> Waldron (1995) interprets Taylor's theory by arguing that there is less of an issue of the individual being accepted for who she/he is, but more of a "deadly serious business of ethnic politics". But the two are also interrelated. The "deadly" business of ethnic politics does have a profound impact on individual identities, in a sense that aggressive recognition of collective aspects of ethnicity can limit space for layered and hybrid identities. While misrecognition (for example, racial discrimination) can indeed cause profound self-deprecation (Taylor 1995), the issue remains of what ought to be recognized (beyond the measures to eliminate discrimination, prejudice, and stigmatization) and by whom, especially if we perceive cultures in a changing, shifting modes. Wrong kinds of recognition that essentialize group identities lead to the "deadly" ethnic politics and also to the profound senses of misrecognition of both self and others.

rooted in a cultural claim.<sup>17</sup> Modood has argued that immigrant groups can benefit from the political environment created by the native-born minorities whose mobilization creates institutional opportunities and increases influence beyond the inclusion of their own group (Modood in Hochschild and Mollenkopf 2009). Modood goes as far as to conclude that forms of conflict (such as the Brixton riots and the Rushdie affair) can have "positive political effects" reflecting a recognition-based strategy that would foster "integration for marginal groups," although evidence suggests that the legacy of institutional reform following the riots is among the most significant benefits of this conflict-based strategy (see Jones-Correa 2009), indicating that misrecognition that can trigger conflict may result in limited institutional reform (e.g. increased minority hiring by the police or city administration, rather than educational or criminal justice system reform).

Urban institutional and non-institutional structures (informal organizations, NGOs) may offer space for democratic action and thus also perhaps for transforming recognition struggles.<sup>18</sup> Multiculturalist policies in Canada (although not in Europe, especially not so in the Netherlands, where policy resulted in extreme marginalization) appear to have placed an emphasis on "supporting (financially and otherwise) ethnic organizations, making use of the ethnic press as a standard part of government communication, and encouraging institutions and organizations to explore areas of common concern such as human rights and racism (Heisler in Vertovec, ed. 1999, 635/127 654/128)."

Selected recognition claims are better suited to uncontested democratic processes, however. Symbolic claims (e.g. street names, festival locations in contrast to specific types of medical services or assisted multi-family housing) can be better addressed by the local institutions that possess sufficient powers and resources to respond to symbolic demands, in contrast to the forms of recognition claims, commonly resolved by law suits, that are goal oriented, conflictual, can limit coalition-building, and can foreclose deliberation with other groups. Nevertheless the claims such as street festivals may be a form of symbolic recognition of an ethnic group, but also a vehicle for further political mobilization in the contested territories of ethnic trenches--e.g. ethnic parades during electoral campaigns and the related politicization of the cultural sphere (Jones-Correa 1998) as well as the politicization of the voluntary or the non-profit social-service sector connected to local political leadership in New York. This is significant in relationship to the city, as not all groups could or should have all of their national holidays acknowledged by the state. Werbner and Anwar argued that the first phase of minority empowerment in Britain took form via localized associate webs of interrelationships via formal or informal associations or community events and festivals, and was then followed by ideological convergence (i.e. politicization of cultural affiliations) and mobilization (1991, 12). More recent research focused

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<sup>17</sup> For example, Dominican leaders in the 1980s (based on what the others have documented and what some 'older' activist have told me) very much felt that the only way to respond to the need of Dominicans was to have Dominicans representing them. They felt un-recognized and non-redistributed to. In a sense, recognition was a means to redistribution. In recent years, during a City council campaign, where there were 8 Dominican candidates, the one candidate whose campaign was based almost solely on Dominicaness (he was walking around wrapped in the Dominican flag) actually got the fewest votes. Almost all questions asked from the people at forums were about the redistributive issues (fieldwork notes).

<sup>18</sup> In turn, given that empirical research shows that investment in targeted policies only strengthens the number of and the interconnectedness among immigrant organizations highlighting the significance of "local integration policies" based in this case on neighborhood-level organizations or groups representing the immigrant community fostering civic 'multicultural democracy' (Pennix et al. 2004, 13).

on European cities, finds, however, that social and cultural aspects of civil society can exert a pull away from the political/state sphere or that diverse urban areas might complicate or fragment participation and negatively affect social solidarity and social capital (Putnam 2008; see also V 2). "Participation in civil society can also be disempowering. For example, if a particular religion holds that women are inferior to men then participating in this institution will be not only disempowering but anti-liberal."<sup>19</sup> Putnam and Campbell (2010) show that religiously based social networks foster civic engagement in the U.S. (pp. 473-8), "and improve the quality of democratic deliberation" (Djupe 105) but not political mobilization (Putnam and Campbell 2010, 105, 107). Tolerance for religious diversity is explained by a "web of interlocking personal relationships among people of many different faiths" (Putnam and Campbell 2010, 109). Putnam's research demonstrated correlations between religious involvement and civic engagement which are in some cases characterized by a lack of toleration and forms of illiberalism and form bonding rather than bridging capital among rather than across groups. Christian organizations create social capital and heighten the civic engagement of African-Americans, while black Islam represents a form of resistance to Christianity and Eurocentrism (169). Bridging social capital, Putnam found, does not thrive in diverse communities, although research on immigrants in Canada offered empirical evidence to the contrary in correlations between social trust and multicultural immigration and integration policies (180-181).

Even in the case of more substantive forms of recognition, there can be little improvement in the status of, or lack of discrimination against, a group, even if the state approves a religious practice or acknowledges substantive holidays (in the case of Muslim groups, for example). Recognition claims derive their resources from within culture (e.g. heritage rooted in country of origin), but also from without, such as the heritage of civil rights movements or international human rights causes. A positive outcome of these struggles could include social mobilizations where recognition would address discrimination and grievances of the group, heightening the participation of the excluded and the misrecognized, in contrast, nationalist mobilizations would override other claims and transform legitimate discriminatory claims into forces of exclusionary (including self-exclusionary) political struggles.

Demands for recognition can form "multilateral web of relationships" on the local level (Tully 2000). Neither are those who make these claims necessarily the most representative, nor are the urban institutions necessarily responsive to these influences. Strategic employment of cultural and political identities also occurs in the incorporation process (also in Kasinitz 1992), yet these uses are not primarily instrumental. Group identities should not be confused with the aspects of identities that group representatives use in the political process (Benhabib 2002), although immigrant identities are also in turn influenced by the ways in which the political processes reconstitute ethnicity. Thus, the question is whether the focus on recognition forces the presumptions (or assumptions) of homogeneity within the group, given that particularistic claims can seem to artificially unite the group.

One response to this question could be found by examining the phases of incorporation, given that claims presented by first representatives, which can have a positive effect on further participation, might follow the path of the previous groups but may also set the ground for future counter claims by group members (Tully 2000), as challengers from within the group might

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<sup>19</sup> Maria G. Kowalski. Personal Correspondence with author. June 28, 2018.

emphasize opposing notions of the aspects of ethnicity/religion<sup>20</sup> which need to be recognized or as group members who initially faced barriers to articulating claims raise challenges. For example, while immigrant groups situated in enclaves promote “particularistic identities” in the initial stages of incorporation, as the process continues identities shift toward broader regional/cultural/racial identities and away from particularistic modes (Kasinitz (1992)). Furthermore, advanced stages of assimilation may lead immigrants away from the initial affiliations with radical parties or organizations supporting these parties,<sup>21</sup> suggesting that citizenship and assimilation lead immigrants away from not merely particularisms but multiethnic and progressive affiliations. Thus, perhaps multiculturalist practices might retain this linkage, although this does not assume that voting will remain the same. To an extent, the capacity of a group to allow a variety of counter claims to be presented and articulated in the institutional settings and the capacity of institutions to negotiate claims by multiple groups and challengers within these groups can demonstrate the scope of the possibility of recognition claims to provide an important resource for the empowerment of citizenship and to further incorporation.

Recognition can give an impetus for participation, even if groups may end up locked into their own claims (in the case of nationalist mobilization) rather than foster multiple identifications based on multiple recognition claims of immigrant groups. Groups may be held together by the glue of a recognition claim, obtain political representation based on the resilience of ethnicity and then be in a better position to form coalitions and alliances. Recognition claims may, however, be promoted more by the upper-income entrepreneurial segments of the group who are able to advance their own political empowerment, election of the first representatives, and the symbolic group recognition (as noted above, e.g. street renaming, holiday celebrations, cultural programs and festivals, etc.), but not to expand social equality (school reform, housing programs, and so forth).

### **Urban cosmopolitanisms?**

The goal here has been thus to investigate the transformative potential behind recognition projects and to probe their limitations; to investigate cities in order to determine the limits of hospitality and openness toward the immigrants. Derrida, for example, calls for cities of refuge as a new form of solidarity. "They must, if they are to succeed in so doing, make an audacious call for a genuine innovation in the history of the right to asylum or the duty to hospitality" (2001, 4). Derrida asks, "[c]ould the City, equipped with new rights and greater sovereignty, open up new horizons of possibility previously undreamt of by international state law?" (2001, 7-8)

While fundamental aspects of equality are not resolved on the local level but are dependent of broader state and international protections and larger institutional contexts set up to uphold them, it is in the local sphere that that the consequences of those actions can be felt most fully – in the neighborhood, the workplace, on the street where discriminatory effect against immigrants of color is compounded by their low socio-economic status and where a study of

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<sup>20</sup> And in the context of religion, some of the differences have been recognized by the Supreme Court due to the right to freedom of worship and not due to the recognition of the importance of culture. I thank Maria G. Kowalski for this point.

<sup>21</sup> The Swiss Communist Party lost some of its support from the Federazione Colonie Libere Italiane in Svizzera immigrant worker members who assimilated into social and political life of the country (Schmitter in Vertovec, 1999, 187/188, 181/182).

urban inequality can be further substantiated by examining the interrelated recognition, redistribution, and representation claims. Furthermore, research finds that the neighbourhood, "a site of meaningful encounter and contact," (Pratsinakis et al. 2015, 4) "appears to be a focal point of immigrants' social life (Schnell et al., 2012) and thus a key field where bridging ties may potentially develop" (Pratsinakis et al. 2015, 4); while the neighborhood is "important field for socialization," even if the immigrants have interethnic friends outside these neighborhoods, the neighborhood is "only partly [important] for the development of strong interethnic ties" (Pratsinakis et al. 2015, 6). Furthermore, "everyday cross-ethnic encounters in the neighbourhood do not easily translate to actual close relationships or friendships especially when the ethnic divisions are also coupled with class divisions (Blockland and Eijk, 2010)" (Pratsinakis et al. 2015, 14). "Over time the neighborhood gradually loses its significance as a setting for interethnic contact, as immigrants become embedded in the host societies, acquiring all these skills and capabilities that may allow them to expand their social networks beyond their area of residence" (Pratsinakis et al. 2015, 14).

Furthermore, a question arises whether recognition claims may offer paths towards other forms of citizenship or broader identification. It seems unlikely, for example, that recognition claims would offer substantive path towards cosmopolitanism. Recognition claims may in contrast work to particularize ethnic minorities, foreclosing further venues to cosmopolitanism (in the broadest sense), already unattainable to them because of class status, but now further diminished by their fixing onto an ethnic claim or misrecognition grievance. There is, however, a possibility for linking misrecognition to cosmopolitanism. A cosmopolitan life displays "kaleidoscopic tension and variety" (Waldron 94), a cosmopolitan is one "conscious of living in a mixed-up world and having a mixed-up self" (and the former can reinforce the latter). These notions encompass the idea of variety, diversity and *mélange*, and the cosmopolitan self is constituted through a sense of consciousness about this "kaleidoscopic tension." A redefinition of the self in response to misrecognition of others remains a possibility given that not all forms of misrecognition might cause forms of injury or perpetuate social suffering (and even in the latter case, a person mistaken for an individual of another non-mainstream identity may in fact grow into social and political consciousness and non-elite cosmopolitanism via these identifications -- Dominicans and blacks, Turkish and other minorities, Bangladeshis and Indians). In the urban context distinct from the exclusionary spaces of community and citizenship (Muller 2011, 3416), the cosmopolis can be seen as "a city... in which there is genuine acceptance of, connection with, and respect and space for the cultural other, and... the possibility of a togetherness in difference" (Sandercock cited in Young et al. 2006, 1689). Muller refers to this as "urban alchemy"-- "the belief that the diverse and divided population of a city can be transformed into one harmonious community of cosmopolitan citizen" (Muller 2011, 3416) but warns that urban cosmopolitanism should not be celebrated so much (Muller 2011, 3429). Cosmopolitanism can be seen as a discursive social practice "in which people manage to supersede the parochialisms of their own national, ethnic and religious identities and position themselves and others as members of a shared community of equals without compromising cultural differences" (Muller 2011, 3418). While a compatibility of immigrant cultures with liberal values cannot be assumed, and indeed one can cite selected forms of accommodation that are not warranted, what is critical here is the emancipatory potential of grounded urban cosmopolitanism that would overcome parochialisms and particularisms.

But cosmopolitanism can also be linked to the "ways in which urban reimagining creates a geography of difference in which certain forms of difference are valued or pathologised and fixed in space" (Young et al. 2006, 1687) in particular cases where these forms of difference "cannot be easily commodified and consumed" (Young et al. 2006, 1689). It can also be connected to the ways in which they are marketed and linked to the "normalising of hegemonic discourses of urban regeneration" (Young et al. 2006, 1688), as diversity too can be "mediated, engineered and packaged" (Young et al. 2006, 1691). "Place-marketing" stereotypes places, reproduces sameness, represents the powerful groups' view of the city, reinforces social exclusion, enhances privatized images which limit publicness, and "denies [the] play of difference" and the unacceptable forms of difference that disrupt the city's regeneration strategies (Young et al. 2006, 1692) (which may involve exclusion of the homeless from public spaces, for example). Young et al. show how real estate agents and those engaged in the marketing of place "reinterpret and represent 'class aesthetics' of this process, tapping into the subtleties of taste differences and the deployment of cultural capital by potential purchasers, a process which can exclude other tastes" (Young et al. 2006, 1697), marketing a 'narrow cosmopolitanism' (Young et al. 2006, 1698) produced with the engagement with promotional media in which the new cosmopolitan city is "marked out as different, but this is a form of difference which is planned, legitimized, regulated and commodified as a part of marketing the city" (Young et al. 2006, 1698). "Marginalized group and lifestyles, however, are excluded from such imagery which makes this 'cosmopolitan' image appear banal and neutral, obscuring economic and power relations within the city" (Young et al. 2006, 1700). But the research finds as well that "these new cosmopolitan spaces in the city can also be sites in which difference is more tolerated and even welcomed and sought out" (Young et al. 2006, 1709).<sup>22</sup>

These descriptive accounts accord with liberal multiculturalists who have challenged the notions of universal citizenship by pointing out that by including difference we can achieve true equality even if this proposal may be challenged on many grounds, as has been discussed. If we return to Benhabib's earlier and related point, however, it could further be argued that the frequency with which individuals (for example, second/third generation immigrants) in cosmopolitan cities "break away" from a group to embrace other identities mitigates the threat that the ethnic particularism of communities would be internally oppressive (e.g. a redefinition of what it means to be, for example, a Bangladeshi, a Dominican, or a Turk, in the context of a large global city like London, New York, or Berlin). We can note this process of formation of "multicultural citizenship" in metropolitan areas where geographic identity does not merely feature a return to the older, geographically smaller (regional) container for citizenship, but serves as a bridge to a broader multi-ethnic and cosmopolitan identity (e.g. a Dominican New Yorker, a Turkish Berliner, a Bengali Londoner, etc., rather than a Dominican-American, etc.).

This is in agreement with Muller's view that "some people feel that their urban identity offers them a way to claim local belonging where they feel excluded on national or ethnic grounds" and

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<sup>22</sup> And describing how class identities shape urban cosmopolitanism in the popular press, as his neighbors from the Dominican Republic lost their rent-controlled apartment on the Upper West Side of New York and were forced to move back to the Dominican Republic, Kevin Baker recounts the "exuberant diversity" of a working class city that is being lost to upscaling, gentrification, and tourism. "Beneath me I could hear a hive of dinnertime conversations carried on in half a dozen languages, smell cooking that came from all over the world, hear someone ringing a gong and repeating a Buddhist chant" (2018).

that "such an urban identification implies a community that is open to the membership of others who are nationally, ethnically, and religiously different" (Muller 2011, 3419). In a related example, immigrants in Canadian cities increasingly seek residences in multicultural neighborhoods but not necessarily in their own enclaves (Hiebert, quoted in Binnie et al., 2006, 20); thus, the urban identities of Turks in Toronto, for example, are also created through their interaction with other groups. But there are also examples of groups that have rejected notion of urban cosmopolitanism (as with the Bangladeshi community in north of London, due to the diasporic trajectory and the labor market profile, for example Muller 2011, 3420).

Grounded urban cosmopolitanism (see also Young et al. 2006, 1688) tries to rescue it from the elitist inclinations associated with the term or from "consumers with middle or high incomes who find the multicultural theme appealing and want to experience the difference of the 'other'" (van der Horst and Ouwehand 2012, 871) or from those who try to reinvent themselves by performing new cosmopolitan lifestyles (Young et al. 2006, 1700) or from "fun-filled, flavoursome and exciting" multicultural planning (van der Horst and Ouwehand 2012, 872)<sup>23</sup> from the notions of the "togetherness of strangers" (Young 1990, 237) and the tolerance of difference that hides indifference (Sennett 2002). This can be accomplished "[b]y questioning the 'predefined' categories of identity... the multiplicity of of identities together with everyday life interactions in multicultural neighborhoods create a cosmopolitan practice (elite as well as vernacular) that strengthens co-existence and relations among difference groups" (Koutrolidou 2012, 2052). "Belief that contact and interaction between different groups will reduce conflicts and improve their relations" can, however, be confronted with the actual experience of mainly "fleeting [interactions]", of the realities of intergroup conflict and competition for resources, and of the "homogeneous micro enclaves ([created] through gentrification)" (Koutrolidou 2012, 2062). Researchers in Quebec, moreover, found that immigrants emphasized patterns of discrimination as more influential than citizenship policy (which balanced the specificity of Quebec's French community's demands with a multiethnic society of Canada and its diverse cities) and saw "the coexistence of diverse loyalties and multidimensional identities as far less problematic than either the Canadian or the Quebec governments have" (Aleinikoff and Klusmeyer, 11). Evidence from Quebec and Canada (see, Wright and Bloemraad 2012, 88) further questions the thesis that diverse urban areas might complicate or fragment participation (Putnam 2007). This suggests the emancipatory aspects of hybrid belonging, shaped by urban diversity, and actively embraced as a category of identification and citizenship practice by the immigrant groups.<sup>24</sup> But it also warns that immigrant inclusion and related multicultural arrangements are critically tied to issues of racial discrimination in both

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<sup>23</sup> For example, "festivals might reproduce stereotypical identities, further contributing to their 'exoticisation', while promoting rather superficial encounters and potentially strengthening perceptions of 'otherness' by treating cultures as 'exotic' consumption goods" (Koutrolidou 2012, 2060).

<sup>24</sup> Examples of emancipatory aspects of hybrid belonging, preferences for shared residence with other groups, the acceptance of urban diversity as a category of identification and citizenship practice by the immigrant groups in Western democracies with advanced multicultural policies (e. g. Canada) suggest that second and subsequent generations of immigrants might find within contexts of urban diversity a broader range of ethnic identity, although not socioeconomic mobility, options. These examples further allow for an analysis of the extent to which state endorsements of both incorporative modes of assimilation and elements of multiculturalism would result in the blurring of boundaries and select hybridization, even if this may not in the end apply to (or be desirable for) all groups.

native born and foreign-born communities insufficiently addressed by the new assimilation policies. This includes further "segregation-segregation that went beyond housing, separating facilities, education and forms of social interaction and leading to polarized communities that lived 'parallel lives'" (Koutrolikou 2012, 2053); this particularly affecting minority youth (Koutrolikou 2012, 2057). Furthermore, "the social mix that is generated by gentrification [can become] problematic for both for local life and relations since it displaced locals and enhanced non-mixed places" (Koutrolikou 2012, 2058). Thus, the mainstream discourse that insists upon the distinctness of migrant cultures in contrast can lead to social exclusion, racialization, perception of alien culture (language, religion, and so forth), and doubt about possibilities for social cohesion (especially in the case of Muslim groups). The global city literature is suggestive of possible connections between the exclusions of immigrants of color and vestiges of racial discrimination<sup>25</sup> (e.g. the riots in the racialized spaces of English and French cities), albeit the connections are left undeveloped. For example, the "rioters [in Britain] were young Britons who were bi-lingual perfectly at home with British modernity and Islamic tradition, politicised and unequivocal about their identities as British Muslims [... their anger] aimed at the lack of economic opportunity, negligence by the public authorities and community elders, racism and racialized institutional practices, and enduring history of taunt and intimidation, and material deprivation and marginalisation (Kundnani, 2001). They were civic riots by a group wanting to claim the public turf as full British citizens and not the riots of cultural aliens (Amin, 2002)" (Bennett et al. 2016, 1018).

Urban cosmopolitanism may, finally, allow us to take that daring step further, following Derrida "look[ing] up to the city, rather than to the state" and asking questions written in the context of the French asylum policies but now particularly applicable to the new role of cities as a free and sanctuary spaces under the current restrictive national regime in the U.S. Derrida writes, "I also imagine the experience of cities of refuge as giving rise to a place (lieu) for reflection – for reflection on the questions of asylum and hospitality – and for a new order of law and a democracy to come to be put to the test (expérimentation). Being on the threshold of these cities, of these new cities that would be something other than 'new cities', a certain idea of cosmopolitanism, an other, has not yet arrived, perhaps. – If it has (indeed) arrived . . . – . . . then, one has perhaps not yet recognised it" (2001, 23). Urban cosmopolitanism may need to be recognized, yet only with full awareness of all the dimensions of problems with recognition and its relatedness with representation and redistribution.

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<sup>25</sup> The Kerner Report (prepared in July 1967 by the National Advisory Commission of Civil Disorders appointed by President Lyndon Johnson) examined the riots that were taking place in American cities since 1964 and found that the US was "moving toward two societies, one black, one white -- separate and unequal." "In April 1968, one month after the release of the Kerner Report, rioting broke out in more than 100 cities following the assassination of civil rights leader Martin Luther King, Jr." Charging that a "system of apartheid" existed in major cities, the report recommended investments in low-income areas and ghettos, the creation of jobs, job training programs, and adequate house, which were however not adopted. Current research on European multi-ethnic cities, for example, suggests policies that facilitate the process of social integration "prioritising neighborhoods that concentrate newcomers" (Pratsinakis et al. 2015 14), that increase access to labor market and welfare services, as well as measures that promote interethnic dialogue and counter racial stereotypes (Pratsinakis et al. 2015, 14).

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## ***Blue Response Matters***

Recent incidents of police misconduct involving unarmed black men and women have resulted in highly publicized protests. As such, law enforcement has been tasked with responding to demonstrations and reestablishing order. While existing research has explored black attitudes on police stops, arrests, and shootings, scholars have largely ignored how black citizens assess police responses to protests. Using a unique national survey experiment, I find that overall black attitudes are mostly negative toward violent responses to protests, while generational and gender differences among black respondents tell a more nuanced story. Upon reading this analysis, a police agency interested in maintaining order and its reputation among constituents of color it serves will be compelled to explore alternative means of responding to black protests. This is especially the case when the protests were prompted by perceived police misconduct (i.e. the killing of an unarmed person of color). Policy-wise, this may mean embracing more negotiated management strategies, as the nonviolent responses in this experiment, which in many ways echoed negotiated management, were largely seen as appropriate.

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### **Introduction**

Police behavior has been an enduring focus of the American public for generations. From the Los Angeles riots to the aftermath of the murder of Michael Brown in Ferguson, Missouri to the protests sparked by the deaths of Eric Garner and Freddie Gray, social, political, and media speculation has placed police conduct under heavy scrutiny. Questions abound regarding the fairness, appropriateness, legality, and legitimacy of their methods, as critics have accused policing agencies of adopting punitive and repressive measures that target communities of color. Conversely, police advocates defend against these critics, arguing that maintaining “law and order” is paramount.

Despite this ongoing conflict between criminal justice reformers and law enforcement partisans, the literature is limited on black public opinion, protests, and police response within political science. Generally, studies have broadly examined public attitudes toward law enforcement or found implications for instances of police brutality (i.e. police shootings) on black public opinion. When black attitudes *are* studied, they predominantly center on two explanations. First, contemporary black attitudes on the institution of policing are the result of decades of negative experiences under crime-control policies (Weitzer & Tuch, 1999; Weitzer, 2000). Second, black performance evaluations of the police are not, unlike whites, predicated on crime rates, but on *procedural justice*. Indeed, because of these factors, and because race is the best predictor of evaluations of police performance (Brown & Benedict 2002, 547-549; Roberts & Stalans 1997, 8; Thomas & Hyman 1977, 77), distrust governs black attitudes on the police (Sharp & Johnson, 2009). Though I spend some time discussing these attitudes, the crux of this paper is less interested in broad opinion of the police. It is being conducted to examine how attitudes, specifically those of black Americans, are shaped by distinct types of police behavior during protest situations. Furthermore, I will conclude that the intersection of black identity,

gender identity, and age, as it relates to feelings about the police, influences how black Americans view police behavior, especially regarding how they respond to public protests.

Given our national discourse over the past several years, it is safe to assume that police response to public unrest is subject to more skepticism among black citizens (Sharp & Johnson 2009), an issue that has gone overlooked in the literature. Historically, whether violent or non-violent, civil resistance has been met with counter resistance from agents of government. Indeed, research on law enforcement has confirmed that policing agencies think strategically when responding to public unrest. Consequently, their conduct is the byproduct of bureaucratic considerations, understanding the wide-ranging perceptual repercussions of agency response within the public sphere. Vitale (2005) writes, “How police departments choose to handle large demonstrations can have profound implications for police-community relations...” (284). This is also true of the institution of policing, as its legitimacy and authority relies on public confidence and cooperation (Goldsmith 2005; Levi, Sacks, & Tyler 2009; Mawby 2010; Reiner 2010). Alas, black initiated protests have been found to be significant predictors of arrests (Rafail, Soule, & McCarthy 2012, 751), further supporting assumptions about negative black attitudes and police response to unrest.

### **Police Presence in Communities of Color**

Increased police presence in communities of color has created conditions for *perceived* acts of police misconduct and resulting protests. The crux of this perception is that “broken windows” policies often lead to incidents of gross police misconduct (i.e. overpolicing and increased interaction with law enforcement in communities of color amplifies risks for the arrests, shootings, and killings of unarmed black men and women). Consequently, the issue of “illegitimate” (or seemingly unlawful) police conduct impacts attitudes (Brown, 2013), and anger among many blacks, because of this conduct, has exploded into movement outrage. Because of each new racialized citizen-police interaction, many take to the streets to express their discontent, and these moments of unrest often require law enforcement response. Indeed, it has been found that black initiated protests are also more likely to attract police presence (Rafail, Soule, & McCarthy 2012).

Inherent to police authority is the “legitimate” use of force to curb crime and disorder. Citizens rely upon law enforcement to stamp out criminal activity, civil nuisance, and mob violence. Police agencies are expected to adhere to (and serve) these public needs, and their performance evaluations are often predicated on crime rates. When police actions lower the level of crime in a community, public performance evaluations reflect their work (Tyler 2001, 216). Still, public reaction to law enforcement is often the byproduct of highly publicized events of police *misconduct* (Weitzer 2002). When a resulting incident of civil unrest occurs, a police department is expected to respond and reestablish order. Its decisions and reactions are important, because they may have an impact on how the public evaluates the agency. Based on the literature (and history of antagonism), one might assume that regardless of *how* police respond to unrest, blacks will consistently assess it as inappropriate (or “illegitimate”). The “legitimacy” of their crime-reduction tactics has evolved over time, but the real consequences of police conduct have racial implications. Nevertheless, blacks are found to be *more* supportive of *legal* (or lawful) use of deadly force by police than whites. It is *illegal* use of deadly force that is cause for their concern (Cullen et al. 1996). Admittedly, these findings preceded viral social media

coverage of police misconduct, and with the advent of movement organizations like Black Lives Matter, may prove to be outdated. As such, the more contemporary questions are whether blacks *will* support police conduct that results in the use of deadly force in protest situations and/or *when* might they support this conduct? For example, when demonstrations turn violent, might a violent response from law enforcement be perceived as lawful? Conversely, given nonviolent demonstrations, might blacks feel that nonviolence is the only appropriate police response? Unfortunately, existing research does not answer these questions, as *broad* black attitudes on police has dominated scholarly attention. Furthermore, questions about when intraracial attitudes diverge as they relate to police conduct have also received scant attention. Fortunately, using interdisciplinary theory will assist in my attempt to thoroughly answer these questions.

### **Intersectionality**

Intersectionality theory describes the “mutually constitutive,” “reinforcing,” and “naturalizing social identities held by an individual” (Shields 2008). Its theoretical origin is in feminist thinking, as Crenshaw (1995) articulates a concept of *political intersectionality*, or the inherent conflict between the different and often conflicting needs of the respective groups of which one identifies (Shields 2008, 301). Crenshaw (1995) focuses on black women and their political Catch-22, being forced to divide their efforts between fighting patriarchy and toppling racism, and how focusing on one identity over the other does not sufficiently explain the plight of the black female experience. Indeed, Collins (1990; 2000) argues that gender cannot be analyzed without contextualizing the social location of an individual (i.e. socioeconomic status and age), and the “power relations embedded in social identities” (Shields 2008, 301). In other words, the experiences of an upper middle-class black woman Baby Boomer will not necessarily mirror that of a working-class black woman Millennial. Only by acknowledging the fact that class-status intersects with race (and influences experiences) might one understand the full story. This is also a central tenet of this piece. Since Crenshaw’s work, intersectionality has become the most important contribution to feminist thinking about gender (McCall 2005).

Unfortunately, this theory has not been fully embraced by all social sciences. Intersectionality has proved a mainstay in sociological analyses, and perhaps by this very fact, has been somewhat avoided in other disciplines (Shields 2008). This includes political science. Yet, many political scientists risk losing insight as we continue to tackle issues of race, gender, and class. For example, without an intersectional lens, scholars using unclear categorical racial lines (while more easily quantified), often provides race with more substantive meaning than it merits (Helms, Jernigan, & Mascher 2005). Similarly, Bograd (1999) posits that focusing solely on gender regarding intimate partner violence, as opposed to including more social identities, weakened empirical studies on the subject. Chiefly, I intend to avoid these results in this paper, hence my incorporation of intersectional theory.

Using an intersectional lens is important for this research because it allows this piece to reach beyond broad assumptions about black attitudes, and “see things from the worldview of others and not simply from our own unique standpoints” (Walker 2003, 991). Here, highlighting the intersectional impact of gender and age may provide a more in-depth explanation of “black attitudes” regarding police conduct, particularly their response to protests.

Indeed, differing policing behaviors, historical context, and the demographic makeup of the population shapes public perceptions. Nevertheless, because studies tend to examine black attitudes toward law enforcement on instances of police shooting, arrests, stops, and excessive force, feelings about police responses, especially regarding how they respond to public protests, are less understood. This is only exacerbated by the reality that research in political science tends to ignore an intersectional lens.

### **Theory and Hypotheses**

The primary goal of this experiment is to see if police behavior changes attitudes. As such, the anticipated negative reaction to violent responses to nonviolent demonstrations assumes that violent state-sanctioned actions will be triggering and alarming to black respondents, as images of police violence against nonviolent civil rights activists are easily recalled. Conversely, I assume that nonviolent responses to nonviolent demonstrations are the most acceptable scenario, as empathetic (to the demonstrations) black respondents will require (and deem appropriate) a more nuanced and muted reaction from law enforcement. Therefore, I hypothesize that violent police responses to nonviolent demonstrations as compared to nonviolent responses to violent demonstrations will have a negative experimental effect on respondents' measure of appropriateness.

Furthermore, black attitudes are too often measured as a monolith. Intersecting characteristics within the black community are given short-shrift. Nevertheless, if the results of the American National Election Studies (ANES) survey, race and ethnicity scholarship, and intuition have substantive merit, intersectional characteristics are important distinctions to consider when measuring black attitudes on police response to protest, as these views cannot be assumed to be homogenous. My theory is rooted in the assumption that, when considering individual characteristics, attitudes about specific responses will differ. These hypotheses suppose that the theory of intersectionality will shed a more sophisticated light on black attitudes within this context.

**Hypothesis 1 (H1):** Respondents will assess violent responses to nonviolent demonstrations as less appropriate than nonviolent responses to nonviolent demonstrations.

**Hypothesis 2 (H2):** Respondents will assess nonviolent responses to violent demonstrations as more appropriate than violent responses to violent demonstrations.

Less curiously, scholars have found that age is positively related to confidence in police (Correia, Reisig, & Lovrich 1996). Older folks are less distrusting of the police (Sharp & Johnson 2009, 172). Younger citizens (and juveniles under the age of 18) hold less positive attitudes toward the police than older adults (Apple & O'Brien 1983, Scaglione & Condon 1980, Hurst & Frank 2000). Waddington & Braddock (1991) studied fifty-four black, white, and Asian adolescent boys who had interacted with police. Overwhelmingly, black adolescents described police as "bullies." These views promote mistrust and undermine the legitimacy of the police, which suggest that young black respondents will hold antagonistic attitudes toward the police, regardless of the circumstances. On the other hand, older blacks' more entrenched community stakes render them more in favor of law enforcement, as they act as a mechanism for maintaining

order. Because older respondents are assumed to have higher confidence in, more trust in, and warmer feelings toward the police, law enforcement responses to demonstrations may be deemed as more legitimate means of force, especially when the protests are violent. As such, my hypothesis assumes a negative reaction to the experimental effect of violent responses (as compared to nonviolent responses) among younger survey respondents.

**Hypothesis 3 (H3):** The negative effect of violent police responses to violent demonstrations will be stronger among younger respondents than among older respondents.

The opposite should be true among older respondents, as they are more likely to deem law enforcement actions as legitimate. Furthermore, the assumption is that older respondents have a greater stake in community stability (theoretically having more ties to community leadership, as well as investments in properties and businesses). As such, when demonstrators violently threaten order, older respondents may expect police to *act*, by embracing aggressive (or violent) tactics to restore it. Nonviolent responses to violent demonstrators may look too ineffectual. Therefore, nonviolent police responses to violent demonstrations as compared to violent responses to violent demonstrations will have a negative effect on older respondents' measure of appropriateness.

**Hypothesis 4 (H4):** The negative effect of nonviolent police responses to violent demonstrations will be stronger among older respondents than among younger respondents.

Research findings on the impact of gender on attitudes toward the police have vacillated between more positive female attitudes (suggested as the result of fewer interactions with the police and higher fear of crime) (Cao, Frank, & Cullen 1996; Cheurprakobkit, 2000; Sims, Hooper, & Petersen, 2002) and no significance (Frank, Brandl, Cullen, & Stichman, 1996; Ren, Cao, Lovrich, & Gaffney 2005). Most studies have failed to look specifically at black *women*, presumably because scholars assume little to no significant differences between their attitudes and those of black men. Furthermore, even while interactions between black women and law enforcement are *relatively* (though not significantly) fewer than those of black men, researchers have claimed that “vicarious” experiences – or the perception of pervasive racism from authority figures – often imbue attitudes within the black community. In other words, black men sharing their experiences with black women (whether real or imagined) has a ripple effect of “anguish and anger” among blacks (Feagin & Sikes, 1994, 16). On face, this concept has merit. Nevertheless, national survey results show black women mirroring that of white women in general “feelings” toward law enforcement. Results show that women are less cold toward the police than men. In fact, the black women surveyed were almost as “warm” toward the police as *white men* (who have more interactions with the police than black women), suggesting the interaction effect (their womaness) may be more powerful than the vicarious experiences (their blackness). These feelings (and lack of interaction), perhaps, provide law enforcement with more legitimacy and trustworthiness with black women, even in times of social unrest. This may indicate more receptive attitudes toward law enforcement, and at the very least, higher levels of belief in the legitimacy of police actions. In this case, restoring order by violent means when demonstrations are violent. I therefore hypothesize that nonviolent responses to violent demonstrations as

compared to violent responses to violent demonstrations will have a negative effect on female respondents' measure of appropriateness.

Black men, however, are a unique sample, because by every measure, law enforcement actions disproportionately affect them. The prevailing narrative is that they are excessively targeted. Each new incident of violence between police and black men serves to compound these negative perceptions, driving a gulf between black men and the police departments that patrol their neighborhoods. Racial profiling is a controversial matter within the public discourse, as charges of racism and lack of "fairness" against the police are widely discussed (Smith & Petrocelli, 2001). These conditions animate my hypothesis that regardless of whether demonstrations are violent or nonviolent, there will be a more negative response to violent police responses among male respondents. In short, the nature of the protest or the police response should not matter. In fact, black men (especially young black men) ought to be the surliest and most skeptical group within the sample.

**Hypothesis 5 (H5):** The negative effect of violent police responses to violent demonstrations *and* nonviolent police responses to nonviolent demonstrations will be stronger among male respondents than among female respondents.

**Hypothesis 6 (H6):** The negative effect of nonviolent police responses to violent demonstrations will be stronger among female respondents than among male respondents.

### **Experimental Design and Data**

To test these questions, I conducted a 2 x 2 full factorial experimental survey in which the experimental factors were 1) the type of demonstration (violent or nonviolent) and, 2) the type of police response to the demonstration (violent or nonviolent). My sample was comprised of 684 black American adults who were recruited by Survey Sampling International (SSI),<sup>26</sup> using the following conditions: the sample must include relatively equal representation by gender (male and female), as well as age (Millennials, Generation Xers, and Baby Boomers), as graphed below.

The survey was hosted on Qualtrics and the protocol proceeded as follows: (1) an invitation to participate in the survey experiment. SSI was directed to assemble a panel comprised only of black Americans from within the United States. They were also instructed to recruit relatively equal numbers of men, women, Baby Boomers, Generation Xers, and Millennials (2) respondent identification of personal characteristics, including gender, household income, zip code, partisan identification, level of education, and year of birth. Respondents were asked to provide these descriptors for several reasons. First, an analysis of gender and year of birth could not be conducted without this information. Second, using an intersectional lens compelled me to inquire about respondent socioeconomics. For example, income and level of education may also be

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<sup>26</sup> Survey Sampling International "reaches participants in 90+ sample countries via internet, telephone, mobile/wireless and mixed-access offerings. SSI offers samples, data collection, questionnaire design consultation, programming and hosting, online custom reporting and data processing." Its online sample is "controlled by a suite of quality-control procedures including an extensive Partner Certification Program, digital fingerprinting, IP-verification, methodologically sound profiling, built in quality control questions, and strict reward claims verification procedures." Marketing, SFA. "Survey Sampling FAQs." *SSI - Survey Sampling International*. Web. 19 Apr. 2017.

important factors to consider when analyzing attitudes toward the police. Here I focus on age and gender but I do intend to use these data collected in future research (3) a request to answer feeling thermometer questions on “the Democratic Party,” “the Media,” “the Police,” “Planned Parenthood,” “Black Lives Matter,” and “Wall Street” (4) prompt for respondent, describing the survey process (5) respondents were then randomly assigned to one of four treatment groups (see figure 2) and then provided with a (7) written description of a protest incident (see descriptions below), along with a (8) corresponding image. Use of images were designed to give visual, complimentary aid to the written description. Selection of these images were carefully made to follow as closely as possible with the written description without prejudicing the respondent with familiar faces or events. Therefore, for example, no images were used from the incidents in Ferguson or Baltimore. Nevertheless, they were not chosen for their subtlety, as the pictures capturing police and protestor violence are stark. Ultimately, I chose to use images because they are effective and influential experimental tools (Barker & Milivojevic 2016, 183). Furthermore, Brader’s (2005) study on the role of emotion in political advertising, suggests that images (particularly pictures) are good tools for encouraging emotional responses in survey experiments. After respondents had a chance to read the description and view the image, they were asked to give an (9) assessment of the initial response to the protests made by law enforcement in the description and then provide a further (10) assessment of a range of potential nonviolent and violent responses by law enforcement.

*Figure 2: Baseline and Treatment Groups*

<b>Baseline Group</b> Nonviolent Demonstration/Nonviolent Police Response (NN)	<b>Treatment Group</b> Violent Demonstration/Violent Police Response (VV)
<b>Treatment Group</b> Nonviolent Demonstration/Violent Police Response (NV)	<b>Treatment Group</b> Violent Demonstration/Nonviolent Response (VN)

Once respondents were randomly assigned to the baseline group or a treatment group, they were asked to read one of four corresponding prompts (effects have been bolded and italicized):

1. This afternoon, a large group of demonstrators took to the streets in force, upset by a recent police-related incident in which a deputy police officer killed an unarmed black youth. For hours, demonstrators have loudly demanded that the officer be arrested, ***chanting slogans, singing songs, forming a human-wall around city hall, and blocking traffic in the downtown area***. In response, law enforcement ***employed impact weapons, batons, tear gas, and rifles to quell the demonstrations and make arrests*** (NV).

2. This afternoon, a large group of demonstrators took to the streets in force, upset by a recent police-related incident in which a deputy police officer killed an unarmed black youth. For hours, demonstrators have loudly demanded that the officer be arrested, ***throwing rocks and bottles into the windows of city hall, flipping parked cars in the downtown area, as well as***

**assaulting responding law enforcement with street debris.** In response, law enforcement **employed impact weapons, batons, tear gas, and rifles to quell the demonstrations and make arrests** (VV).

3. This afternoon, a large group of demonstrators took to the streets in force, upset by a recent police-related incident in which a deputy police officer killed an unarmed black youth. For hours, demonstrators have loudly demanded that the officer be arrested, **throwing rocks and bottles into the windows of city hall, flipping parked cars in the downtown area, as well as assaulting responding law enforcement with street debris.** In response, law enforcement **attempted to interact with the leaders of the demonstration, negotiating demands, and gaining cooperation through facilitation** (VN).

4. This afternoon, a large group of demonstrators took to the streets in force, upset by a recent police-related incident in which a deputy police officer killed an unarmed black youth. For hours, demonstrators have loudly demanded that the officer be arrested, **chanting slogans, singing songs, forming a human-wall around city hall, and blocking traffic in the downtown area.** In response, law enforcement **attempted to interact with the leaders of the demonstration, negotiating demands, and gaining cooperation through facilitation** (NN).

#### Variables

Once respondents were exposed to their treatment scenario, they were asked to provide an initial assessment of the police response. Survey respondents were to assess, per the written description and visual images,<sup>27</sup> whether the police acted appropriately or inappropriately, in accordance with a five-point range of possible responses (*strongly inappropriate* is 1; *somewhat inappropriate* is 2; *neutral* is 3; *somewhat appropriate* is 4; *strongly appropriate* is 5). This range functions as my dependent variable throughout the survey. Highlighted potential modifiers of the experimental effects include gender (male = 0; female = 1) and year of birth or age (continuous from 1940 to 2000). Other independent variables include income (ordinal scale), partisan identification (ordinal scale), and level of education (ordinal scale).

After their initial response (IR), respondents were then tasked with assigning a level of appropriateness or inappropriateness to a slate of possible violent and nonviolent responses to

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<sup>27</sup> Descriptions of the visual images are as follows:

NV – Visual of multi-racial protestors locking arms peacefully marching down a street, along with images of police officers in riot gear, shooting tear gas from behind riot shields at protestors.

VV – Visual of mostly shirtless, black males in a semicircle, setting street debris ablaze, along with images of police officers in riot gear, shooting tear gas from behind riot shields at protestors.

VN - Visual of mostly shirtless, black males in a semicircle, setting street debris ablaze, along with an image of a bicycled police officer of color peacefully conversing with two black protestors who are wearing, “Am I Next” t-shirts.

NN - Visual of multi-racial protestors locking arms peacefully marching down a street, along with an image of a bicycled police officer of color peacefully conversing with two black protestors who are wearing, “Am I Next” t-shirts.

their protest scenarios. The five-point range of responses applied to these tactics as well. Please see Figure 4 for description of these responses.

**Figure 4: Violent and Nonviolent Response Options**

<b>Responses</b>	
<i>Violent 1 or (V1)</i>	Use wrist locks, twist locks, arm bars, and other painful pressure point measures to gain compliance.
<i>Violent 2 or (V2)</i>	Use batons, riot control sticks, and bats.
<i>Violent 3 or (V3)</i>	Use deadly force.
<i>Violent 4 or (V4)</i>	Use pepper spray, tear gas, smoke, and concussion grenades to disperse the group.
<i>Violent 5 or (V5)</i>	Move the crowd and make arrests. Use weapons like batons, bats, riot shields, Tasers, pepper spray, K-9 units, side arms, shotguns, rifles, smoke, and launchers.
<i>Nonviolent 1 or (NV1)</i>	Use loud speakers to get demonstrators to hear and follow orders.
<i>Nonviolent 2 or (NV2)</i>	Interact with organizers and gain their cooperation.
<i>Nonviolent 3 or (NV3)</i>	Make verbal commands.
<i>Nonviolent 4 or (NV4)</i>	Bring about facilitation, not confrontation.
<i>Nonviolent 5 or (NV5)</i>	Attempt to gain compliance by displaying a professional appearance, use verbal commands, try to negotiate with demonstrators, conduct squad formations, and use empty hand tactics.

## **Results**

### Initial Response

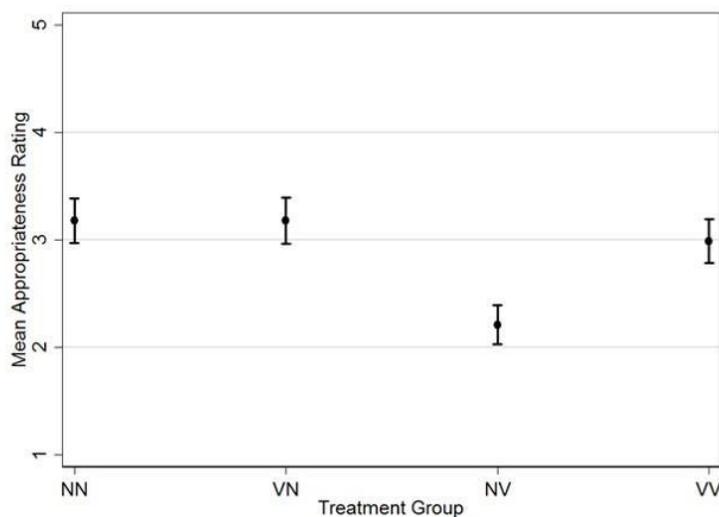
Figure 5 presents the descriptive statistics of the four groups. The baseline treatment of “nonviolent (demonstration)/nonviolent (response)” assumes most demonstrator-law enforcement interactions are reflective of this treatment (particularly in this age of “negotiated management” and “strategic incapacitation” approaches to public demonstrations). The baseline assumption is that nonviolent responses to nonviolent demonstrations is face-acceptable across the board. Interestingly, the mean response in the baseline group is 3.18, a surprisingly low level of approval for the nonviolent response. Yet, as expected, the most problematic of the four groups (nonviolent protests and violent police responses) shows the lowest mean approval of 2.21, an intuitive result which I hypothesized (the violent protest/violent response mean was also low at 2.98 – though not significantly lower than the baseline group).

Figure 5: Descriptive Statistics of Four Groups

Group	Observations	Mean	Standard Deviation	95% Confidence Interval
Nonviolent Protest/Nonviolent Response (b)	165	3.18	1.36	(2.97, 3.39)
Violent Protest/ Nonviolent Response	163	3.17	1.40	(2.95, 3.39)
Violent Protest/Violent Response	164	2.98	1.33	(2.77, 3.19)
Nonviolent Protest/Violent Response	165	2.21	1.20	(1.93, 2.31)

Figure 6 displays the mean appropriateness scores for each treatment group with 95% confidence intervals. This figure is used to determine if the initial police response to the prompt in each group was different for groups with violent responses. Respondents were classified into four groups: the baseline of nonviolent protest and nonviolent response (n = 165), violent protest and violent response (n = 164), violent protest and nonviolent response (n = 163), and nonviolent protest and violent response (n = 165). As shown, there was a statistically significant difference between groups. It is revealed that there is a statistically significant decrease in appropriateness in the nonviolent/violent response group compared to the baseline group. This suggests that the violent treatment had an impact on “appropriateness,” especially in the expectedly “problematic” group of NV. However, there were no statistically significant differences between the violent/violent response and violent/nonviolent response. Indeed, while the former (VV group) is not statistically significant, it does move in the negative direction away from the baseline group and reduce “appropriateness” of response. These results (while not statistically significant) suggest that the violent treatment could be having a negatively effect.

Figure 6: Mean Appropriateness Scores by Treatment Group (with 95% Confidence Intervals)



### Intersectional Appropriateness

So far, initial analyses of the violent treatment on violent and nonviolent demonstrations suggest black respondents are less likely to support violent police responses. Using an

intersectional lens, which suggests that differences do exist among black men and women, as well as older and younger, further analysis of police responses reveal that (on the initial response measure), gender was not a significant indicator of differences of “appropriateness,” but age was. To measure potential differences based on gender and age on the initial response, an OLS regression was conducted to determine reaction to the initial police response to the prompt in the baseline and treatment groups. Table 1 show the effects of police responses in the NV group, as well as significant decreases in appropriateness when controlling for age.

*Table 1: OLS Regression on the Appropriateness of the Initial Police Response of the Baseline and Treatment Groups*

VARIABLES	(1) Gender	(2) Age
treatment = 2, VN	0.010 (0.210)	-0.137 (0.269)
treatment = 3, NV	<b>-0.914***</b> (0.211)	<b>-1.005***</b> (0.271)
treatment = 4, VV	-0.141 (0.211)	-0.418 (0.276)
agegroup = 1, Millennial		-0.317 (0.256)
agegroup = 3, Baby Boom		0.187 (0.285)
1b.treatment#1o.agegroup		0.000 (0.000)
1b.treatment#2b.agegroup		0.000 (0.000)
1b.treatment#3o.agegroup		0.000 (0.000)
2.treatment#1.agegroup		0.184 (0.354)
2o.treatment#2b.agegroup		0.000 (0.000)
2.treatment#3.agegroup		0.208 (0.391)
3.treatment#1.agegroup		0.044 (0.363)
3o.treatment#2b.agegroup		0.000 (0.000)
3.treatment#3.agegroup		-0.041 (0.384)
4.treatment#1.agegroup		0.432 (0.368)
4o.treatment#2b.agegroup		0.000 (0.000)
4.treatment#3.agegroup		0.153 (0.383)
Gender		0.026 (0.107)
Income	-0.094 (0.118)	-0.093 (0.118)
Party	<b>0.169***</b> (0.052)	<b>0.167***</b> (0.053)
Education	0.028 (0.044)	0.035 (0.044)
Female	0.089 (0.210)	
1b.treatment#0b.female	0.000 (0.000)	
1b.treatment#1o.female	0.000 (0.000)	
2o.treatment#0b.female	0.000 (0.000)	
2.treatment#1.female	-0.025 (0.297)	
3o.treatment#0b.female	0.000 (0.000)	
3.treatment#1.female	-0.149 (0.298)	
4o.treatment#0b.female	0.000 (0.000)	
4.treatment#1.female	-0.146 (0.297)	
Age	<b>-0.012***</b> (0.004)	
Constant	26.916*** (7.285)	2.865*** (0.272)
Observations	630	630
R-squared	0.110	0.112

Figure 12 shows the insignificant differences in predicted appropriateness ratings of the initial response among black men and women.

**Figure 12: Changes in Predicted Appropriateness of Nonviolent Response Battery (NV1-NV5) (Age)**

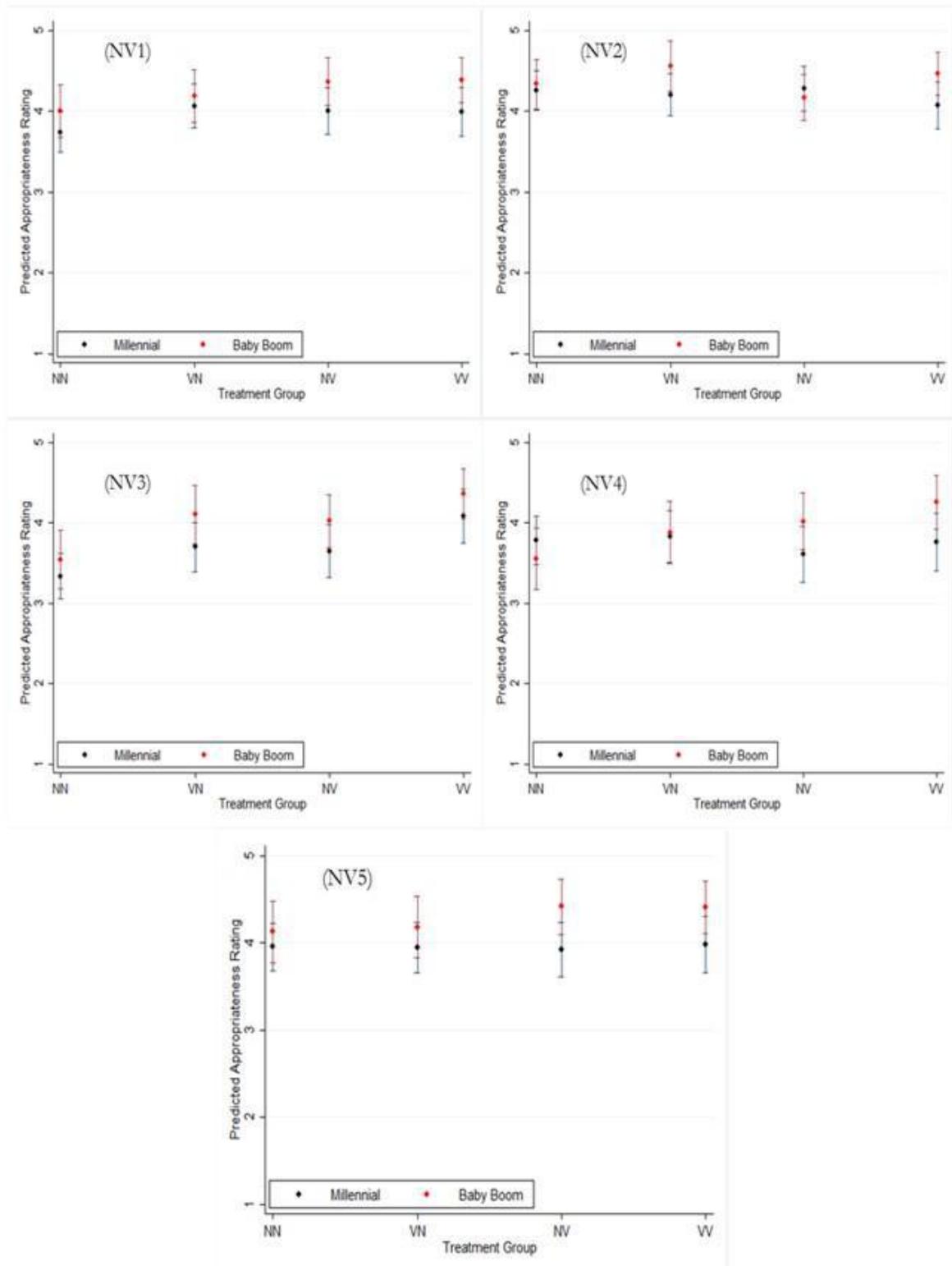
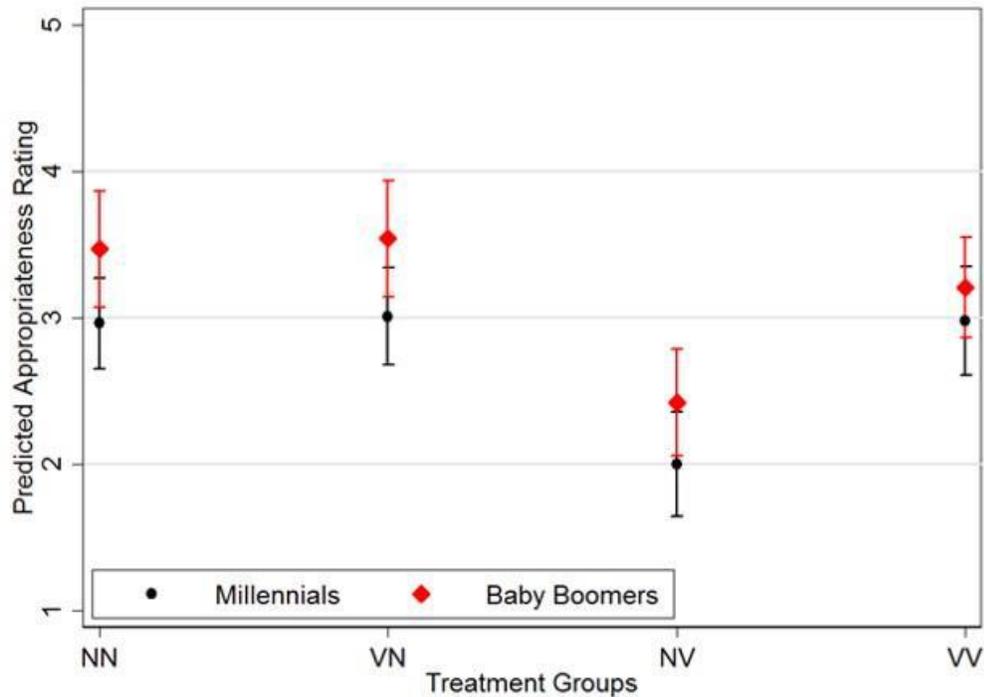


Figure 8, however, shows the significant differences between Baby Boomers and Millennials in each of the treatment groups.<sup>28</sup> When the police response was nonviolent, Boomer ratings average around 3.5 on the five-point scale. Millennial ratings hover around 3. Among both groups, appropriateness drops when the police response was violent. But this drop is quite significant among Millennials. This suggests that the younger generation showed less approval when the police response is violent.

*Figure 8: Changes in Predicted Appropriateness Ratings of Initial Police Response (Age)*



### Violent and Nonviolent Police Responses

This segment of the survey was designed to give respondents an opportunity to, especially if they disagreed with the initial police response, share their own feelings about what would be appropriate and what would not be an appropriate response to their prompt. This part of the experiment is being used to compliment the initial response results, telling us a little more about how *specific* types of police behavior can impact respondent attitudes.

To test how specific responses are measured (on the scale of appropriateness), I first categorized ten distinct police responses, as collected from Young (2012) and the California Commission on Peace Officer Standards and Training (2012), two sources which outline contemporary police strategies for crowd management, intervention, and control. These

<sup>28</sup> Generation categories were broken up like such: Baby Boomers were respondents born between 1946-1964; Generation Xers were born between 1965-1982; Millennials were born between 1983-2004.

Bump, Philp. "Here Is When Each Generation Begins and Ends, According to Facts." *The Atlantic*. The Atlantic Magazine, 25 Mar. 2014.

responses were described in the source texts as either “hard” or “soft” responses, words used synonymously with “violent” and “nonviolent” or “aggressive” and “passive.” In this paper, I use “violent” and “nonviolent” for categorization (mostly because these terms are clearer than “hard” and “soft”). The range of responses can be seen on Figure 4.

**Figure 4: Violent and Nonviolent Response Options**

<b>Responses</b>	
<i>Violent 1 or (V1)</i>	Use wrist locks, twist locks, arm bars, and other painful pressure point measures to gain compliance.
<i>Violent 2 or (V2)</i>	Use batons, riot control sticks, and bats.
<i>Violent 3 or (V3)</i>	Use deadly force.
<i>Violent 4 or (V4)</i>	Use pepper spray, tear gas, smoke, and concussion grenades to disperse the group.
<i>Violent 5 or (V5)</i>	Move the crowd and make arrests. Use weapons like batons, bats, riot shields, Tasers, pepper spray, K-9 units, side arms, shotguns, rifles, smoke, and launchers.
<i>Nonviolent 1 or (NV1)</i>	Use loud speakers to get demonstrators to hear and follow orders.
<i>Nonviolent 2 or (NV2)</i>	Interact with organizers and gain their cooperation.
<i>Nonviolent 3 or (NV3)</i>	Make verbal commands.
<i>Nonviolent 4 or (NV4)</i>	Bring about facilitation, not confrontation.
<i>Nonviolent 5 or (NV5)</i>	Attempt to gain compliance by displaying a professional appearance, use verbal commands, try to negotiate with demonstrators, conduct squad formations, and use empty hand tactics.

After categorization, OLS regressions were conducted to determine reaction to the violent and nonviolent police responses with age and gender interaction terms. Also, I illustrate mean appropriateness scores (highlighting gender and age) for each individual violent and nonviolent police response with 95% confidence intervals.

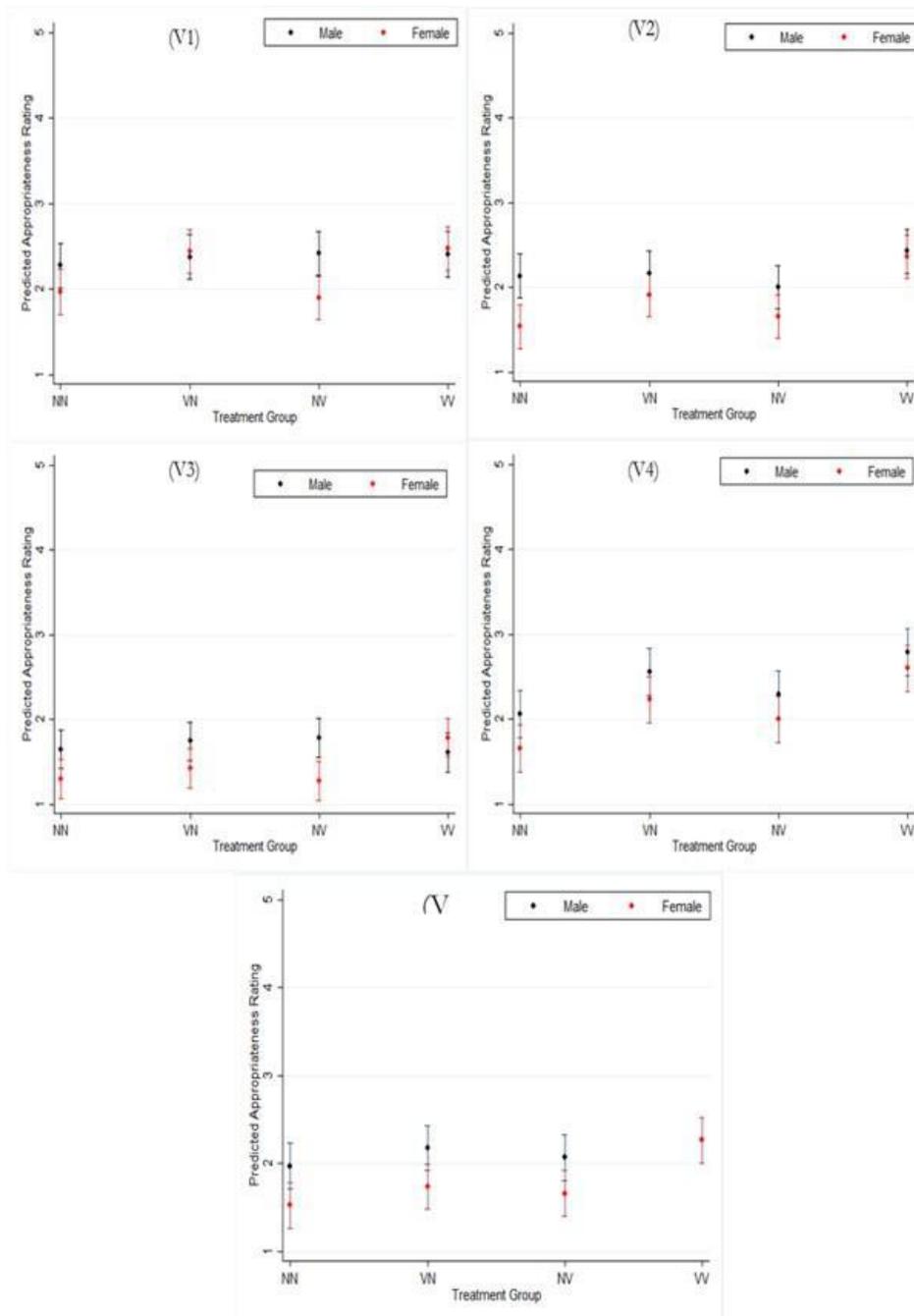
I first analyzed violent police responses (V1-V5) and gender. There were several significant differences between men and women on the violent responses (V1-V5) (see Table 2), where use of batons and bats (V2), deadly force (V3), pepper spray (V4), and arrests (V5), showed significant decreases in appropriateness for black women.

Table 2: OLS Regression on the Appropriateness of the Violent Police Responses of Baseline and Treatment Groups (Gender)

VARIABLES	(V1) Wrist Locks, etc.	(V2) Batons, Bats, etc.	(V3) Deadly Force	(V4) Pepper Spray, etc.	(V5) Make Arrests, etc.
treatment = 2, VN	0.098 (0.187)	0.035 (0.184)	0.094 (0.165)	<b>0.494**</b> <b>(0.199)</b>	0.207 (0.186)
treatment = 3, NV	0.136 (0.188)	-0.133 (0.185)	0.130 (0.166)	0.224 (0.200)	0.097 (0.187)
treatment = 4, VV	0.133 (0.189)	0.295 (0.186)	-0.044 (0.167)	<b>0.728***</b> <b>(0.201)</b>	0.294 (0.188)
Female	-0.278 (0.188)	<b>-0.553***</b> <b>(0.185)</b>	<b>-0.331**</b> <b>(0.166)</b>	<b>-0.370*</b> <b>(0.200)</b>	<b>-0.409**</b> <b>(0.187)</b>
1b.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
1b.treatment#1o.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
2o.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
2.treatment#1.female	0.378 (0.265)	0.337 (0.261)	0.034 (0.234)	0.080 (0.282)	0.004 (0.264)
3o.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
3.treatment#1.female	-0.201 (0.266)	0.251 (0.262)	-0.155 (0.234)	0.118 (0.283)	0.040 (0.264)
4o.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
4.treatment#1.female	0.377 (0.265)	<b>0.536**</b> <b>(0.261)</b>	<b>0.533**</b> <b>(0.234)</b>	0.219 (0.282)	<b>0.446*</b> <b>(0.264)</b>
Age	0.000 (0.003)	-0.003 (0.003)	0.004 (0.003)	-0.004 (0.004)	-0.002 (0.003)
Income	0.051 (0.105)	0.170 (0.103)	0.112 (0.093)	0.068 (0.112)	0.067 (0.104)
Party	<b>0.127***</b> <b>(0.046)</b>	<b>0.135***</b> <b>(0.046)</b>	0.040 (0.041)	<b>0.120**</b> <b>(0.049)</b>	<b>0.120***</b> <b>(0.046)</b>
Education	<b>0.085**</b> <b>(0.040)</b>	-0.018 (0.039)	-0.020 (0.035)	-0.007 (0.042)	0.004 (0.039)
Constant	1.313 (6.501)	8.749 (6.402)	-7.087 (5.736)	9.571 (6.919)	5.416 (6.471)
Observations	630	630	630	630	630
R-squared	0.051	0.080	0.044	0.081	0.062

Figure 9 illustrates that black women were consistently more likely than black men to measure these responses as less appropriate. This is true when protests were violent and nonviolent. Nevertheless, both men and women were likelier to deem these responses as inappropriate on the scale of appropriateness (no response rated above neutral/ambivalence for either group) (V1-V5).

Figure 9: Changes in Predicted Appropriateness of Violent Responses (V1-V5) (Gender)



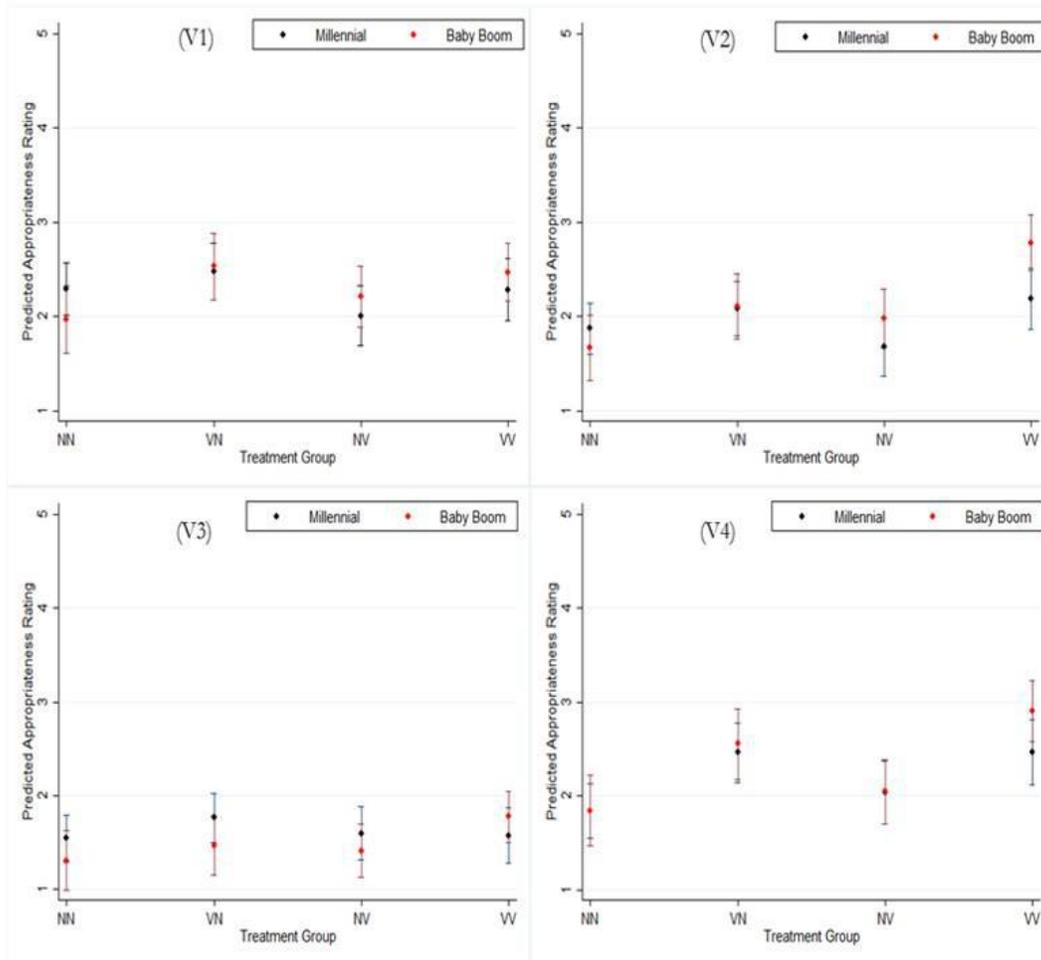
Next, I analyzed violent police responses when considering age, where there were no significant ratings changes in the ‘violent’ responses variables (V1-V5) (see Table 3). Initially, this led me to believe that there was less generational distance among black respondents than I anticipated. Nevertheless, determining reaction to *specific* violent responses, significant differences between Boomers and Millennials became more apparent. For instance, with “use of batons, riot control sticks, and bats” (V3), age mattered.

Table 3: OLS Regression on the Appropriateness of the Violent Police Responses of Baseline and Treatment Groups (Age)

VARIABLES	(V1) Wrist Locks, etc.	(V2) Batons, Bats, etc.	(V3) Deadly Force	(V4) Pepper Spray, etc.	(V5) Make Arrests, etc.
treatment = 2, VN	0.245 (0.240)	0.004 (0.235)	-0.059 (0.213)	0.303 (0.254)	0.134 (0.239)
treatment = 3, NV	0.258 (0.242)	-0.083 (0.237)	-0.002 (0.214)	<b>0.471*</b> <b>(0.256)</b>	0.176 (0.241)
treatment = 4, VV	<b>0.595**</b> <b>(0.246)</b>	0.271 (0.241)	0.163 (0.218)	<b>0.833***</b> <b>(0.261)</b>	<b>0.423*</b> <b>(0.246)</b>
agegroup = 1, Millennial	0.301 (0.228)	-0.044 (0.224)	-0.001 (0.202)	-0.029 (0.242)	0.013 (0.228)
agegroup = 3, Baby Boom	-0.027 (0.254)	-0.245 (0.249)	-0.233 (0.225)	-0.026 (0.269)	0.021 (0.254)
1b.treatment#1o.agegroup	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
1b.treatment#2b.agegroup	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
1b.treatment#3o.agegroup	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
2.treatment#1.agegroup	-0.063 (0.316)	0.211 (0.310)	0.280 (0.280)	0.317 (0.335)	0.094 (0.315)
2o.treatment#2b.agegroup	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
2.treatment#3.agegroup	0.317 (0.349)	0.439 (0.342)	0.213 (0.310)	0.409 (0.370)	0.159 (0.348)
3.treatment#1.agegroup	-0.550* (0.324)	-0.108 (0.317)	0.057 (0.287)	-0.275 (0.343)	-0.182 (0.323)
3o.treatment#2b.agegroup	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
3.treatment#3.agegroup	-0.017 (0.343)	0.393 (0.336)	0.105 (0.304)	-0.268 (0.363)	0.022 (0.342)
4.treatment#1.agegroup	-0.608* (0.329)	0.049 (0.322)	-0.130 (0.292)	-0.206 (0.348)	0.082 (0.328)
4o.treatment#2b.agegroup	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
4.treatment#3.agegroup	-0.096 (0.342)	0.843** (0.335)	0.303 (0.303)	0.233 (0.362)	0.220 (0.341)
Gender	<b>-0.148</b> <b>(0.095)</b>	<b>-0.266***</b> <b>(0.093)</b>	<b>-0.230***</b> <b>(0.084)</b>	<b>-0.262***</b> <b>(0.101)</b>	<b>-0.282***</b> <b>(0.095)</b>
Income	0.066 (0.105)	0.182* (0.103)	0.122 (0.093)	0.076 (0.112)	0.074 (0.105)
Party	<b>0.117**</b> <b>(0.047)</b>	<b>0.138***</b> <b>(0.046)</b>	0.044 (0.042)	<b>0.119**</b> <b>(0.050)</b>	<b>0.120**</b> <b>(0.047)</b>
Education	<b>0.078**</b> <b>(0.040)</b>	-0.013 (0.039)	-0.028 (0.035)	-0.004 (0.042)	0.001 (0.039)
Constant	1.556*** (0.243)	1.761*** (0.238)	1.624*** (0.215)	1.760*** (0.257)	1.610*** (0.242)
Observations	630	630	630	630	630
R-squared	0.052	0.092	0.035	0.090	0.059

Figure 10 (V2) shows the predicted changes in appropriateness ratings between Millennials and Boomers. Here, a change in predicted ratings when protests were violent, where Boomers were more likely to rate “use of batons, etc.” as more appropriate than Millennials. These results suggest that older respondents were more likely to indicate that this response was more appropriate in violent protest situations (there are no significant differences when the protests are nonviolent). That said, while differences between Millennials and Boomers are significant here, it is still a violent response (V2) that mustered (at best) a neutral/ambivalent response from these respondents. It cannot be stated that either group (Millennials or Boomers) deemed this response as “appropriate” overall.

Figure 10: Changes in Predicted Appropriateness of Violent Responses (V1-V5) (Age)



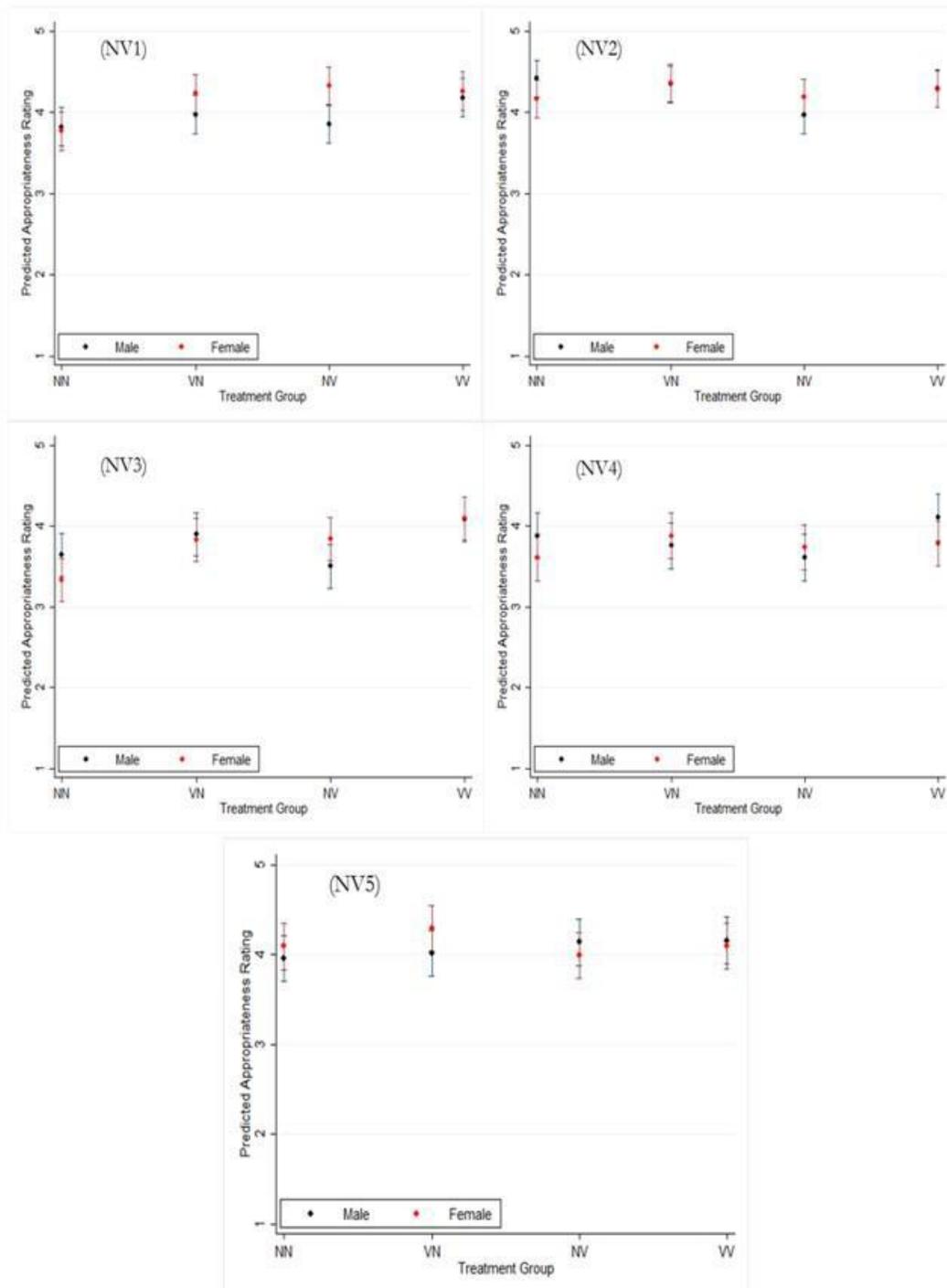
Once violent police responses were measured, I then moved on to non-violent police responses, to gauge what impact (if any) they may have when highlighting the gender and age variables. As such, another OLS regression was conducted to determine reaction to the nonviolent responses (NV1-NV5) in each group. I first look at gender, where Table 4 shows significant results.

*Table 4: OLS Regression on the Appropriateness of the Nonviolent Battery of Police Responses of Baseline and Treatment Groups (Gender)*

VARIABLES	(NV1) Loud Speakers, etc.	(NV2) Cooperation	(NV3) Verbal Commands, etc.	(NV4) Facilitation	(NV5) Negotiation, etc.
treatment = 2, VN	0.151 (0.169)	-0.071 (0.164)	0.256 (0.193)	-0.122 (0.204)	0.058 (0.184)
treatment = 3, NV	0.035 (0.170)	<b>-0.450***</b> <b>(0.165)</b>	-0.142 (0.194)	-0.266 (0.205)	0.179 (0.185)
treatment = 4, VV	<b>0.361**</b> <b>(0.171)</b>	-0.122 (0.166)	<b>0.439**</b> <b>(0.195)</b>	0.235 (0.206)	0.198 (0.185)
Female	-0.055 (0.170)	-0.257 (0.165)	-0.297 (0.194)	-0.280 (0.205)	0.129 (0.184)
1b.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
1b.treatment#1o.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
2o.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
2.treatment#1.female	0.312 (0.240)	0.271 (0.233)	0.239 (0.273)	0.394 (0.290)	0.140 (0.260)
3o.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
3.treatment#1.female	<b>0.520**</b> <b>(0.241)</b>	<b>0.472**</b> <b>(0.233)</b>	<b>0.657**</b> <b>(0.274)</b>	0.393 (0.290)	-0.273 (0.261)
4o.treatment#0b.female	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
4.treatment#1.female	0.134 (0.240)	0.245 (0.233)	0.329 (0.273)	-0.062 (0.290)	-0.196 (0.260)
Age	<b>-0.010***</b> <b>(0.003)</b>	<b>-0.005*</b> <b>(0.003)</b>	<b>-0.009**</b> <b>(0.003)</b>	<b>-0.009**</b> <b>(0.004)</b>	<b>-0.012***</b> <b>(0.003)</b>
Income	-0.011 (0.095)	-0.013 (0.092)	0.103 (0.108)	-0.002 (0.115)	-0.070 (0.103)
Party	0.010 (0.042)	0.020 (0.041)	0.070 (0.048)	-0.009 (0.051)	0.035 (0.046)
Education	0.006 (0.036)	<b>0.066*</b> <b>(0.035)</b>	<b>0.068*</b> <b>(0.041)</b>	<b>0.113***</b> <b>(0.043)</b>	<b>0.082**</b> <b>(0.039)</b>
Constant	23.054*** (5.889)	14.058** (5.709)	20.421*** (6.705)	21.611*** (7.102)	27.166*** (6.386)
Observations	630	630	630	630	630
R-squared	0.058	0.030	0.067	0.043	0.039

Figure 11 shows a change in predicted appropriateness ratings for each of the responses. Overwhelmingly, there were few significant differences between men and women. Where these differences do exist, black men were more likely to skew toward neutral/ambivalence than black women (in both violent and nonviolent protest situations) (NV1, NV3, and NV5).

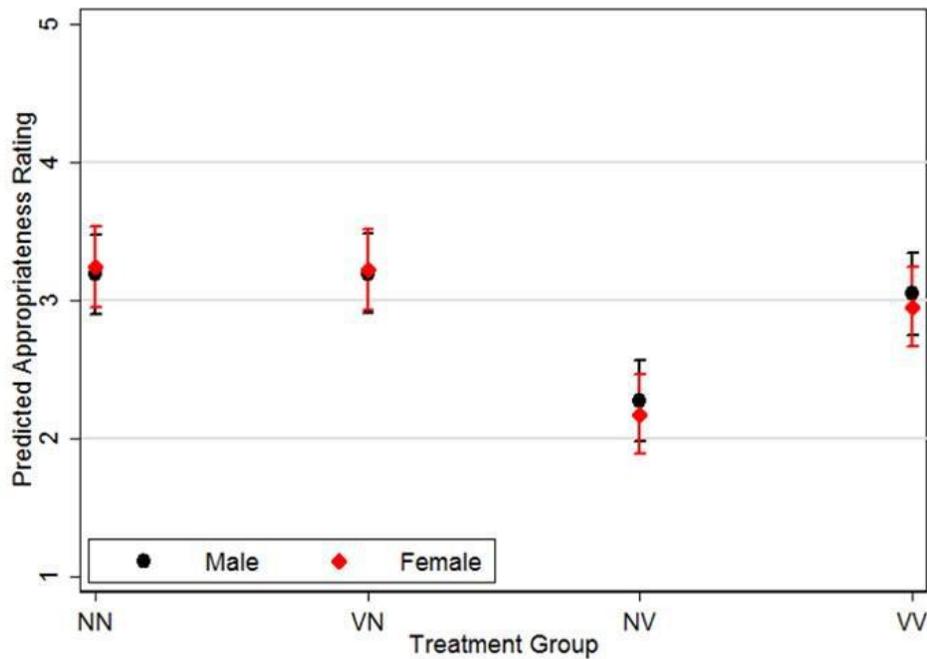
Figure 11: Changes in Predicted Appropriateness of Nonviolent Response Battery (NV1-NV5) (Gender)



In Figure 7, when protests were violent and nonviolent, Millennials were significantly less supportive of nonviolent police responses (NV1-NV5). These results are confounding. As this suggests that Millennials are more likely to deem nonviolent responses as ‘inappropriate.’ These counterintuitive results may expose a limitation. The measure of ‘appropriateness’ and ‘inappropriateness’ may not fully capture a respondents’ reaction to the specific response. When

protests are violent, an “inappropriate” reaction to nonviolent reactions could just mean that the respondent did not feel the response was *enough* of a response. In this study, perhaps Millennials had more complicated reactions to the potential police responses. For instance, if a young person did not believe the nonviolent response was enough of a response to violent protests, it does not mean they would support more violent means (like using pepper spray or dogs) against protestors. This could simply indicate that there is a nuance to the story that needs to be explored. It may mean that attitudes are difficult to reduce to either/or feelings. It may be folly to dichotomize reactions to complicated incidents.

Figure 7: Changes in Predicted Appropriateness Ratings of Initial Police Response (Gender)



Furthermore, the labelling of “violent” and “nonviolent” was largely police agency categorization. Broadly, I organized response labels as closely to police definitions as possible. I borrowed the litany of responses from Young (2012) and the California Commission on Peace Officer Standards and Training (2012), two sources which outline contemporary police strategies for crowd management, intervention, and control. The issue – as it relates to young black Millennials – is that POLICE Magazine’s (which is where Young’s piece was published) characterization of the responses could be out of touch. While it considers something like making ‘verbal commands,’ a nonviolent or “nonviolent” response to protestors, young black Millennials could perceive those responses as “violent,” and thus be as inclined to deem it an inappropriate police endeavor. Future qualitative research (such as interviewing young black Millennials) could be used to scrutinize the efficacy of these labels among certain groups.

### Discussion

An analysis of these results reveal support for three of my hypotheses (H1-H3), while H4-H6 were not supported. This experimental study suggests several dispositions among black

respondents. First, overwhelmingly, even accounting for age and gender, real opposition from black respondents comes when police respond violently to nonviolent protests. A result that comports with H1. There was simply no support for hardline, violent responses against demonstrators. An unsurprising result, given that this experiment did not exist in a vacuum, and most of these respondents had been exposed to the pervasive race-police politics of the past few years. Perhaps at play is Weitzer and Tuch's (2005) "group-position thesis," which argues that racial identity salience determines respondent's level of open-mindedness as it relates to the police. Howell and Perry (2004) also note that higher racial salience is linked to more antagonism toward the police and their behavior. Accordingly, police departments ought to be keenly aware that their actions do impact the attitudes of black citizens, particularly when police responses to protests are perceived as violent or aggressive.

Furthermore, using an intersectional lens reveals some divergence within this respondent sample. Though respondents were more antagonistic toward violent police responses to nonviolent protests, there are results that suggest that attitudes on police response is conditional on the nature of protest. For example, older respondents were sometimes significantly likelier than younger respondents to deem violent police responses to violent protests as more appropriate. Similarly, black men were (at the very least) more ambivalent about use of violent responses when demonstrations are violent. In other words, tolerance of police violence was contingent upon whether or not the respondent was older or male and whether or not the experimental protestors were violent.

Also, throughout the assessments, age divergence exists. For older black respondents, there is a preference for nonviolent response tactics when demonstrations are nonviolent, and less antagonism toward nonviolent responses when unrest turns violent. This defies H4, as older respondents were far likelier to score nonviolent responses to violent demonstrations as "strongly appropriate." On the other hand, older respondents were also far likelier than young respondents to accept violent (or violent) responses when demonstrations were violent. As such, older respondents simply display a greater preference for nonviolent solutions. Nevertheless, young respondents do not show a preference for either form of response (perhaps a reflection of their colder feelings toward the police from the outset). They were, however, more receptive to nonviolent responses to both violent and nonviolent demonstrations, as well as less likely to support violent responses to violent demonstrations (H3).

As far as gender is concerned, the startling take-away is black men's likelier ambivalence about violent responses in violent demonstration scenarios. While black men were not overwhelmingly more likely than women to positively score these tactics, their consistently higher neutrality (particularly when demonstrations were violent) suggests an ambivalence about violent police responses that does *not* comport with H5. Black men were also consistently less fervent in *strong* support for nonviolent responses to violent demonstrations. Women, on the other hand, were likelier to support nonviolent responses in both violent and nonviolent scenarios (Figure 11), as well as less likely to support violent responses in both circumstances (Figure 9). These results do not support H6. Black women were less ambivalent and more consistent in their views about these responses. These results confound the literature on interactions between police and citizens. Explanations for these confounding gender results are unclear and provide fertile ground for future research.

In this paper, I found that overall attitudes were mostly negative toward violent responses to protests, while generational and gender differences among black respondents tell a more nuanced story. Upon reading this analysis, a police agency interested in maintaining order *and* its reputation among the constituents of color it serves will be compelled to explore alternative means of responding to black protests. This is especially the case when the protests were prompted by perceived police misconduct (i.e. the killing of an unarmed person of color). Policy-wise, this may mean embracing more negotiated management strategies, as the nonviolent responses in this experiment, which in many ways echoed negotiated management, were largely seen as appropriate.

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### ***When formatting a law, can opposing sides both be right?***

Can the use of one-time plastic bags be reduced through legislation dealing with outright bans, use fees, recycling, or voluntary efforts? Existing and proposed laws at the State and local levels of government find both support and opposition to their merits. For instance, laws limiting or outlawing the use of one-time plastic bags are opposed by manufacturers but endorsed by environmentalists. Bag manufacturers, who have invested heavily into reformulating the composition of their bags to be more environmentally friendly, see restrictive plastic bags laws as an overreaction to a problem that is already being addressed within the industry. They advocate that comprehensive plastic bag recycling programs are a cost effective solution to the problem. Contrasting this view are staunch environmentalists who advocate bans as the only mechanism to ensure the viability of our waterways and the survival of our aquatic wildlife. Ultimately if both sides compromise, society would be better off overall and both sides would still get most of what they desire.

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The first major legislative action to test this premise occurred on September 30, 2014 when Californian Governor Jerry Brown signed SB 270 enacting the first statewide ban on one-time use plastic bags. Technically, the law did not ban the bags, it prohibits stores from handing them out for free. Although the law was to go into effect July 1, 2015,<sup>1</sup> implementation was postponed until after a November 8, 2016 referendum was defeated.<sup>2</sup> The referendum was backed by the trade group, American Progressive Bag Alliance (APBA), who secured the necessary number of verified signatures to qualify for placing a referendum on the California ballot and mounted a vigorous media campaign to overturn the bag ban law. The battle over the implementation of this law illustrates the opposing fractions to environmental initiatives: legislation versus market forces. On one side are environmentalists supported by the Sierra Club, who see the negative side of plastic bag usage: litter and risk to wildlife. While on the opposite side are the bag manufacturers, who want to protect jobs and who have over time reformulated the composition of the bag so that it is more environmentally friendly (i.e., by becoming more biodegradable and recyclable).

Although the main purpose of this law is to reduce waste through encouraging the purchase and utilization of reusable bags, the driver behind the plastic one-use bag ban law was twofold.<sup>3</sup> First was the need to reduce litter and the skyrocketing costs of its cleanup. Plastic bags are one of the most visible trash components and the bags are easily blown from place to place. They often catch on trees, shrubbery, and fences making them difficult to collect, which increases their cleanup costs. They also tend to clog sewer drains which in turn may cause dangerous conditions on roadways or unsanitary pooling of water breeding harmful bacteria or bugs. Bags also tend to accumulate within any enclosed area such as parks, cu-du-sacs, and along waterways. Estimates of cleanup costs within the State of California tally over \$400 million per year of which approximately 8% to 25% (depending on locale) is directly attributable to plastic bags. Other pitfalls are associated with recycling effects such as a tendency of plastic bags to jam recycling

equipment which causes stoppages of recycling lines due to cleanups or repairs owing to the damage inflicted. Estimates are that 19 billion plastic bags are thrown away in California every year.<sup>4</sup> The second key factor was to protect wildlife, especially those found in the ocean and other waterways within the state. For birds, seals, sea otters, turtles and fish, plastic bags have caused death from both entanglement (i.e., tangles leading to strangulation) and digestive complications (i.e., ingesting plastic bags can clog their digestive tracks).

With the passage of this law, the big question is “Will the law work?” Before this law was passed, most coastal cities within the state already had local laws that banned or limited the use of one-use plastic bags. For instance, the city of San Jose claimed a significant drop in plastic bag litter (59% drop in parks and along roadsides; 71% reduction in creeks and rivers, and a 69% reduction in storm drains) after their law went into effect.<sup>5</sup> Other communities (Los Angeles, Sacramento County, Napa County, and Santa Barbara County) also claim litter reduction after bag bans.<sup>6</sup> Since California is not the only state to take action by initiating plastic bag bans, other states, as well as, countries offer additional evidence as to the effectiveness of bag-ban laws. For example, Hawaii offers an effective state ban on plastic bags since each of its counties has adopted a plastic bag ban. But as shown by the set of laws found in Hawaii, loopholes often exist. For instance, the laws banning plastic bags defined as being less than 0.0025 inches thick with handles. Thus major retailers, such as Walmart, simply adapted by using slightly thicker bags to satisfy the legal requirements of the law, although not the intent. Similar to the Californian law, exceptions allow restaurants, pharmacies, and dry cleaners to still use plastic bags.<sup>7</sup>

The appendix outlines effects of state plastic and paper bag legislation across the nation. Table A1 summaries enacted legislation, which are weaker than the current California law. For instance, Delaware only encourages the use of reusable bags by consumers and retailers, but it does require stores to establish an at-store recycling program to provide an opportunity for customers to return plastic bags. Additionally, the law requires that all plastic carryout bags display a recycling message. Thus, this type of program if run successfully would satisfy both the litter and threat to wildlife problems. Table A2 summaries pending legislation.<sup>8</sup> For example, Delaware does have pending legislature that would require stores to charge five cents for every single-use carryout bag that is provided to customers to further discourage use. Similar to the California statute. The Delaware law would also establish reporting requirements to track fees that are charged and distribution of bags to gauge the usefulness of the law overtime.

Within the global perspective, an Argentinian study on a plastic bag ban reported in the *Journal of Environmental Psychology* supports an increase in the use of recyclable bags after the law was enacted.<sup>9</sup> Thus, coincidental evidence satisfying the intent of the law (i.e., reducing litter and waste). There is no reason these results cannot be extrapolated to other countries. A Taiwanese study of their plastic bag ban found lower material specific waste, total recycling rates, and total garbage volumes. The plastic bag policy resulted in a reduction in both net waste and total garbage volumes by approximately 27%. Recycling volumes also increased by 64%.<sup>10</sup> In a South African study, the finding only support short-run gains. Unfortunately, the initial gains deemed promising declined over time.<sup>11</sup> In a study spanning 3 locals (China, Hong Kong and India), the findings demonstrate that consumers’ behavior and governmental policies are key variables for encouraging consumers to utilize reusable bags and practice recycling.<sup>12</sup> Similarly, in a study focused in Wales, the findings show that the attitude of the underlying consumers dictate the overall success of a government law against single-use plastic bags using a bag fee.<sup>13</sup>

Few disputes the fact that plastic bags are a major source of litter or that these bags are a threat to wildlife. But recent innovations within the industry should be taken into consideration. Claim is that plastic bags now being produced in the United States are 100 percent recyclable and reused by 90 percent of consumers. Thus, they are not one-time use bags. Surveys indicate the bags are used to carry other items after being brought home from the grocery store. They are also used as trash can liners eliminating the need for purchasing additional special purpose bags.<sup>14</sup> Besides being 100 percent reusable and recyclable, these newer plastic bags are more environmentally friendly versus paper and reusable bags. There are studies that show plastic to be a “greener” alternative since they use less natural resources to produce and to transport.

In an interview by Matt Cooper with University of Oregon Chemistry Professor David Tyler focused on a survey of the literature hinting “that the environmental impact of some of our ‘green’ choices can be surprising when you consider their effects from cradle to grave—that is, the total impact from the point a product is created from raw materials, through its manufacturing, distribution and consumer use, ending with its disposal or recycling.”<sup>15</sup> But reputes of Professor Tyler’s claims focus on the fact that the research on plastic and its alternatives can often be biased. Thus, it is important to determine what factors were controlled and which ones were not? One key question asked Professor Tyler focused on the research findings supporting his green position on plastic bags. Professor Tyler responded that “There are really good things about plastic bags—they produce less greenhouse gas, they use less water and they use far fewer chemicals compared to paper or cotton. The carbon footprint— that is, the amount of greenhouse gas that is produced during the life cycle of a plastic bag—is less than that of a paper bag or a cotton tote bag. If the most important environmental impact you wanted to alleviate was global warming, then you would go with plastic.” For support, he stated that “Cotton is typically grown on semiarid land so it consumes a huge amount of water and you also need a lot of pesticides. About 25 percent of the pesticides used in this country are used on cotton. Paper is just typically considered a fairly polluting industry. Whereas the petroleum industry, where we get our plastics, doesn’t waste anything. Chemists have had sixty to seventy years to make the production of plastics fairly efficient and so typically there is not a lot of waste in the petroleum industry.” Since plastic bags can be recycled, rather than ban the bag these recycling options needs to be promoted more by increasing the number of drop off locations to make it convenient for the consumers.

Since Professor Tyler was just citing existing research, several responders to the interview pointed out that results of multiple studies can always be “cherry picked” to support nearly any position. Thus, it is important to determine what factors were controlled and which ones were not? For instance, an EPA study, “Advancing Sustainable Materials Management: Facts and Figures” shows that bag bans and taxes don’t meaningfully reduce litter or waste in our landfills.<sup>16</sup> From the EPA site, many questions about plastic bags and recycling are addressed. When addressing recycling plastic bags, the EPA points out recycling is typically regulated at the local level and thus we get a piecemeal approach. The EPA notes that loose plastic bags have always been difficult to handle in the recycling process due to the high probability of the bags clogging recycling equipment. To lessen this problem, recycler accept single use bags only if they are bundled together in tight, tied packages. This can be accomplished by making recycling bins available at every store that utilize single-use plastic bags. This would increase their collection and allow them to be bundled and ultimately recycled. Thus, recycling might serve the same

purpose as a bag ban. But the EPA stresses the underlying objectives of any bans (local, state, or federal) should follow preference chain: reduction, reuse, recycling, and disposal. Following these guidelines, most bag bans focus on reduction by charging a fee to encourage the use of reusable bags.

The impetus behind the bag bans focus on four key factors: (1) Bags are typically made out of petroleum-based plastic and don't biodegrade when they are disposed of or escape into the environment; (2) When plastic bags are disposed of on land they may be blown into creeks, lakes, or oceans where they can entangle marine life or the animals may mistakenly eat the plastic bags thinking that they are food; (3) The light-weight plastic is not easily recyclable; and (4) The bags are often used only once before being thrown away.<sup>17</sup> Factor (1) is highly criticized when focusing on the latest generation of plastic bags. Although crude oil is one of the raw materials for making plastics, it is not the major feedstock for plastics production in the United States. Plastics are now produced largely from natural gas.<sup>18</sup>

Advocating for the use of plastic bags, the U.S. Energy Information Administration states that plastic grocery bags are the greenest option at checkout and require fewer resources to produce and transport than common alternatives. American plastic bags are made from natural gas, not oil. In the U.S., 85 percent of the raw material used to make plastic bags is produced from natural gas.<sup>19</sup> The industry claims that newer plastic formulations do photo-degrade (i.e., exposure to sunlight causes the breakdown of the components into smaller and smaller pieces. Plastic polymers consists of molecular chains. The radiation from the sun breaks the large chains down into smaller molecules. Although these smaller molecules are still too tough to digest. Overtime, sunlight will eventually degrade these molecules further so that eventually they can be recycled into organic molecules that are not harmful. Unfortunately, this final degradation process is likely to take 500 years or more.<sup>20</sup>

An article by the U.K. Environmental Agency, "Life Cycle Assessment of Supermarket Carrier Bags" also is critical of the research findings on the effect of plastic bags on the environment.<sup>21</sup> This article also supports that fact that plastic bags can be the most environmentally friendly option at checkout. New generation bags are 100 percent reusable and recyclable. Standard reusable cotton grocery bags must be reused 131 times "to ensure that they have lower global warming potential than" a plastic bag used only once.<sup>22</sup> It would take 7.5 years of using the same cloth bag (assuming one grocery trip per week) before it's a better option for the environment than a plastic bag reused three times.<sup>23</sup>

Bag bans and taxes cannot guarantee a reduction in litter or an improvement in life of our wildlife. Various studies show supposed "greener" alternatives actually place a greater burden on the environment. This increased burden is due to the requirement of more natural resources to produce and transport when factoring in costs on per use. Claim is also that most alternatives to plastic bags are less recyclable.<sup>24</sup> Other studies show that bag bans and taxes don't meaningfully reduce litter or the amount of waste going to our landfills.<sup>25</sup> Without plastic grocery bags, people purchase replacement bags — often made of thicker, heavier plastic — and then send those bags to the landfill.<sup>26</sup> The proponents of the bag ban in Washington D.C. claim that over the 4 years in which a tax on disposable bags has been effect, there has been a 60 percent drop in household bag use and thus fewer plastic bags littering the streets. But the fees collected have held steady at \$150,000 to \$200,000 per month and lend doubt to this reduction. See Table 1 for the progressive growth in fees over the years 2010 through 2013.<sup>27</sup>

**Table 1. Washington D.C. Effects of the Plastic Bag Ban**

Year	Bag Fees	Penalties	Voluntary Tax	License Plate Fees	Total	Percentage Change
2010	\$1,510,088	\$0	\$18,107	\$0	\$1,528,195	
2011	\$1,845,413	\$650	\$69,849	\$6,493	\$1,922,405	25.8%↑
2012	\$1,993,183	\$1,409	\$64,117	\$10,670	\$2,069,379	7.6%↑
2013	\$2,001,575	\$2,602	\$58,120	\$10,753	\$2,073,050	0.2%↑
Total	\$7,350,260	\$4,661	\$210,194	\$27,917	\$7,593,032	

Source: The Washington Post, "Tax data cast doubt on claims about declining use of plastic bags in D.C."; January 2014.

Mixed support for the D.C. bag-ban law was provided by a survey of both individual households and businesses conducted by Opinion Works of 600 randomly selected residents by telephone and 177 businesses (73% which were independent businesses). Although there exists concerns about how the individual survey was conducted which might invalidate the validity of its findings. First, respondents claimed a reduction of plastic bag litter use, even though residents failed to see any improvement in the level of trash in their neighborhoods. Second, an overwhelming 80% of residents stated that they have reduced their usage of disposable bags since the 5-cent fee was introduced. And finally, residents estimate of disposable bag usage in a 7 day period before law's passage at 14.51/10 bags (mean/median) dropped to 6.99/4 bags (mean/median) after its passage.

Four key finding from the business survey were reported. First, businesses reported a 50% reduction in bag use on average (median). Second, 68% of businesses saw fewer plastic bag litter around their stores. Third, 79% reduced the number of bags provided by 40%/35% (mean/median). And fourth, the actual reduction in disposable bags purchased by businesses dropped 47/50% (mean/median).<sup>28</sup> The planned uses for the funds raised were notable focusing on education, assistance for the poor, and cleanup.<sup>29</sup> A follow-up article in the Washington Post questioned the actual benefits from the law. According to a city audit and The Washington Post's review of the fund set up to capture the collection of fees and taxes weaken the proponent's position. Criticized were the measurements for success that relied on nonscientific survey techniques. Additional criticism was directed at the use of the fund set up to collect the fees and taxes associated with the law. Detailed revealed that the funds were frivolously spent on field trips for schoolchildren and employee salaries, rather than on tangible cleanup projects on the river or its watershed.<sup>30</sup> The auditor findings show the following distributions: 31.8% for personnel; 21.7% for grants; 19.6% for community relations and advertising; 16.2% for capital projects; and 10.7% for administration. The Post's review showed only about one-third of the spending went toward beneficial projects such as trash traps to clean the river, rain barrels and rain gardens to catch runoff, green roofs, tree planting, or stream restoration.

The Environmental Protection Agency calculates that plastic bags, by weight, account for just 0.3 percent of the U.S. municipal solid waste stream.<sup>31</sup> According to the 2015 Litter Survey Ranking conducted by Environmental Resources Planning, plastic retail bags comprise a very small portion – less than 2.0 percent – of litter.<sup>32</sup> Also, to date, there is no proof that Washington,

D.C.'s bag tax has done anything to actually decrease use of plastic bags or litter. According to a Washington Post investigation, D.C. collected roughly \$10 million—since 2010—without making any environmental progress.<sup>33</sup> Other studies also support these views.<sup>34</sup>

The substitution effect of exchanging one object for another of equaling bad environmental impact is illustrated by a ban in South Australia (SA).<sup>35</sup> Bin liners, which are plastic bags used to line garbage bins, have seen sales doubled since free plastic shopping bags were banned more than two years ago. Most bin bags are made of thicker plastic than traditional bags, which means they take longer to break down in the environment. This doubling is supported by firms such as Woolworths. Coles, another department store note that sales of kitchen bags increased 40 percent in the year following the ban. Glad, a bin bag manufacturer, reported over a 50 percent jump in kitchen-tidy bag sales in the first year of the ban in SA, compared with only a 5.5 percent increase nationally in non-ban areas. For instance, 48 million Glad bin bags were bought in 2008, rising to more than 73 million in 2009 and 84 million in 2010. The figures raised concerns about whether the plastic bag bans are effective.

Even with mixed results of bag bans, there has been a push for a national ban on plastic one-use bags. For instance from the Congressional Record—Extensions of Remarks (April 23, 2009), Congressman James Moran from Virginia introduced Bill E947: The Plastic Bag Reduction Act of 2009. Claims cited for the bill include the giant “garbage patches” in our oceans caused by the accumulation of garbage of which plastics of all types, including plastic bags are causing great harm to wildlife. Data cited show 267 species have been endangered from entanglements and ingestion. The proposed law encourages consumers to choose reusable bags by imposing a 5 cent tax on single-use carryout bags beginning as early as January 1, 2010. On January 1, 2015, the amount of the tax would increase to 25 cents per bag. The tax would apply to paper as well as to plastic single-use carryout bags. To encourage recycling, for each 5 cents collected, the retailer has the opportunity to apply for a tax credit of one cent to support a qualified bag recycling program. An additional cent would be transferred to the Land and Water Conservation Fund. The bill would also direct the Comptroller General to conduct a follow-up study of the law's effectiveness and to evaluate whether imposing a tax on other products, such as food wrappers and containers, could also reduce their use. Since the bill was not passed, it was reintroduced the following year (April 22, 2010 Congressional Record—Extensions of Remarks E627) and again failed to generate the necessary support for passage.

Reintroduced again in 2013 as the Trash Reduction Act of 2013, Representative Moran again failed to generate much support or interest. Yet again he tried to shame his colleagues to win their support by citing the facts supporting the extent of the problem. For instance, “Just how bad is the trash problem? According to the U.S. EPA, the average American throws away about 4.4 pounds of trash each day or 1,600 pounds per year. That's nearly 248 million tons of American garbage each year. To put that in perspective, it's enough trash to fill a football-field-sized hole over 93 miles deep. Or create a similar-sized stack of garbage that reaches low earth orbit. This amount of trash could cover the state of Texas two and a half times or fill enough trash trucks to form a line to the moon.”<sup>36</sup>

One thing is certain, there is a problem with not only plastic bags, but plastic containers and bottles in general. An example of the destruction that plastic has had on sea birds such as albatrosses, which roam across our oceans. Albatrosses and similar seabirds frequently grab food wherever they can find it. For instance on Midway Island, which comes into contact with parts of

the Eastern Garbage Patch, albatrosses give birth to 500,000 chicks every year. Two hundred thousand of them die, many of them by consuming plastic fed to them by their parents, who confuse it for food. In total, more than a million birds and marine animals die each year from consuming or becoming caught in plastic and other debris.<sup>37</sup>

Thus plastic bags can be hazardous, but the passage of the plastic one-use bag ban in California to reduce litter and save wildlife cannot be claimed a success. At least, not yet. There is little proof that this ban will produce any meaningful results, especially since one-use plastic bags are such a small aspect of the total litter and garbage problem. Also complicating the process is the introduction of “bans” on the bags bans. Michigan just passed a law (PA 389, December 28, 2016) that bans the banning of plastic bags. More specifically, the law prohibits local ordinances from “regulating the use, disposition, or sales of, prohibiting or restricting, or imposing any fee, charge, or tax on certain containers—plastic bags, cups, bottles, and other forms of packaging.”<sup>38</sup> Similar legislation was recently introduced in the Texas Legislature by State Senator Bob Hall (Senate Bill 103, filed November 11, 2016; open for testimony March 14, 2017; pending).<sup>39</sup> So laws, both for and against plastic bags, continue to be enacted showing that the same “evidence” is being used to justify both causes.

## Endnotes

1. The July 1, 20015 date only applied to large grocery chains and pharmacies. Convenience stores and liquor stores were to be phased in the following year on July 1, 2016.  
[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB270](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB270)
2. A “yes” vote supported the bag ban won 53.27% (7,228,900 votes) versus a “no” vote 46.73% (6,340,322).  
[https://ballotpedia.org/California\\_Proposition\\_67,\\_Plastic\\_Bag\\_Ban\\_Veto\\_Referendum\\_\(2016\)](https://ballotpedia.org/California_Proposition_67,_Plastic_Bag_Ban_Veto_Referendum_(2016))
3. For those that chose not to participate, the laws does permit stores to sell plastic bags for a fee of not less than 10 cents per bag. This may seem like an incidental cost and to those in the middle class or above, it is. But for the poor, it is an additional expense added to their weekly food budget they can ill afford. Thus, the legislature put in a provision that exempts customers using a payment card or voucher issued by the California Special Supplemental Food Program for Women, Infants, and Children.Card/vouchers pursuant to Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106 of the Health and Safety Code or an electronic benefit transfer card issued pursuant to Section 19972 of the Welfare and Institutions Code.
4. See [https://www.savesfbay.org/sites/default/files/news\\_release/Fact%20Sheet%20single%20use%20bags\\_MASTER%205-9-14.pdf](https://www.savesfbay.org/sites/default/files/news_release/Fact%20Sheet%20single%20use%20bags_MASTER%205-9-14.pdf)
5. See note 4 for [additional details](#).
6. See <https://www.cawrecycles.org/list-of-local-bag-bans/> for a summary from 151 California cities and counties bag bans results prior to the statewide ban.
7. See “Hawaii’s plastic bag ban goes into effect, but. . .” by Margaret Badore  
<http://www.treehugger.com/environmental-policy/hawaiis-plastic-bag-ban-goes-into-effect-but.html>
8. See <http://www.latimes.com/local/politics/la-me-pol-brown-bills-20141001-story.html>
9. “Charges for plastic bags: Motivation and behavioral effects” (volume 40, December 2014, pp. 372-380 by Adrina Jekovcevic, Linda Steg, Nadia Mazzeo, Romina Caballero, Paul Franco, Natalia Putrino, and Jesica Favara  
<http://www.sciencedirect.com/science/article/pii/S0272494414000863>
10. “Economic Incentives and Residential Waste Management in Taiwan: An Empirical Investigation” by Hai-lan Yang and Robert Innes, Environmental & Resource Economics (2007) 37:489-519 <http://web.b.ebscohost.com/ehost/command/detail?sid=91263d9a-2270-469a-95f0-8b37de0b1f26%40sessionmgr120&vid=4&hid=124>

11. "Analysis of the plastic-bag levy in South Africa" by Johane Dikgang, Anthony Leiman, and Martine Visser, Resources, Conservation and Recycling 66 (2012) 59-65. [http://ac.els-cdn.com/S0921344912001073/1-s2.0-S0921344912001073-main.pdf?\\_tid=ae7e4d22-f918-11e6-9622-0000aacb362&acdnat=1487779688\\_cbfba03572b493c9dd7d969590ef0a93](http://ac.els-cdn.com/S0921344912001073/1-s2.0-S0921344912001073-main.pdf?_tid=ae7e4d22-f918-11e6-9622-0000aacb362&acdnat=1487779688_cbfba03572b493c9dd7d969590ef0a93)
12. "Carbon footprint of shopping (grocery) bags in China, Hong Kong and India" by Subramanian Senthilkannan Muthu, Y. Li, J.Y. Hu, and P.Y. Mok Atmospheric, Environment 45 (2011) 469-475. [http://ac.els-cdn.com/S135223101000840X/1-s2.0-S135223101000840X-main.pdf?\\_tid=7e2bc504-f919-11e6-9ee5-0000aacb360&acdnat=1487780036\\_a23c119ee63089373a8a22a468138320](http://ac.els-cdn.com/S135223101000840X/1-s2.0-S135223101000840X-main.pdf?_tid=7e2bc504-f919-11e6-9ee5-0000aacb360&acdnat=1487780036_a23c119ee63089373a8a22a468138320)
13. "The introduction of a single-use carrier bag charge in Wales: Attitude change and behavioural spillover effects" by Wouter Poortinga, Lorraine Whitmarch, and Christine Suffolk. Journal of Environmental Psychology 36 (2013) 240-247 [http://ac.els-cdn.com/S0272494413000686/1-s2.0-S0272494413000686-main.pdf?\\_tid=3a0425de-f91d-11e6-9c26-0000aacb360&acdnat=1487781640\\_809fe9854ce1bd7d48ea1a814787668d](http://ac.els-cdn.com/S0272494413000686/1-s2.0-S0272494413000686-main.pdf?_tid=3a0425de-f91d-11e6-9c26-0000aacb360&acdnat=1487781640_809fe9854ce1bd7d48ea1a814787668d)
14. Other uses for plastic bags used to dispute their one time use can be found at <http://www.bagtheban.com/learn-the-facts>
15. See University of Oregon College of Arts and Sciences, "Paper or Plastic? The Answer Might Surprise You"; Fall 2012 for the complete interview summary <https://cascade.uoregon.edu/fall2012/expert/expert-article/>
16. See <https://www.epa.gov/smm/advancing-sustainable-materials-management-facts-and-figures>
17. U.S. Energy Information Administration article, "How much oil is used to make plastics?" (April 2016) <https://www.eia.gov/tools/faqs/faq.cfm?id=34&t=6>
18. Natural gas is used for process heat in the production of precursor chemicals and plastics and as a feedstock for those precursor chemicals. Petrochemical feedstock naphtha and other oils refined from crude oil are used as feedstock for petrochemical crackers that produce the basic building blocks for making plastics. However, the primary feedstock for U.S. petrochemical crackers are hydrocarbon gas liquids (HGL), of which 82% were byproducts of natural gas processing in 2014. The remaining 18% of the HGL were produced by U.S. refineries and contain both alkanes and olefins. Alkanes can be used as feedstock for petrochemical crackers, whereas refinery olefins, primarily propylene but also minor quantities of ethylene and butylenes, can be used as direct inputs into plastics manufacturing.
19. U.S. Energy Information Administration, "How much oil is used to make plastics?"; April 2016

20. See <http://scribol.com/environment/waste-and-recycling/the-north-pacific-gyre-100-million-tons-of-garbage-and-growing/>
21. (February 2011) <http://www.bagtheban.com/learn-the-facts/environment>
22. U.K. Environmental Agency, "Life Cycle Assessment of Supermarket Carrier Bags", February 2011.
23. U.K. Environmental Agency, "Life Cycle Assessment of Supermarket Carrier Bags", February 2011.
24. University of Oregon College of Arts and Sciences, "Paper or Plastic? The Answer Might Surprise You", Fall 2012.
25. Environmental Protection Agency, "Advancing Sustainable Materials Management: Facts and Figures", April 2016.
26. The Scottish Government, "Proposed Plastic Bag Levy - Extended Impact Assessment"; August 2005 and The Advertiser, "Bin line sales double nation average after plastic bag ban", August 2011.
27. The Washington Post, "Tax data cast doubt on claims about declining use of plastic bags in D.C."; January 2014 ([https://www.washingtonpost.com/local/dc-politics/tax-data-cast-doubt-on-claims-about-declining-use-of-plastic-bags-in-dc/2014/01/09/7b8c2302-7870-11e3-b1c5-739e63e9c9a7\\_story.html?utm\\_term=.f8d285ac3e0e](https://www.washingtonpost.com/local/dc-politics/tax-data-cast-doubt-on-claims-about-declining-use-of-plastic-bags-in-dc/2014/01/09/7b8c2302-7870-11e3-b1c5-739e63e9c9a7_story.html?utm_term=.f8d285ac3e0e))
28. See <http://ddoe.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/DDOE%202013%20Bag%20Law%20Survey%20Final%20Report%20%282%29.pdf>
29. Specifics cited include: (1) A public education campaign to educate residents, businesses, and tourists about the impact of trash on the District's environmental health; (2) Providing reusable carryout bags to District residents, with priority distribution to seniors and low-income residents; (3) Purchasing and installing equipment, such as storm drain screens and trash traps, designed to minimize trash pollution that enters waterways; (4) Creating youth-oriented water resource and water pollution educational campaigns for students at the District public and charter schools; (5) Monitoring and recording pollution indices; (6) Preserving or enhancing water quality and fishery or wildlife habitat; (7) Promoting conservation programs, including programs for wildlife and endangered species; (8) Purchasing and installing signs and equipment designed to minimize trash pollution; (9) Restoring and enhancing wetlands and green infrastructure; (10) Funding community clean-up events and other activities that reduce trash; (11) Funding a circuit rider program with neighboring jurisdictions to focus river and tributary clean-up efforts upstream; (12)

Supporting vocational and job training experiences in environmental and sustainable professions; (13) Maintaining a public website that educates District residents on the progress of clean-up efforts; and (14) Paying for the administration of this program.

30. The Washington Post, "Is D.C.'s 5-cent fee for plastic bags actually serving its purpose?"; May 2015 ([https://www.washingtonpost.com/investigations/nickel-by-nickel-is-the-dc-bag-fee-actually-saving-the-anacostia-river/2015/05/09/d63868d2-8a18-11e4-8ff4-fb93129c9c8b\\_story.html?utm\\_term=.13a05c1c101b](https://www.washingtonpost.com/investigations/nickel-by-nickel-is-the-dc-bag-fee-actually-saving-the-anacostia-river/2015/05/09/d63868d2-8a18-11e4-8ff4-fb93129c9c8b_story.html?utm_term=.13a05c1c101b))
31. Environmental Protection Agency, "Advancing Sustainable Materials Management: Facts and Figures 2013"; June 2015.
32. Environmental Resources Planning, LLC, "ER Planning PR Bags Report Brief – 2015 Litter Survey Rankings"; 2015.
33. The Washington Post, "Tax data cast doubt on claims about declining use of plastic bags in D.C."; January 2014 and The Washington Post, "Is D.C.'s 5-cent fee for plastic bags actually serving its purpose?"; May 2015.
34. See <http://www.bagtheban.com/learn-the-facts/environment#sthash.IklzCh7H.dpuf>
35. The Scottish Government, "Proposed Plastic Bag Levy - Extended Impact Assessment"; August 2005 and The Advertiser, "Bin line sales double nation average after plastic bag ban"; August 2011 (<http://www.adelaidenow.com.au/news/bin-line-sales-double-nation-average-after-plastic-bag-ban/news-story/5110eb1ecbe8e10e3e18d16e11545940>)
36. See April 23, 2013 Congressional Record—Extensions of Remarks E511.
37. LA Times August 2, 2006 "Altered Oceans Part Four: Plague of Plastic Chokes the Seas by Kenneth R. Weiss <http://www.latimes.com/world/la-me-ocean2aug02-story.html>
38. As reported in the Washington Post. See [https://www.washingtonpost.com/news/energy-environment/wp/2016/12/30/yes-this-is-real-michigan-just-banned-banning-plastic-bags/?utm\\_term=.4dbd7e9809dc](https://www.washingtonpost.com/news/energy-environment/wp/2016/12/30/yes-this-is-real-michigan-just-banned-banning-plastic-bags/?utm_term=.4dbd7e9809dc)
39. [SB 103 http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=85R&Bill=SB103](http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=85R&Bill=SB103)

## Appendix: Recycling Programs and Requirements by State

**Table A1: Enacted Plastic Bag State Legislation**

State	Citation	Status	Summary
Arizona	2015 Ariz. Sess. Laws, Chap. 271 ( <a href="#">2015 SB 1241</a> )	*Enacted	Prevents a city, town or county from regulating the sale, use or disposition of plastic bags and other “auxiliary containers” by an owner, operator or tenant of a business, commercial building or multifamily housing property. The law does not prevent a city, town or county from continuing a voluntary recycling and waste reduction program.
California	<a href="#">2014 SB 270</a>	Put to Referendum	As of July 1, 2015 certain large stores are prohibited from providing a single-use plastic carryout bag to a customer, unless the retailer makes that bag available for \$0.10 and certain conditions are met.
California	<a href="#">2011 CA S 567</a>	Enacted	Prohibits the sale of plastic products labeled as compostable, home compostable, or marine degradable unless it meets standard specifications. Provides for a civil penalty for a violation.
California	Cal. [Public Resources] Code § 42357.5 ( <a href="#">2010 SB 228</a> )	Enacted	Requires manufacturers of compostable plastic bags to ensure that the bag is readily and easily identifiable from other bags. Prohibits a compostable plastic bag sold in the state from displaying a chasing arrow resin identification code or recycling symbol in any form.
California	<a href="#">2006 AB 2449</a>	Enacted	Retail stores must adopt an at-store recycling program. Plastic bags used at retailers must have clearly printed “Please Return to a Participating Store for Recycling” on the bag.
Delaware	<a href="#">2009 HB 15</a> ; Amended by <a href="#">2014 HB 198</a>	Enacted	Encourages the use of reusable bags by consumers and retailers. Requires a store to establish an at-store recycling program that provides an opportunity for customers of the store to return plastic bags and requires all plastic carryout bags to display a recycling message.
District of Columbia	<a href="#">2010 B 150</a>	Enacted	Protects the aquatic and environmental assets of the District of Columbia, bans the use of disposable non-recyclable plastic carryout bags, establishes a fee on all other disposable carryout bags provided by certain retail stores, and establishes the recurring Anacostia River Cleanup and Protection Fund.
Idaho*	<a href="#">2016 HB 372</a>	*Enacted	States that any regulation regarding the use, disposition or sale of plastic bags or other “auxiliary

			containers” shall be imposed only by a statute enacted by the legislature.
<b>Illinois</b>	<a href="#">2016 HR 1139</a>	Adopted	Establishes “Recycle Thin Film Friday” in the State of Illinois as an effort to reclaim used thin-film plastic bags and to encourage consumers to use reusable bags.
<b>Maine</b>	2010 SB 131	Enacted	Convenes a work group, through a partnership with state agencies and other appropriate entities, to work towards a viable solution to the checkout bag issue to achieve environmental benefits, maintain financial viability for manufacturers and retailers and avoid cost impacts, provides for a report to the legislature.
<b>Maine</b>	<a href="#">1991 LD 1166</a>	Enacted	Retailers may only provide customers with plastic bags if there is a receptacle to collect used plastic bags within 20 feet of the entrance and all plastic bags collected are then recycled.
<b>Missouri</b>	<a href="#">2015 HB 722</a>	*Enacted	Provides all merchants doing business in the state with the option to provide either paper or plastic bags. Prevents localities from imposing a ban, fee, or tax upon the use of either paper or plastic bags.
<b>New York</b>	<a href="#">2008 AB 11725</a>	Enacted	Plastic Bag Reduction, Reuse and Recycling Act; retailers of stores are to establish in-store recycling programs that provide an opportunity for the customer to return clean plastic bags to be recycled. The plastic carryout bags provided by the store must have printed on them “Please Return to a Participating Store for Recycling.”
<b>North Carolina</b>	<a href="#">2010 SB 1018</a>	Enacted	Reduces plastic and non-recycled paper bag use on North Carolina’s Outer Banks. A retailer subject to certain provisions shall display a sign in a location viewable by customers saying “[county name] County discourages the use of single-use plastic and paper bags to protect our environment from excess litter and greenhouse gases. We would appreciate our customers using reusable bags, but if you are not able to, a 100% recycled paper bag will be furnished for your use.”
<b>Rhode Island</b>	<a href="#">2008 SB 2565</a>	Enacted	This legislation promotes the use of paper bags by retailers. Retail establishments must offer the use of a paper bags to the consumer. Every retail establishment that provides customers with plastic bags must provide conveniently located receptacles where customers can return their clean and dry

			plastic bags to be recycled. Failure to comply with these laws is punishable with fines up to \$500.
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\*(Pre-emption bills denoted with \*)

**Table A2: 2015-2016 Pending State Legislation Summaries**

State	Bill Number	Status	Summary
Delaware	<a href="#">HB 202</a>	Pending – Carryover	Requires stores to charge five cents for every single-use carryout bag that is provided to customers. Establishes reporting requirements to track fees that are charged and distribution of bags. Expands existing at-store recycling program.
Hawaii	<a href="#">HB 1507</a>	Pending – Carryover	Convenes a working group to study methods of reducing use of single-use plastic bags and non-recyclable paper bags. Though all of Hawaii’s counties have enacted bag bans, differences exist between them.
Illinois	<a href="#">SB 2224</a>	Pending	Creates the Plastic Bag and Film Recycling Act. Requires manufacturers of plastic carryout bags to register with the Illinois Environmental Protection Agency and pay to the Agency an initial registration fee and annual registration renewal fee.
Illinois	<a href="#">HB 4202</a>	Pending – Carryover	Creates the Plastic Bag and Film Recycling Act. Requires manufacturers of plastic carryout bags to register with the Illinois Environmental Protection Agency and pay to the Agency an initial registration fee and annual registration renewal fee. (similar legislation to IL <a href="#">SB 2224</a> )
Massachusetts	<a href="#">HB 4168</a>	Pending	Beginning Aug. 1, 2018 stores may no longer provide single-use carryout bags to customers at point of sale. Reusable bags, recycled paper bags and compostable plastic bags may be sold for a minimum of 10 cents each.
Massachusetts	<a href="#">HB 739</a>	Pending – Carryover	Prohibits retail stores from distributing plastic carryout bags at the point of sale. Retailers who provide carryout bags must use recycled paper bags.
Massachusetts	<a href="#">HB 1501</a>	Pending – Study Order	Requires every store to pay to the Commissioner of Revenue an excise of two cents per plastic bag provided to customers during the tax year—50 percent returned to store; 50 percent retained by the Commonwealth.
Massachusetts	<a href="#">SB 434</a>	Pending – Carryover	Requires the Department of Environmental Protection to promulgate regulations to prohibit the use of plastic carryout bags by 2019.
Massachusetts	<a href="#">SB 2286</a>	Pending	Prohibits a vendor at a farmers market from providing a single-use carryout bag to a customer. Makes exceptions

			for bags without handles provided to protect items from damage, contamination or to contain an unwrapped food item.
<b>Massachusetts</b>	<a href="#">SB 2305</a>	Pending	Refers to the “Plastic Bag Reduction Act”, which states that no store shall provide a single-use carryout bag to a customer at the point of sale.
<b>New Jersey</b>	<a href="#">AB 2396</a>	Pending	Provides for the decrease and eventual ban on use of non-compostable plastic grocery bags.
<b>New Jersey</b>	<a href="#">AB 3671</a> / <a href="#">SB 2349</a>	Pending	Beginning June 1, 2017, store operators must charge a five-cent fee for each single-use carryout bag provided to the customer. Exemptions: customers 65 years of age or older and individuals enrolled in SNAP, WIC or the Work First New Jersey program. Dedicates revenue from the fee to the Health Schools and Community Lead Abatement Fund.
<b>New York</b>	<a href="#">AB 1991</a> / <a href="#">SB 703</a>	Pending – Carryover	Creates the “Pennies for Park” program to provide funds for capital expenditures at state parks and historic sites. Imposes a one cent fee on single-use plastic carryout bags.
<b>New York</b>	<a href="#">AB 3636</a> / <a href="#">SB 4536</a>	Pending – Carryover	Prohibits grocery stores from providing plastic carryout bags requiring them to provide recyclable paper bags instead at no charge.
<b>New York</b>	<a href="#">SB 3098</a>	Pending – Carryover	Requires stores to charge five cents for each plastic bag provided to customers.
<b>New York</b>	<a href="#">SB 3329</a>	Pending – Carryover	Increases number of stores subject to the Plastic Bag Reduction, Reuse and Recycling Act.
<b>New York</b>	<a href="#">AB 5954</a>	Pending – Carryover	Requires greater number of stores in New York City to provide a recycling bin for plastic bags. Grants co-enforcement authority to the city over certain provisions of the law.
<b>New York</b>	<a href="#">SB 7336</a> / <a href="#">AB 9904</a>	*Pending	Prohibits the imposition and/or collection of any tax, fee or local charge on carry out merchandise bags.
<b>New York</b>	<a href="#">SB 7085</a>	Pending	Improves access to plastic bag collection bins by moving the bin to the entrance of the store. Requires a sign be placed above the bin to clarify that many other types of plastic bags can be recycled at these locations and that the bin must be emptied regularly. (similar to <a href="#">AB 10368</a> )
<b>New York</b>	<a href="#">AB 10368</a>	Pending	Relates to certain recycling program requirements; requires regular emptying of the bins; requires that information already collected by retailers regarding recycled plastic is transmitted to the Department of Environmental Conservation; requires stores to maintain

			records of recycling of plastic bags and make such records available.
<b>New York</b>	<a href="#">AB 8479</a>	Pending	Declares that there shall be a tax of five cents upon plastic and paper shopping bags used to transport every sale of tangible personal property by consumers.
<b>Pennsylvania</b>	<a href="#">SB 540 / HB 1431</a>	Pending – Carryover	Imposes a two-cent fee on each plastic bag supplied by retail establishment. A portion of the collected fees will be used for the improvement of recycling practices, education and compliance.
<b>Pennsylvania</b>	<a href="#">HB 1280</a>	*Pending – Carryover	Prohibits the imposition of a ban, fee, or tax on the provisions of plastic bags at the point of sale.
<b>Pennsylvania</b>	<a href="#">HB 1281</a>	Pending – Carryover	Establishes the Plastic Bag Recycling Advisory Board. Provides for a study and report.
<b>Rhode Island</b>	<a href="#">SB 2527</a>	Pending	Prohibits retail sales establishments from making available plastic checkout bags, or plastic water bottles or expanded polystyrene disposable food containers at the point of sale.

Source: <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx>

## ***The Search and Seizure Implications for Motor Vehicle ‘Stops’ Due to the Decriminalization of Marijuana: Will probable cause be going up in smoke?***

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Marijuana law reform is going on practically throughout the country. According to the National Conference of State Legislatures, as of April 2017, twenty-nine states have either decriminalized the manufacture, sale, and possession of marijuana for *medical* purposes, or legalized it in small quantities.<sup>1</sup> In seven, first-time possession of a small amount of marijuana for recreational use is punishable only by a fine.<sup>2</sup> At the federal level, on the other hand, marijuana remains classified as a Schedule I substance.<sup>3</sup> This article examines the ‘search’ and ‘seizure’ implications of these law changes, with a specific focus on the ‘probable cause’ requirement for law enforcement investigatory activity when making a motor vehicle stop.

### **Decriminalization v. Legalization.**

As a preface, it is important to weigh the differences of these terms in both the legislative and judicial context. Ultimately, as this article details, the semantics may, for ‘probable cause’ determinations, become quite important. Over the past few decades, states have been evolving their positions on marijuana, including decriminalization initiatives, legal exceptions for medical uses, and the legalization of certain quantities for recreational use. As a beginning point though, it is useful to understand that marijuana *decriminalization* differs markedly from *legalization*.

#### **A. Decriminalization.**

Essentially, ‘decriminalization’ means that a state has repealed, or amended, its law to remove *criminal* penalties so individuals would not be subject to prosecution, having a criminal record or receiving a jail sentence. Infractions are punishable by a ‘civil’ fine only.<sup>4</sup> For instance, if a state decriminalizes the possession of marijuana in small amounts, possession of marijuana within the specified *small* amount would be still violate state law; however, it would constitute a ‘civil’ offense and subject the individual to a civil penalty, not criminal prosecution. By decriminalizing possession of marijuana in small amounts, states are *not* legalizing *possession*.

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<sup>1</sup> See <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>2</sup> In these jurisdictions, first-time possession of a small amount of marijuana is punishable only by a fine and/or participation in an examination, drug education, or drug treatment: Seven states have legalized possession of a small amount. (Alaska, CA, Colorado, Maine, Massachusetts, Nevada, Oregon and Washington and D.C.).

<sup>3</sup> Possession of marijuana in any amount remains a federal offense. See Title 21, U.S.C. Section 844(a). In October of 2009, the Obama administration sent a letter to federal prosecutors encouraging them not to prosecute people who distribute marijuana for medical purposes in accordance with state law. See “Justice Department Update to Marijuana Enforcement Policy” dated August 29<sup>th</sup>, 2013. Any probable cause determination in a federal case would be unaffected by state marijuana initiatives and case law discussed in this article.

<sup>4</sup> In Massachusetts as an example, a person in possession of an ounce or less of marijuana is subject to a civil penalty of \$100. See, e.g., MGL, Chapter 94C, Section 32L and Chapter 40, Section 21D.

### B. Medical Marijuana.

In 1996, California became the first state to amend its drug laws to allow for the medicinal use of marijuana. California has since legalized possession. And now, over half of the states, and the District of Columbia, allow for the medicinal use of marijuana. Typically, qualified users of medical marijuana are exempted from state prosecution.

### C. Legalization.

Colorado and Washington are two examples of states which have voted to legalize, regulate, and tax small amounts of marijuana for *recreational* use. This has been followed by legalization initiatives in Alaska, Oregon, and the District of Columbia. These recreational initiatives all *legalize* the possession of specific quantities of marijuana by individuals 21 years or over. Some, like Colorado, Alaska, Oregon, and the District of Columbia allow for private citizen cultivation. Also, several specify that the operation of a motor vehicle while under the influence of marijuana remains a crime.<sup>5</sup> Others, like Colorado, allow any individual over 21 to grow small amounts of marijuana for personal use, but specifies that marijuana may not be consumed ‘openly or publicly or in a manner that endangers others.’<sup>6</sup> But importantly in any ‘probable cause’ determination, in these states possession as authorized, is *neither* a criminal or civil violation.

### D. Summary.

Within each context, it is necessary and informative, if not controlling, that each state’s law be examined for the specific uses allowed and conditions thereof, and penalties provided, especially for subsequent violations. The determination of ‘probable cause’ in any given instance may very well ultimately hinge on the specific state’s laws, wording and legislative intent as the following analysis will demonstrate.

#### **Probable Cause in a Motor Vehicle Context.**

It is firmly established that a police officer has probable cause to conduct a search when ‘the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.’<sup>7</sup> The Supreme Court has ruled that a “practical, non-technical probability that incriminating evidence is involved is all that is required.”<sup>8</sup> Probable cause is a totality of the circumstances decision and exists when a reasonably prudent person is justified in finding a fair probability that evidence of criminal conduct will be found.<sup>9</sup> For several decades now, the smell, or sight, of marijuana *alone* has been held to be adequate probable cause to search a vehicle.<sup>10</sup>

It has been widely recognized that, provided the original stop is legitimate, the smell of pot coming from a vehicle would typically provide probable cause to justify, under the *Carroll*

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<sup>5</sup> See Washington Initiative 502, [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf).

<sup>6</sup> See Colorado Amendment 64, Colo. Const. art. XVIII, Section 16, cl. 3.

<sup>7</sup> *Texas v. Brown*, 460 U.S. 730, 742, (1983) (plurality opinion) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925).

<sup>8</sup> *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

<sup>9</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>10</sup> *United States v. Johns*, 469 U.S. 478, 482 (1985).

doctrine<sup>11</sup>, a search of the *entire* vehicle, including all packages and containers inside the vehicle so long as those packages and containers would be capable of concealing contraband.<sup>12</sup> However, within the context of the automobile exception, some courts have now ruled that, due to their state's decriminalization initiative, the odor of burnt marijuana alone now does not give rise to probable cause to search a vehicle. At this time, these jurisdictions are in the minority.

#### A. No Probable Cause

For example, in *Commonwealth v. Cruz*<sup>13</sup>, on June 24<sup>th</sup>, 2009, Officers Christopher Morgan and Richard Diaz were in the Hyde Square neighborhood of the Jamaica Plain section of Boston. Patrolling in plain clothes in an unmarked Ford Crown Victoria automobile, the officers saw a vehicle parked in front of a fire hydrant. The vehicle's windows were rolled down and it was light outside. Inside, the officers could see a driver, and the defendant who was sitting in the front passenger seat. As the officers drove down the street, Officer Diaz saw the driver light a small, inexpensive cigar that is commonly known to mask the odor of marijuana smoke. Both officers recognized the defendant as a neighborhood resident.

Pulling up next to the car, Officer Morgan asked the driver to explain why he was parked in front of the fire hydrant. The driver replied that he was waiting for his uncle who lived in a house nearby. While the officers were stopped next to the car, Officer Morgan saw the defendant smoking the cigar. At this point, both officers got out of their unmarked cruiser and walked toward the car. Officer Morgan approached the driver's side and Officer Diaz went to the passenger side. From the driver's side, Officer Morgan could smell a 'faint odor' of burnt marijuana. Officer Morgan noticed the driver was 'very nervous', had trouble breathing' and 'it almost looked like he was panicking'. When asked whether he had been smoking marijuana, the driver replied that he had smoked "earlier in the day'. Morgan asked the driver if there was anything inside the car that the officers 'should know about'. The driver responded, 'No.'

Meanwhile, Officer Diaz also saw that the defendant appeared 'nervous' and made little eye contact with Diaz, choosing to look straight ahead or down. Neither officer saw any contraband or weapons within plain view in the car. There was no evidence that either driver made furtive gestures or threatening movements. The officers did not ask for his license and registration. Neither officer conducted any field sobriety tests to determine if the driver was presently under the influence of marijuana. Instead, the officers called for backup, and four additional officers arrived, and 'based on the odor of marijuana and just the way they were acting,' both the driver and the passenger were ordered out of the car.

As the defendant stepped out of the car, Diaz asked him if he had 'anything on his person.' In the presence of the six police officers, the defendant told Diaz he had 'a little rock for myself' in

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<sup>11</sup> Generally, for a search of an automobile a law enforcement officer must obtain a warrant. See *Riley v. California*, 134 S.Ct. 2473, 2482 ( 2014 ). One exception to the warrant requirement is the 'automobile exception', under which a law enforcement officer may conduct a warrantless search of a vehicle base on probable cause. See *California v. Acevedo*, 500 U.S. 565, 569 ( 1991 ). The automobile exception originates from the case of *Carroll v. United States*, 267 U.S. 132 ( 1925 ).

<sup>12</sup> *See generally*, *Wyoming v. Houghton*, 526 U.S. 295 (1999) and *United States v. Ross*, 456 U.S. 798 (1982).

<sup>13</sup> *Commonwealth c. Cruz*, 459 Mass. 459,472, 475-476 (2011). In 2008, because of an initiative petition adopted by the voters, possession of one ounce or less of marijuana changed from being a criminal to a civil offense in the Commonwealth. *See* G. L. c. 94C, §§ 32L-32N.

his pocket. Diaz reached into the defendant's pocket and retrieved the item, which Diaz estimated to be four grams of crack cocaine. The lower court had concluded, in granting the Defendant's motion to suppress, that the police had permissibly approached the car because it was parked in front of a fire hydrant, a civil traffic violation. The court found, however, that since the stop was made in daylight, and the defendant made no furtive or threatening movement, and the defendant was known to the officers, the officers should not have ordered the defendant out of the car based on the odor of burnt marijuana *alone*. The court reasoned that since the decriminalization by the Legislature of possession of one ounce or less of marijuana, coupled with the driver's statement that he had been 'smoking earlier in the day', suggested that any marijuana that remained would be **less** than one ounce. Finally, it found that 'there was no probable cause to believe that the defendant or the driver were committing any criminal offense. Therefore, the court ruled the officers were not justified in ordering the defendant out of the car and granted the motion to suppress.

The state appealed the order to the Massachusetts Judicial Supreme Court. It argued the odor of burnt marijuana may still provide the police with probable cause or, at least, *reasonable suspicion*, that a crime is occurring justifying the vehicle exit order by the police. It contended the stop's location, a high crime neighborhood; the defendant's nervous demeanor; and the occupant's sharing of a cigar were facts which, when coupled with the odor of burnt marijuana, created the suspicion of criminal activity justifying the exit order.

The court disagreed. It stressed the defendant lived on the very street on which the encounter occurred and was known to one of the officers. Further, the defendant's nervous demeanor was not a sufficient factor on which to base suspicion of criminal activity. And, most importantly, the court found that there were no articulable facts to support a reasonable suspicion that the defendant possessed more than one ounce of marijuana. The court held the exit order was unsupportable based on 'reasonable suspicion' as required for a lawful *Terry* stop, or investigative detention.<sup>14</sup>

Finally, the court addressed the important issue of whether despite the lack of any basis for the exit order the officers had probable cause to conduct a warrantless search of the vehicle under the 'automobile exception' <sup>15</sup> Here, the Commonwealth's argument was that, if the police have probable cause to believe that contraband, i.e., *any* amount of marijuana, is in a vehicle, the police may validly conduct a warrantless search.

The Massachusetts Supreme Judicial Court, however, was not persuaded by this reasoning. It determined there were no facts to support probable cause to believe that a *criminal* amount of contraband was present in the car. The court stated the same standard for the issuance of a search warrant to search a car should apply. It found that standard could not be met and, therefore, it was unreasonable for the police to order the defendant out of the car to facilitate the warrantless search.

### 1) A 'Burnt' v. 'Unburnt' Analysis

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<sup>14</sup> *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968 ). Under *Terry*, the police must be able to point to 'specific' and 'articulable' facts that give rise to the reasonable suspicion of criminal activity. When properly applied, it permits officers to interdict crimes as they are occurring or about to be committed.

<sup>15</sup> *Carroll v. United States*, 267 U.S. 132 (1925 ). Under the automobile exception, a warrantless search of an automobile is permitted when police have 'probable cause to believe that a motor vehicle on a public way contains contraband or evidence of a crime.

Also in Massachusetts, the *Cruz* decision has subsequently been applied in a 2014 case.<sup>16</sup> In this case, law enforcement officers responded to a vehicle collision in which the defendant's vehicle had rear-ended another vehicle. One of the officers noticed a strong odor of *fresh* marijuana near the defendant's vehicle. The defendant was asked whether his vehicle contained marijuana. He replied in the affirmative and provided the officers with the key to the glove compartment. Inside, the officers found a bag of marijuana (search # 1). After removing the bag of marijuana, the officers continued to detect a strong odor of marijuana in the car. When questioned again, the defendant admitted that his vehicle contained more marijuana. Next, the officers began a search of the car ( search # 2 ). They found a backpack in the backseat containing more marijuana.

The trial court denied his motion to suppress the bag found in the glove compartment. However, it granted the motion as to the marijuana found in the backpack.<sup>17</sup> The State appealed and, while the case was pending in the intermediate appellate court, the Supreme Judicial Court of Massachusetts transferred the case on its own order. The Court vacated the trial court's granting of the motion to suppress and remanded with instructions to determine whether there was probable cause to *arrest* the defendant *after* they seized the marijuana in the glove compartment. The Court cited its earlier decision in *Cruz* where it held the odor of *burnt* marijuana *alone* did not suggest criminal activity.

The Court stated that, although the strength of the odor of burnt marijuana might correlate to the amount of marijuana more closely than the odor of fresh marijuana, it did not follow that a strong odor of fresh marijuana indicated a *criminal* amount establishing probable cause. It noted that the record contained no evidence that the officers had undergone specialized training that would allow them to discern, by odor, not only the *presence* and *identity* of a controlled drug, but also its *weight*.<sup>18</sup> The Court stated:

“In sum, we are not confident, at least on this record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine. In the absence of reliability, a neutral magistrate would not issue a search warrant and, therefore, a warrantless search is not justified based solely on the smell of marijuana, whether burnt or unburnt.”<sup>19</sup>

#### *B. Probable Cause Exists.*

In contrast, there are several courts which have held that, despite the decriminalization of marijuana in small amounts for personal use, when an officer has probable cause to believe a

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<sup>16</sup> Commonwealth v. Overmeyer, 11 N.E. 3d 1054 ( Mass. 2104 ).

<sup>17</sup> *Id.* at 1057.

<sup>18</sup> *Id.* at 1059.

<sup>19</sup> Courts in Maine, Oregon, California, Minnesota and Colorado have reached this conclusion. See State v. Barclay, 398 A.2d 795 ( Me. 1979 ); State v. Smalley, 225 P. 3d 844 ( Or. App. 2010 ); People v. Waxler, 224 Val. App. 4<sup>th</sup> 712 ( 2014 ), as modified on denial of reh'g ( Apr. 3, 2014, review denied ( June 11, 2014 ); State v. Ortega, 749 N.W. 2d 851 ( Minn. Ct. App. 2008), aff'd, 770 N.W. 145 ( Minn. 2009 ); People v. Zuniga, 372 P. 3d 1052 ( Colo. 2016 )

validly stopped automobile contains *any* quantity of marijuana, a warrantless search is justified based on the *likely* presence of contraband.<sup>20</sup>

A good illustration of the majority view of the issue is *Robinson v. Maryland*.<sup>21</sup> This case is a consolidated set of appeals where defendants challenged warrantless searches of their vehicles by officers who based probable cause *only* on a strong ‘odor’ of marijuana. As of October 1<sup>st</sup>, 2014, under Maryland law, possession of less than ten grams of marijuana became a ‘civil offense’ that is punishable by a fine.<sup>22</sup>

Distilled succinctly, the defendants argued that *Carroll v. United States* is not determinative because possession of less than ten grams of marijuana was no longer a *criminal* offense as a result of Maryland’s decriminalization changes and the fact that the *odor* of marijuana indicates only its presence, not its amount. Central to the argument posited was the premise that law enforcement officers cannot conduct warrantless searches for *civil* offenses.

The State, on the other hand, contended that the decriminalization of possession of less than ten grams of marijuana does not affect existing case law which permits a warrantless search of a vehicle based on the odor of marijuana. It argued that the Carroll doctrine permits these warrantless searches, regardless of whether the offense is ‘criminal or ‘civil’ because, despite decriminalization, marijuana remains contraband which is subject to *seizure*.

In its opinion, the court reiterated the standard of probable cause:

“Probable cause exists where, based on the available facts, a person of reasonable caution would believe ‘that **contraband or evidence of a crime**’ is present.”<sup>23</sup>

The court then examined an earlier Maryland case in which the Maryland Court of Appeals concluded that the decriminalization of possession of less than ten grams of marijuana did not alter the status of marijuana as contraband in Maryland.<sup>24</sup> It also cited the four other jurisdictions which have addressed the issue similarly.

For instance, the Supreme Judicial Court of Maine has held, that despite a statute that made possession of a small amount of marijuana a ‘civil violation’. marijuana remained contraband subject to seizure.<sup>25</sup> In *Barclay*, a law enforcement officer stopped a vehicle that the defendant was driving because the vehicle’s exhaust system appeared to be faulty. While at the driver’s side of the vehicle, the law enforcement officer smelled marijuana smoke. He searched the vehicle and found two pipes and several marijuana cigarette butts, which were tested and found to contain marijuana. The defendant moved to suppress the marijuana, contending that the search was unlawful because the Fourth Amendment does not permit a search for evidence of a *civil* violation.

The court held that the police officer had probable cause to believe that the vehicle in question contained marijuana. Key to the court’s rationale was the determination that a law enforcement officer may search for goods whose possession is punishable only by a civil violation, as those items can be the subject of a *search warrant* under Maine statutes. Thus, it held that,

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<sup>20</sup> See *State v. Smalley*, 233 Or. App. 263, 265, 270-271 ( 2010 ).

<sup>21</sup> See *Robinson v. Maryland*, 152 A. 3d 661 ( 2017 ).

<sup>22</sup> See Md. Code Ann., Section 601©(2).

<sup>23</sup> See *Florida v. Harris*, 133 s. Ct. 1050, 1055 ( 2013 ).

<sup>24</sup> *Supra* n. 22 at 664-65.

<sup>25</sup> *State v. Barclay* 398 A. 2d 794 ( 1979).

notwithstanding its new status under decriminalization, marijuana remains *contraband* and thus subject to search.

Oregon courts have reached a similar result. In *State v. Smalley*<sup>26</sup>, a police officer stopped a vehicle in which the defendant was a passenger. The driver consented to a search of the vehicle. The officer noticed an odor of marijuana coming from a backpack behind the driver's seat. He searched the backpack and discovered marijuana. The passenger then admitted the backpack belonged to him. In a motion to suppress, the defendant argued that a police officer cannot search for marijuana without probable cause to believe that there is a criminal amount of marijuana present. The trial court granted his motion to suppress.

On appeal, the court concluded the police had probable cause to believe that the backpack contained "at least some amount of contraband" based on the officer's testimony concerning the odor of marijuana emanating from the backpack.<sup>27</sup> The Court rejected the argument put forth by the defendant stating:

"probable cause to believe that a lawfully stopped automobile which was mobile at the time of the stop contains contraband or crime evidence justifies an immediate warrantless search of the entire automobile for the object of the search..."<sup>28</sup>

The Court concluded that the terms "*contraband or crime evidence*" are not identical. It reasoned the word "contraband" includes anything that is 'illegal' to possess, including marijuana in any amount. And, therefore, police may search for goods that encompass that definition, even if the goods did not constitute evidence of a crime.<sup>29</sup>

In a recent Minnesota case<sup>30</sup>, a police officer stopped a vehicle in which the defendant was a passenger. The officer noticed an odor of burnt marijuana coming from the vehicle's passenger compartment. The driver consented to a search of the vehicle and the officer asked the driver to exit. As the officer patted the defendant down, the defendant handed him a small amount of marijuana. As well, a narcotics dog was present and he alerted to the vehicle's center console and the seat where the defendant had been sitting. The police officer searched the vehicle's center console and found a rolled-up dollar bill with cocaine on it. He then searched the defendant more thoroughly and found a folded dollar bill also with cocaine on it.

The trial court denied his motion to suppress. On appeal, the Court of Appeals of Minnesota affirmed finding the officer had probable cause to search the vehicle based on the odor of marijuana.<sup>31</sup> It held that the police officer had probable cause to search the defendant after he handed over a non-criminal amount of marijuana because, whether detected by sight or smell, the *presence* of marijuana in *any* amount in one location indicates that there *may* be more in another location.<sup>32</sup>

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<sup>26</sup> 225 P. 3d 844 ( Or. Ct. App. 2010 )

<sup>27</sup> *Id.* at 847.

<sup>28</sup> *Id.* at 848.

<sup>29</sup> *Id.*

<sup>30</sup> *State v. Ortega*, 770 N.W. 2d 145 ( 2009 )

<sup>31</sup> *Id.* at 854.

<sup>32</sup> *Id.*

### Medical Marijuana Only States.

With respect to a probable cause determination, will it matter that it is a state, or jurisdiction, has passed *only* medical marijuana laws. The answer is ‘possibly’, if a recent decision out of New Jersey is any indication based on its analysis.<sup>33</sup> In 2010, New Jersey passed its ‘Compassionate Use Medical Marijuana Act’ ( CUMMA ).<sup>34</sup> The CUMMA law created a limited exception allowing possession of marijuana for medical use by qualifying patients who obtain the appropriate registry identification card.<sup>35</sup>

Sometime after 1:00 a.m. on January 7<sup>th</sup>, 2012, New Jersey State Police received a report of three gunshots near an intersection in Fairfield Township. Trooper Matthew Gore was dispatched and arrived two minutes later. Gore observed three parked cars near a residence where there was a party. Gore approached the only occupied car, containing three males, to ask about the reported gun shots. The defendant rolled down the driver’s window of the car. He denied seeing or hearing anyone fire a gun. Gore then asked the defendant if he had attended the party. Defendant replied he had just arrived to pick up his cousins but he had been at the residence only for a short time.

After conversing with the defendant for one or two minutes, Trooper Gore continued up the street to the residence and spoke to the young female holding the party. She said she heard three gunshots but was unclear who fired the shots. While walking back to his vehicle, Trooper Gore heard a woman a couple of houses away yelling at defendant’s vehicle which had pulled into her driveway. She was telling the defendant to get his car out of her driveway. Gore approached the defendant’s car to speak with him. As he did so, he detected the odor of burnt marijuana coming from the car. Gore asked the defendant and the other two males to exit the car. All three were arrested and searched. In the search incident to arrest, Gore found a small baggie of marijuana in an exterior pocket of defendant’s jacket, and a handgun in the interior pocket.

The defendant was charged with unlawful possession of a handgun and possession of marijuana. He moved to suppress both the gun and drugs. The trial court denied the motion. In his appeal, the defendant argued, as a result of CUMMA, marijuana was no longer ‘*per se* contraband’ and that the odor of marijuana was no different than an officer smelling alcohol emanating from the vehicle. Under a New Jersey ruling in 1999, the court had held that odor of alcohol on a driver’s breath was not sufficient probable cause to search the vehicle for open containers of alcohol without a warrant because the use of alcohol is not a *per se* violation of the law.<sup>36</sup>

The appeals court, however, distinguished ‘marijuana’ from ‘alcohol’. It observed that alcohol was a ‘lawful’ product, whereas ‘marijuana’ remained ‘*illegal*’ except in the instance of a registered, qualifying patient. It held that, absent evidence of the person suspected of possessing or using marijuana having a registry identification card, the detection of marijuana by a sense of smell provides an officer with the necessary probable cause to believe that the crime of *unlawful* possession has been committed.<sup>37</sup>

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<sup>33</sup> State v. Myers, 122 A. 3d 994 ( 2015 )

<sup>34</sup> N.J.S.A.. 24:61-1 to -16

<sup>35</sup> N.J.S.A.. 2C:35-18.

<sup>36</sup> See State v. Jones, 326 N.J. Super. 234, 241 ( App. Div. 1999 ).

<sup>37</sup> *Id.* at 244-45.

### **Odor of Marijuana in a SIA context under *Gant*.**

Under *Arizona v. Gant*, a ‘search incident to arrest’ of a person *into* a *vehicle* is now only permissible when the arrestee is (1) unsecured and within reaching distance of the passenger compartment at the time of the search, or (2) it is reasonable to believe that the vehicle contains evidence of the crime for which the person is arrested.<sup>38</sup> In these situations, officers can, under the prescribed circumstances, conduct a limited search (in terms of scope) into the passenger compartment of a vehicle.

While making an arrest, for instance of the driver who is ‘unsecured’ and within ‘reaching distance of the passenger compartment, what if the officer detects an odor of marijuana *in the vehicle* during the *Gant*- based search? It is very likely any probable cause determination to conduct a further, enlarged search of the vehicle, under the ‘automobile exception’ will depend on the particular analyses above. In other words, as long as lawful arrest has been made of a driver or an occupant (for example other than for marijuana possession related offense), and the *Gant* criteria are present and can be established, the elongation of the vehicle search based on the odor of marijuana would be no different in any jurisdiction. There would be a clear, separate judicial determination of the probable cause for the extended search based on how that jurisdiction interprets situations discussed herein. In other words, where the *Gant* search ends and the ‘automobile exception’ search began. Any analysis of the probable cause inquiry would follow the respective lines of reasoning, for that jurisdiction, discussed herein.

### **Canine Sniffs**

Lastly, the use of canines around vehicles is also pertinent to the issues already reviewed. Up until now, without the consent of a driver to search the vehicle, the police may develop probable cause using a drug sniffing dog as an investigative tactic. A police officer can circle a canine around the car while the citation is being issued, or stop being conducted.<sup>39</sup> If the dog ‘alerts’, this will give the police the probable cause to search the car.<sup>40</sup> But, in the absence of a driver’s consent, the police cannot ‘exceed’ a traffic stop in order to use the drug sniffing dog and search the vehicle following the dog’s alert.<sup>41</sup>

Whether the jurisdiction has decriminalized or legalized, the circling of a canine around a vehicle, during the stop, will remain constitutionally appropriate. This investigative step is not a Fourth Amendment search.<sup>42</sup> In jurisdictions that have changed their marijuana laws, the issue of whether the ‘alert’ constitutes probable cause will likely be no different from that of an officer who smells the odor. The probable cause analysis would be no different from any of the foregoing examples.

### **Conclusion.**

In jurisdictions that have either decriminalized, or legalized, what will be the most persuasive, judicial rationale for the probable cause determination in the motor vehicle context can be a ‘toss-up’ as we are seeing in some of the early decisions in this area. What is clear is that the

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<sup>38</sup> *Arizona v. Gant*, 556 U.S. 332, 343, 351 ( 2009 ).

<sup>39</sup> *Illinois v. Caballes*, 543 U.S. 405, 409 ( 2005 ).

<sup>40</sup> See *Florida v. Harris*, 133 S.Ct. 1050,1057 ( 2013 ).

<sup>41</sup> See, e.g., *Rodriguez v. United States*, 135 S.Ct. 1609, 1612 ( 2015 )

<sup>42</sup> See *Illinois v. Caballes*, supra at note 40.

beginning point will be an examination of the state's precise statutory language and legislative intent.

A strong argument for prosecutors might be that probable cause is established in such an instance because, whether in is a decriminalized or legalized state, the scent of marijuana gives an officer the basis to *confirm* compliance with the law's dictates, i.e., that the amount possibly in the vehicle is *less* than the legal amount. The only way to determine this would be to conduct a search of the vehicle. Since several courts have interpreted the marijuana law changes as still meaning remains 'contraband', the odor alone could mean that a *unlawful* amount is in the vehicle.

There has even been a privacy issue found by at least one court.<sup>43</sup> The concern cited is that, in a medical marijuana jurisdiction, these patients could become second-class citizens who lose their privacy if the scent of marijuana furnishes probable cause to search.

Ultimately, there are likely two key issues here that will be determinative as these cases move through other courts in the country. First, is how a court views the status of marijuana is likely to be very important. Typically, possessing any amount over the specified quantity is still a 'crime'. In any probable cause inquiry, the key analysis is whether a reasonably prudent person would think that a fair probability exists that the vehicle contains 'contraband' over the allowable quantity. This, of course, could depend on many factors. But, detection of an odor alone is likely to continue to provide law enforcement with the argument that a reasonable person would believe that there is a **fair** probability that the vehicle contains evidence of a crime or contraband. And reasoning so, most courts will continue to allow these motor vehicle searches as legitimate 'automobile' exceptions to the Fourth Amendment's warrant requirement, whether it is the officer, or his dog, that does the detection.

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<sup>43</sup> See *State v. Sisco*, 359 P.3d 1, 10 ( Ariz. Ct. App. 2015 ) ( vacated 373 P. 3d 549 ( Ariz. 2016 ) .

## ***Doing More with Less: Exploring Public Defenders' of Workplace Challenges***

The challenges of public defenders (PDs) are well documented, particularly those issues related to resource constraints and excessive caseloads, and the resulting morale and turnover issues. Other challenges are less well covered, including challenges related to defending solely indigent clients, mistreatment by court personnel, and an inability to decline cases. Additionally, little research has explored how public defenders perceive these challenges and the ways in which it impacts their work. Drawing upon semi-structured interviews, the current inquiry provides a qualitative assessment of frequently and less frequently covered challenges, and the ways it impacts the work of public defenders. Findings indicate that public defenders feel confident representing their clients in plea negotiations, but feel greater stress when cases go to trial. Public defenders are frustrated from interactions with clients, the public, and court officers. The current inquiry also finds that indigent clients present unique challenges due to intersections of poverty with unemployment, homelessness, and racial or ethnic background as it relates to treatment by the courts. Furthermore, public defenders report systemic organizational challenges to compliance with the American Bar Association (ABA) recommendation that they refuse to accept cases they feel unprepared to defend. Implications for future research and policy are discussed.

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The Sixth Amendment to the U.S. Constitution, written in 1789, guarantees the right to have the Assistance of Counsel for a citizen's legal defense. It was not until 1963 that the U.S. Supreme Court decision *Gideon v. Wainwright* extended the right to court appointed counsel beyond capital cases. The promise of *Gideon*, along with other decisions such as *Escobedo* and *In re Gault*, was the provision of effective counsel for those who cannot afford an attorney. The extension of counsel to less serious cases and additional stages in the criminal process led to expansion of *pro bono* counsel and public defenders' offices.

The required expansion for provision of court appointed counsel in criminal trials for indigent defendants led to a remarkable increase in *pro bono* counsel for the indigent through a variety of different models (Johnson, 2014).<sup>1</sup> The public defender model is likely the most familiar model to most Americans, as virtually every county with a population over 750,000 uses the public

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<sup>1</sup> The most commonly used models are assigned counsel, contract, and the public defender, although most jurisdictions use some hybrid of these models (Spangenberg and Beeman, 1995). As of 1986, about 37 percent of U.S. counties used the public defender model.

defender model (Spangenberg and Beeman, 1995). The workplace challenges of public defenders have only increased since *Gideon*, as the resources provided have not kept pace with the increased crime and incarceration rates from the 1960s to the present day. The expansion of demand has left public defenders' offices with inadequate resources, heavy caseloads, and diminished workplace morale.

While the issues with these systems have been noted, little research has inquired public defenders directly about the impact these challenges have on their work and morale. The reality is that public defender systems are woefully underfunded (Carmichael et al., 2015; Giovanni and Patel, 2013; Ogletree, 1995), have inadequate access to investigative resources, have excessively high caseloads (Carmichael et al., 2015; Leftstein, 2011; Ogletree, 1995), and suffer from morale issues (Leonetti, 2015; Ogletree, 1995). The existence of these challenges is documented, but the perceptions of how these issues impact the working lives of public defenders are less well researched.

In addition to these well covered challenges, other challenges have received scant research attention, including those related to interactions with impoverished clients and a workplace culture that prevents the refusal of accepting new cases even if the attorney knowingly cannot provide adequate representation. While the issues have been identified (Leonetti, 2015; Ogletree, 1995), they have not received systematic inquiry.

Drawing upon semi-structured interviews with public defenders from two Illinois counties, the current inquiry seeks to explore the ways public defenders perceive their work-related challenges. Public defenders were asked about excessive caseloads, treatment by other court personnel, community perceptions, and morale issues. Adding to these commonly identified challenges, respondents also discussed challenges related specifically to representing indigent clients, and the cultural and workplace barriers to refusing new cases.

### **Literature Review**

The Bill of Rights guarantees individuals the right to the assistance of counsel via the Sixth Amendment. It was not until the early 1960s that this Constitutional guarantee became a reality for most individuals who are accused of crimes, via the landmark US Supreme Court case *Gideon v. Wainwright*. *Gideon* provided the promise of legal counsel even to those who could not afford their own attorneys, when charged with a crime by the state. This ruling then led to a variety of systems to provide for indigent defense including private bar appointments and an exponential increase of assorted public defender programs (Johnson, 2014; Spangenberg and Beeman, 1995).

Upon the formation of these public defenders' offices, the challenges and pressures of offering legal assistance to all indigent criminal defendants became quite clear. Following the dramatic increase in arrests, convictions, and incarcerations from the 1970s to the mid-2000s, these challenges increased dramatically and became well documented (Johnson, 2014; Leonetti, 2015; Ogletree, 1995). The most commonly identified challenges are that public defenders lack resources, have extremely high caseloads, suffer from mistreatment by other court personnel, and have poor office culture and morale.

State public defenders' offices are notoriously underfunded and lack resources comparable to their prosecutorial counterparts. In 2007, the Bureau of Justice Statistics concluded that about \$2.3 billion was spent on indigent defense across the 50 states and District of Columbia (Langton and Farole, 2010), which equated to a little less than 40 percent of the 5.8 billion spent on

prosecution (Perry and Banks, 2012; See also Giovanni and Patel, 2013)<sup>2</sup>. The deficiency of resources can have a significant impact on the ability of public defenders to do their jobs. Public defenders who are underfunded lack the corresponding staff of investigators and paralegals that assist in the operations of prosecutors' cases, and even those of privately funded attorneys (Langton and Farole, 2010). Public defenders also then lack funding to provide for essentials (e.g., client and witness interviews, and compensation for expert witnesses) in the more complex cases (Ogletree, 1995). This disparity results in real world consequences, where the treatment under the law for indigent defendants becomes unequal to those with greater means. Consequently, there is significant disparity in the administration of justice falling largely upon economic and racial lines, as evidenced by the higher rates of incarceration and exonerations for blacks and African-Americans (Gross, Possley, and Stephens, 2017; Mauer and King, 2007).

A closely related challenge for public defenders is an excessively high caseload. In 1973 the National Legal Aid and Defender Association (NLADA) posited that individual attorneys should not handle over 150 felony cases per year, or over 400 cases if limited to only misdemeanors (Carmichael et al., 2015). Today it is clear that this number may actually be on the high end of the range, with various research studies all reporting lower numbers, and attorneys estimating that about 90 felonies and 200 misdemeanors would be appropriate for them to handle the cases sufficiently (Carmichael et al., 2015). High caseloads can put excessive pressures on indigent defense attorneys to encourage their clients to plead, make them less effective at trial due to inadequate case preparation, and may even lead to wrongful convictions (Lefstein, 2011).

Public defender's offices have also been accused of being places where a toxic work environment exists, leading to diminished morale and burnout. The psychological and emotional impact of this work environment leads to a perception that people have low job satisfaction (Ogletree, 1995). Some of this arises from mistreatment inside the courts, such as dealing with hostile judges, prosecutors, and clients. News comedian John Oliver, host of *Last Week Tonight* (HBO, 2015), highlighted an extreme example of this when he examined news coverage of a fistfight between a judge and a public defender in Florida. Others have noted organizational pressures to conform to court expectations (Leonetti, 2015; Ogletree, 1995). Job stress and dissatisfaction may result from internal pressures not to "rock the boat" in a way that compromises the courtroom workgroup relationship (Leonetti, 2015), but little research has actually examined the potential for outright discrimination against public defenders in the courtroom. Other research has noted that they may experience social stressors outside of the courtroom, such as perceptions from within their family or social circles that they work to free the guilty or "bad guys" (Newton, 2009).

### **Less Covered Challenges**

One of the frequently overlooked aspects of the work of public defenders is that they are often the only government agent that indigent people have contact with who are actually an advocate for them (Giovanni and Patel, 2013). Indigent persons charged with a crime frequently suffer from mental illness (Lamb and Weinberger, 1998), drug abuse (Mumola and Karberg, 2006; see also Giovanni and Patel, 2013), unemployment, and homelessness (Giovanni and Patel,

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<sup>2</sup> It should be noted that the figures for public defenders excluded other providers of indigent defense, such as assigned counsel or contracting models.

2013). This may result in public defenders spending precious time they really do not have to arrange for treatment, employment, and housing assistance. Despite the obvious challenges, little research has explored the additional impact that these issues may have on the ability of public defenders to adequately represent their clientele.

The perceived inability of public defenders to decline to take cases is another area that has received a moderate amount of attention, though little empirical inquiry. In many instances, cases are assigned from the judge without consideration to the existing caseload of the attorneys (Lefstein, 2011). The public defenders, existing in a submissive capacity, elect not to refuse cases on the basis that they are unable to provide a legal defense in a manner they feel is appropriate (Lefstein, 2011; Leonetti, 2015). This practice may persist in courthouses across the United States despite ABA guidelines instructing defense attorneys to do exactly the opposite.

### **Current Inquiry**

Based upon the existing literature, the current research seeks to obtain public defender impressions of their work-related challenges. The current inquiry will examine public defender perceptions of more commonly covered issues such as resource and caseload problems, and how these impact their disposition of cases. More commonly covered issues such as mistreatment by other court personnel, as well as client and public perceptions will also be addressed. Additionally, the impact these common challenges have on morale, burnout, and turnover are also examined. Given the limited previous research, the current inquiry also seeks to examine the less well covered challenges related to the poverty of clients, and consequences of the inability to refuse cases. To accomplish this, the current inquiry completed phone interviews with eight public defenders across two counties in the State of Illinois.

### **Methods**

The current research uses interviews conducted via telephone with public defenders working in two counties in the State of Illinois. Upon review of the Institutional Review Board, telephone interviews were completed to prevent re-identification of the public defenders. Roster information was collected from the two counties, and participants were randomly selected to be contacted via email. In total, 12 public defenders were randomly selected for phone interviews, and eight agreed to participate, resulting in a response rate of about 67 percent.

Respondents were provided with an information sheet prior to being contacted via phone interview. The respondents then provided project staff with a phone number and convenient time to call. Respondents were asked if they understood the consent sheet, if they had any questions about the research, and then were asked if they agreed to voluntarily continue the interview. Respondents were asked questions from a structured-interview instrument. The interview instrument consisted of eight questions, including the obstacles that public defenders face, public perceptions of defenders, reasons for choosing their career path, supervisors, caseload, ability to adequately represent clients, and office social pressures. The interviews took about 30 minutes to complete. The answers that respondents provided were noted via shorthand, and then narratives were authored directly following the completion of the interviews.

Following the completion of all interviews, the narratives were coded via a two-cycle process. The first cycle coding method that was used is structural coding (MacQueen et al., 2008; Namey

et al., 2008; See also Saldaña, 2009). According to Saldaña (2009; p. 66) “Structural coding applies a content-based or conceptual phrase representing a topic of inquiry to a segment of data that relates to a specific research question used to frame the interview”. Structural coding is also well suited for semi-structured interviews that seek to identify major themes (Saldaña, 2009). The second cycle coding technique used is referred to as pattern coding (Miles and Huberman, 1994; Saldaña, 2009). This strategy allowed for development of major themes from the data, by encapsulating the first codes into larger themes (Saldaña, 2009).

### **Findings: Commonly Covered Challenges**

#### *Resources and Caseloads.*

The heavy caseloads of public defenders have long been believed to impact their preparation, plea bargain rate, and morale. It is also believed by many to be the greatest obstacle for their success and job satisfaction. Indeed, these issues weighed heavily on the minds of the public defenders interviewed. Four of the eight interviewed indicated that caseload was the biggest obstacle they faced compared to private attorneys. When asked “What are some obstacles that you believe public defenders face, that other defense attorneys do not”, one public defender from a large county in Illinois, Andrew, had this response:

*Heavy caseloads, and we don't have any control over our caseloads. It all depends on the Judge and location as to what your caseloads are. And seniority [determines] what courtroom you work in.*

Andrew highlights the fact that the caseloads are not uniformly demanding across the board, and in fact, four of the eight public defenders did not point toward high caseloads as their primary obstacle, instead indicating other factors such as disrespect from court personnel, client perceptions of their advocacy, and bias in the courtroom. So, while caseloads are high, it stands to reason that the pressures effect some more than others, either due to coping mechanisms or variation in the caseloads managed.

Previous research indicates that recommended caseloads vary with the seriousness of the cases being defended, ranging between 91 and 152 cases for felonies and between 162 and 400 for misdemeanors (Carmichael et al., 2015). However, some authors have claimed that caseload may not even be an accurate measure of the demand placed on attorneys, and that those who clear cases more effectively and efficiently are essentially punished by receiving additional cases (Leonetti, 2015). We attempted to address this question by asking if caseload was a proper indicator of workload, and if this workload was evenly distributed throughout the office. Even though the majority of PDs viewed their workload as a primary obstacle, all but two indicated that there were no problems with the way that cases were distributed. Amelia, who works in the larger county representing serious felonies, observes that in a large county the workload often varies geographically between courthouses:

*No, but it is for different reasons, one being geography. My felony trial is the second largest to Municipal Courthouse on [omitted]. [Omitted] County has felony, and misdemeanor, and juvenile, and domestic cases. These are higher caseloads [than serious felony cases]. If you go over to [omitted] courthouse, they have a smaller caseload.*

Andrew was also able to illuminate differences based on courthouse geography:

*No. Attorneys at [omitted] street have many more cases. Most courts have two attorneys with 50 cases each, which is a lot for felony cases.*

Ultimately, the larger question for public defenders is the extent to which caseload impacts their ability to effectively represent indigent clients. Carmichael and colleagues (2015) highlight that the potential consequences of higher than recommended caseloads are that they contribute to a meet-and-plead system, prevent investigations, prevent identification and interviews of key witnesses, and promote mistakes and miscommunication with the prosecution. As Hanson and colleagues (1993) have noted, public defenders plea bargain at a higher rate than private attorneys, but there is not a remarkable difference. It stands to reason that public defenders may be able to inform about how these caseloads actually impact their thought processes when it comes to workplace decisions. To assess these issues, we asked the public defenders if they knew of any other public defenders who accepted cases knowing they could not adequately defend the client. Additionally, we asked them how many cases they handled in the previous year, and what percent of those they felt prepared to defend.

The responses to the first question fell along county lines. Public defenders in the smaller county indicated that they did not know attorneys who accepted cases knowing they could not provide an adequate defense, while those in the larger county unanimously agreed that they had met someone who engaged in this behavior. Nathan brought up a recent interaction he had with a fellow attorney at a trial lawyers' seminar:

*We were discussing caseloads and someone from [omitted] County said they had over 300 felony cases at one time. That is against the advisement of the American Bar Association and dangerous to the clients!*

When asked about caseload and the percent of cases that they felt they could adequately defend, the results were somewhat more positive, with four attorneys stating they were 100 percent prepared for all of their cases, while four indicated they would have liked to have been more prepared.<sup>3</sup> Samantha, who works in the larger of the counties and handles both misdemeanors and felonies short of murder, helps highlight the way that she views her workload and ability to represent all clients:

*I average about 10 new cases a month, so about 100 new cases a year. Most of those are fairly straightforward. A very small percentage, about 5 percent, are serious enough to make me think 'man, I really wish I had more time to do some things different with the case'.*

Similarly, Robert, who works in the smaller of the two counties in the felony department shares some similar perceptions:

*I'm not exactly sure...maybe 200? I do feel that I can represent all of them, but I would not if they went to trial.*

Amelia indicated that she is willing to take cases to trial that require it, but it comes at a personal hardship and that the cases she will represent as plea bargains are neglected in the interim:

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<sup>3</sup> Somewhat inconsistently, an attorney from the smaller county indicated they did not know anyone who accepted cases they could not adequately defend, then indicated they were prepared for all cases unless they went to trial.

*If I know a case is going to a jury trial, what ends up happening is that the other cases get neglected. Even at home, my house is a mess, I only focus on the trial. The trial case is the show. Then you have to play catch-up on the other cases.*

These statements highlight the higher level of comfort and control that attorneys feel when representing their client in plea bargains, and the level of discomfort they feel when taking cases to trial. The burden of excessive caseloads increases the power held by the State and prosecution. Trials result in great discomfort for public defenders, either through an internal perception that they are unprepared, or as Amelia highlighted, through the acceptance of personal and professional neglect to ensure that they are prepared. The resulting power imbalance further encourages plea bargaining given the perception by public defenders that they will not have adequate time and resources to prepare for a jury trial.

### *Morale and Burnout.*

While our line of questioning sought to examine social pressures that attorneys face from inside and outside the office, the stories of public defenders really highlight issues related to stress, burnout, and morale effectively to the point where they merit inclusion. Dealing with hostile judges, prosecutors, clients, and the general public (Ogletree, 1995), as well as expectations for bureaucratic compliance (Leonetti, 2015) are identified by previous research as the major sources of stress in the occupation. The current inquiry also identifies that in some instances, low morale among public defenders may also be an issue, and it may also demonstrate a non-recursive relationship that creates a positive feedback loop of further diminishing morale.

Four of the eight public defenders indicated that treatment by court personnel or perceptions of clients were an obstacle they faced that private attorneys do not. Amelia was able to summarize the lack of respect that occurs across the board in the courthouse. She identified the lack of respect from the court in general as the obstacle she faces that private attorneys do not:

*[My largest obstacle is] the lack of respect that comes from the court in general. This includes the judge, the courtroom staff, the sheriff, the State's Attorney, and even the clerks.*

#### *Hostile judges.*

Samantha is able to illuminate some of the sources of stress in the courtroom that arises from hostile judges. She notes that some judges permit all private attorneys to present their cases before public defenders are allowed:

*In the courtroom, private attorneys get a certain leeway that public defenders do not. Private attorneys get their cases called first, the judges give more latitude and time on a case for a private attorney. Private attorneys are sort of a visitor in the courtroom. Also, private attorneys get to pick their caseload. Public defenders do not have that option [assigned by judges]...It naturally happens, and it is more effective for private [attorneys] to go first. However, it comes down to awareness on the judges. They need to understand that public defenders are lawyers too, and give PDs a chance to handle their cases equally. It's a matter of responsibility on the individual judge.*

Samantha does note the potential benefit from having public attorneys go first, likely due to observing the sentences obtained via pleas in other cases, the streamlined organization of proceedings, and her clients having an opportunity to observe the process. The priority in

appearance seems to simply be yet another aspect of the latitude and time that private attorneys receive from judges that public defenders do not.

#### *Prosecutors.*

Robert highlights the pressures that arise from internal and external role conflict of trying to do the best for the client, while maintaining ethical standards of representation and managing a relationship with prosecutors and judges. He often receives pressure from prosecutors and the court to make plea deals:

*When I push cases to trial, the State comes back with a misdemeanor...It's my job to be my clients voice in the courtroom...the court is asking me why I am not making a plea deal...that is not my purpose.*

While certainly private attorneys feel pressure to plea, and the difference in rates of plea bargains between public defenders and private attorneys is not exorbitant, the increased demands placed on public defenders may be part of the cause for this disparity. Additionally, public defenders feel pressure from the judges to engage in plea bargaining, which Robert mentions, which may make it more difficult for public defenders to resist given the defender-judge power dynamic.

#### *Clients.*

The negative perceptions many clients have of their appointed counsel may be what wears most on public defenders. While the adversarial system would indicate that they occasionally conflict with prosecutors, the lack of respect, appreciation, and confidence that clients have in public defenders seems to especially bother these attorneys emotionally (Five of eight listed it as a significant obstacle or workplace pressure). Cynthia, who works in the smaller county, lists perceptions of clients as the largest obstacle to her job not faced by private attorneys:

*Public defenders generally have a bad reputation. The clients are under the impression that they will not have adequate representation, so the obstacle has been proving them wrong.*

She indicates that being underappreciated by skeptical clients is the biggest challenge that she faces in her work as a public defender, above caseload and resource issue. When asked how the residents of his county view him, Robert spoke more explicitly about the clients he had back when he was in misdemeanor court several years prior:

*When I was in misdemeanor court, I would meet with about 20 clients a week and they always asked 'Am I in real trouble here, do I need to get a real attorney?' I believe that there is a lack of real desire of ownership from the client, and the PDs are kind of forced upon them. They cannot choose their own attorney and are kind of forced into the relationship.*

Samantha reported similar experiences:

*People have the feeling public defenders aren't real lawyers, they think they will not fight as hard, and they believe that they work for the state [prosecution].*

#### *General public.*

Public misperceptions and assumptions about who they are, the quality of their work, and their chosen professions seem to be a source of stress for public defenders as well (Newton 2009). Public defenders, despite working in the same field and in the same courtrooms with judges, prosecutors, and private attorneys, do not enjoy the same occupational prestige. Public

defenders view themselves as being every bit as competent and skilled as prosecutors and other defense attorneys (in fact, many have worked in these other capacities), but are denied equal status among those outside of the profession. Robert explains social pressures in his office and how he is viewed by community members in his county:

*Like most other public defenders' offices. [They] probably believe we aren't good enough to get "real" attorney jobs...People also ask public defenders often when they are going to go private. They assume this is just a starting point...People asking me how I am comfortable with constantly "getting people off" or "helping bad guys".*

Martin provided a similar response, placing the work he does in juxtaposition to the work done by private defense attorneys:

*The poor people appreciate a public defender versus privileged or higher class people who would probably only have the opinions of what they see on TV. They believe that public defenders only defend the guilty people. They wouldn't say that about a person with a million-dollar attorney.*

Martin presents a very important point in the societal view of public defenders, one that pervades every aspect of their work. Society views his clients as more likely to be guilty, less deserving of representation, and views him as somehow less than, a failure, or standing on a stepping stone simply because the people he defends are indigent. His statements make it clear that this challenges wears on his personal morale in the profession, and represents a challenge to his courtroom success.

### *Turnover*

The morale challenges may then lead to a situation where people are either unhappy in the office, or simply leave because it is difficult to function in the office climate with the work that is required (Leonetti, 2015). Andrew explains the difficulty in managing personal expectations with reality when it comes to how effective the attorneys can be with such unmanageable caseloads and limited resources:

*The ones who have made it understand that this is as good as it gets, but some people leave. We are losing good public attorneys because of the working conditions, but I sympathize with both sides of the spectrum. It is very unfortunate that we are losing the people we are, because they will never be replaced.*

### *Less Covered Challenges*

The preceding sections covered several commonly reported challenges that public defenders face. While substantial research has reported on these areas (Giovanni and Patel, 2013; Newton, 2009; Lefstein, 2011; Leonetti, 2015; Ogletree, 1995), little research had taken an in-depth look at how these issues impact public defenders in their daily operations and thought processes. The following section will explore some of the challenges faced by public defenders that are less well covered in prior research, namely the challenges posed by representing the indigent and an inability to decline cases.

### *Indigent Defendants.*

In previous research inquiries, the primary area of concern with respect to public defenders has been caseload. One area that has not been covered as thoroughly when it comes

to workplace challenges is the intersection between poverty (i.e., the reason people are provided an attorney) and other social considerations such as mental illness, homelessness, transportation issues, and race. All of these factors add an additional element to the work of public defenders that is likely less prevalent in the work of private attorneys.

One of the more frequently occurring complaints from public defenders was that their clients failed to make appointments. A relatively junior attorney, Vivian, from the smaller county studied, works in the traffic court and frequently deals with no shows:

*We do not get paid, so the clients believe that we are not real lawyers. The clients don't show up for appointments.*

While Vivian attributes the no shows to a lack of perceived legitimacy on the part of her clients, Nathan reports a more likely cause of many of the no shows to appointments with public defenders:

*Other obstacles are the ones with indigent clients themselves. [They have] no permanent address, no phone, [they are] homeless. It's hard to contact the clients sometimes.*

If defending well over the recommended number of cases was not challenging enough, Nathan points out that now simply getting in touch with clients to inform them of progress in their case can be a serious impediment to his work on their defense. As has been shown in previous research, issues such as homelessness and mental illness can impact contacts with the criminal justice system (Roy et al., 2014). This prevalence of homelessness and mental illness becomes a larger challenge in the work of PDs, particularly given the fact that many of these individuals will be required to rely on the services of public defenders.

Another challenge noted by Nathan is that court personnel such as judges and prosecutors, as well as lay participants such as juries, have biases against the poor. This is particularly true when the client is a person of color:

*The criminal justice system is geared towards indigent people. It is not a 'fair' system like it is said to be. People say 'justice is colorblind', I don't agree. There is a lot of prejudice against minorities in the courtroom.*

Nathan goes on to say that status as an indigent person of color results in poorer treatment from the judge and prosecution:

*The big concern is with the judiciary and State's Attorney prosecution. Many times minorities are charged with crimes that a person from the suburbs would not be.*

Nathan even states that the perception of indigent, nonwhite defendants impact the jury's presumption of innocence:

*More of the presumption [guilty until proven innocent] is to the minorities, facts of cases would be analyzed differently if someone were white and privileged...People view minorities as expendable. I have heard jurors say "well if he wasn't guilty of this, he was guilty of something else". So are people really "presumed innocent"? I challenge anyone to spend a week in my courtroom and not say that it's the exact opposite.*

Certainly, these issues make the work of public defenders substantially more challenging. Whether they are perfectly aware of the issues, choose to ignore them, or must openly combat them, the additional challenges placed on defenders of the poor with regard to contacting them and overcoming courtroom biases certainly adds another layer of difficulty.

### *Inability to Decline Cases.*

Perhaps the biggest issue that has not been covered in previous research is the inability of public defenders to decline cases when they are feeling particularly pressured and unable to provide an adequate defense. Several of our participants indicated they could handle all of their cases, others indicated there were only particular times that they became overwhelmed (e.g., preparing for a trial), and others indicated they were in the 90-95 percent range in terms of adequate preparation. The inability to have some type of arrangement for these attorneys to recuse themselves from cases they are unprepared to adequately defend represents a significant amount of stress, and it seems to be an all or nothing proposition for them due to the way cases are assigned to PDs (i.e., from the judge in individual courtrooms). Amelia informs of the process by which cases are assigned, the lack of concern judges have when public defenders inform them that the number of cases assigned is excessive, and stated the manner in which they are assigned is not in the best interest of attorneys or clients:

*We do not have the option to say no. There is no choice. I have been told by a judge that they don't care. [Omitted], a public defender in our office, started to contest the amount of cases she was assigned due to conflict of interest. We have a murder case with multiple defendants. The defendants were assigned out, and the remaining defendants got dispersed to other public defenders' offices in [omitted] County. This causes conflicts, the PDs know each other, they are friends, they go to each other's weddings. But the courts have insisted there is not a conflict.*

Martin, a supervisor in the larger county, was asked if he knew of any public defenders who accepted cases knowing they could not adequately defend the client:

*They do what they are told. Doing more with less is almost the motto for public defenders. We are not experiencing issues like Orleans Public Defenders Office [refusing to take new cases], but we don't have an issue, as an office as a whole.*

Andrew reports a more definitive experience:

*Yes, every day. We don't have a choice and management doesn't have a choice to help us. We are losing attorneys because of the horrible work conditions and the low morale.*

Samantha takes it one step further, explaining that she has been assigned cases that went to trial the same day:

*We don't have the ability to say no, so yes, absolutely. Sometimes we get assigned a case and the judge says that it's going to trial that day, we have to scramble to get it done. It's an assignment, not a choice.*

Even Robert, who is an experienced attorney in the smaller county, reported the same sentiments, though he does not currently have those issues in his office:

*Louisiana head public defenders' statewide manager put a halt to new cases, national news. Basically said their office is too overwhelmed with cases and they won't take anymore. You either suck it up or you take a stand. We don't have that issue in [omitted] County.*

The inability of public defenders, their supervisors, and entire management structure to find a way to halt cases when they *knowingly* cannot represent the client adequately is indicative of a broken system. This may be perhaps the most substantial problem faced by these attorneys, and the causal process has not been addressed with policy nor attracted much research attention. Individual attorneys need an ability to refuse cases they cannot adequately represent,

or supervisors need the ability to distribute cases efficiently and fairly. Neither the threat to the clients nor the threshold for the number of cases a public defender takes should depend on the judge or courtroom case assignment. Even if no more resources were provided, cases could be distributed more efficiently and effectively if supervisors were given more control over individual attorney caseloads.

### **Discussion and Policy Implications**

The current inquiry used phone interviews with eight public defenders across two Illinois counties to obtain information about how commonly research occupational challenges such as limited resources, high caseloads, mistreatment by court personnel, and client and public perceptions impact their functions at work and the office climate. Additionally, the less commonly covered occupational challenges of representing the indigent and the inability to refuse cases are also addressed. Given the findings, the current research is able to suggest avenues for future research, as well as some tempered suggestions for potential policy implications.

Not surprisingly, half of the public defenders interviewed mentioned caseload as their most significant challenge they faced compared to private attorneys. Fortunately, the attorneys seem to be fairly confident about their ability to represent the clients they are given and do so effectively. The respondents also tended to indicate that these cases are fairly well balanced in terms of the number of cases and workload that is assigned to each attorney. So while the public defenders agree that they have too many cases, they typically do not see a gross imbalance in the workload between lawyers in their respective offices.

One substantial hurdle seems to be the reluctance of public defenders in these offices to feel comfortable taking cases to trial. Even if the case seems appropriate for moving to trial over a plea bargain, the public defenders report that this is the stage where their ability to adequately defend their clients will break down. Public defenders feel good about obtaining justice in plea bargains, but trials simply exhaust too many resources for them to feel adequately prepared. Plea negotiations seem to be the process public defenders feel they can use to achieve justice given the reality of resource deprivation. While the current research is unable to assess whether these feelings are common among other attorneys acting in the capacity of indigent defenders, or all defense attorneys, it certainly appears to be a significant concern among public defenders.

An additional commonly covered issue faced by public defenders is morale, burnout, and turnover within the office. One of the questions we asked the public defenders was how they were perceived by the public in their county. Several indicated that they were bothered by the perception that they were not “real lawyers” or that people in their social circles viewed their chosen profession as a stepping stone. They also frequently encountered individuals who questioned them about their desire to protect “guilty people”. These issues likely serve as significant sources of stress for public defenders, who typically view themselves as equally skilled when compared to prosecutors or private attorneys and who got into the profession to help those they perceived to be at risk of mistreatment by the system.

The perceptions clients held of them was also commonly listed as a challenge that public defenders face, but private attorneys do not. Public defenders were frequently bothered by the belief of their clients that PDs were agents for the prosecution or simply uninterested in actually representing them. The juxtaposition of personal sacrifice to help the indigent, pressed against

the belief of clients that public defenders are somehow coopted by the state or not “real attorneys” is an additional source of stress that may lead to workplace dissatisfaction and burnout (see Ogletree, 1995). Future research should seek to quantify the impact of client perceptions of legitimacy (or attorney impressions of how they are viewed by clients) on public defender stress levels.

Perhaps the more intriguing portion of the current inquiry is some of the less covered issues faced by public defenders. One of the more enlightening issues uncovered by this research is the difficulties associated with defending the indigent amid intersections of homelessness, mental health, and systemic racism. Public defenders reported that they have clients who do not reliably meet with them due to issues related to their indigent status (such as homelessness and mental health issues). Furthermore, these public defenders are of the belief that the status of their client as indigent, and the intersections of poverty, race, homelessness, and mental health create an accumulated systemic bias that erodes the presumption of innocence in the courtroom.

Building upon this challenge, public defenders themselves feel mistreated in the courtroom. One respondent reported a two-tiered system where private attorneys were all permitted to present their cases first, while public defenders were forced to wait. Public defenders have also reported pressure from judges to engage in a plea deal. This may not be particularly egregious, but these attorneys are at the mercy of the court when it comes to caseload assignments and other issues related to the courtroom power structure. There should be some protections from judicial pressure to engage in plea negotiations if the public defender feels it is not appropriate.

Perhaps the greatest threat to justice, and fair treatment of indigent defendants and the attorneys who represent them is the culturally normative practice that public defenders are expected to accept new cases, even if they knowingly cannot provide an adequate defense. The occupational expectation is that judges assign cases and public defenders then defend the cases. As one respondent put it: *you either suck it up or you take a stand*. This cultural expectation directly contradicts the recommendation of the most prestigious professional organization in the field, the ABA. The ABA (1992; 68) recommends in their *Standards of Criminal Justice: Providing Defense Services* that:

*Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments.*

The public defenders’ experiences fly directly in the face of this recommendation. There are no safety valves that allow for the PDs to engage in behavior consistent with this recommendation. They perceive management can do nothing to assist, and their only recourse of refusing to accept cases is not seen as a viable option.

### **Limitations**

Of course, the current inquiry is not without limitations that bear mentioning. The first limitation of this research is the low number of respondents. Eight public defenders, while more than several other research inquiries into this topic, is certainly a limitation in terms of

generalizability. Second, while the inquiry used data from two substantively different counties, (one of which contained a mid-sized metropolitan area but was largely rural and the other primarily urban) both of these counties were from the State of Illinois. This also limits the generalizability given the financial situation of the state, which did not have a state budget passed in nearly two years at the time of the interviews in 2017. A final limitation is that this inquiry did not interview attorneys who represent the indigent through alternative models, such as the assigned counsel or contract models. All of these limitations should be considered when developing future research or designing policy responses to the outlined problems.

### **Policy Implications**

Based on these findings, we humbly offer a few potential policy suggestions that courts and public defenders offices may want to consider exploring and subsequently evaluating. Certainly, given the limitations of this research, these are not to be considered best practices but rather avenues for exploration. The first policy that should be explored is public education about the role of public defenders, their function in the modern courts system, and why they deserve respect and appreciation from the general public and their clients. While Americans certainly seek justice and do not want innocent people imprisoned, we place little emphasis on properly funding and respecting the people whose job it is to fight for those most at risk of being wrongfully convicted in our population. The public defender institutions are woefully underfunded, and this stems from an unwillingness to recognize the value of protecting the indigent largely because of the blame that is placed on the impoverished and the intersectionality of stigmatized groups (e.g., people of color, people with mental illness, and the homeless) among those needing public defenders. The only way to combat this issue is to increase awareness of how the system is functioning with respect to the risk poor criminal defendants face, and the social consequences of ignoring our financial obligations to ensuring justice.

A second potential policy implication is to maintain not only race and gender diversity, but also economic diversity in jury pools. A major concern of several of the public defenders was that they and their clients experience discrimination to the extent that it may impact the presumption of innocence for the client. An economically diverse jury pool may be more likely to understand the plight of the indigent defendant, and not assume they are guilty simply because they are impoverished.

A third policy implication to address issues related to poverty, mental illness, and homelessness among indigent defendants would be to have public defenders' offices improve their working relationship with social workers (Giovanni and Patel 2013). Public defenders could make referrals for indigent defendants who may benefit from having a social worker. Similarly, social workers may be able to assist with issues such as contacting defendants, getting defendants a home address, and ensuring that defendants attend scheduled meetings. This increased communication could make the challenges associated with defending the indigent outside of the courtroom easier for public defenders.

A final policy implication, and perhaps the most important, is offering some type of protection or remedy for public defenders who need to refuse taking on additional cases. The current research uncovered a cultural expectation that judges assign cases, and public defenders accept those cases without regard to their ability to offer an adequate defense, in direct violation of ABA suggested protocols. Public defenders report being assigned trials the same day, excessive

caseloads, and being prepared to defend cases only if they do not go to trial. Public defenders' offices need to establish a process by which they are able to reassign cases within the office to match the workload, rather than having judges provide the only say in who will be representing a case. Public defenders also need outlets to protect "whistle blowers" who identify they cannot adequately represent a case, or who need to pass cases on to fellow attorneys. The courts need to provide some sort of reprieve, without stigma or punishment, for the instances in which public defenders identify they cannot provide adequate representation.

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## ***Internet Grooming: An Analysis of the Issue and a Search for Solutions***

Instances of child sexual abuse which were preceded by online grooming have caused grooming to become an area of interest for legislators and law enforcement professionals. This paper analyzes the impact of online grooming on child victims and addresses the shortcomings of current legislative measures for controlling online grooming activity. The author proposes measures for more effectively regulating grooming through legislation at the state and federal levels. Recommendations for a more effective law enforcement response to grooming through adequate training, specialized divisions and personnel, adopting a collaborative approach, and fostering partnerships with schools and youth-serving organizations are made. The author endorses a societal response to grooming by means of age-appropriate guidelines, education, and discussion within schools and youth-serving organizations, as well as with both peers and parents. The author also recommends that the reporting process, social awareness campaigns, and social vulnerability of children be addressed.

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### **Introduction**

Child sexual abuse has long been a concern throughout the world. For many years, this was something that most people thought of in the context of person-to-person contact between a child and an adult. However, as both children and adults have greatly increased their use of the Internet, online communications have become a reality of life for the vast majority of people. Communicating online can be an incredibly useful thing, as it opens up the ability for people to stay in touch with one another from anywhere in the world, to make valuable contacts that would never would have been established otherwise, and wish to conduct business that would be impossible if it weren't for an online presence.

However, there is also a dark side to these online communications, one which involves adults communicating with children in a way that prepares those children for a process of horrific sexual abuse at the hands of their online "friends". This process, known as grooming, is exacerbated by the fact that most children now have almost constant access to the Internet on computers, tablets, phones, and other mobile devices. Grooming and the subsequent sexual abuse that generally follows can have a devastating impact on a tremendous number of children and adolescents. Because of its great complexity, grooming is an issue that requires a multifaceted approach involving the legislature, law enforcement, and members of society in order to successfully prevent, deter, and punish this inappropriate and damaging behavior.

### **What is Grooming?**

Grooming is defined as the "act of deliberately establishing an emotional connection with a child to prepare the child for child abuse" (U.S. Legal). An alternative definition is "specific techniques used by some child molesters to gain access to and control of their child victims" (Lanning, 2018, p. 6). The most common grooming behaviors through which perpetrators gain the trust of and access to their victims include acts of attention, affection, and kindness, as well

as giving gifts, alcohol, drugs, money, and privileges to the child. Other frequently observed grooming activity includes playing games with a child, teaching him or her a sport or instrument, giving gifts as a bribe, taking the child on an outing or day trip, and showing a child affection and understanding. Grooming may also involve providing a safe environment for a child to disclose information, giving compliments, and convincing a child to either do something or say something incriminating. This places the abuser in a position of power and makes it problematic for the child to tell someone about the abuse that is taking place (Elliott, Browne & Kilcoyne, 1995).

The process of grooming a child victim generally involves identifying children who would make good potential targets; obtaining information about the unique weaknesses and susceptibilities of that child; and gaining access to the child in order to begin building a relationship of trust. A perpetrator most often gains access to a child over the Internet by establishing a relationship by means of filling a preidentified need in the child's life; saying things to make the child feel special; or making the child feel that he or she can trust the online perpetrator (Lanning, 2018, p. 11; Lanning, 2010). A very important component to the grooming process is for the perpetrator to make the child believe that the perpetrator is a good person who can be trusted (Lanning, 2018). Once a child has become vulnerable from the perpetrator's establishment of rapport and trust, the perpetrator often subjects that child to atrocities such as sexual abuse, exploitation, sex trafficking, child pornography, and child prostitution.

While grooming is certainly intended to be followed by sexual abuse or sex-based crimes, the grooming process itself is most often not particularly sexual in nature. Grooming generally does not include any physical contact, but instead involves the perpetrator developing a relationship with and gaining the confidence of a child or adolescent. The development of this type of relationship places children in a position of trust with the perpetrator, and thus gives the perpetrator an opportunity to abuse that trust and take advantage of the child. While there are many types of behavior that may be encompassed in the definition of grooming, whatever form of behavior the perpetrator chooses to employ, it is always to achieve the end of establishing an emotional bond with the child victim (Lanning, 2018, p. 6).

### **The Extent of the Issue**

There are currently over 130,000 cases of child sexual abuse reported in the United States each year (Sedlak *et al.*, 2010). Though this is alarming in and of itself, what is perhaps even more problematic is that this number is not a true representation of how often child sexual abuse takes place, as most instances are never reported and go undetected by both law enforcement and the guardians of child victims. This often leads to significant long-term harm that endures throughout these children's lives, as well as a snowball effect for grooming and subsequent sexual abuse as those who commit these crimes without being caught and punished are highly likely to reoffend. The potential for long-term damage to victims is exacerbated by the fact that children who are at a heightened risk for becoming targets of online grooming are frequently those who have experienced issues in various aspects of their lives such as low self-esteem, unstable home life, sexual identity issues, lack of friends, lack of parental involvement, and other factors that put them in a generally higher risk category (Wolak *et al.*, 2010; Mitchell *et al.*, 2007).

In the U.S., grooming activity constitutes approximately 25% of arrests for computer-related sex crimes (Wolak, Mitchell & Finkelhor, 2003). 1 in 4 children has been exposed to sexual pictures or images via the Internet against that child's wishes. 1 in 5 U.S. children has been

sexually solicited online, while 1 in 17 has been harassed or threatened in an online environment (Finkelhor, Mitchell & Wolak, 2000). The majority of online grooming activity is targeted at young females (Finkelhor, Mitchell & Wolak, 2000, p. 16). One recent study showed the rate of online grooming for young females being twice as high as that of males, with rates of 66% for females and 33% for males (Jones, Michell & Finkelhor, 2012). The rate of online grooming among children aged 13-17 is significantly higher than that of children who are 12 and younger (Baumgartner *et al.*, 2010). Indeed, one study showed a sample in which 73% of children who had been the targets of online grooming were between the ages of 13 and 15 (Wolak *et al.*, 2009). Children in this age range are particularly susceptible to grooming and subsequent sexual abuse due to the insecurity and vulnerability that often arises during the young teenage years, as well as the greater frequency with which young teenagers use the Internet and mobile devices in comparison with children in younger age categories.

The real danger that arises from online grooming activity is that these acts are committed as a means of preparation for inflicting some form of sexual abuse to that child. A significant number of child sex abusers have admitted that they engage in various forms of communications and planning techniques to identify children who are particularly susceptible to sexual abuse, who are unlikely to report the abuse, and to prime the child for impending sexual exploitation by making them believe that there is nothing wrong with this type of adult-child interaction (Seto, 2008). The sexual abuse that takes place after a period of online grooming can lead to many significant issues, both immediately and later on in the child's life. Victims of childhood sexual abuse frequently experience problems with mental health, depression, sexual dysfunction, anxiety, and a heightened risk for suicide throughout their lives (Gijn-Grosvenor & Lamb, 2016, p. 577). Furthermore, those who experience sexual abuse after grooming are much more likely to repeat the behavior themselves as adults, thus furthering the cycle of abuse (Gijn-Grosvenor & Lamb, 2016, p. 577). The need to clearly define and regulate grooming activity is extremely important, as being able to identify such behavior can help prevent more extensive abuse, as well as to aid in corroborating incidents of sexual abuse that do take place so that the offenders can be appropriately punished (Bennett & O'Donohue, 2014, p. 958).

### **Current Legislation**

One of the biggest challenges with regulating online grooming is that there is currently very little statutory law that addresses this behavior, and virtually none of the existing law defines or regulates grooming in a comprehensive manner. 18 U.S.C. §2422 states that:

“(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.”

Essentially, this federal statute makes it a crime to attempt to entice a minor child to become involved in sexual activity through use of the mail or in interstate commerce. Furthermore, 18 U.S.C. §2425 criminalizes the act of transmitting information about a minor for the purpose of causing them to engage in sexual activity, while 18 U.S.C. §2252A(a)(6) makes it a federal crime to attempt to persuade a minor to engage in illegal conduct through child pornography. In addition to these federal regulations, 49 states have enacted statutes that make online solicitation of a minor a criminal offense (American Bar Association). However, these state and federal statutes are extremely limited in their application to online grooming, as will be discussed later.

Internationally, England and Wales have taken a somewhat more proactive approach to regulating grooming. England and Wales made online grooming a criminal offense in 2003 and the number of grooming prosecutions has increased steadily since that time (Kool, 2011, p. 47). In these countries, Section 15 of the Sexual Offences Act of 2003 makes it a crime to either arrange a meeting or to actually meet with a child under the age of 16 with the intent of having a sexual encounter with that child. This act also makes it a criminal offense to arrange such a meeting on behalf of another person. This is a good starting point for model grooming legislation because this statute permits prosecution for both the arrangement of the meeting and the meeting itself. This is a far more proactive approach to grooming regulation than any of the existing U.S. statutes because an individual can be punished for an offense even if the perpetrator never actually meets the child. However, the Sexual Offences Act is still limited by the fact that some type of action toward a sexual encounter with the victim is required for a conviction.

### **Issues with Existing Legislation**

One of the biggest challenges with prosecuting cases of online grooming is that there is no clear and uniform definition of what does and does not constitute grooming a child in preparation for sexual abuse. One look at the various definitions of online grooming that have been promulgated makes it readily apparent that there is very little uniformity among both scholars and legislators as to what constitutes grooming behavior (Bennett & O'Donohue, p. 959). Grooming has been judged to a large degree under a sort of "you know it when you see it" standard. This is highly problematic for securing criminal convictions. Because it takes place in an online environment, grooming will undoubtedly cross jurisdictional lines, which makes the lack of uniformity in defining grooming highly problematic for both law enforcement and prosecutors.

Perhaps one reason for the lack of definitional uniformity is that it is extremely difficult to develop a comprehensive list that encompasses all or most forms of grooming behavior within the text of a statute. Because online grooming involves a tremendously broad range of behavior, designing and implementing legislation that encompasses all or even most of this behavior, yet is not so overly broad as to face constitutional challenges, is quite challenging. Indeed, one of the primary criticisms of grooming legislation is that it criminalizes thoughts rather than actions. These hurdles to effective legislation are further enhanced by the fact that in online grooming cases, it is the context of the activity, rather than the activity itself, that makes it problematic. Many communications that could be considered grooming of a child in certain instances also take place quite innocently in many normal relationships between adults and children. Things such as establishing trust, gift giving, taking children on outings, and encouraging children to share things

about themselves takes place regularly in healthy relationships between children and their family members, teachers, clergy, and other trusted adults (Bennett & O'Donohue, p. 959). This makes it tremendously challenging to both define grooming and to separate instances of grooming in preparation for sexual abuse from normal communications between adults and children.

Another challenge in developing effective grooming legislation is that while grooming is indeed a precursor to sexual abuse, the grooming behavior itself is usually not explicitly sexual. Grooming is relatively easy to identify after the fact, but is very hard to detect while it is taking place. If examined in a vacuum, it is likely that a significant amount of grooming behavior would not be seen as harmful or inappropriate by an objective viewer. It is only when it is examined through the context in which the behavior occurs that it is seen as something that has the potential to inflict a significant amount of harm upon child victims. However, these contextual factors that are so important are very difficult to encompass within an enforceable statute.

Because this behavior is most often not explicitly sexual or inappropriate in nature, children and adolescents frequently have a difficult time saying no and explaining why they want the behavior to stop. Children often feel that it is rude or bad manners to tell someone who is showing them love and attention to stop what they are doing because it makes them feel uncomfortable. Children may also be very sensitive to hurting the perpetrator's feelings. Because individuals who engage in grooming often have a close relationship with the victims and their families, many victims feel like they will create more problems if they try to protest behavior that may not appear to be inappropriate. As such, victims are very unlikely to report sexual grooming to their parents or authorities (Lanning pp. 8-9).

Another problem that contributes to the difficulty in identifying grooming is that due to lack of life experience, young grooming victims tend to normalize this behavior. They may think that the person who is grooming them for sexual abuse just likes them and is attempting to pursue a close but consensual relationship. Because they have no real experience with romantic relationships, victims often believe that this is the type of activity that takes place in normal dating scenarios. They often feel flattered by the attention rather than recognizing it as being highly inappropriate. This is particularly true when the perpetrator is someone who the victim admires, such as a teacher, coach or trusted adult friend. This may lead to the victim being both excited about the attention and acquiescent in allowing the behavior to continue and escalate (Berliner, 25). As such, victims of sexual abuse that stems from grooming often experience a significant amount of shame and self-blame for what has happened to them since they never asked for it to stop (Berliner, 25).

Law enforcement professionals also face tremendous challenges in effectively dealing with online grooming. Because this is a rather new area of law, many law enforcement officers simply lack experience in how to handle these types of cases. The lack of funding for training and hiring specialized personnel that many police departments experience only compounds the problem and contributes to the ineffectiveness of the law enforcement response to online grooming. Additionally, law enforcement is challenged by the fact that most individuals who engage in online grooming do not fit within a well-defined list of characteristics. Rather, we find that individuals of virtually all genders, sexual persuasions, socioeconomic classes, and ages may easily fit within the definition of a sexual predator who grooms children prior to abusing them sexually (McCartan and McAlister, 2012; McCartan, 2008). Therefore, designing methods to effectively identify and prosecute offenders is often extremely difficult for law enforcement.

Another law enforcement challenge in regulating online grooming is that sexual offenders are quite effective in modifying their behaviors to avoid being caught (McCartan, 2008). Child sexual abusers are quite adept at understanding when they should pursue a victim, when they should cease pursuit, and how to change or vary their activities to thwart detection (McCartan & McAlister, 2012, p. 258). This means that once regulations have been implemented to control their existing behavior, offenders will find other methods of targeting and soliciting children in an online environment that is not yet encompassed by valid laws or which has not yet been identified by law enforcement professionals. If law enforcement officers have not received adequate training to help them anticipate these behavioral changes, this will further compound the difficulties in identifying and punishing online groomers before the behavior escalates into full-scale sexual abuse of a child.

### **Legislative Recommendations**

Due to the fact that many cybercrimes take place across state lines, it is frequently recommended that federal legislation be the first line of defense in prosecuting and punishing crimes that take place over the Internet. However, online grooming is somewhat different from other cybercrimes in that the victim and perpetrator know one another in most instances. Because of this, it is extremely important that states enact their own grooming legislation, as it is in state courts where a grooming conviction is most likely to be sought when a victim and perpetrator know one another and likely live within the same state's legal jurisdiction. It is recommended that the federal government lead the way in developing grooming legislation from which states can model their own statutes, but that each state develop its own legislative measures for grooming activity with the intent that the state statute will be the first line of defense for ensuring that this behavior is both regulated and punished appropriately. So that online grooming can be punished consistently, it is important that the states and the federal government define grooming activity in a substantially similar manner with little variation among legal jurisdictions.

It is also important that any legislation be specific to grooming behavior. One of the most significant issues in regulating grooming under current legislation is that law enforcement and prosecutors are forced to apply statutes governing other crimes, such as online solicitation, to online grooming cases because this is the only option available. This is a highly inefficient process which greatly dilutes the ability to regulate and stop grooming activity before it reaches the point of sexual abuse to a child. Instead, governments should enact legislation that is specific to instances of online grooming, which will allow this activity to be regulated in a more effectual way, and which will give all parties clear notice of what type of behavior is and is not permissible when interacting with children in an online environment.

So that grooming to be appropriately regulated and stopped before sexual abuse takes place, it is absolutely essential that any grooming legislation clearly and unequivocally define what is considered grooming behavior. Though there is some variance in definitions of grooming, there has been a significant amount of scholarly research that has identified common areas of frequently observed behavior patterns in online grooming. These areas of consistency should be included in the definition of grooming that is found in any type of legislation or regulatory measure (Bennett & O'Donohue, 2014).

An outstanding example of grooming legislation can be observed in a recent resolution drafted by the American Bar Association's Young Lawyer Division. This resolution promotes the implementation of grooming legislation at all levels of government, and proposes language to be used within such a statute. The proposed statutory language states that "A person commits an offense of grooming when he or she knowingly uses a computer on-line service, internet service, or any other device capable of electronic data storage or transmission, with the intent to seduce, solicit, lure, or to attempt to seduce, solicit, lure, or entice, a child to commit any sexual conduct prohibited by state law." This language was developed after a survey of all 50 states' grooming legislation was undertaken and was found to be quite lacking in adequately protecting children from online predators who engage in grooming behavior (American Bar Association). The ABA YLD's sample statute provides an outstanding starting point for developing effective and enforceable legislation, as it addresses many of the concerns with such legislation being so overly broad as to render it unenforceable on Constitutional grounds. This language is narrowly focused on an online groomer's intent to use an electronic device for the specific purpose of facilitating a sexual event with a minor child. This resolution is also commendable in that it encourages states which have already enacted some form of grooming legislation to review their legislation and make it align more closely with the ABA's proposed statute, along with the implementation of any measures or concerns that may be of special concern in that particular jurisdiction.

One of the primary issues in developing grooming legislation is that this behavior is something which might be considered normal and harmless in many cases, but which is objectively inappropriate based on various factors within that particular set of circumstances. This creates significant obstacles to both law enforcement and prosecutors in identifying and securing a conviction for grooming behavior. For instance, a prosecutor would need to establish that the situation indicates that it is more likely than not that sexual abuse would take place if the behavior continued. This can be extremely challenging when the behavior may appear quite benign on its face. As such, it is recommended that the legislative definition of grooming be accompanied by several example scenarios illustrating exactly how the requirements of this statute can be established. While this is certainly not a comprehensive solution, it would provide prosecutors a starting place from which to apply the statute and to explain its application to a factfinder at trial. Providing scenarios would also give the public a clearer sense of what behavior is and is not permitted, which could help the statute stand up to potential due process claims.

Many attempts at grooming legislation have been criticized based upon the idea that such regulatory measures criminalize thoughts rather than actions. As discussed previously, it is the inappropriate nature and intent, rather than the actions themselves, that define online grooming behavior. The criminal law *actus reus* requirement makes it extremely difficult to prohibit an action that is defined primarily by the intent of the perpetrator. It is necessary that the definition of grooming require that some type of action be taken before this legislation can survive Constitutional scrutiny. In order to balance these issues, it is recommended that U.S. grooming legislation follow the example taken in England and Wales, which requires a perpetrator to either intentionally meet a child under age 16, or to travel with the intention of meeting the child for the purpose of inflicting sexual abuse upon that child at some point in time (Sexual Offences Act, 2003). It is not necessary that the child know that the meeting is for sexual purposes, and it does not have to be shown that sexual abuse was to take place at that particular meeting. So long as the meeting was part of a course of conduct intended to eventually lead to sexual abuse, the

requirements of the statute have been met. While this requirement is problematic in that it does not allow for a prosecution of online grooming in its earliest stages, it does allow law enforcement to focus its efforts on apprehending online groomers who have decided to expand their activity to the type of interaction in which real harm can be inflicted upon the victim. Just as importantly, enacting this requirement means that such grooming legislation comports with the *actus reus* criminal law requirement, and that resulting convictions under said legislation will not be overturned for this reason.

Due to a shortage of resources and the nature of the crime, the reality is that many perpetrators who are convicted of a grooming offense will not be placed in any type of detention facility. As such, any U.S. grooming statute should include sanctions such as sex offender registration and allowing law enforcement to monitor the perpetrator's home and electronic devices. It is recommended that grooming legislation permit the imposition of both criminal and civil sanctions, depending upon the specific circumstances involved in each case. The United States should also follow the example set in England and Wales by making use of Sexual Risk Orders (SROs) and Sexual Harm Prevention Orders (SHPOs) in grooming cases. SROs and SHPOs are civil orders which were enacted in 2014. An SRO or SHPO may be implemented when a court finds that such an order is necessary to protect the victim from some type of sexual harm. The terms of these orders can vary to include whatever restrictions a judge determines are necessary to protect the victim from harm based upon the circumstances of that case. SROs in particular can be quite beneficial in such cases because they can be imposed even in the initial phases of grooming, as well as when the perpetrator has no previous convictions (Kool, 2011). Though there are many benefits to utilizing SROs and SHPOs in grooming cases, constitutional principles dictate that U.S. courts would have to implement such orders using the least restrictive means possible to prevent the resulting harm, as well as to give the offender adequate specificity about what behavior is and is not allowed under such an order.

It is also recommended that any statute include a degree of flexibility in punishing grooming offenses. As this is a crime that may encompass a wide variety of circumstances, it would be beneficial for legislators to look outside the scope of exclusively punitive sanctions such as incarceration or fines. As an example, the Dutch Criminal Code allows for the imposition of punitive sanctions, as well as such as more educational punishments such as paying money to a public fund and taking care of the victim's interest (Kool, 2011). Since online grooming is a crime that inevitably involves children, one can certainly envision numerous scenarios in which thinking outside the scope of a more traditional retributive punishment could be extremely beneficial for helping to rehabilitate offenders, to provide a sanction that has a more meaningful impact on the victim, as well as an educational opportunity for both the victim and the perpetrator.

### **Law Enforcement Recommendations**

Providing appropriate training to law enforcement is extremely important because individuals who engage in online grooming of children and adolescents are quite adept in maneuvering and changing both their tactics and their utilization of technology in order to avoid being caught. Because technology and techniques used to circumvent protective measures are constantly changing, it is very important that law enforcement professionals who deal with cybergrooming cases engage in training and technological updates on an ongoing basis. One-time training in this area will only be useful in the short term. In addition to being effective in modifying

their behaviors, child sexual abusers are also extremely proficient in embracing changing technology and technologic advances to pursue and solicit children in an online environment (McCartan & McAlister, 2012). Law enforcement professionals also need to be trained in how to interpret cybergrooming legislation in identifying what behavior is in violation of such statutes. Officers who handle cybergrooming cases must also be continuously educated and updated on legislative changes and advancements in sexual grooming cases. Such training should include how to identify what behavior has the potential to escalate into sexual abuse of a child and should be given the highest priority when assessing cases. Officers who handle cybergrooming cases also need to be educated in how to effectively communicate with victims of this behavior, as the vast majority are children who need to be handled in a particularly sensitive manner throughout the investigation process.

Depending on the size and resources of a particular law enforcement agency, having either specific personnel or entire units dedicated to identifying and processing cybergrooming cases would also do a tremendous amount to help stop this activity before it escalates into sexual abuse of children. These individuals would receive more intensive training on cybergrooming and would also be able to work with schools and youth-serving organizations on educating children on how to identify and deal with online grooming directed at them or their peers. Due to their additional training and knowledge, such units or specialized personnel would also be a logical place for cybergrooming instances to be reported and for a subsequent investigation to be initiated.

Because all cybercrimes, including grooming, have the potential to transcend jurisdictional borders, it is essential that various states, as well as countries throughout the world work together in order to combat online grooming. As previously stated, this will be made significantly easier if grooming legislation is as consistent as possible throughout various jurisdictions. Regulation of cybercrimes often necessitates that numerous law enforcement agencies be involved in the successful resolution of a case. Due to the collaborative nature of these cases, it is very important that each agency or entity have a clearly defined role in the resolution of a grooming case in order to avoid a duplication of services and to prevent wasting precious law enforcement resources. It is also very important that leaders within law enforcement agencies foster a culture in which working collaboratively with other agencies is both expected and encouraged. Law enforcement leadership should foster a culture within that particular department that identifies grooming as a real threat that has the potential to inflict devastating harm upon children if left unchecked. Seeing this type of example from superiors will help encourage law enforcement professionals at all levels to take instances of grooming seriously and to do all they can to assist the victims of this crime.

It is also recommended that there be a blending of law enforcement and societal responses by giving local law enforcement the opportunity to work with schools and youth serving organization on prevention, awareness, and reporting of cybergrooming. This type of partnership would allow children to be educated in a way that corresponds with the real-life enforcement of cybergrooming. It will also allow them to become familiar and comfortable with law enforcement professionals, which will then give them a realistic avenue for reporting such behavior so that it can be identified and stopped at the outset.

### **Societal Recommendations**

As children spend the majority of their time in school and with peers, it is very important that schools be involved in safety discussions of children's online communications. School involvement is also necessary as many parents will either be unable or unmotivated to engage in discussions with their children about these important topics and safety protocols. Schools should purchase and utilize some type of interactive curriculum, of which many are available, that meets the needs of that particular school system and which gives students the information necessary to both identify and report grooming behavior. Whatever curriculum is chosen for use, it should incorporate some type of "real life" components in which students can hear the stories of abuse victims with whom they can easily identify. Seeing someone to whom students can relate and hearing how easy it was for someone like them to become a victim will be far more effective than simply presenting information in a more abstract manner, as students may take in the information but fail to relate it to their own scenario.

In addition to disseminating information and safety messages, it is recommended that schools also provide a forum for open and ongoing discussions among peers about online grooming and sexual communications (Wurtele & Kenny, p. 340). While many children may be afraid or cautious about sharing this information with adults, talking to their peers is far less intimidating. If a child is able to share his or her experiences with a trusted peer, and see that the friend has had similar experiences, it will likely give that child confidence in coming forward and reporting the inappropriate behavior. This is particularly important since while most youth and adolescents do not tell their parents about sexual abuse, they will often confide in their peers about such things (Wurtele & Kenny, p. 341).

Addressing grooming from an educational perspective is very important, given the fact that this behavior is so difficult to encompass in the text of a statute, as well as the challenges encountered by law enforcement in policing this activity. For these reasons, it is anticipated that bodies outside the government, such as schools, parents and peers, may be the most effective at preventing grooming by teaching children about this crime and providing a forum for open dialogue about grooming and sexual abuse. Likewise, education and awareness will be much more effective than monitoring and control over children and adolescents' online activity. If they are given the opportunity to participate in the solution, this will empower children to take action to report grooming and sex abuse.

The reality of today's youth is that most live in households with working parents, which means that they spend the majority of their time at school and then in some type of after school care program until the evening hours. As such, programs and organizations that provide care to minor children should also engage in conversations about online grooming and the resulting sexual abuse that can occur. These programs should establish clear guidelines about the use of electronic devices while children are in their care. They should go over the guidelines and expectations with both children and parents, and explain why these guidelines are in place. Because many children spend a significant amount of time in the care of such programs and organizations with their peers, these also provide a valuable opportunity to help educate and engage with children about protecting themselves from online abuse. Many children form trusting relationships with the leaders and caretakers in after school programs and extracurricular activity organizations. These leaders can do a significant amount to provide a safe place for a child to report grooming and abusive behavior.

Because of the nature of the relationship between the child and the leaders or caretakers, it is strongly recommended that these programs and organizations establish strict guidelines and ongoing education to those who have contact with children about what behavior is and is not permitted; what the consequences are for violating these rules in their interactions with children; and how to recognize signs that a child may be the victim of online grooming. These rules and policies should be explained in detail to parents, children, and staff so that there are numerous levels of accountability, which increases the likelihood that inappropriate behavior will be reported by one of the parties involved.

It has been observed that making a distinction between grooming children for sexual activity and simply mentoring and providing support for children in a positive way is one of the greatest challenges faced by youth-serving organizations (Lanning, 2018, p. 13). This also applies to schools, churches, sports organizations, and other entities that work with children on a regular basis. Technological measures, such as software that prevents children from accessing certain Internet sites while at that organization's location, and which allows parents to view a child's browsing history during that time are certainly a first line of defense. However, these should not be relied on exclusively, as children are often far more technologically savvy than adults and many may be aware of numerous ways to circumvent these protections. As such, these measures should be used in addition to, not in place of, education and ongoing discussion about the dangers of online grooming and sexual abuse. Because online groomers may target children of various ages, this type of discussion and education should take place in an age-appropriate way, with more information and details being given to adolescents and teenagers.

The highest risk factor for a child being groomed online is social vulnerability. There are many factors that may contribute to a child's social vulnerability, including bullying activity, sexual identity issues, being isolated from peers, and other factors (Kool, 2011; Ybarra & Mitchell, 2004). As such, it is crucial that those who work with children regularly keep an eye out for these issues and be able to direct children with such susceptibilities to resources that can help them overcome such factors and reduce that child's risk for becoming a target of online grooming.

It is also vital that children have a place where they can report grooming and online abuse. Since these children are clearly comfortable communicating online, it would ideally be a place where children could report such activity via the Internet. The existence and location of such a reporting service would need to be marketed extensively and be made well known to children who are of an age to have an online presence. It has been noted that though there are a number of websites and public service announcements that promote safety for adolescents online, these are flawed in that most do not adequately address the real picture of what takes place in online sexual solicitations of children and adolescents (Wurtele & Kenny, 2016, pp. 337-338). These websites tend to warn young online users of the risks of instant messaging and chat rooms, to keep identifying information private, and to never meet individually with a person that they encountered online. However, very few of these websites specifically address sexual solicitation and how to handle an inappropriate online relationship with an adult who is known and trusted by the child (Wurtele & Kenny, p. 338). Since this comprises a substantial number of grooming cases, it is very important that these messages be disseminated as well.

Likewise, awareness campaigns against sexting and sending sexual content tend to be aimed at sexting among peers rather than sending this type of information to an adult (Wurtele & Kenny, p. 338). The effectiveness of these websites and public service announcements is also

questionable because it is quite likely that many adolescents either do not access them at all, or upon seeing them, disregard them as something that applies to someone else but not to them. In order for these public awareness campaigns to be effective, they must be presented in a way that resonates with the intended audience, and they must be presented in such a way that encompasses grooming behavior from an adult. By doing this, it is anticipated that such websites and public awareness campaigns can indeed bring about a great good to the public by deterring the type of behavior and resulting sexual abuse to children that they are intended to address. It is recommended that forums for reporting grooming and sexual solicitation be established both online and via text. Especially since many youth who experience this behavior are marginalized individuals with insecurity issues, being able to report this behavior in way that does not initially involve face-to-face interaction is crucial to catching grooming behavior in its early stages before it has escalated to full-scale sexual abuse.

Parental involvement and supervision is absolutely essential to preventing grooming and resulting sexual abuse of children. In order to effectively prevent their children from becoming the victims of sexual abuse from online grooming, it is very important that parents communicate openly and frequently with their children; establish close and trusting relationships with their children; and closely monitor children's online activities (Wildsmith *et al.*, 2013). While monitoring children's online activities is important while they are young, it is equally as important that parents help establish and reinforce safe online habits and protocols so that as children become older and more independent, they are in a good position to protect themselves from predators with less parental supervision. This is particularly important as older children and adolescents are far more likely to have access to cell phones and mobile devices, and therefore may access the Internet away from the parents with greater frequency than younger children. Likewise, parents should also have ongoing and open discussions with their children about the appropriate boundaries of adults initiating relationships with children. This dialogue should increase as children become adolescents and begin to explore various aspects of dating and romantic relationships. Parents should engage in these discussions in an open and non-judgmental manner, which will give children a sense of security in confiding in their parents if any relationship with an adult begins to push these boundaries of inappropriateness.

In order to address grooming and resulting child sexual abuse, an interagency approach is crucial. There must be a working partnership of the police with both schools and youth-serving organizations in order to provide a seamless process for reporting grooming behavior (Davidson & Martellozzo, 2008). Indeed, a comprehensive study has shown great success in a UK-based educational initiative called the Metropolitan Police Safer Surfing Programme, which stems from a partnership between the London Metropolitan Police and area schools. The students who participated in this program showed a heightened awareness for the warning signs of grooming, what type of information should not be given out over the Internet, and what type of activities could put them at risk for sexual abuse (Davidson & Martellozzo, 2008). It is recommended that similar partnerships and educational programs be established and implemented between police forces throughout the U.S. and the school districts that fall within that department's jurisdiction.

### **Conclusion**

Grooming is defined as purposely establishing a connection with a child for the purpose of preparing that child for future sexual abuse. The act of grooming itself may appear harmless on

its face, but it has the potential for inflicting a devastating impact on children if it is allowed to continue. Children who are the victims of online grooming are at a heightened risk for mental health issues, depression, sexual problems, anxiety, and suicidal behavior throughout their lives. There is currently very little law that specifically addresses grooming behavior. Those legislative measures that can be applied to grooming are ineffective at doing so in a comprehensive manner. Due to the detrimental impact that this activity has on its child victims, it is essential that legislators recognize grooming as a credible threat and enact appropriate legislation to effectively define grooming behavior and punish perpetrators before the abuse becomes more extensive.

So that cybergrooming can be effectively dealt with through legislation, it is necessary that both federal and state governments enact grooming-specific legislation that clearly and unambiguously defines what constitutes grooming. These definitions should be consistent with one another since grooming may need to be addressed on both an interstate and intrastate basis. The resolution promulgated by the American Bar Association's Young Lawyer Division should be looked to for guidance on developing grooming statutes. Legislation must require that some action be taken and should ideally include illustrative scenarios of grooming. Grooming laws should include some flexibility in sanctions so that either a punitive or a more educational punishment may be implemented as appropriate.

So that online grooming can be dealt with correctly, it is important that law enforcement professionals receive detailed and ongoing training about how to identify grooming, process grooming cases, and interact with grooming victims. Depending upon the size and resources of a law enforcement agency, either a specialized grooming unit or designated personnel assignment to sexual grooming cases is recommended. It is also imperative that law enforcement adopt an interagency approach to working on grooming cases, and that case protocols be consistent throughout agencies. Law enforcement should also establish partnerships with schools to both educate children about grooming and to teach them what resources are available to them if they become the victims of online grooming. Finally, it is essential that schools, youth serving organizations, and parents take a proactive approach to both educating children about grooming and how to take action if they become the victims of grooming. Doing this will make a tremendous impact on stopping online grooming before it escalates into child sexual abuse, as well as preventing the devastating impact this activity can have on our children.

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## ***Manufacturing a Definition of the Situation: A Case Study of a Successful Investigative Failure in a Homicide Case***

While research on homicide investigations have examined how cognitive biases can mislead investigations, few studies have examined cases where the police start an investigation based on an incorrect definition of a situation. Utilizing the David Koschman homicide investigation as a case study, this article illustrates how the Chicago Police Department used confusing line-ups, incomplete canvassing, and inconsistent record-keeping practices to support a particular definition of a situation that is based on a preconceived truth. Our findings demonstrate how the police can use their considerable knowledge of investigatory procedures to arrive at a predetermined outcome. We argue that this outcome can be partially explained through the intersection of local police culture, political influence, and the information management tools/procedures used to help investigate homicides.

**Keywords:** homicide investigations; investigative failure; police cultures; politics and policing

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### **Introduction**

The success of a homicide investigation can be measured in multiple ways, from its outcome and adherence to procedural integrity to prevention and community impact (Innes & Brookman, 2013). Scholars have also shown that homicide clearance is shaped by factors that are extraneous to police agencies, such as the level of social control that is embedded in a community (Regoeczi, Kennedy, & Silverman, 2000), neighborhood characteristics (Jiao, 2007; Morris & Maguire, 2016; Petersen 2017), community size (Pare, Felson, & Ouimet, 2007), weapons used (Alderden & Lavery, 2007), and victim characteristics (Hawk & Dabney, 2014; Martin, 2014; Pierce et al., 2014), as well as factors that are internal to police agencies such as case load (Jiao, 2007), resources available to investigators (Carter & Carter, 2016), training provided to detectives (Keel, Jarvis, & Muirhead, 2009), along with the pressures placed on officers to solve the crime (Schlesinger et al., 2014; Snow, 2005). Whether the success of a homicide investigation is measured in its clearance or adherence to departmental procedure and protocol, this aspect of the literature presupposes an inquisitorial mode of police action, that the police have 'good' intentions to solve a homicide (Trainum, 2014) based on facts and the 'truth' of what happened. Few have asked whether the police in fact intend to solve a case accurately by identifying and arresting the correct suspect.

There are good reasons to suspect that the police may not be interested or be able to solve a case by identifying the correct suspect for a number of reasons. First, investigative decision making occurs in the context of an organizational process structure that has the potential to lead to misinterpretation and misidentification of suspects. Detectives have a pragmatic and fractal view of the truth rather than an absolute one (Innes, 2002). Consequently, they may simply be “carried along” by investigative structures and epistemologies when no obvious suspects are identified during the initial stages of an investigation (Innes, 2002). Furthermore, detectives may be operating under personal belief systems that tend to devalue certain victims (e.g., Blacks, Latinos) while elevating the moral worth of some victims (e.g., White women) as a way of managing the emotional strains of detective work (Hawk & Dabney, 2014; Martin, 2014; Pierce et al., 2014). Both reasons have the potential to contribute to investigative failures.

Second, the organizational and process structures related to homicide investigations compel unethical actions in conjunction with some of the cultural aspects of police work in general: police routinely lie as part of their work (Alpert & Noble, 2009). Lying as part of police work is so common that names have been given to two pervasive forms of police lying. “Reportlying” refers to the practice of lying on police reports and other official forms while “testilying” refers to lying during testimony (Houglund & Allen, 2015). It has been found that the most common crime that police officers commit is perjury, which is committed to hide the incompetence of fellow officers or to cover up a crime. Whether a lie is told deliberately to cover up a crime or through omission of exculpatory facts in reports (Fisher, 1993), police lying represents a reality of police work that militates against the view that the police strive to always identify the accurate suspect. Third, researchers have shown that homicide investigations are pushed and pulled by stressors unrelated to a case. For example, time and the pressure to “get a scene right” the first time are significant sources of stress in a homicide detective’s workload, as well as constant oversight from upper administrators (Dabney et al., 2013). While quantitative studies have shown little impact of political influence on murder clearance rates, qualitative case studies have shown that political influence affects investigative decision-making and case outcomes (Davies, 2007). As Davies (2007, p. 146) notes, “media, local political figures, and prosecuting attorneys exercise significant impact on police practices and procedures, investigative decision making, and even fluctuations in murder clearance rates.” The actions of homicide detectives that lead to investigative failures—intentional or unintentional—remain opaque from quantitative methodologies and require qualitative approaches to uncover the forces that shape the outcome of a case.

If political influence affects the outcomes of homicide investigations by impacting investigative decision making, how are the process structures manipulated to achieve a desired outcome? This question has not been asked in the previous literature. If the police are not in fact rational entities trying to maximize performance, but an organization that seeks to secure approval from ‘authorizing environments’ (Davies, 2007), then how do homicide detectives use the existing investigatory methodologies and epistemologies (Innes, 2002) to accomplish an investigatory failure in a homicide investigation? Using the homicide of David Koschman as a case study, this article attempts to show how an investigative failure can function as a success that protects the privilege of political power. It does so by showing how the homicide detectives at the Chicago Police Department (CPD) began a homicide investigation with a predetermined ‘definition of a situation’ based on a preconceived truth and then proceeded to support their

conclusions by manipulating conventional investigation protocol. This paper contributes to the literature on homicide investigation by showing how the police retain a significant amount of discretionary and narrative power to shape investigations toward a particular outcome based on a manufactured definition of a situation, despite several technological, procedural, and political checks and balances that have been built into the criminal justice system.

### **Prior work on homicide investigations**

As one of the most “visible” crimes, homicides and their clearance face vigilant scrutiny and accountability from various political entities, the public, and the media (Alison et al., 2013; Davies, 2007; Puckett & Lundman, 2003). There is also general consensus that the outcomes of homicide investigations are shaped by demographical characteristics of victims (Alderden & Lavery, 2007; Litwin, 2004), social characteristics of neighborhoods (Petersen, 2017), as well as bureaucratic and organizational pressures within police departments in general and homicide investigation units in particular (Dabney et al., 2013). Although a successful homicide investigation has been defined as one that concludes with the identification and arrest of a suspect followed by an eventual conviction (Geberth, 2006), recent works have highlighted the importance of alternative measures of success such as procedural integrity, community impact reduction, and homicide prevention (Brookman & Innes, 2013).

Although traditional models of homicide investigations have mirrored an apprentice model whereby new investigators shadow experienced detectives as a way of learning the skills of the craft (Geberth, 2006), recent works have emphasized the processual and structural aspects of police investigations as a complex task. The complexity in explaining this process lies in the use and reliance on inference-based decision making and other subjective measures that are often necessary for a homicide investigation (Snow, 2005). Furthermore, theories of homicide investigation have gone beyond the dyadic classification such as a “dunker” and a “whodunit” (Simon, 1991), and evolved into explicating the intricate process structures related to the two canonical classifications related to murder investigations (Innes, 2002). Innes (2002) states that homicides that are relatively easy to solve—self-solvers—revolve around three stages of investigative activity: (1) establishing a definition of a situation; (2) information collection involving interviews with various participants; and (3) case construction where detectives weave a coherent narrative of the murder so that the motive for a homicide becomes evident (Innes & Brookman, 2013). A whodunit, on the other hand, is not as simple as self-solvers since these type of homicides tend to occur between strangers who do not have an established history of interaction. Consequently, this type of investigation involves five stages where the following sequential activities take place: (1) establishing a definition of the situation; since the suspects may not be obvious in whodunit cases, detectives follow routine procedures such as interviewing witnesses and canvassing neighborhoods to structure their activities (Brookman, 2005); (2) information burst stage where police actions lead to an influx of information; (3) suspect development; (4) suspect targeting; and (5) case construction (Innes, 2002). In both process structures, establishing a basic definition of the situation—whether a homicide occurred or not—determines the next series of actions.

Problems arise when investigative failures at one of the stages leads to publicized cases of miscarriages of justice that involve wrongful convictions (e.g., Thompson-Cannino, Cotton, & Torneo, 2009). Researchers have shown that investigative failures are likely to arise when

detectives engage in tunnel vision, focusing an inordinate amount of time and resources into one theory of murder rather than considering alternative hypotheses (Trainum, 2014) or base their investigative decisions on preconceived biases toward various groups or populations (e.g., ethnic minorities) (Schlesinger et al., 2014). Researchers have shown that a premature shift from deliberation to implementation hinders an impartial information search that may be a significant cause behind investigative failures. This premature shift leads to misidentifications, which then leads to the closing of a case prematurely due to a lack of evidence, and wrongful convictions (Fahsing & Ask, 2013). It has been argued that it is important to identify these decisional tipping points—decisions that put a mindset focused on verifying the guilt of a suspect—to safeguard against premature shifts that lead to investigative failures (Fahsing & Ask, 2013). Although decisional tipping points have been conceptualized as a mindset that focuses on the verification of guilt of a suspect, few have asked if mindsets can be politically influenced to construct the innocence of a guilty suspect.

Although researchers and practitioners agree that homicide investigations do not follow a linear approach (Geberth, 2006), notable investigative failures have spawned the creation and implementation of formal structures to standardize investigative methodologies and epistemologies. Investigative failures that have become notorious tend to center around wrongful convictions or prolonged investigations that experience difficulties in identifying and arresting a suspect, despite the presence of sufficient leads. The problem in these types of cases has been a failure in information and data management rather than malicious intent or gross incompetence of investigators (Keppel & Birnes, 2003, 2009). Consequently, standardized reporting tracking systems such as Major Incident Room Standard Administrative Procedure (MIRSAP) (Mooney, 2010) and Professionalizing Investigation Programme (PIP) have been created and implemented in the U.K. (Maher, 2010) as a way of standardizing and developing investigative skills, knowledge, and practice amongst police forces in order to professionalize investigations and as a way of reducing linkage blindness in multijurisdictional investigations (Egger, 1984). In the U.S., Washington State's Homicide Investigation Tracking System (HITS) emerged in the context of a prolonged effort to identify a prolific serial killer (Keppel, 1992).

Homicide investigations also have to be understood in the context of general police culture and the unique norms of homicide investigation units. First, the capacity to exercise coercion by police officers plays an important role in the creation and maintenance of a distinct police culture (Bittner, 1978). This capacity distinguishes the police from the public and adds to the overall cohesion of occupational police culture (Caldero & Crank, 2004). The police mandate and self-identity impose a moral hue in the work that they perform (Herbert, 1998). Second, police culture is heavily influenced by local politics and political figures (Wilson, 1968). Wilson's (1968) theoretical framework helps explain how local political culture and police styles influence the actions of police officers. The police are likely to be guided by structural or organizational motivations, ideologies and interests both internal and external to the organization (Manning, 2004). Third, police officers constantly have to navigate role ambiguity and uncertainty with respect to supervisory expectations (Manning, 1995). This ambiguity is highlighted in the work of homicide detectives who must perform multiple tasks at crime scenes, often under stress in the presence of witnesses, families, supervisors, and media, and painstakingly document the procedures and findings in paperwork (Dabney et al., 2013). Moreover, the uncertainty of not knowing when they will be called in to work—even on their day off—and managing the conflicting

reality of investigative work, lead to tremendous stress and pressure for detectives who have to investigate the cases (Hawk & Dabney, 2014).

The literature on homicide investigations is pertinent to this paper in another way. The case study that is examined in this paper involves a homicide investigation that was closed prematurely. The premature closing was not brought about by tunnel vision or bias, but allegedly due to the suspect's identity: the suspect in the homicide case was the presiding mayor's nephew. The victim's mother alleged that the case was cleared prematurely due to the political influence the mayor's family exerted on the case processes and outcome (Koschman v. City of Chicago et al., 2014). It remains unclear how the homicide detectives carried out their investigation in such a way that led to the exceptional clearance of the culpable person while the traces of the victim were erased from the textual archives of police records. The current case study as an example of a failed homicide investigation is important because the successful failure may be related to a pattern that is reflected in the investigating agency's record-keeping practices.

Historians have shown that records of law enforcement's criminal activity tends to be manipulated, omitted, or destroyed altogether (Steinwall, 1986; Theoharis, 2004). In some instances police agencies keep one set of "clean" records for public consumption and official archives while another more accurate "street" records are kept for secret purposes or to recall facts accurately prior to trial, without being subject to discovery motions (Fisher, 1993). The Chicago Police Department in particular has a history of keeping parallel records maintaining "street files" that withhold exculpatory evidence, despite court orders and internal directives (Notice 82-2) from CPD Superintendent Richard Brzezczek directing all commanding officers to release all records to defense counsel (Palmer v. City of Chicago). In the current case study, David Koschman's mother alleged that a similar pattern of parallel record-keeping led to the insulation of the mayor's nephew by hiding the existence of accurate interview notes from discovery and prosecution (Koschman v. City of Chicago et al., 2014). It remains unclear how the parallel records may have operated in the current case study to produce a failed investigation.

### **Background: The Homicide of David Koschman**

On April 25, 2004 Richard Vanecko (age 29) punched David Koschman (age 21) after a drunken confrontation on a downtown street in Chicago in front of several witnesses. Koschman was 5 feet 5 inches tall and weighed 125 pounds. Richard Vanecko was 6 feet 3 inches tall and weighed 230 pounds. Richard Vanecko was also the presiding mayor's (Richard M. Daley) nephew. Koschman was accompanied by his friends Scott Allen, James Copeland, Shaun Hageline and David Francis Jr. at the scene while Richard Vanecko was accompanied by Craig Denham, Kevin McCarthy and Bridget McCarthy, celebrating an engagement party (Novak, Fusco, & Marin, 2011a). The altercation began when Koschman bumped into Denham, which caused Denham's glasses to fall off. After Vanecko punched Koschman, he fell backwards and hit his head against the concrete pavement (Day, 2004). Richard Vanecko and two of his friends fled the scene. Detective O'Leary and Detective Clemens of the CPD investigated the initial battery. They interviewed Nancy Koschman (mother of David Koschman), Kevin McCarthy and two additional witnesses, Michael Connolly and Philip Kohler, who were not a part of either of the groups involved in the altercation.

Eleven days after the incident, David Koschman died (Gilger, 2011a). Once the battery case was reclassified a homicide, Detectives Yawger and Vilardita were brought on to assist with the investigation. They conducted a series of interviews with witnesses and other key individuals who had been involved with this case. An interview with Kevin McCarthy and his wife Bridget McCarthy confirmed that Kevin McCarthy had lied to the police in his initial statement on April 25<sup>th</sup>, 2004 in which he stated that he did not know any of the involved individuals. Moreover, these interviews led to the identification of Richard Vanecko and Craig Denham as the other two involved individuals who had fled from the scene after Koschman was injured (Gilger, 2011a). According to the CPD's Case Supplementary Report (CSR) submitted on the 28<sup>th</sup> of February, 2011, however, none of the witnesses were able to identify Vanecko; McCarthy and Denham were positively identified. Following the line-ups, it was concluded that no possible charges would be sought since none of the witnesses could identify who punched Koschman. They also concluded that the victim, David Koschman, was the aggressor whereas whoever punched Koschman acted in self-defense. Based on the aforementioned conclusions, the Koschman homicide case was classified 'cleared closed/exceptionally' (Gilger, 2011a; 2011b). A follow-up investigation concluded that Vanecko had acted in self-defense (Giralamo, 2004).

Seven years later, the reporters from the *Chicago Sun Times* reinvestigated the case and found several anomalies: files related to the Koschman case had disappeared (Downs, 2011); eyewitness line-ups were conducted in ways that were inconsistent with departmental procedures (Yawger, 2004b; Webb, 2013); the statements witnesses provided to the detectives were inconsistent with the ones journalists found (Novak, Fusco, & Marin, 2011d). Nancy Koschman, the victim's mother, along with other relatives, petitioned for and was granted the motion for the appointment of a special prosecutor (Circuit Court of Cook County, 2011). The petitioners believed that the initial investigation, as well as the CPD's reinvestigation of the Koschman case, were purposely misguided due to the powerful influence of the Daley family in Chicago (Koschman v. City of Chicago et al., 2014). The petitioners also requested that the special prosecutor investigate the following: (1) whether the detectives from CPD prepared false reports; (2) if Assistant State's Attorney Darren O'Brien and the employees of the Cook County State's Attorney's Office intentionally conspired to insulate Vanecko from criminal responsibility; and (3) if charges could be brought against Richard Vanecko for the murder of David Koschman (Circuit Court of Cook County, 2011).

### **Data and methods**

A complex homicide case such as Koschman's entails many investigative intricacies. In order to examine these complexities, this article treats the Koschman homicide investigation as a 'case' and utilizes the 'case study method'. This approach treats the Koschman homicide investigation as a unit of analysis and as a focal point for intensive scrutiny. The case study method entails providing rich in-depth descriptions of events, the actors involved, actors' experiences, motivations for behavior, outside influences, environmental factors, specific local cultures and how each of these factors interact through time and space (Denzin & Lincoln, 2011; Gagnon, 2010). In qualitative research, the case study method can be used to build, extend, and validate theory while simultaneously possessing a high degree of internal validity. Therefore, this method is particularly useful for explaining social phenomena (Stake, 2009; Woodside & Wilson, 2003). More specifically, the purpose of this paper is to analyze the investigative procedures followed

by the CPD in the Koschman case as reflected in official reports used by the CPD. Treating the Koschman homicide investigation as a case study allows us to demonstrate how police investigations can start with a preconceived outcome and through considerable discretion amass evidence to support said outcome.

Employing the case study design as the overarching method of research, content analysis was utilized to analyze data from the available documents related to the Koschman case. With respect to social research, content analyses are most appropriately used when studying recorded forms of human communications such as newspapers, laws and legislations, letters, emails and more (Berg, 2001). The data examined for this case study was gathered from official police records, court documents, the special prosecutor's report, the petitions filed with the court by Koschman's family, and the news reports that resulted from the Chicago Sun-Times investigation of Koschman's homicide. Two police records that were used to document the activities related to homicide investigations are especially significant: CPD's General Progress Reports (GPR) and Case Supplementary Reports (CSR). These two forms are important because they entail open-ended answers in the form of a narrative. These forms are filled out at regular intervals after major steps in the investigation have been completed (witness interviews). Elsewhere, it has been argued that the police wield intertextual authority to omit, alter, and fabricate witness statements to create a disingenuous account of a homicide incident in these formats; that this editorial power is just as significant as the coercive power of the police, contemporary criminologists have ascribed this as the defining characteristics of the modern police (Zaidi, O'Connor, & Shon, 2018). The detailed narratives of available police records were first analyzed and verified against the findings from the investigation conducted by the Chicago Sun-Times. When discrepant narratives arose, clarification was sought by examining court documents, the special prosecutor's report and the various petitions filed with the court.

This data collected was coded into mutually exclusive categories in order to illustrate how the Koschman homicide investigation deviated from standard investigatory practices noted in the literature (e.g., Innes, 2002; Maher, 2010). The process of coding allowed for this raw data to be transformed and classified into conceptual categories for further analysis (Berg, 2001). Through multiple unmotivated readings, it became evident that the process related to investigative failure involved the following themes: 1) faulty line-up; 2) incomplete canvassing of the initial incident; and 3) misplacement of physical records. The documents utilized for this investigation were obtained from the Chicago Sun-Times website. The appendix to this paper contains the list of the primary documents analyzed for the purposes of this article. These documents were originally obtained by Tim Novak of the Chicago Sun-Times through a FOIA request and then uploaded to the Chicago Sun-Times online database. The first and third author of this article submitted a similar request to the CPD in January of 2015 but at the time of writing, no response had been received. What follows is an analysis of the best available evidence pertaining to the investigatory aspects of the Koschman homicide investigation.

### **Facilitating Investigative Failure in the Koschman case**

The homicide of David Koschman was not a whodunit case. It morphed from a battery to a homicide; unlike a true whodunit, there were multiple witnesses at the scene who observed the encounter that began as an argument that turned into a homicide. Consequently, the five step model of a whodunit murder investigation (Innes, 2002) would not have been applicable as leads

did not have to be followed and there was no primary crime scene until a month after the initial incident. The detectives had to interview witnesses and suspects, keep accurate records, and compile them for prosecutors (Dabney et al., 2013).

A close reading of the primary (General Progress Reports and Case Supplementary Reports) and secondary data (special prosecutors report, newspaper articles) revealed that homicide detectives deviated from standard investigative procedures to create supportive documentation in the official police records in order to buttress their preconceived idea about the case. Moreover, it could be argued that the detectives facilitated investigative failure by conducting a confusing line-up, conducting an incomplete canvassing, and a gross misplacement of records related to the case that should have been produced through discovery motions by the defense counsel. The preceding steps also were not consistent with the investigative steps noted in the literature and existing CPD policy. In this section, we argue that three investigative steps facilitated the investigative “failure” in the Koschman homicide investigation.

### *Conducting a confusing line-up*

An identification line-up is a fairly common investigative procedure used by the police in their investigations (Hobson & Wilcock, 2011). Previous research indicates that eyewitness identification is considered to be a powerful and persuasive source of evidence within the criminal justice system (Porter, Moss, & Reisberg, 2014). On the contrary, recent research on eyewitness identification and police line-ups indicates that it is among the leading causes of wrongful convictions (Pozzulo, Dempsey, & Crescini, 2009), that one in five witnesses is likely to identify a filler rather than the actual suspect (Porter et al., 2014). Given such questionable findings, research on identification line-ups has focused on factors such as appearance changes, age of witnesses, and number of suspects presented that can influence validity and accuracy and lead to misidentification (Hobson & Wilcock, 2011).

A close reading of the data revealed that change in appearance and time lapse between the incident and the identification line-up as possible reasons for misidentification. The identification line-up for the Koschman case was conducted on May 20<sup>th</sup>, 2004. In this line-up, Koschman’s friends and bystander witnesses were asked to identify Vanecko, Denham, and McCarthy. As corroborated by court records, news reports, and the Special Prosecutor’s report, the manner in which this line-up was presented was inconsistent with standard practices (Circuit Court of Cook County, 2011). First, the line-up was conducted nearly a month after the incident had occurred. Secondly, knowing that the witnesses had physically identified Vanecko by the virtue of his relatively larger build, the detectives presented white male fillers who were physically larger than Vanecko (People v. Vanecko, 2013). Moreover, the witnesses consistently reported that the assailant was wearing a hat at the time of the altercation yet, none of the participants in the line-up wore a hat (Koschman v. City of Chicago et al., 2014). The identification line-up presented ideal conditions for misidentification: none of the witnesses were able to identify Vanecko as the assailant.

It is almost impossible to prove or disprove why seasoned detectives selected fillers who were physically larger than the alleged suspect or why they failed to have the fillers and suspects wear hats, as indicated in the initial witness statements. It is difficult to impute malicious or negligent intent to the actions of the seasoned detectives. However, what is indisputable are the consequences of the confusing line-up that occurred: none of the witnesses was able to identify

Richard Vanecko as the assailant who had punched David Koschman. We argue that this line-up that was executed in confusing ways functioned as a first step in insulating the suspect from being identified as the perpetrator.

#### *Incomplete canvassing of the initial incident*

Canvassing is one of the primary procedures which often marks the beginning of an investigation. Within the preliminary fact-finding stage of the investigation, law enforcement officials are supposed to complete a general canvas of the incident. The practice of canvassing includes interviews with witnesses, involved parties, and individuals from the neighborhood or the surrounding areas (Edwards, 2009). Prior research indicates that canvassing is a major lead-generating procedure. Moreover, it is stated that canvassing creates a broad framework of data which can be utilized at the various stages of the investigation (Geberth, 2006). A failure to canvas appropriately can result in an overly complex and strenuous investigation (Snow, 2005). There is consensus in the literature that inadequate canvassing can obscure the course of the investigation as significant information pertaining to the case may remain concealed.

Examining the Koschman case revealed that standard investigative steps impacted the course of the investigation. A notable shortcoming in the investigation involved the failure to secure available video footage of the altercation from nearby surveillance cameras. As per CPD's standard investigative procedures, officers and detectives involved in an investigation are expected to canvass the area for additional witnesses and evidence (Koschman v. City of Chicago et al., 2014). This above-stated protocol was not followed by the detectives involved in the Koschman investigation. If detectives had appropriately canvassed the scene, surveillance footage of the initial altercation between Vanecko and Koschman would likely have been acquired. There were at least 13 establishments that would have had video footage of the area where the altercation took place; however no efforts at gathering such evidence were made (Koschman v. City of Chicago et al., 2014). Consequently the investigation of the battery case was concluded in a matter of a few hours. After the death of David Koschman and reclassification of the case as a homicide, Detective Yawger, along with all other detectives assigned to the case thereafter did not acquire surveillance footage that could have provided a factual account of the altercation (Koschman v. City of Chicago et al., 2014; People v. Vanecko, 2013).

Again, it is almost impossible to prove or disprove why seasoned detectives did not canvass the 13 establishments that could have contained footage of the altercation. Again, it is difficult to impute malicious or negligent intent to the actions of the seasoned detectives. However, what is clear is that the failure to obtain surveillance footage led to Vanecko's actions as being interpreted and reported as self-defense, thereby absolving him from criminal responsibility. It has been shown elsewhere that witness statements were intertextually manipulated to create a plausible context of a confrontational homicide as a way of framing the incident as one of self-defense rather than a premeditated attack (Zaidi et al., 2018). This definition of the situation as one of self-defense rather than a malicious and unprovoked attack was possible because the line-up was not able to establish Richard Vanecko as the assailant. The assailant who punched David Koschman was never established in the official records; only that David Koschman was punched and fell backwards.

A 6 feet and 3 inch tall Richard Vanecko weighing 230 pounds punched 5 feet 5 inch David Koschman who weighed 125 pounds, which caused him to fall and hit his head on the pavement

and die from his injuries. Surveillance footage would have showed if Koschman was indeed the aggressor or a peacemaker; the surveillance footage would have showed if Vanecko punched Koschman in self-defense or out of the blue. What is clear is that the failure to thoroughly canvass the neighborhood resulted in the insulation of Vanecko from being identified as the perpetrator; instead, he became textually constructed as a reasonable person practicing self-defense. The two preceding steps therefore were implicative in establishing a definition of the situation as being related to self-defense rather than a malicious attack.

### *Inconsistent record-keeping practices*

Although previous researchers have emphasized the role of cooperation amongst law enforcement agencies as a key variable to improving homicide clearance rates (Carter & Carter, 2015), that a cooperative working relationship can be used to facilitate investigative failure has not been noted. Such a possibility emerged in the reading of the secondary data related to the Koschman case. The Cook County State's Attorney's Office (SAO) assigns an Assistant State's Attorney (ASA) to homicide units in Area Headquarters (at the time of the Koschman case, an area consisted of 5 police districts) to conduct felony reviews. It was the ASA's job, as head of the Felony Review Unit, to provide advice or recommendations to homicide detectives, and to document them in the unit's case-tracking database. It was an integral part of the job of the Chief of the Felony Review Unit to ensure that such guidelines were followed. However, a felony review folder that should have been created and turned in for every case that was assessed for the purpose of internal recordkeeping never occurred. ASA O'Brien did not turn in any records related to recommendations. The felony review file pertaining to the Koschman case was classified as 'missing' (Koschman v. City of Chicago et al., 2014).

After the Koschman case was sent to the State's Attorney's Office (SAO), ASA O'Brien, accompanied by Detective Yawger, re-interviewed some of the key witnesses. Both were highly experienced and had well-renowned reputations for being thorough and detailed in their investigations (People v. Vanecko, 2013). However, ASA O'Brien and Detective Yawger did not take meaningful notes during the interviews that they conducted. The notes that they did manage to take were destroyed afterwards, which was inconsistent with existing procedures. Even with the existence of strict procedural guidelines, ASA O'Brien did not create or submit mandated records. No records pertaining to the Koschman case were ever created in the Felony Review Unit (People v. Vanecko, 2013).

As the reinvestigation of the Koschman case unfolded, more and more instances of missing files began to emerge. A day after the FOIA request was submitted by the Chicago Sun-Times, Detective Yawger, who had retired prior to the reinvestigation, called Detective Walsh to discuss Koschman's homicide file (People v. Vanecko, 2013). Detective Walsh later reported to CPD's Commander Yamashiroya that David Koschman's homicide file was missing. That same file was later recovered from Detective Walsh's own office in an incomplete state (Downs, 2011). Among many other records, the newfound homicide file was missing all the General Progress Reports (GPRs) from the initial investigation in 2004 (Gilger, 2011c). These GPRs would have included witness statements which were indicative of Vanecko's unjustified assault on Koschman. Nevertheless, the reinvestigation of the Koschman case was closed in March of 2011 without any charges in question as had been decided amongst the officials at the CPD, SAO, and Mayor's office.

Following the inconsistencies with respect to missing police records, the City of Chicago's Inspector General Office (IGO) launched an investigation on how the CPD had handled the Koschman case. In April of 2011, the IGO sent a request to CPD in order to acquire all documents pertaining to the Koschman case (People v. Vanecko, 2013). Following this request, telephone records show that Detective Walsh and retired Detective Yawger had several conversations. A day after their telephone conversation on June 28<sup>th</sup>, 2011, Detective Walsh was able to recover a copy of the Koschman homicide file which appeared to be in an altered state (People v. Vanecko, 2013). A day after the discovery of the Koschman homicide file, retired Detective Yawger was able to recover his working file from the CPD locker room. These newfound files remained in the custody of Detective Walsh and retired Detective Yawger before the eventual turnover to the IGO (People v. Vanecko, 2013). Both of these newfound files appeared to be altered; the consisting documents did not match the inventory sheets which is indicative of the fact that materials within the files had been rearranged and removed (Koschman v. City of Chicago et al., 2014).

The missing files again reiterate the parallel record-keeping practices of the CPD. Prior to the Koschman case, the CPD was involved in another case that involved the maintenance of street files that were excluded from discovery motions from defense counsel. The case involving Palmer v. City of Chicago mandated CPD to alter its recordkeeping practices so that, where the plaintiffs alleged that the defendants, acting through the CPD and the Cook County State's Attorney's Office, were: "continuing their policy and practices of concealing basic investigative working files, known as 'street files,' 'running files,' or 'office files,' in order to restrict and prevent the flow of exculpatory evidence to criminal defendants, in spite of the Constitutional requirements of Brady v. Maryland, 373 U.S. 83[83 S. Ct. 1194, 10 L. Ed. 2d 215] (1963) and the discovery rules of the Illinois Supreme Court (Ill.Rev.Stat. ch. 38, Sec. 110-A, S.Ct. Rules 412, et seq.)."

That the Cook County State's Attorney's Office and CPD failed to maintain adequate records, despite constitutional requirements imposed by Brady v. Maryland, the discovery rules from the Illinois Supreme Court, and a direct order (Notice 82-2) from the CPD Superintendent Richard Brzeczek to the Detective Division, mandating that "all current unit investigative files be preserved intact; prohibits the permanent removal, destruction, or alteration of any unit investigative report or file by any sworn or civilian member of the Department; establishes procedures for Detective Division members to insure unit investigative files are properly preserved and controlled" (Palmer v. City of Chicago, 1985) suggest that cooperation amongst agencies and chain of command within police agencies may not overcome other more powerful forces that operate in the nexus between police and politics.

The missing records from detective Walsh's office were a violation of the CPD's internal policy. Although Detective Walsh was investigated by Internal Affairs Division for the missing records, even the Special Prosecutor noted that Walsh and others involved in the original investigation could not be charged due to a lack of evidence. Although impossible to verify, the missing General Progress Reports and Case Supplementary Reports would have probably revealed what the witnesses later told reporters from the Chicago Sun Times: that numerous witnesses had Richard Vanecko as the assailant. This is the truth and the definition of the situation that should have shaped the subsequent steps in the investigation. However, such a definition of the situation would not have been consistent with the definition that detectives crafted as a way of insulting the mayor's nephew from criminal responsibility. The official records

that were kept and turned over as discovery motions included only those records that had textually constructed the incident as one related to a drunken brawl that resulted in a defensive homicide. In the version created in the official records, David Koschman was the aggressor and Richard Vanecko a peacemaker who defended himself from the aggressor. However, in the records that never came to light and in the surveillance footage that was never obtained, the witness statements corroborated the fact that David Koschman was punched without provocation, that he was a victim of a sucker punch. This is the definition of the situation that the records overlooked—wittingly or unwittingly.

### **Discussion & Conclusion**

The homicide investigation of David Koschman was a failure because the detectives prematurely closed the investigation, and allowed the person responsible for his death to escape the sanctions of the criminal justice system. We have argued that the investigative failure began when detectives imposed an erroneous definition of the situation. Rather than defining the homicide as a street brawl that turned into a confrontation which turned lethal, the detectives framed the investigation as a defensive homicide using omitted, fabricated, and altered witness statements (Zaidi et al., 2018). We have argued that the investigative failure functioned as a success, for it insulated the presiding mayor's nephew from criminal responsibility. We have argued in this paper that the investigative failure occurred because detectives wittingly or unwittingly carried out their investigations that ultimately hindered it—which became its very success.

First, by conducting a confusing line-up, the detectives were able to generate an official police record which established that a suspect could not be identified by the available witnesses, thus erasing Vanecko's existence as a suspect from the archives of Chicago Police. Second, the incomplete canvassing aided in the elimination of plausible suspects and the truthful definition of the situation from police records. Since no video footage of the incident was obtained, the information presented in official records was entirely reconstructed from altered, omitted and/or fabricated witness statements and remained uncontested (Zaidi et al., 2018). Lastly, the inconsistent record-keeping practices, as well as the misplacement of investigative files, are also suggestive of the notion that the records pertaining to the Koschman case were not handled in typical ways.

The findings of this case study indicate that the discretionary powers exercised by police officials allow for the production of official documents that reflect the detectives' definition of the situation rather than the factual account of an incident. Our analysis indicates that CPD detectives established an incorrect definition of the situation which was then supported with inaccurate police records to support the initial account. This process afforded the Mayor's nephew with protection from legal consequences, for it erased the traces of his existence within the documents. By conducting a confusing identification line-up, incomplete canvassing, and inconsistent record-keeping practices, Vanecko's involvement was never fully acknowledged or investigated. This outcome appears to be based on the initial definition of the situation that the detective presupposed, and the preconceived truth manufactured to support the initial definition.

Police culture must be taken into consideration in order to understand the actions and inactions of the police officials involved in the Koschman case. The underpinnings of theory of

local political culture and police styles dictate that police behavior and culture are heavily influenced by the overall political culture of their society (Wilson, 1968). Given the strong political presence of the Daley family in Chicago, proponents of the local political culture and police styles theory would posit that the investigative failures in the Koschman homicide investigation is reflective of the political influence of the Daley family on the overall police culture of the CPD.

The Daley name has a distinguished history in Chicago politics, beginning with Richard J. Daley who served as the mayor from 1955 to 1976, then his son Richard M. Daley who served as the mayor from 1989 to 2011. William “Bill” Daley served as the Secretary of Commerce under the William Clinton administration. Prior to serving numerous terms as mayors, Richard J. and Richard M. Daley were integral players in the Democratic “political machine” in Chicago in significant ways. Richard J. Daley was the chair of the Cook County Democratic Central Committee; Richard M. Daley served as the Cook County State’s Attorney. According to the affidavit filed by Nancy Koschman, it was this distinguished pedigree of Richard Vanecko that led to the alleged investigative misconduct in the Koschman case (*Koschman v. City of Chicago et al.*, 2014). Even the special prosecutor noted that CPD detectives failed to follow proper investigation protocol (Webb, 2013). That the main suspect in Koschman’s homicide was the presiding mayor’s nephew may or may not have affected the outcome in verifiable ways. That truth is impossible to verify: “short of an organized conspiracy of falsification from the very start of an investigation, there are inherent checks on an officer’s ability to fabricate factual details from the start” (Dorfman, 1999, p. 494). We might tentatively add that other agencies that worked closely with the CPD, those agencies which had the duty to oversee and serve as a check on police powers (e.g., Cook County State’s Attorney Office; Illinois State Police), failed to do so.

Despite illustrating important ways in which a police department can deviate from standard investigatory procedures in a homicide case by beginning with an incorrect definition of the situation, there are two key limitations that are essential to highlight. First, the data utilized for this case study is limited by availability. That is, since the FOIA request for this research remains unaddressed, the data presented in this article is solely derived from the documents that were released to the Chicago Sun-Times and posted to their online archive. Future research on such a topic can benefit from the disclosure and the examination of all police documents rather than a selected few. Second, the findings of this research were gathered from the examination of a single case study which obviously cannot be generalizable to every homicide investigation conducted by the CPD or investigations done by other police departments. Therefore, having more than one case for analysis could improve the overall generalizability of the results.

The Koschman case, although exceptional, raises several questions about the nature of policing in contemporary times. First, and most obviously, is the question of how far policing has evolved as a profession despite the implementation of major case and data management systems (Mooney, 2010). That is, the evolution of policing is often described as starting with the political era where police acted as service providers for the political realm before moving through the reform era and the professionalization of the police. Currently, the police are thought to be in the era of community policing and problem-solving (Kelling & Moore, 2006). As the Koschman case demonstrates, the political era appears to wield considerable influence in policing in Chicago. This suggests that rather than thinking of these as distinct eras, it would be more fruitful to envision the characteristics of these three eras as being simultaneously present in police departments but to varying degrees.

Second, the Koschman case raises questions about how to best understand policing in a rapidly changing society. That is, police have adapted to social changes by increasingly standardizing procedures and forms. This standardization is meant to reduce risk by limiting police discretion and to provide external institutions with risk knowledge. Given this trend, it is argued that contemporary police should be primarily considered information and risk managers (Ericson & Haggerty, 1997). The Koschman case illustrates how this standardization can be easily circumvented and actually used to construct an alternative truth. In addition to coercive power (Bittner, 1978), the power of the police may reside in their capacity to construct a narrative that they control through their definition of the situation (van Maanen, 1978). In order to better understand police discretion in the context of politics and risk society, further research is necessary.

Finally, the Koschman case leaves us with difficult questions about what can be done to prevent the police from starting an investigation with an incorrect definition of the situation and a preconceived truth which is then supported through collected evidence. In the Koschman case, the procedures that were meant to objectively guide investigations were in place, as well as other oversight and external checks and balances. Yet, the political influence appears to have overridden the existing controls. Part of the issue that may need to be further explored in the future then is to examine how the trust that is embedded within the people in the system as well as the technologies and standardized procedures that support their supposed objective work can be removed from the political influences on policing in contemporary times. That remains a significant question for future research.

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## ***An Examination of the Interconnectedness of Traditional and Cyberbullying: Trends, Policies, and Displacement Theory***

This study fills a gap in the existing bullying literature by testing whether the traditional method of bullying has been displaced from the schoolyard to cyberspace. Despite all of the attention bullying receives in popular media and academic literature, there is little consensus on whether the prevalence and types of bullying behaviors follow any identifiable trends. Some research does suggest that overall traditional bullying may be declining nationwide, while cyberbullying is on the rise. There has been an influx of new laws and policies over the past decade that attempt to curb bullying behaviors. These two factors – the potentially changing trends of a phenomena and the passage of new laws to address it – are commonly associated with displacement theory. This theory suggests crime control efforts may not actually decrease crime rates, but instead transform the nature of such behaviors; for example, perhaps traditional, in-person bullying is not actually decreasing, but merely changing its form and moving online. This study tests whether bullying has shifted from the schoolyard to cyberspace by using the 2009, 2011, and 2013 editions of the School Crime Supplement to the National Crime Victimization Survey (NCVS). The results show that traditional bullying decreased through 2013, as did the occurrence of cyberbullying, indicating that displacement is not occurring.

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Bullying is typically conceptualized with two categories, “traditional” and “cyberbullying”, with *traditional* bullying broadly referring to in-person harassment and violence perpetrated by one student against another and *cyberbullying* including those harassing behaviors done digitally (e.g. Waasdorp & Bradshaw, 2015; Thomas, Connor, & Scott, 2015). There is little consensus on the victimization rate or prevalence for either form of bullying, and only a few studies measure their occurrence nationwide and over time. For example, Perlus, Brooks-Russell, Wang, & Iannotti (2014) found a decrease in traditional bullying behaviors over time. Since cyberbullying is a more recent phenomenon, however, there is even less research on its occurrence over time. Despite the lack of empirical support, there is a general agreement among academic researchers that cyberbullying appears to be on the rise (see Stauffer, Heath, Coyne, & Ferrin, 2012). Mainstream media outlets make similar claims, sometimes asserting that cyberbullying is at extreme levels. For example, cyberbullying has been labeled a pervasive problem and an ABC News special argued “in the age of the Internet, bullies can do more damage faster than ever before” with nearly half of American teenagers having experienced cyberbullying (see Peebles, 2014; Smith, Louszko, & Efron, 2015). Lastly, legislators have used this apparent increase in cyberbullying to support the creation of new laws aiming to criminalize the behavior (see Marsico, 2014; Salvi, 2017). Despite all of the attention cyberbullying receives from academics,

the media, and lawmakers alike, a thorough literature review on the topic did not produce any studies that measure its prevalence over time.

The research to date tends to study only one type of bullying behavior, either traditional or cyber, with few studies examining the concurrent trends for these types of bullying behaviors. One assumption noted in the literature is that these two forms of bullying are distinct (Brown, Jackson, & Cassidy, 2006). Yet this assumption appears to have left a void in the current literature where bullying research does not adequately examine any potential connection between the two forms of bullying. As a result, this study uses displacement theories of crime as a theoretical framework to examine whether the patterns in bullying behaviors have changed significantly. In a general sense, displacement refers to a phenomenon whereby existing laws or policies create a superficial perception of a decrease in the undesirable behavior. In reality, however, the targeted behaviors have actually transformed in ways that are not immediately obvious, thereby obfuscating the true prevalence of the deviant phenomenon. Specifically, this study examines whether method displacement has occurred in relation to school bullying by examining whether traditional bullying is being replaced with cyberbullying. The National Crime Victimization Survey (NCVS)'s School Crime Supplement (SCS) is used to examine bullying trends and is arguably the most comprehensive compilation of data on bully behavior (Mosher, Miethe, & Phillips, 2002).

This study is exploratory and does not attempt to identify the *cause* of any displacement discovered. Rather, this study is a descriptive analysis of whether evidence exists that supports the hypothesis that displacement has occurred using the existing NCVS datasets. Specifically, it will examine different indicators of method displacement to determine if there has been a shift in recent years from traditional methods of bullying to cyber methods. This study employs a criminological lens, something otherwise rare for a topic dominated by education researchers and psychologists. This is especially important considering that bullying is becoming increasingly criminalized in the United States (Salvi, 2017). If the results suggest the existence of displacement, this study paves the way for future researchers to collect original data and isolate the specific causes of this phenomenon. If the data, however, show a decrease in cyberbullying it will call into question the disproportionate focus placed on virtual harassment by modern researchers and the media.

## **Prior Literature**

### **Definitions and Measurements**

The term *traditional bullying* is used to distinguish conventional forms of schoolyard harassment from its online counterpart. Despite the fact that traditional bullying has been a recognized phenomenon significantly longer than cyberbullying, variations in its conceptualization and operationalization are still common. Strohmeier and Noam (2012) explain that bullying can be defined “as a subset of direct or indirect aggressive behavior characterized by intentional harm doing, repetitive aggressive acts, and an imbalance of power” (p. 8). According to Rigby (2011), bullies intentionally and repeatedly hurt or threaten their targets through actions that “may be overt, as in face-to-face physical assaults and verbal abuse, or covert, as in deliberate and sustained exclusion” (p. 274). Other researchers divide bullying into three main types - physical, verbal, and social — and do not emphasize differences between in-person and online platforms for bullying behaviors (Law, Shapka, Hymel, Olson, & Waterhouse, 2012).

The variations in the *measurement* of bullying are even more common than the variations in its definition. For example, Burton, Florell, & Wygant (2013) measured the occurrence of bullying by asking students to respond to seven bullying related behaviors, such as “Someone threatened me” and “Someone physically hurt me” (p. 107). One of the strengths of research such as this is that the absence of the word “bullying” in the used measures allows more students to answer more honestly, as they do not have to identify as victims. Many other studies measured the occurrence of bullying by using the Olweus Bully/Victim Questionnaire (OBVQ; Olweus, 1996). The OBVQ is a popular 40-question survey instrument covering different aspects of bullying behaviors and provides a technical definition of the term ‘bullying’ for participants (Kyriakides, Kaloyirou, & Lindsay, 2006). While this is a common approach to measuring bullying victimization, the inclusion of the researchers’ conceptual definitions in the survey itself may influence respondent’s answers (see Trochim, Donnell, & Arora, 2015).

Similar to ‘traditional’ bullying, one of the biggest barriers to determining the accurate prevalence of cyberbullying are the variations in how the term has been conceptualized and operationalized by researchers. Law et al. (2012) note that cyberbullying “is a relatively new phenomenon. As such, consistency in how the construct is defined and operationalized has not yet been achieved” (p. 226). For example, Smith et al. (2008) defined cyberbullying as “an aggressive intentional act carried out by a group or individual, using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend him or herself” (p. 376). Law et al. (2012) define it as the “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices” (p. 227). Other definitions fail to define the bullying aspect of the concept and attempt to identify what makes harassment “cyber.” For example, Olweus (2013) describes cyberbullying as any “...bullying performed via electronic forms of contact or communication such as mobile/cell phones or the Internet” (p. 765). More recently, Englander, Donnerstein, Kowalski, Lin, & Parti (2017) noted that there is still little consistency on how to define the term and what nuances it should include.

These definitions, as well as many others used by researchers, have considerable overlap with each other. They do differ, however, from the NCVS’ definition of cyberbullying that is used in this study. The NCVS School Crime Supplement considers any behavior that causes “the victimization of a student by one of their peers through the use of electronic means” to constitute cyberbullying (Department of Justice [DOJ], 2013). This definition is somewhat unique in that it does not require the acts to be repeated or specify that they must be accompanied by any particular intent.

The *measurements* of cyberbullying utilized by previous research also differ significantly from those seen in the NCVS. Smith et al. (2008) used a modified version of a survey developed by Solberg and Olweus (2003), which asked participants directly if they have ever been the victims of bullying. Students were provided with a definition of both cyber and traditional bullying and then were asked how often they had experienced any of the described behaviors. Law et al. (2012) utilized the popular *Safe Schools and Social Responsibility Survey for Secondary Students* (SSSRSSS) to measure bullying behaviors. Similar to the survey instrument developed by Solberg and Olweus (2003), the SSSRSSS provides a definition of each type of bullying and then asks the respondents if they have ever experienced what was just described to them. As Law et al. (2012) explain, “each form of bullying and victimization item was defined with examples in order to increase precision in measurement” (p. 228). This approach, of first defining bullying and then

asking participants to identify if and how often they have been victimized, was common among the research reviewed for this study.

### Prevalence

One of the most significant limitations to existing research on traditional bullying is that most studies are cross-sectional and the different methodological approaches used make it difficult to gauge any changes over time (see Burton et al., 2013). Perlus et al. (2014) conducted one of the few studies examining bullying trends using data from the Health Behavior in School-Aged Children (HBSC). They found that from 1998 to 2010, the number of students who reported being the victims of bullying decreased from 13.7 percent to 10.2 percent, though the only statistically significant decrease in victimization was among male students. Other studies found rates of traditional bullying occurring more frequently than reported by Perlus et al. (2014). For example, Schneider, O'Donnell, Stueve, & Coulter (2012) found a higher rate of schoolyard bullying, with 25.9 percent of their participants reporting they had experienced school bullying in the past 12 months. The researchers found that both female and male students reported similar levels of victimization (25.1 percent of girls and 26.6 percent of boys). Additionally, students who did *not* identify as heterosexual were considerably more likely than students who reported being heterosexual to experience schoolyard bullying (42.3 vs. 24.8 percent, respectively). These results, especially the latter data on the role of sexual orientation, provide an important discussion of the occurrence of bullying in one geographical area. The sampling techniques used by Schneider et al. (2012), however, do not allow the findings to be generalized outside of the Boston area.

As with 'traditional' bullying, the noted prevalence of cyberbullying varies greatly in the existing literature, and for similar reasons: inconsistent definitions and methodologies. For instance, Raskauskas and Stoltz (2007) reported that 49 percent of their studied sample had been cyberbullied. Juvonen and Gross (2008) found that as many as 75 percent of students reported experiencing a form of cyberbullying. On the other hand, Allen (2012) found a mere 3.2 percent of participants as being victims of cyberbullying. More recently, Roberto, Save, Ramos-Salazar, and Deiss (2014) found 47 percent of students had been cyberbullied while in high school. As discussed earlier, each of these studies had drastically varying methodological techniques, resulting in starkly different estimates. Given the wide range of estimates of the prevalence of cyberbullying, it is not surprising that there is also no reliable measurements examining the trend of cyberbullying over the years. While some academics assert that there is a consensus that cyberbullying will only increase in the future, there is little empirical support for this proposition (see Stauffer et al., 2012; Stewart & Fritsch, 2011).

Other studies have noted an extensive overlap between the occurrence of traditional and cyberbullying victimization. Schneider et al. (2012) analyzed the connection between traditional and cyberbullying and found the intersection of victims to be substantial; of all cyberbullying victims, 59.7 percent reported to also be victims of traditional bullying. Waasdorp and Bradshaw (2015) found that approximately 50 percent of bullied students were subjected to *all* examined forms, with only 4.6 percent of bullied students experiencing cyberbullying alone. In contrast, Kubiszewski, Potard, & Auzoult (2015), found little overlap between the two forms of bullying. These studies examine both forms of bullying concurrently, but they do not explore the relationship between the two variables overtime.

### **Theoretical Explanations of Traditional and Cyberbullying**

Although the existing body of research focuses on the prevalence of bullying, or in identifying patterns among targets for bullying, some research has begun to address *why* bullying occurs. While not drawing on criminological theories specifically, much of the current literature that examines the why of bullying draw from deterrence and/or opportunity theories. Some researchers, for example, have found a decrease in schoolyard victimization and attribute it to new initiatives undertaken by school administrators aimed at decreasing bullying and school-related violence, consistent with both opportunity and deterrence theories of crime (see Hankin, Hertz, & Simon, 2011 and Blosnich & Bossarte, 2011).

Blosnich and Bossarte (2011) found the presence of teachers in the halls at school was associated with a significant decrease in the reported instances of bullying and theft. Further, Hankin et al. (2011) reported the use of metal detectors, a school safety measure that has become increasingly popular over the past twenty years, was correlated with a decrease in fights between students, consistent with opportunity theory. Gregory et al. (2010) also examined the effect of school policies on the prevalence of traditional bullying and concluded traditional bullying has substantially decreased in school environments where “student perceptions that school rules were fair and strictly enforced, and that adults were supportive and willing to help students” (p. 494). The study controlled for variables of “school size, proportion of minority students, and students who qualified for free- and reduced-price meals” and found an across-the-board trend that schools that operate in structured manners had significantly less traditional bullying and victimization (Gregory et al., 2010).

Studies on cyberbullying also frequently allude to ideas consistent with opportunity and/or deterrence theories. Kowalski, Giumetti, Schroeder, & Lattanner (2014) interviewed students who admitted to online bullying and found that they feel a sense of anonymity. The participants reported thinking they are less likely to face consequences for their online actions and could target victims regardless of their size. That is, the nature of cyberbullying is appealing to certain students who are afraid to instigate harassment at school when they are face-to-face with their victims, suggesting a lack of deterrence is present. Similarly, Hinduja and Patchin (2013) explored whether “control agents” affect the prevalence of cyberbullying. The authors surveyed a random sample of 4,441 students and noted those who individuals who felt their parents would take bullying behaviors seriously and punish such actions were less likely to report engaging in them, suggesting some students have been successfully deterred by the existence of control factors (Hinduja & Patchin, 2013). Consistent with an opportunity analyses of crime, Rice et al. (2015) found that higher levels of electronic media usage had a positive association with cyberbullying and higher levels of parental control over that usage were negatively associated levels of cyberbullying perpetration.

The existing research demonstrates the need for a thorough examination and synthesis of trends in both traditional and cyberbullying. While these individual studies may, at first glance, contain results supportive of opportunity and deterrence theories, no definitive conclusions can be drawn from their findings as the authors only examined one form of bullying. While some of the reviewed studies did research both traditional and cyberbullying, none used displacement theories of crime to examine if and how the nature or bullying has shifted over the past decade. This study fills this apparent gap in the current body of bullying-related literature.

### **Current Study: Theoretical Framework and Research Questions**

Crime displacement theory in the most general sense refers to the phenomenon that occurs when crime reduction techniques (increased police presence, new laws and initiatives, etc.) do not actually reduce criminal acts, but instead cause them to occur in different locations, times, or methods (Kelling, Pate, Dieckman, & Brown; 1974). According to Repetto (1976), who conducted extensive research on the offending patterns of burglars, opportunistic criminals can be deterred if their access to a target is blocked. Specifically, Repetto (1976) found that displacement is not an inevitable consequence of crime prevention efforts. Some offenders, perhaps a majority of them, will desist from criminal activity when their immediate opportunity to offend dissipates. Other offenders, however, will continue committing crimes in another form if they are prevented from continuing in their initial circumstances (Repetto, 1976). If this phenomenon occurs, it shows that crime prevention efforts are of limited usefulness (Heal & Laycock, 1988). More insidiously, since crime displacement erroneously creates an impression that crime reduction techniques are effective, when in reality the nature, type, or location of the illegal activity has just been altered, it may lead to a false sense of security and thus should be taken into consideration by policy makers when new laws are passed.

Heal and Laycock (1986) explain “there is little point in the policy-maker investing resources and effort into [crime prevention] if by doing so he merely shuffles crime from one area to the next but never reduces it. For this reason, the possibility of displacing crime by preventive intervention is a crucial issue for the policy-maker” (p. 123). Despite this potentially prevalent unintended effect of crime prevention policies, there seem to be little reference to the possibility of displacement in anti-bullying dialogue. Some researchers argue that anti-bullying programs created through new laws or rules have been largely ineffective (see Ferguson, Miguel, Kilburn, & Sanchez, 2007), while others suggest they are correlated with a reduction in traditional behavior (Wilson & Lipsey, 2003). However, no studies adequately address whether these programs are associated with a presumed spike in the prevalence of cyberbullying.

As Cornish and Clarke (1986) explain, even if there is not an abundance of empirical support for the displacement theory as a whole, it “[should alert] the policy-maker to the possibility that a range of unanticipated consequences may attend novel (or ill-considered) crime-control policies” (p. 2). Due to the lack of research on the subject, however, the possibility of a displacement effect will continue to be absent from the discussion on anti-bullying methods until there is evidence that supports its application.

### **Types of Displacement**

Repetto (1976) and Hakim & Rengert (1981) define five different types of displacement: *temporal displacement*, where the time of the day the crime is committed is changed; *method displacement*, where offenders commit the same crimes as before, but use a different method; *target displacement*, where offenders choose different targets; *type displacement*, which occurs when offenders abandon the type of crime they were initially perpetrating, but immediately begin engaging in a new type of criminal behavior; and *spatial displacement*, which occurs when offenders are pushed out of their original area of offending and consequently move on to new locations. Finally, Bowers and Johnson (2003) describe the phenomenon of *perpetrator*

*displacement*, which occurs when offenders are removed from the streets and are replaced by new ones.

Several aspects of displacement theory can be applied to bullying, but this study only examines the occurrence of method displacement as it is supported the most by theory and the previous literature (see Perlus et al., 2014; Stauffer et al., 2012). Whether there has been a shift from traditional bullying to cyberbullying in a way suggestive of displacement will be measured three ways. First, if method displacement has occurred, there should a noticeable shift in the way bullies harass their victims. For instance, if cyberbullying increases through 2013 and other forms of violence and traditional bullying behaviors declined, it is suggestive of method displacement. If the opportunity for students to victimize their peers at school is blocked by the implementation of anti-bullying policies, students might begin to abandon the more punishable forms of traditional bullying in favor of online harassment. Since cyberbullying provides a more anonymous method that is considerably less likely to result in a punishment, it may be more appealing to would be bullies. Thus, this study examines the following research questions.

**Research Question One: Do cyberbullying rates increase through 2013 while traditional victimization rates decrease?**

In addition to a shift simply from traditional bullying to cyberbullying over time, which would be partially evidenced by an affirmative response to the previous question, displacement theory would also suggest that there are changes in the occurrence of individual types of bullying behaviors. As previously discussed, *traditional bullying* and *cyberbullying* are broad constructs made up of a wide range of specific behaviors of varying severity. NCVS measurements include behaviors such as excluding another student from activities, verbal harassment, and physical harm, as aspects of traditional bullying. If method displacement has occurred, it follows that the more violent behaviors that are included in NCVS measures of traditional bullying decline and the less serious activities might increase. Therefore, we are led to ask the following:

**Research Question Two: When the variables that make up the construct of traditional and cyber bullying are analyzed separately, are there noticeable trends between variables?**

Finally, if method displacement is occurring, one would expect certain patterns to be visible in the available data demonstrating an overlap between traditional and cyberbullying victims. Specifically, if the students who experienced cyberbullying were also being bullied at school, this would suggest that online harassment is merely an extension of in-school victimization; a 'widening' of the behavior. As time goes on, however, the occurrence of method displacement would suggest the group of students who experience *both* forms of bullying would decrease as more students will report being the victim of cyber, but not traditional bullying (because bullies are abandoning traditional methods in favor of cyber ones). This leads to the third and final research question relating to the displacement of bullying that is examined in this study:

**Research Question Three: What is the extent of overlap between students who report being the victims of traditional bullying and the victims of cyberbullying? How has this changed over time?**

## Methodology

The School Crime Supplement (SCS) to the National Crime Victimization Survey (NCVS) was selected for this study as it is the most comprehensive national data on bullying that allows for comparison over time, a necessary aspect of any displacement analysis. Since the mid-2000's, the SCS has expanded the scope of their research to incorporate specific measures of traditional bullying and then later cyberbullying. The NCVS first began to examine cyberbullying, in addition to its longstanding examinations of traditional bullying, in 2007 and has continued to survey its prevalence in its subsequent semi-annual editions in 2009, 2011, 2013, and 2015. Since 2009, the NCVS has used largely consistent measurements of cyberbullying, making the data fit for comparison (see Appendices A and B for tables of exact questions from each year). The 2007 and 2015 editions of the NCVS used significantly different measurements than the other years and consequently are not included in this analysis.

## Data Collection and Sample

This study uses a secondary analysis of data from the 2009-2013 versions of the National Crime and Victimization Survey: Student Crime Supplement. The NCVS is conducted by the U.S. Census Bureau on behalf of the Bureau of Justice Statistics (BJS) and was developed by both agencies in cooperation with the National Center for Education Statistics. The SCS is given to all NCVS households who have members ages 12-18 (see DOJ, 2013). Every month, U.S. households are randomly selected by researchers and any members who meet their criteria are added to the panel. Once participants agree to participate, researchers interview them seven times over the next three years (every six months). Only the first of the seven interviews is conducted in-person and the subsequent interviews are completed via the phone. Once the seventh interview is completed, a new household enters the sample and the current one is rotated out.

Between 2009 and 2013, the SCS was given to all NCVS respondents who were between the ages of twelve and eighteen during that year. Additionally, respondents had to be enrolled in "primary or secondary education programs leading to a high school diploma (elementary through high school), and who had been enrolled sometime during the six months prior to the interview." Eligible participants who do not complete the SCS are classified as "non-interviews." Participants become "non-interviews" for a variety of reasons such as they are temporarily residing elsewhere, they are not home during the three-week period the SCS is conducted, their parents do not want them to be interviewed, they decline to participate, etc. Population comparison information is not included as data from the National Crime Victimization Survey is obtained from a sample that is representative of the United States population as a whole (see DOJ, 2013).

## Definitions and Measurements of Key Variables

The National Crime Victimization Survey uses the following definitions of traditional bullying and cyberbullying in the 2011 and 2013 version of the SCS. The 2009 edition had slight variations in phrasing, which are included in Appendices A and B:

1. *Traditional bullying* is the victimization of a student by one of their peers that occurred at school. It was measured by asking students (yes or no) whether another student has (participants responded "yes" or "no"):
  - a. Made fun of you, called you names, or insulted you, in a hurtful way?
  - b. Spread rumors about you or tried to make others dislike you?

- c. Threatened you with harm?
- d. Pushed you, shoved you, tripped you, or spit on you?
- e. Tried to make you do things you did not want to do, for example, give them money or other things?
- f. Excluded you from activities on purpose?
- g. Destroyed your property on purpose?

2. Cyber/electronic bullying is the victimization of a student by one of their peers through the use of electronic means, including “the Internet, e-mail, instant messaging, online gaming, text messaging, and online communities” (DOJ, 2013: 23). It is measured by asking students if they had ever been harassed, threatened, or excluded in an online forum or through other electronic means. Specifically, it was measured by asking participants if another student had done the following to them (participants responded “yes” or “no”):

- a. Posted hurtful information about you on the Internet, for example, on a social networking site like MySpace, Facebook, Formspring, or Twitter?
- b. Purposely shared your private information, photos, or videos on the Internet or mobile phones in a hurtful way?
- c. Threatened or insulted you through email?
- d. Threatened or insulted you through instant messaging or chat?
- e. Threatened or insulted you through text messaging?
- f. Threatened or insulted you through online gaming, for example, while playing XBOX, World of Warcraft, or similar activities?
- g. Purposefully excluded you from online communications?

### **Analysis**

This study uses a combination of descriptive statistics, cross tabulations, and chi-square analyses. Descriptive statistics relating to each research question were calculated for each year that the SCS was administered from 2009 until 2013. Second, cross-tabulations with chi-square analysis were used to determine what percentage of students reported experiencing each bullying behavior during 2009, 2011, and 2013 and to identify which, if any, of the observed differences across years are statistically significant.

### **Results**

The answers to each of the three research questions examined in this study are presented below.

#### **Research Question One: Did cyberbullying rates increase through 2013 while traditional victimization rates decreased?**

The occurrence of both traditional bullying and cyberbullying victimization decreased in 2013. In 2009 and 2011, traditional bullying victimization rates were identical, with 28.2 percent of students reporting they experienced at least one bullying behavior while at school. The 2013 edition of the SCS shows this number falling to 21.7 percent (see Table 2). The percentage of participants that experienced traditional bullying differed significantly between 2009 and 2013,

$\chi^2(2, N = 15,098) = 72.7, p = .000$ . Cyberbullying increased between 2009 and 2011, going from 6.2 percent to 9 percent. In 2013, however, the number of students reporting they had experienced any cyberbullying behavior fell to 6.7 percent, a rate more consistent with 2009 results. These observed differences across years were statistically significant,  $\chi^2(2, N = 15,063) = 34.6, p = .000$ .

*Table 1. Number and Percentage of Students Who Reported Experiencing each Bullying Behavior*

	2009		2011		2013	
	%	n	%	n	%	n
Any traditional bullying behavior	28.2 <sub>a</sub>	1,233	28.2 <sub>a</sub>	1,625	21.7 <sub>b</sub>	1,078
Any cyberbullying behavior	6.2 <sub>a</sub>	268	9.0 <sub>b</sub>	518 <sub>a</sub>	6.7	332
<b>Traditional Bullying Behaviors:</b>						
Made fun of them, called names	19.0 <sub>a</sub>	830	17.7 <sub>a</sub>	1,034	13.8 <sub>b</sub>	691
Had rumors spread about them	16.7 <sub>a</sub>	731	18.4 <sub>b</sub>	1,078	13.2 <sub>c</sub>	660
Threatened them with harm	5.8 <sub>a</sub>	255	5.1 <sub>a</sub>	300	4.0 <sub>b</sub>	202
Pushed, shoved or spit on	9.2 <sub>a</sub>	405	7.9 <sub>b</sub>	462	6.2 <sub>c</sub>	312
Forced to do something	3.6 <sub>a</sub>	159	3.2 <sub>a</sub>	189	2.2 <sub>b</sub>	111
Excluded them from activities	4.7 <sub>a,b</sub>	209	5.4 <sub>b</sub>	317	4.5 <sub>a</sub>	227
Had property destroyed	3.3 <sub>a</sub>	145	2.7 <sub>a</sub>	161	1.6 <sub>b</sub>	78
<b>Cyberbullying Behaviors:</b>						
Had hurtful information posted	2.1 <sub>a</sub>	92	3.7 <sub>b</sub>	214	2.8 <sub>c</sub>	138
Excluded from an online community	0.9 <sub>a</sub>	40	1.1 <sub>a</sub>	67	0.9 <sub>a</sub>	46
Threatened or insulted through:						
- Email	1.4 <sub>a</sub>	60	1.9 <sub>b</sub>	113	0.9 <sub>c</sub>	46
- Messaging or chat	1.8 <sub>a</sub>	80	2.7 <sub>b</sub>	160	2.1 <sub>a</sub>	105
- Text messaging	3.1 <sub>a</sub>	136	4.5 <sub>b</sub>	261	3.1 <sub>a</sub>	157
- Online gaming	0.7 <sub>a</sub>	32	1.4 <sub>b</sub>	83	1.5 <sub>b</sub>	76

The subscript letter represents categories whose column proportions do / do not differ significantly from each other at the 0.05 level.

**Research Question Two: When the variables that make up the construct of traditional and cyber bullying are analyzed separately, are there noticeable trends between variables?**

While all seven of the traditional bully measurements decreased from 2009-2013, five of the seven traditional bullying measures showed consistent decreases from 2009, 2011 and 2013 (see Table 1). The percentage of students who had been made fun, called names or insulted went from 19 percent in 2009 to 17.7 percent in 2011 to 13.8 percent in 2013,  $\chi^2(2, N = 15,139) = 48.5, p = .000$ . Second, the number of students who reported being threatened with harm by one of their peers decreased from 5.8 percent in 2009 to 5.1 in 2011 to 4.0 percent in 2013,  $\chi^2(2, N = 15,141) = 15.7, p = .000$ . Third, 6.2 percent of students reported being pushed, shoved or spit on

at school, down from 7.9 percent in 2011 and a high of 9.2 percent in 2009,  $\chi^2(2, N = 15,139) = 29.0, p = .000$ . Only 2.2 percent of respondents stated another student had forced them to do something they did not want to do on the 2013 version of the SCS, a decrease from 3.2 percent of students in 2011 and 3.6 percent in 2009,  $\chi^2(2, N = 15,138) = 17.2, p = .000$ . The last traditional bullying variable that decreased all three years was whether students had their personal property destroyed while at school, which fell from 3.3 percent in 2009 to 2.7 percent in 2011, down to 1.6 percent in 2013,  $\chi^2(2, N = 15,134) = 30.8, p = .000$ .

The remaining two traditional bullying behaviors (had rumors spread and excluded from activities) increased in 2011 and decreased again in 2013. The number of students who had rumors spread about them increased from 16.7 percent of all SCS respondents in 2009 to 18.4 percent in 2011 down to 13.2 percent in 2013. The observed differences across years were significant,  $\chi^2(2, N = 15,121) = 56.4, p = .000$ . The last measure of traditional bullying, whether students were excluded from activities, went from 4.7 percent in 2009 up to 5.4 percent in 2011 and back down to 4.5 percent in 2013. These differences, however, were not statistically significant,  $\chi^2(2, N = 15,135) = 5.2, p = .073$ .

Five out of the six behaviors that make up the SCS construct of cyberbullying increased between 2009 and 2011 and then decreased in 2013 (see Table 1). The one exception to this trend, being threatened or insulted through online gaming, increased very slightly in 2013 from 1.4 to 1.5 percent, up from 0.7 percent in 2009,  $\chi^2(2, N = 15,115) = 14.1, p = .001$ . All other types of online threats or insults decreased in 2013. First, the number of students threatened through email went from 1.4 percent in 2009 up to 1.9 percent in 2011 and down to an all time low of 0.9 percent in 2013,  $\chi^2(2, N = 15,117) = 20.0, p = .000$ . Receiving threats through messaging or chat was somewhat higher with 1.8 percent reporting this form of cyberbullying in 2009, 2.7 percent in 2011, and 2.1 percent in 2013,  $\chi^2(2, N = 15,117) = 10.8, p = .005$ . The number of students receiving threats through text messaging, the last virtual medium examined, was higher than email or chat, but still declined in 2013. In 2009, 3.1 percent of SCS respondents reported receiving harassing text messages. This figure increased to 4.5 percent in 2011 and decreased to 3.1 percent in 2013. The observed differences across years for victimization by text messaging was significant,  $\chi^2(2, N = 15,114) = 19.2, p = .000$ .

The number of students who had hurtful information posted about themselves online by someone else rose from 2.1 percent in 2009 to 3.7 percent in 2011, but decreased to 2.8 percent in 2013,  $\chi^2(2, N = 15,084) = 23.0, p = .000$ . In the 2009 edition of the SCS 0.9 percent of students reported being excluded from an online community. This figure rose to 1.1 percent in 2011 before dropping back down to 2009 levels of 0.9 percent in 2013. This change over time, however, was not statistically significant,  $\chi^2(2, N = 15,115) = 2.0, p = .37$ . Note: a seventh variable, purposely sharing private information, was not included in the 2009 edition of the SCS and was therefore excluded in this part of the analysis, but was calculated into the overall trends for each type of bullying.

**Research Question Three: What is the amount of overlap between students who report being the victims of traditional bullying and the victims of cyberbullying? How has this changed over time?**

The data showed no clear trend of the overlap between students who experienced both forms of bullying overtime (see Table 2). The number of students who were victims of both

traditional bullying and cyberbullying went from 5.1 percent in 2009 to 7.2 percent in 2011 and back down to 5.2 percent in 2013. Students who reported being only victims of traditional bullying fell from 23 percent in 2009 to 20.7 percent in 2011 and decreased again in 2013 to 16.5 percent. Those students who reported only being the victims of cyberbullying went from 1.0 percent in 2009 to 1.7 percent in 2011 to 1.5 percent in 2013.

*Table 2. Overlap between traditional and cyberbullying victimization*

	<b>2009</b>	<b>2011</b>	<b>2013</b>
	<b>%</b>	<b>%</b>	<b>%</b>
Victim of traditional only	23.0	20.7	16.5
Victim of cyber only	1.0	1.7	1.5
Victim of both	5.1	7.2	5.2
Victim of neither	70.8	70.3	76.8

### Discussion

The downward trend evident in NCVS datasets since 2009 involving traditional bullying victimization was expected. The limited research on the topic includes similar findings (Perlus et al. 2014). What is unexpected, however, was the finding that cyberbullying dropped over 25 percent in 2013 after increasing approximately 45 percent in 2011. As Stauffer et al. (2012) argue, it is generally accepted that cyberbullying is on the rise. This finding, however, demonstrates this assumption is not necessarily accurate and definitely needs to be examined further using consistent measurements that allow for trend analyses. Unfortunately, the 2015 measurements of cyberbullying in the NCVS are significantly different from prior years, and prohibited the addition of 2015 data to this exploratory analysis.

Based on an analysis of NCVS data from 2009-2013, it does not appear that method displacement, as defined and measured by this project, has occurred. Method displacement, when offenders commit the same crimes using a different method, was measured by examining whether there has been a shift in the tools used by bullies to harass their victims. First, the data was analyzed to determine if there has been a shift away from traditional bullying towards cyberbullying between 2009 and 2013 as evidenced by a decrease in the former and a spike in the latter. No such trend was found. As demonstrated in Table 1, while traditional bullying did decrease significantly through 2013, so did cyberbullying. As a result, the NCVS bullying data, at its broadest level, does not indicate method displacement has occurred since 2009.

Many of the individual variables that make up the construct of traditional bullying did decrease between 2009 and 2011. Two of the measures, “excluded from activities” and “had rumors spread,” increased through this time, which caused the broad construct of traditional bullying to appear unchanged between 2009 and 2011. Since several of the traditional bullying variables did decrease during this time frame, while many cyberbullying measures increased, it may first appear to be evidence of displacement in regards to some individual behaviors (but not the broad constructs themselves). A closer examination of this data, however, does not produce strong support for method displacement, although it does not entirely rule it out. The traditional bullying behaviors did not decline anywhere near the rate that cyberbullying increased, meaning

displacement likely does not fully account for the 45 percent increase in cyberbullying seen between 2009 and 2011. Additionally, the result that almost all cyberbullying victims were also the targets of traditional bullying makes a method displacement explanation of bullying rates rather unlikely. This potentially suggests that bullies are using new methods to target some of their victims, but not abandoning their traditional bullying behaviors in favor of electronic ones. The overlap between victims should have decreased consistently over the time period examined, but it did not.

As a second measure of method displacement, the individual behaviors that make up the constructs of traditional bullying and cyberbullying were analyzed separately. This was done to determine whether any of the individual variables followed any observable trends outside of the overall trend of the construct itself. For traditional bullying, five out of the seven variables decreased along with traditional bullying as a whole. The two variables that strayed from this pattern, having rumors spread and being excluded from activities, increased in 2009, but then decreased in 2013. For cyberbullying, five out of the six behaviors that make up its construct increased between 2009 and 2011 and then decreased in 2013; only one behavior increased very slightly through all three years. Since none of the cyberbullying variables significantly increased from 2009 to 2013, the analysis of individual behaviors did not indicate method displacement has occurred.

Finally, as a third measure of method displacement, the overlap between victims of traditional bullying and cyberbullying was examined. If method displacement is occurring, the number of students who experience both forms of bullying should decrease over time (indicating a shift from traditional methods to cyber methods). Further, there should be a noticeable increase in students who *only* experience cyberbullying and a decrease in students who *only* experience traditional bullying. If a majority of bullying victims are targeted both at school and online over time, however, this would indicate that cyberbullying is merely an extension of in-school victimization. This differs from the first measure of displacement in which there is potentially overlap between the two groups of victims. According to the data, the percentage of all surveyed students who were the victims of both forms of bullying increased from 5.1 percent in 2009 to 7.2 in 2011, but dipped down to 5.2 percent in 2013. That is, the expected shrinkage in overlap between victimization categories did not occur. Next, the percentage of students who only were the victims of traditional bullying consistently decreased: from 23.0 percent in 2009 to 20.7 percent in 2011 to 16.5 percent in 2013. The data show that 1.0 percent of students were the victims of *only* cyberbullying in 2009. These patterns are not indicative of method displacement. What the data does show, however, is that an overwhelming majority of cyberbullying victims are also victims of traditional bullying, but the reverse is not necessarily true. This suggests that cyberbullying is not a phenomenon independent of traditional bullying, but is rather an extension of the same behavior. This finding alone shows the importance of examining both types of harassment together although it does not support a displacement theory of bullying.

### **Limitations**

A limitation to this project is its total reliance on data measuring bullying victimization, but not offending. While victimization rates are an important aspect of understanding the prevalence of a certain behavior, they only allowed for an indirect measurement of method displacement. A

truly comprehensive discussion of displacement would necessarily include data on the perpetration of bullying collected from the offenders themselves. To fully understand the nature of bullying, additional data should be collected on both the perpetration and victimization of both forms of bullying within the same study.

Another limitation to this study is its examination of only five years (three sets) of data. Unfortunately, NCVS only started measuring cyberbullying in this specific form in 2009, and then changed again in 2015. The use of data from only three points in time makes it difficult to draw conclusions about any trends that might be occurring long-term. While traditional bullying decreased and cyberbullying increased and then decreased sharply in the period examined, only a larger timeframe would reveal for certain what, if any, trends bullying has been following.

Lastly, while the NCVS is a well-established data set that uses a large, representative sample, it is not perfect. First, the NCVS contains only self-reported data, which has well-known criticisms including concerns about respondent's truthfulness and their ability to recall relevant information, although these fears are not always justified (see Chan, 2009 for a discussion of the strengths of self-reported data). Second, the wording of the NCVS questions changed slightly between 2009 and 2011/2013 (see Appendices A and B for a full explanation of variations). Although the differences were minor, it could have impacted the validity and reliability of the data. Lastly, some of the questions on the SCS may be problematic. For example, when measuring traditional bullying, the NCVS includes the researchers' conceptual definition in the survey itself prior to relevant questions. As discussed earlier, this approach is unnecessary and could potentially interfere with respondents' answers who are reluctant to self-identify as victims. The NCVS does not do this for cyberbullying.

### **Policy Implications and Conclusions**

An analysis of the data did not produce support for the occurrence of method displacement. To the contrary, the results show that method displacement has not occurred from 2009-2013. Further, the fact that so few individuals reported to be victims of cyberbullying and only cyberbullying, suggests that policies targeting bullying behavior in general may be sufficient to curb the occurrence of both types of victimization. That is, the recent (and often unsuccessful) attempts to pass laws that only target cyberbullying off school property may be unnecessary as it does not appear to be an independent problem. At the very least, educators, scholars, and policymakers therefore should consider both cyberbullying and traditional bullying as part of a larger whole.

Indeed, the similarities among the subcategories of traditional and cyberbullying suggest as much. The NCVS traditional bullying survey contained the subcategories that were conceptually indistinguishable from cyberbullying analogs: having rumors spread about the victim, calling names, and excluding from activities (traditional bullying categories) address a similar type of victimization as the cyberbullying examples relating to posting hurtful information, excluding from online communities, and insulting over media, and sharing private information. However, the overall prevalence in the latter cyberbullying behaviors have been consistently lower than the former traditional bullying behaviors. In the age when students have constant access to electronic communication, the propriety of studying otherwise identical types of harassment in distinct categories (in-person versus online) is likely growing dubious.

Overall, the most noteworthy finding of this study is that cyberbullying appears to be almost entirely an extension of the harassment students experience at school. As a result, it would be beneficial for school administrators and policy makers to attempt to address both forms of bullying simultaneously rather than treat them as isolated incidents. Further, while cyberbullying seems to be discussed more than traditional bullying by researchers and the media alike, the data discussed above demonstrate traditional bullying is still much more prevalent than its online counterpart. Consequently, attention equal to that received by cyberbullying, if not more, should be refocused on further examining the nature of traditional bullying, which clearly appears to be the larger problem of the two.

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**Appendix A: Variations in the SCS Survey 2009-2013: Measures of Traditional Bullying**  
**Now I have some questions about what students do at school that make you feel bad or are hurtful to you. We often refer to this as being bullied. You may include events you told me about already. During this school year, has any student bullied you?**

<b>2007/2009</b>	<b>2011/2013</b>
Has another student...	Has another student...
Made fun of you, called you names, or insulted you?	Made fun of you, called you names, or insulted you, <b>in a hurtful way?</b>
Spread rumors about you?	Spread rumors about you <b>or tried to make others dislike you?</b>
Threatened you with harm?	Threatened you with harm?
Pushed you, shoved you, tripped you, or spit on you?	Pushed you, shoved you, tripped you, or spit on you?
Tried to make you do things you did not want to do, for example, give them money or other things?	Tried to make you do things you did not want to do, for example, give them money or other things?
Excluded you from activities on purpose?	Excluded you from activities on purpose?
Destroyed your property on purpose?	Destroyed your property on purpose?

**Appendix B: Variations in the SCS Survey 2009-2013: *Measures of Cyberbullying***

**Now I have some questions about what students do that could occur *anywhere* and that make you feel bad or are hurtful to you. You may include events you told me about already.**

<b>2007</b>	<b>2009</b>	<b>2011/2013</b>
During this school year, has another student...	During this school year, has another student....	During this school year, has another student....
Posted hurtful information about you on the Internet?	Posted hurtful information about you on the Internet, for example, on a social networking site like MySpace or Facebook?	Posted hurtful information about you on the Internet, for example, on a social networking site like MySpace, Facebook, <b>Formspring, or Twitter?</b>  <b>Purposely shared your private information, photos, or videos on the Internet or mobile phones in a hurtful way?</b>
	Threatened or insulted you through email?	Threatened or insulted you through email?
Made unwanted contact, for example, threatened or insulted you via instant messaging?	Threatened or insulted you through instant messaging?	Threatened or insulted you through instant messaging <b>or chat?</b>
Made unwanted contact, for example, threatened or insulted you via text (SMS) messaging?	Threatened or insulted you through text messaging?	Threatened or insulted you through text messaging?
	Threatened or insulted you through online gaming, for example, while playing a game, through Second Life, or through XBOX?	Threatened or insulted you through online gaming, for example, while playing XBOX, <b>World of Warcraft, or similar activities?</b>
	Purposefully excluded you from an online <b>community, for example, a buddy list or friends list?</b>	Purposefully excluded you from online communications?

## ***Criminal Justice Education Graduates Tracer Study***

This graduate tracer study is intended to trace graduates and determine the employability of the graduates of the Criminal Justice Education of SY 1988-1989 to SY 2011-2012. The CCJE Alumni are considered as the best proof of the success of the program in terms of employment, relevance to the career, and position held.

The study used the quantitative-cross-sectional descriptive research method using the revised Graduate Tracer Survey Questionnaire of the Commission on Higher Education (CHED).

Findings of the study indicate that the CCJE graduates are mostly employed as regular employee in their current job either as law enforcers or security practitioners. Most of them work in the Philippine National Police, Bureau of Jail Management and Penology, Bureau of Fire Protection, other law enforcement and industrial security agencies. The learning skills, problem solving, information and technology and critical thinking are important indicators to measure the impact of the curriculum in the workplace.

The recommendation is to focus more on academic development, and other law enforcement job opportunities and must enhance the leadership capabilities of the students. Moreover, additional training programs should be given to the students to further improve their performance and to possess positive attitude towards work.

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### **Introduction**

The goal of every educational institution is to provide learners quality education wherein every graduate is competitive in the workplace. Employability of the graduates is a valid indicator that measures the effectiveness of the curriculum in shaping the knowledge, skills, and attitude of the graduates in the workplace, which are instrumental in driving forward the economy of a nation (Yorke & Knight in Learning and Employability Series 1<http://www.employability.ed.ac.uk>). Thus, graduates are expected to belong to a pool of high level of human resources, locally and internationally that responds to the demands of the changing needs of its society, specifically its economic development. World Bank (1999) as cited in Anho (2011) justifies that the education provided by a university is vital to the development of the nation since it serves as a ladder to the development of its economy.

The 21<sup>st</sup> century is a challenge for the graduates of any program. Employers expect that the institution where these students graduate has honed their academic knowledge, skills, and attitudes, preparing them for the workplace. In the field of Criminal Justice Education, the concern of the employer (the government institution) is not only on the job competencies of the

graduates but more importantly on the values and trainings imparted on them by the school since the graduates are expected to be implementers of law and peace in the community.

One of the pillars of the Criminal Justice System in the Philippines is the Law Enforcement which comprises the Philippine National Police (PNP), National Bureau of Investigation (NBI), Philippine Drug Enforcement Agency (PDEA), National Police Commission (NAPOLCOM), and Armed Forces of the Philippines (AFP). The Law Enforcement is at the forefront of the justice system in charge of crime prevention and crime control. The law enforcement initiates the criminal justice system if the person arrested is believed to be a suspect. Therefore, prevention of crime and implementation of the law and peace in the community are the major functions of the law enforcement. Such functions are crucial in lowering the crime rate in the society. It is a fact that high crime rate affects the economic conditions of the nation. According to a news article (Philippine Crime, 2014 as cited in [www.geographic.com](http://www.geographic.com)) *The Library of Congress Country Studies; CIA World Factbook*, during the early and middle part of 1980, there was a steadily worsening economy because of the deteriorating law and order in the country. However, crime rate decreased in 1989 due to improved police work.

During the 1990s, corruption and drug trafficking were difficult to solve. The capacity of the Law Enforcement to resolve these major problems was still questionable because of their “ability to solve problems, perform functions, set and achieve objectives.” (<http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/CJS-Cap-Assmnt-FINAL.pdf> Retrieved on March 8, 2015, p.14). Sir Robert Peel (as cited by Cappitelli, 2014, para 5) states that ‘the test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it’ (para 1).

In the Philippine setting, it has been observed that integrity of men in uniform, particularly the Philippine National Police (PNP), is beginning to decline because of their involvement in crimes such as graft and corruption, drug trafficking, robbery, smuggling, kidnapping with ransom, and other index and heinous crimes (Philippine National Police Manual, 2011). The Philippine government has exerted effort to combat the deteriorating image of the PNP. Unfortunately, such effort is seemingly ineffective in upholding the dignity of the PNP. It calls for a nationwide cooperation, involving the participation of the community. This scenario led to the creation of Republic Act No. 8551 (Feb, 25, 1998), an act providing for the reform and reorganization of the Philippine National Police and for other purposes, and amending certain provisions of Republic Act 6975, an act establishing the PNP under a reorganized Department of the Interior and Local Government, and for other purposes. Section 30 of RA 8551 states that the minimum qualifications for appointment of police officer include a formal baccalaureate degree from a recognized institution of learning and eligibility in accordance with the standard set by the Commission and others. It is perceived that professionalism is a vehicle to uphold the dignity of the police. This perception is supported by August Vollmer, the father of ‘American policing’ (cited in Holden, 1992, p.66), he states that police officers should be professionals who are capable of performing task through the use of modern technology for crime investigation and capable of the oral and writing tasks. Further, Sir Robert Peel (cited by Cappitelli, 2014) reiterates that the ‘police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain the respect of the public’ (para 1).

Therefore, it is the major responsibility of every Higher Educational Institution (HEI) offering BS Criminology to produce graduates who can perform the tasks of a responsible police officer.

The graduates are expected to be role models of the society, and more importantly, implementers of law and peace in the society. Realizing this scenario leads to the following questions: Does the curriculum offered by the HEI meet the needs of the learners when they are already in the workplace? Does the curriculum serve as an avenue in honing their knowledge, skills, and attitude needed in the workplace? More importantly, is the curriculum offering of the HEI in line with the demand of the society, particularly the labor market? Do the preparation and training they receive from the HEI determine their employability and relevance in the society?

Several tracer studies have been conducted by the different higher institutions. Mubuke, Businge, and Malwadde (2014) conducted a cross-sectional tracer study among graduates of radiography. The study revealed that a significant number of the graduates were employed abroad while others worked for private and government with satisfaction. On the other hand, Rocaberte (n.d.) conducted a tracer study among 500 graduates of the University of Pangasinan from 2001 to 2004. This study excluded the program of Law. Some major findings were: 75 % of the graduates were employed and those who were unemployed were not given opportunity to work and do not have work experience. Another result of the study was that graduates were employed because of their communication skills, technology skills, problem-solving skills, and critical thinking skills. On the other hand, the tracer study conducted by Ramirez, Cruz and Alcantara (2014) revealed that the academic-acquired skills and competencies of the graduates of Rizal Technological University of the Philippines were directly related to the graduates' job performance and relevance in their chosen career. Moreover, the training they had undergone made the graduates globally competitive.

The related studies are similar to the present study since the latter focused also on the employability of the graduates except that the present study included items on the strength and weaknesses of the different academic programs offered by the College of Criminal Justice Education of De La Salle University-Dasmariñas (DLSU-D).

The findings of the present study are deemed important in disciplinary advancement since there is a strong demand from the members of the justice system to continue improving the system to increase legal awareness and to strengthen public confidence to ensure the efficacy of the judicial institutions (<http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/CJS-Cap-Assmnt-FINAL.pdf> Retrieved on March 8, 2015). It should be noted that justice plays an important role in the economic development of the nation.

However, the scope of the study is limited on the following: employability of the graduates, specifically the span of time it takes respondents to have a job that is in line with their qualifications; to estimate the proportion of respondents who are employed, underemployed, and unemployed; to identify the respondents' job satisfaction and employment status; to know the extent of enrollment of the respondents as regards postgraduate studies and trainings; to gauge the contribution of the program of study to the graduates' competencies learned in college and found useful in their first job; to determine how knowledge, skills and attitudes of the graduates are utilized in the workplace; and to identify the strengths and weaknesses of the Criminal Justice Education Program of DLSU-D.

Further, the data gathering was limited only to the survey question. Interview technique was not part of the study due to time constraint on the part of the respondents who render services 24-hour a day.

### **The History of the College of Criminal Justice Education in DLSU-D**

The declining image of the policemen as peace officers and law enforcers during the mid of 1960s to the end of the 20<sup>th</sup> has become very alarming (Gallagher, Maguire, Mastrofski, & Reisig, 2001). Their involvement in graft and corruption, drug trafficking, robbery, smuggling, kidnapping with ransom, and other index and heinous crimes is an everyday happening (De Guzman, 2014). While the government is doing its duties to curb these complexities in public safety, seemingly such effort is not enough to uproot and quell them; hence, it necessitates everybody's help. Professionalism is the key as emphasized in Republic Act No. 8551 (Feb, 25, 1998), an act providing reform and reorganization of the Philippine National Police (PNP). This silent call for help to reorient, renovate, and make recovery of the lost PNP integrity and respect of the people moved DLSU-D to create a Trimester Police Science, followed by Bachelor of Science in Criminology in school year 2000-2001. The course was for members of PNP, BJMP, and BFP who had not completed any bachelor's degree. This course also intended to remold and bring them closer to God as they serve the people and their country. Further, the college also offered a Certificate Course on Police Science which is a two-year non-degree program. The course includes 44 units of general education and 48 professional education units (College of Criminal Justice Education Manual).

The Bachelor of Science in Criminology, major in Police Administration curriculum, was made into a ladderized program to allow the students who finished the certificate course in Police Science to enroll in the 3rd year BS in Criminology program. The certificate course in Police Science came into inception as part of the program of the then College of Criminology, which after a few years was renamed as College of Law Enforcement Administration and Public Safety (CLEAPS) upon instruction of the former DLSU-D President, Bro. Andrew Gonzalez and then Executive Vice-President, Dr. Oscar Bautista to Dean Tirso C. Viray. The Vocational Technical Education Division of the Department of Education, Culture and Sports, Region IV issued a permit to DLSU-D on February 14, 1990 to offer the Two-year Police Science Course under Permit No. TV-P009 S 1990 for School Year 1990-1991. A government recognition was given on October 9, 1991 (GR Number TV-R-032) for the said course.

### **Nature of the Program**

Only active members of the Philippine National Police (PNP), the Bureau of Jail Management and Penology (BJMP) and the Bureau of Fire Protection (BFP) may enroll in Two-year Police Science Course. It is a program where students and teachers meet for fifteen (15) Saturdays per trimester with twenty (20) academic units per term.

For a three-unit course, the teacher and the students meet for only one hour every Saturday. The remaining hours are expected to be spent by the students for independent study during the week with the aid of modules prepared by the college. The scheme is based on the premise that the enrollees from the PNP, BJMP, and BFP are mature and responsible students whose exposure and work experience may compensate for the lack of contact hours with the faculty. Moreover, their work does not really allow them to come on weekdays normally required for regular students.

The possibility of earning a certificate after six trimester or two school years is the greatest motivation for these special type of students. The certificate eventually qualifies them for promotion to a higher police rank.

### **Bachelor of Science in Criminology Trimester**

The growing number of graduates from the certificate course who desire to continue their education but constrained by lack of time urged the College of Law Enforcement Administration and Public Safety to give them the chance to attain their dream to become police professionals who can be more effective and efficient in their service to the country and people.

After seriously studying their plight and after assessing the College's capabilities and resources, considering and the University's mission to help, DLSU-D thought of offering Bachelor of Science in Criminology in a Trimester program.

In this program, graduates of certificate course on the Police Science who follow a curriculum under the ladderized BS in Criminology program, can continue to enroll in the University for another two (2) years or six (6) trimesters to be able to graduate with a Bachelor of Science in Criminology.

Like the special Trimester Police Science, this is also done through the abbreviated special program, offering one hour for 3-unit subjects in 13 to 15 meetings per trimester.

### **Criminal Justice Education**

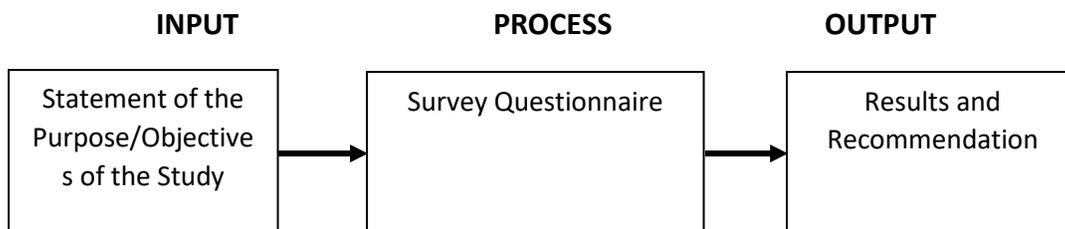
On November 13, 2009, the name College of Law Enforcement Administration and Public Safety at De La Salle University-Dasmariñas was changed to College of Criminal Justice Education. This is in accordance with the pertinent provisions of Republic Act No. 7722, otherwise known as the Higher Education Act of 1994, which rationalized Criminal Justice Education (CJE) in the country that shall include degree programs in Criminology, Law Enforcement Administration, Correctional Administration, Industrial Security Administration and Forensic Science, among others, in order to meet the demands of globalization as it impacts on the rapidly changing and interdisciplinary fields of criminal justice.

Thus, in compliance with the CHED Memorandum Order No. 21 s.2005, the College of Criminal Justice Education (CCJE) aims to provide quality education for the students of BS Criminology and help professionalize the members of the Philippine National Police, Bureau of Jail Management and Penology, and Bureau of Fire Protection. Different enrichment courses were offered. Likewise, CCJE intends to address the demand of the new millennium by providing the learners seminars, forum, short-term courses that will address the needs of the community (College of Criminal Justice Education Manual).

### **Conceptual Framework**

A tracer study is a descriptive research that investigates the status of the graduates as regards employability. Specifically, this is concerned with the graduates who are employed, underemployed, or not employed (Scomburg, 2003). Employability refers to the ability of the graduates to have a job right after graduation and to maintain employment. It, likewise, refers to the ability to look for another job if needed, making use of their knowledge, skills, and attitude (Hillage & Pollard, 1998 cited in Pool & Sewell at [http://bucks.ac.uk/content/documents/1061439/The\\_key\\_to\\_employability\\_developing\\_a\\_practical\\_model\\_of\\_graduate\\_employability1.pdf](http://bucks.ac.uk/content/documents/1061439/The_key_to_employability_developing_a_practical_model_of_graduate_employability1.pdf), Retrieved on September 6, 2015). Further, employability is the capability of the graduates to be successfully employed and positively benefit

themselves in the workplace that impacts the society and the economy because of their honed academic knowledge, skills, and attitudes (Yorke, 2004).



**Figure 1. Conceptual Framework of the Study**

The conceptual framework of the study (see Figure 1) consists of **input**, **process**, and **output** (<http://www.businessdictionary.com/definition/input-process-output-diagram.html>) connected by an arrow considering the following explanation:

The **Input** refers to the statement of the purposes or objectives of the tracer study such as to determine the demographic profile of the respondents in terms of gender, civil status, region of origin, residence, year graduated, and bachelor's degree obtained; and to determine their employability status in terms of the span of time it takes respondents to have a job that is in line with their qualifications; to estimate the proportion of respondents who are employed, underemployed, and unemployed; to identify the respondents' job satisfaction and employment status; to know the extent of enrollment of the respondents as regards postgraduate studies and trainings; to gauge the contribution of the program of study to graduates' competencies learned in college found useful in their first job; and to determine how knowledge, skills and attitudes of the graduates are utilized in the workplace; and to identify the strengths and weaknesses of the College of Criminal Justice Education Program.

On the other hand, the **Process** pertains to the survey questionnaire adapted from the Commission on Higher Education (CHED). The CHED's questionnaire was revised to fit the nature of the Program Curriculum of the Criminal Justice Education of DLSU-D. Then, the revised questionnaire underwent internal and external validation. The **Output** finally presents the findings, conclusions, and recommendations of the study.

### ***Statement of the Objectives***

#### ***General Objectives:***

To trace the status of the graduates of Criminal Justice Education of De La Salle University-Dasmariñas.

#### ***Specific Objectives:***

1. To determine the demographic profile of the respondents in terms of gender, civil status, region of origin, residence, year graduated, and bachelor's degree obtained;
2. To determine the span of time it takes respondents to have a job that is in line with their qualifications;
3. To estimate the proportion of respondents who are employed, underemployed, and unemployed;

4. To identify the respondents' job satisfaction and employment status;
5. To know the extent of enrollment of the respondents as regards postgraduate studies and trainings;
6. To gauge the contribution of the program of study to graduates'
  - 6.1 competencies learned in college and found useful in their first job;
  - 6.2 utilization of knowledge, skills and attitudes in the workplace; and
7. To identify the strengths and weaknesses of the College of Criminal Justice Education Program.

## **Methodology**

### *Research Design*

The study used the quantitative-cross-sectional descriptive research method using the revised Graduate Tracer Survey Questionnaire of the Commission on Higher Education (CHED). It was administered to the graduates of the Criminal Justice Education from 1988 to 2012. The revision of the questionnaire was a concerted effort of the other researchers assigned in the different program offerings.

### *Population and Sampling*

The tracer study consisted of a population of 913 graduates from 1988 to 2012 from the following programs: Police Trimester, Bachelor of Science in Criminology, and the Bachelor of Science in Criminal Justice Education. However, only a sample of 450 was identified using snow balling and convenience sampling through facebook, records from Alumni Office, and information from friends. Of the 450 respondents, only 248 of them participated in the study.

### *Research Instrument*

The study used a modified survey questionnaire adapted from Graduate Tracer Study 2008 of Tertiary Education Commission of the CHED, downloaded from [tec.intnet.mu/.../pubrep/Graduate%20Tracer%20Study%202008.pdf](http://tec.intnet.mu/.../pubrep/Graduate%20Tracer%20Study%202008.pdf) on November 20, 2013. The questionnaire was modified based on the relevance of the items to the nature of the program in DLSU-D. The revisions underwent content validation by an expert in the field of research and criminal justice education. Four hundred questionnaires were distributed but only 248 were retrieved. It took almost five months for the researchers and the research assistant to retrieve the questionnaires.

The survey questionnaire consists of the following major items: general information or demographic profile of the respondents, educational background, trainings and advanced studies attended after college, and employment data.

### **Data Gathering Procedure**

First and foremost, the researchers sought permission from the Philippine National Police (main office) for the conduct of the study. Then, another letter was submitted the head of the different headquarters requesting also permission to conduct the survey. During the distribution of the questionnaires, every Headquarter was provided with the approved letter from the Head of PNP. Four hundred fifty (450) questionnaires were distributed and one set of questionnaire was uploaded through the google website for the purpose of an on-line survey.

For the actual survey, the distribution of questionnaires was done by the Research Assistant and one of the researchers. It took around one month and a half to be able to distribute the questionnaires. The retrieval of the questionnaires was completed around five months. There was difficulty in the retrieval of the questionnaire because every time they would go to the target Headquarter, the respondent was always out for field work or special mission.

### **Data Analysis**

A total of 248 questionnaires were retrieved where 12 of them were downloaded from the google website. The researchers reviewed the retrieved questionnaires. It should be noted that the number of items included in the questionnaire were not completely answered or accomplished by the 248 respondents.

### **Statistical Treatment of Data**

The responses of the respondents were analyzed per item. To arrive at an accurate interpretation of the data, frequency count, percentage, and ranking were used.

**Frequency count** was used to determine the number belonging to a group; the **percentage** was used to determine the magnitude of a portion of the responses to the whole. On the other hand, **ranking** was used to determine the category of responses depending on the magnitude of the items.

### **Results**

This section presents the answers to the specific objectives of the study in a tabular form accompanied with analysis of the Tables.

*Specific Objective # 1: To determine the demographic profile of the respondents in terms of gender, civil status, region of origin, residence, year graduated, and degree obtained.*

**Table 1**  
**Respondents' Profile in terms of Gender and Civil Status**

Civil Status	Gender		
<b>Single</b>	43	Male	213
<b>Married</b>	199	Female	26
<b>Separated</b>	1		
<b>Single parent</b>	2		
<b>Total</b>	245		239

Table 1 shows that majority of the respondents are males (N=213) and married (N=199).

**Table 2**  
**Respondents' Profile in Terms of Region of Origin**

Region	Number of Respondents
<b>Region 2</b>	5
<b>Region 3</b>	9
<b>Region 4</b>	204
<b>Region 5</b>	2
<b>Region 6</b>	1
<b>Region 11</b>	1
<b>Region 12</b>	1
<b>NCR</b>	10
<b>CAR</b>	2
<b>ARMM</b>	1
<b>Total</b>	<b>236</b>

It can be gleaned from Table 2 that majority of the respondents are from Region 4 (N=204), followed by NCR (N=10).

**Table 3**  
**Respondents' Location of Residence**

Location of Residence	Number of Respondents
<b>City</b>	203
<b>Municipality</b>	45
<b>Total</b>	<b>248</b>

It can be noted that majority or 82 % of the graduate-respondents come from the city (N=203) as shown in Table 3.

**Table 4**  
**Respondents' Profile in Terms of the Year They Graduated**

<b>Year Graduated</b>	<b>Number of Respondents</b>
1990	1
1991	1
1994	5
1995	2
1996	2
1997	7
1998	10
1999	10
2000	18
2001	22
2002	15
2003	10
2004	11
2005	9
2006	17
2007	15
2008	9
2009	19
2010	13
2011	9
2012	8
2013	6
<b>Total</b>	<b>219</b>

As shown in Table 4, it was on the year 2001 where the most number of graduates, followed by year 2009 with 19 graduates, and year 2000 with 18 graduates. However, no graduates of 1989, 1992, and 1993 participated in the survey.

**Table 5**  
**Respondents' Bachelor's Degree**

<b>Degree Obtained</b>	<b>Number of Responses</b>	<b>Percentage</b>
Two- Year Police Science	2	0.94
BS Criminology Trimester	45	18.14
BS Criminology	201	94.81
<b>Total</b>	<b>248</b>	<b>100</b>

It can be gleaned from Table 5 that majority of the respondents or 94.81 % of them completed the degree leading to BS Criminology, 18.14 % of them obtained BS Criminology (Trimester), and only 2 graduate-respondents graduated from the Two-year Police Science course.

*Objective # 2: To know the employability status of the graduate-respondents*

**2.1) The span of time it took the respondents to have a job that is in line with their qualifications**

**Table 6**  
**Respondents' Span of Time to have a Job in line with Their Qualifications**

<b>Span of Time</b>	<b>Percentage</b>	<b>Number of Respondents</b>
<b>Less than a month</b>	<b>15.84</b>	16
<b>1 to 6 months</b>	<b>24.75</b>	25
<b>7 to 11 months</b>	<b>14.85</b>	15
<b>1 year to less than 2 years</b>	<b>26.37</b>	27
<b>2 years to less than 3 years</b>	<b>5.94</b>	6
<b>3 years to less than 4 years</b>	<b>7.92</b>	8
<b>4 years and more</b>	<b>3.96</b>	4
<b>Total</b>		<b>101</b>

Table 6 shows that the span of time in obtaining a job were from the period between one year to less than two years with 27 responses or 26.37%, one to six months with 25 responses or 24.75 %, and less than a month with 16 responses or 15.84 %. On the contrary, only four or 3.96 % of the respondents obtained a job after four years.

**2.2) Estimate proportion of graduate-respondents who are employed, underemployed, and unemployed**

**Table 7**  
**Percentage of Respondents who are Employed, Underemployed, and Unemployed**

	<b>Number of Respondents</b>	<b>Percentage</b>
<b>Employed</b>	188	75.81
<b>Underemployed</b>	54	21.77
<b>Self-employed</b>	6	2.42
<b>Total</b>	248	100 %

Table 7 shows that 188 or 75.81 % of the respondents were employed. Fifty-four (54) or 22.77% of them were underemployed where 20 of them were educators, two call center agents, 12 government employees, 12 support staff, and eight security officers. Only six or 2.42 were self-employed or managed their own businesses.

**2.3) Respondents' job satisfaction and employment status**

**Table 8**

Respondents' Reasons for Staying in Their Job

Reason(s) for staying on the job	Number of Respondents
Salaries and benefits	175
Career challenge	135
Related to special skill	93
Related to course or program of study	78
Proximity to residence	52
Family influence	43
Peer influence	43

As shown in Table 8, the major reason why the respondents stay in their job is because of salaries and benefits (N=175). The second was *career challenge* (N=135). Other reasons were: *related to special skill, related to course or program of study, proximity to residence, peer influence, and family influence*, respectively.

**Table 9**

Respondents' Employment Status

Employment Status	Number of Respondents	Percentage
Regular or Permanent	195	87.44
Contractual	11	4.93
Temporary	15	6.73
Self-employed	2	0.90
<b>Total</b>	<b>223</b>	<b>100</b>

As shown in the Table 9, 195 or 87.44 % of them had a *regular or permanent status*. Only 11 or 4.93% (rank 2) and 15 or 6.93 % (rank 3) were *contractual* and *temporary*, respectively. Further, 2 or .90 % of the respondents were *self-employed*.

#### **2.4) The extent of enrollment of the respondents as regards postgraduate studies**

**Table 10**  
Respondents' Post Graduate Studies

School Enrolled	Program	Status	Number of Respondents
DLSU-D	Master of Arts in Criminal Justice	Graduated	22
PCCR	Master of Arts in Criminal Justice	Graduated	4
PCCR	PhD	Graduated	4
PCCR	PhD	On-going	5
EAC	PhD	Graduated	5
<b>Total</b>			40

Table 10 presents the extent of the post graduate studies of the respondents. Twenty-two of them obtained their Master's Degree at De La Salle University-Dasmariñas (DLSU-D) and four of them graduated from the Philippine College of Criminology (PCCR). Likewise, four of the respondents obtained a doctoral degree at PCCR and five of them obtained the degree at Emilio Aguinaldo College (EAC). Further, five of them are still on the completion stage of their doctoral degree at PCCR.

### 2.5) Reasons for pursuing graduate studies

**Table 11**  
Respondents' Reasons for Pursuing Post Graduate Studies

Reason(s) for pursuing post graduate studies	Frequency of Responses
Strong passion for the profession	30
Inspired by a role model	23
Influence of parents	22
Status or prestige of the profession	19
Peer influence	15
Prospect for immediate employment	15
Prospect of career advancement	13
Availability of course offering in chosen institution	9
Affordable for the family	9
Prospect of attractive compensation	8
Opportunity for employment abroad	4

As shown in Table 11, the major reason why respondents continue pursuing post graduate studies was for *strong passion for the profession*. The reason or item, *inspired by a role model* had a frequency of 23 responses. *Influence of parents or relatives* had a frequency of 22

responses. The other reasons were: *status or prestige of the profession* (with 19 responses), *peer influence and prospect for immediate employment* (with both 15 responses), *prospect of career advancement* (with 13 responses), *availability of course offering in chosen institution and affordable for the family* (both with nine responses), *prospect of attractive compensation* (with eight responses) , *and opportunity for employment abroad* (with only four responses), respectively.

**2.6) Trainings Attended by the respondents**

**Table 12**  
Trainings Attended by the Respondents

<b>Trainings</b>	<b>Number of Respondents</b>
<b>Public Safety Basic Recruit Course</b>	135
<b>Criminal Investigation Course</b>	135
<b>Public Safety Officer orientation course</b>	135
<b>Public Safety Officer Basic Course</b>	135
<b>Public Safety Candidate Course</b>	124
<b>Public Safety Responders Course</b>	120
<b>Public Safety Junior Leadership Course</b>	115
<b>Public safety Field Training Program</b>	100
<b>Public Safety Officer Advanced Course</b>	45
<b>Public Safety Senior Leadership Course</b>	45
<b>Public Safety Officer Inspector Course</b>	35
<b>Special Counter-Insurgency Orientation Course</b>	18
<b>Post Blast Investigation Course</b>	15
<b>Public Safety Officer Senior Executive Course</b>	15

Note: Number of respondents who are member of the PNP 135

As shown in Table 12, a total of 15 trainings were attended by the selected respondents. As shown from the frequency of responses, the most attended trainings by the 135 respondents were *Public Safety basic Recruit Course, Criminal Investigation and Detection Course, Criminal Investigation Course, and Public Safety Officer Basic Course*. This is followed by the training on Public Safety Candidate and the least among them were *Post Blast Investigation Career and Public Safety Officer Senior Executive Course* with both 15 attendee-respondents.

*Specific Objective # 3. To determine the contribution of the program of study to respondents*

**3.1) Competencies learned in college that are found useful in their first job**

**Table 13**  
 Respondents' Competencies Learned in College Useful in Their First Job

Competencies Learned in College	Number of Respondents
<b>Problem-solving skills</b>	146
<b>Communication skills</b>	145
<b>Critical thinking Skills</b>	139
<b>Human Relations skills</b>	94
<b>Entrepreneurial skills</b>	36
<b>Information Technology skills</b>	30

It can be noted from Table 13 that among the list of competencies, *problem solving-skills* (N=146) was found to be useful to their first job. This was followed by *communication skills* (N=145) and *critical thinking skills* (N=139). The least competencies among the six items were as follows: *entrepreneurial skills* (N=36); and *information technology skills* (N=30).

### 3.2) Utilization of knowledge, skills, and attitudes in the workplace

**Table 14**  
 Contribution of the Program of Study of CCJE to the Respondents' Knowledge, Skills, and Attitudes

Contribution of the Program of study	Number of Respondents			
	Very much	Much	A little	Not at all
Enhanced academic knowledge	49	0	0	0
Improved learning efficiency	48	0	0	0
Improved communication skills	47	0	0	0
Improved research skills	44	0	0	0
Enhanced team spirit	44	0	0	0
Improved problem-solving skills	41	0	0	0
Improved information technology skills	35	0	0	0

Table 14 presents the contribution of the Program of Study of CCJE to the respondents' knowledge, skills, and attitudes. Forty-nine (49) of them claimed that the Program **very much** enhanced their *academic knowledge*. Forty-eight (48) of them felt **very much** that their ability to *learn efficiently* was improved. Further, 47 of the respondents perceived that their *communication skills* were improved **very much** after taking the Program. Other items that were improved **very much** were *research skills* and *team spirits*, both with frequency of 44 responses.

*Problem solving skills* with frequency of 41 responses, and *information technology skills* (N=35). This obtained a frequency of 35 responses. More importantly, the table revealed that none of the respondents perceived that those items did not have an effect on their skills, knowledge, and attitude.

*Specific Objective # 3: To determine the strength and weaknesses of the program of study of the Criminal Justice Education*

**Table 15**  
Strengths and Weaknesses of the College of Criminal Justice Education Program Offering

College of Criminal Justice Education Program	Responses for Strengths		Responses for Weaknesses		Responses for Do not apply		Total
	F	%	F	%	F	%	F
Range of modules offered	199	92.55	16	0.07	0	0	215
Number of optional modules in relation to the number of compulsory (core) modules	167	63.29	47	21.96	0	0	214
Relevance of the program to your professional requirements	191	88.42	25	11.57	0	0	216
Student workload	189	90.00	20	9.52	1	0.05	210
Problem-solving	196	93.33	14	6.67	0	0	210
Inter-disciplinary learning	197	93.81	13	0.62	0	0	210
Work placement/attachment	195	92.86	16	7.58	0	0	211
Teaching/Learning environment	199	94.31	12	5.69	0	0	211
Quality of delivery	198	92.09	17	7.91	0	0	215

Table 15 presents the strengths and weaknesses of the program of study of the Criminal Justice Education. It can be noted from the table that the total number of responses is not equally distributed among items reflected in first column of Table 15. It is also reflected in the table that the responses of the graduate-respondents as regards the strengths of the program offering outnumbered the responses of the graduate-respondents who identified the weaknesses of the program offering.

It is also shown in the table that *teaching / learning environment* and *range of modules offered* and obtained 199 responses against 12 and 16 frequency of responses as weaknesses, respectively.

Moreover, the item, *quality of delivery* ranked third with frequency of 198 responses as strength of the program against frequency of 17 responses as weakness of the program. The other strength of the program of study, was *interdisciplinary learning which* with frequency of 197 responses against frequency of 13 responses as weakness too. Furthermore, the items that were considered strength of the program offering of Criminal Justice Education are as follows: *problem solving* with 196 responses and *work placement/attachment* with 195 responses and 6 among the nine items, *relevance of the program to the professional requirements of the graduates* with 191 responses and; *student workload* with 189 responses and *number of optional modules in relation to the number of compulsory (core) modules* with 167 responses.

### Discussion

The results of the study suggest that the program curriculum of the Criminal Justice Education addresses the needs of the graduates in the workplace although there were some aspects of this that need to be improved like inclusion of subject on Translation. This subject will enhance the learners' skills on translation and vocabulary. When they become police officers one of their tasks is to conduct investigation related to complaints or crimes. All the reports are written in English even though the medium that is used during the investigation is in Filipino. Some police officers claimed that they have a hard time translating the report to English because they lack vocabulary in the use of the English language. So, this justifies the need to include Translation subject.

It was revealed from the findings of the study that the span of time for the graduates to be employed was from one year to less than a month. This insinuates that the graduates of the College of Criminal Justice Education experienced only a shorter period to be employed. As regards the proportion of respondents who are employed, underemployed, and unemployed, the finding revealed that there is unequal proportion of distribution as to employed, underemployed, and unemployed. The employed got the highest percentage of 78.62, against underemployed with a percent of 21.77, and unemployed, with a percentage of 2.88. It was also revealed that the unemployed was self-employed which can be considered underemployed too.

As regards job satisfaction, it was revealed that the reason why they stay in their job was because of salaries and benefits. This is expected because police officers and other law enforcement have good salary and benefits even up to the time of their retirement (<http://pnp.gov.ph/portal/index.php/pay-and-benefits>; Mojares et al., 2015). They have security of tenure. Also, majority of the respondents were permanent in their job.

Police officers are expected to enroll in post graduate so that they are promoted. However, the data on this revealed that only a handful of them obtained master's and doctoral degrees. The reasons why they pursue graduate studies were due to family and peer influence. Some of them did not consider this as an opportunity to be employed abroad.

Fifteen (15) trainings were identified in the survey form. Most of the trainings focused on public safety and criminal investigation. These are continuing training and human resource development programs for the uniformed personnel of the Philippine National Police that would assure the public that they are equipped with the necessary knowledge, skills, attitudes and values to exercise their profession. Also, these trainings would help them to be morally upright,

professional competent and technically proficient officers who are capable to be of service to the community in order maintain peace and order, protect lives and property, and to improve the relationship of the police to their community.

The graduates perceived that problem-solving skills, communication skills, critical thinking skills, human relations skills, entrepreneurial skills, and information technology skills were the skills that they found useful in their job. This finding is supported by the research project of US Department of Justice entitled “Hiring in the Spirit of Service”. The research revealed that the core competencies required for law enforcement officers are: good judgement, ability to solve problem, and team work (Oliver, 2002). Further, it was also mentioned in an article titled “Top 4 Skills You Need to be a Police Officer” (Wolley, 2012) that a police officer must be able to manage stress, good at decision-making, communicatively competent, and able to deal with others. More so, the ability to use technology is a must for a police officer (Police and Law Enforcement General Job Requirements, <http://www.realpolice.net/articles/training/police-and-law-enforcement-general-job-requirements.html>) since one of his tasks is to do reports.

The claim of the graduates as regards the skills they need in the workplace was congruent to what was revealed as regards the contribution of the program of study of the College of Criminal Justice Education (CCJE) to the graduates. The program has enhanced their academic knowledge, and efficiently improved their learning, communication skills, research skills, ability to deal with others or the spirit of communion, and problem solving skills, as well as the technology skills. However, some of them still perceived that these knowledge, skills, and attitudes need further enhancement. This perception is supported by the study conducted by Pareja (2013) entitled *Selected Police Investigators’ Difficulties Encountered in Writing Law Enforcement Reports in Cavite: Basis for Designing an English Writing Course*. The findings of the study revealed that the 27 participants encountered difficulties in soliciting accurate information while conducting an interview and writing the narrative due to their weaknesses in using accurate grammar and vocabulary. The different steps involved in conducting a law enforcement report would entail the communication and thinking skills. Both skills interplay with one another. The latter refers to the ability of an individual to understand the information gathered, to interpret the meaning of pieces of information, and to recognize what information is needed in order to draw hypothesis (Titus, 2012) while the former refers to the ability of the individual to communicate this information to others in a well-coherent manner.

Further, majority of the respondents confirmed that the items on range of modules offered by the college, number of optional modules in relation to the number of compulsory modules, relevance of the program to their professional requirements, student workload, problem solving, interdisciplinary learning work, placement or attachment, teaching and learning environment, and quality of delivery are the strengths of the program curriculum. More so, only a very low percentage of the respondents perceived that the program curriculum was weak.

### **Conclusion/Recommendations**

The tracer study serves as the cathedral for determining the status of the graduates in the workplace. Further, this serves as a vehicle for determining what component of the program should be enhanced to better improve the knowledge, skills, and attitude of the learners. By doing so, the College of Criminal Justice Education will produce graduates who can compete globally.

The learning skills on communication, problem solving, information and technology, and critical thinking are important indicators to measure the impact of the curriculum in the workplace.

There is a need to include interview technique in conducting a tracer study.

Since this study made use only of cross-sectional descriptive survey, it is recommended that a longitudinal research method be conducted focusing on individual graduate to have a comprehensive information of his status in the workplace and his role in the society.

There is also a need to strengthen the competencies on skills and work related Lasallian values.

The Criminology program must focus more on academic development, and other law enforcement job opportunities and must enhance the leadership capabilities of the students. Moreover, the College of Criminal Justice must provide additional training programs for students to further improve their performance and to possess positive attitude towards work.

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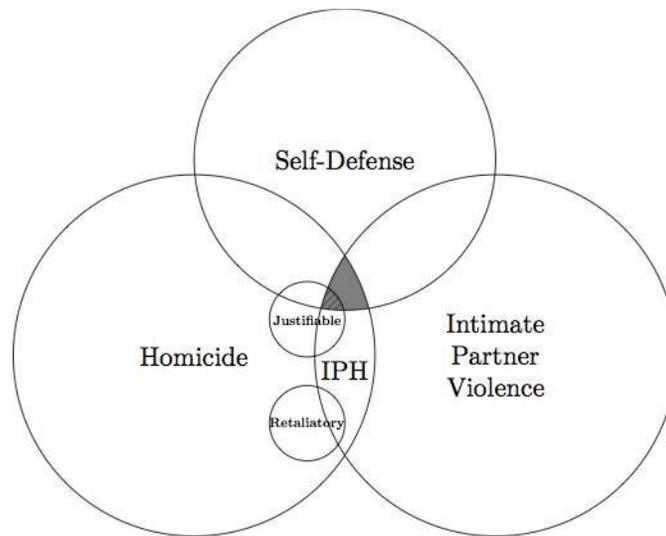
***When Home Becomes Prison and Prison Becomes Home:  
A Case Study of Battered Women Who Kill and Self-Defense Laws***

Against the backdrop of the current state of the battered women’s movement and building on the studies of the movement’s cooptation in the social service and political arenas, this study focuses on the legal reform branch of the movement, which is the most overlooked in the social movement literature. The research seeks to understand what, how and why *legal* compromises are made in the courtroom. This paper examines five appellate court cases of intimate partner homicide. By analyzing court opinions, it finds four major compromises made in the courtroom. To understand those compromises, the study then identifies four challenges and obstacles faced by feminist legal professionals, which constitute the rationales behind the compromises. The contribution of this study is that it shifts the focus of the battered women’s movement back to its original goal, which is to challenge existing self-defense laws and the use of male standard as the only standard of reasonableness and imminence. Earlier in the battered women’s movement, feminist scholars and legal professionals work for and with battered women to untangle the underpinning social structural reasons of intimate partner violence. However, over time, they compromise this ideology when they deploy legal strategies, such as the battered woman defense, that contradict their original goals only to win cases for battered women. In the short run, such defending strategies may seem practical. In the long run, however, this paper argues, such compromises may hinder feminists from achieving their ultimate legal reform goals.

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**INTRODUCTION**



**Figure 1. Justifiable Intimate Partner Homicide in the Form of Perfect Self-Defense**

The grey area in Figure 1 represents the intersection of three research fields: homicide study, intimate partner violence (IPV), and the study of self-defense laws. This research project examines an even smaller subfield within the grey area (the shaded area in Figure 1)—justifiable intimate partner homicide in the form of perfect self-defense. The purpose of this study is to research an overlooked phenomenon—the compromises feminist scholars and legal professionals make in justifiable intimate partner homicide cases. Previous research has observed cooptation in the social service and political branches of the battered women’s movement. Such cooptation is the result of concerns for financial and political support (Johnson, 1981; Davis, 1988; Gagné, 1996). This study fills the gap in the feminist literature and social movement literature by focusing on the legal compromises feminists make in the courtroom regarding the use of self-defense defense in cases of battered women who kill their abusers. This research aims to answer the following questions: (1). Are there any compromises feminist scholars and legal professionals make regarding justifiable intimate partner homicide cases? (2). If so, what are the compromises? (3). How are the compromises made? (4). Why do feminist scholars and legal professionals make such compromises in the legal reform branch of the battered women’s movement?

In order to understand and explain the compromises, the current study first contextualizes justifiable intimate partner homicide in the research areas surrounding the subfield in question. These related areas include the above-mentioned three research fields: homicide, intimate partner violence (IPV), and self-defense laws. This paper then reviews the literature and provides basic knowledge for the three big intersectional areas: (1) intimate partner homicide as an extreme form of IPV and a particular form of general homicide; (2) the application of self-defense in homicide in general; and (3) the application of self-defense in IPV. Further, combining (2) and (3), this study examines the use of self-defense defense in five intimate partner homicide cases. The first three parts of the theoretical review define the problem and give the reader background knowledge for the problem under examination. The last part of the literature review relates directly to the fourth research question of this study, which concerns the rationales behind the compromises made in the courtroom.

## LITERATURE REVIEW

### *Defining the Problem*

Within the grey area in Figure 1, there are two subareas—the shaded part and the remaining area. The shaded part is the focus of this study, which is justifiable intimate partner homicide in the form of perfect self-defense. It is justifiable in the sense that it meets all the legal standards of perfect self-defense in a given state. Therefore, this study rules out imperfect self-defense (including but not limited to preemptive self-defense) acts because such acts of killing are not justifiable and thus punishable according to the law. These unjustifiable and punishable self-defense acts constitute the remaining (unshaded) area within the grey area in Figure 1. Although insanity defense is sometimes used in intimate partner homicide cases, it is beyond the scope of

this research because it does not share similar legal dilemmas as the use of self-defense defense in such cases.

### *The Prevalence and Seriousness of the Problem*

According to a report on the state courts of 16 large urban counties in the United States, 3,750 cases of IPV were filed in May 2002 (Smith & Farole Jr., 2009). Of those 3,750 cases, approximately 25% involved the use of weapon, such as a gun, a knife, or a blunt object; 84% involved a female victim and a male defendant; 46% involved a defendant with a prior history of abuse toward the same victim; 24% of victims had reported prior violence to police (Smith & Farole Jr., 2009). Compared to men, women are still at higher risk to be victimized by an intimate partner. In 2010, of the 3,032 homicides that involved female victims, 39% were committed by their intimate partners, whereas 3% of the 10,878 homicides with male victims were committed by an intimate partner (Bureau of Justice Statistics, 2013). Generally, in the United States, studies show that one out of every four men will use violence against a partner at some time in their relationship (Paymar, 1993); and nearly 1.9 million women are physically battered each year (Schneider, 2000).

Violence perpetrated by one intimate partner against another has received a great deal of academic and media attention. Intimate partner violence, once deemed a private affair, is now recognized by more and more people as one of the various types of violence against women, a violation of basic human rights, as well as a practice of patriarchal oppression of women. Despite the media attention and scholarly focus on the issue, the legal responses to this problem can hardly meet the needs of those who are desperate for help and those who are eager for social change: "Police were more likely to respond within 5 minutes if the offender was a stranger than if an offender was known to the female victim" (Bachman & Saltzman, 1994, p. 8). Even when the offender was arrested, only 7% of the female victims raped and assaulted by their intimate partners reported that their perpetrators were criminally prosecuted, of whom only less than 50% were ever convicted (Grotzinger, Menard, & Gianola, 2008). The most serious charges filed against IPV perpetrators in the aforementioned DOJ report on the state courts of 16 large urban counties include murder (0.2%), rape/sexual assault (1.7%), robbery (0.2%), aggravated assault (12.2%), simple assault (77.9%), intimidation (4.9%, including stalking and harassment), and other violent offenses (2.8%, including offenses such as kidnapping and false imprisonment/criminal confinement). "A misdemeanor was the most serious charge filed against the majority of defendants in intimate partner violence cases. Most misdemeanor charges (96%) were for simple assault" (Smith & Farole Jr., 2009). Of the 3,729 cases for which adjudication outcomes were available as of May 31, 2003, 56% of the cases filed with the court resulted in a conviction, 81.4% of which were for a misdemeanor; 33% of all the 3,729 cases were discontinued by the prosecution or dismissed by the court; 0.6% of all cases ended in acquittal. Of the 2,010 cases whose conviction charges were available by May 31, 2003, 82.7% of defendants convicted in IPV cases received either a jail (75.3%) or prison (7.4%) sentence. 40% of defendants convicted of felony IPV were sentenced to prison for one year or more. 17.3% of convicted defendants were not incarcerated, receiving a probation sentence instead (Smith & Farole Jr., 2009).

Two noticeable characteristics of the police response to IPV are revealed in the above figures: reluctance and leniency. The police's ineffective action (or sometimes inaction) has considerable impacts on both the perpetrators and the victims of IPV. It significantly (and often negatively)

contributes to battered women's decision-making in whether or not to resort to deadly force to end the batterer's violence against their abusers. This point will be further illustrated in the case study section.

### *Theories on Intimate Partner Violence*

The literature on IPV is divided by Schneider (2000) into three categories: the psychological perspective, the sociological approach and the feminist lens. The psychological perspective explains violence, including violence in general and IPV in particular, as pathological behavior. Schneider (2000) points out that this perspective falsely delivers the idea to the public that "those who are battered and who remain in battering relationships are regarded as more pathological, more deeply troubled, than the men who batter them" (Schneider, 2000, p. 23). The second perspective, the sociological approach, which focuses on the social structures and the institution of family that "is set up to allow and even encourage violence among family members" (Schneider, 2000, p. 24). This sociological approach is also referred to as "family violence theory", "gender-neutral explanations", or "the 'women are as violent as men' perspective" (Schneider, 2000). Schneider's major criticism of the sociological approach is its gender-neutral attitude and the theory's claim of gender symmetry in IPV. Schneider argues that "women use violence primarily in self-defense" (also see Dobash & Dobash, 1992) to refute the sociological approach. According to Schneider (2002), the misunderstandings of IPV by the psychological and sociological theorists and the practical failures they have made call for a "reconceiving" (p. 27) of gender violence.

Similarly, Gagné (1998) divides the theories on IPV into three sets of explanations: intra-individual explanations, social-psychological explanations, and macro-level explanations. According to Gagné (1998), intra-individual explanations for IPV focus on batterers' mental illnesses or substance abuse. The second set of explanations, in Gagné's typology, resonates with the combination of the first two categories recognized by Schneider (2000). This set of explanations understands IPV through individual psychological traits (low self-esteem, battered woman syndrome, etc.) in the context of the family structure. The third set of explanations provides macro-level causal factors for IPV. Such factors include social structures and arrangements, or in feminist terms, patriarchy.

Combining the above two typologies identified by Gagné (1998) and Schneider (2000), this paper argues that the compromises made in the courtroom by feminist legal professionals are evidenced by the major shift in the ideological orientation of the battered women's movement. Among the three categories recognized by both Gagné (1998) and Schneider (2000), the feminist/macro-level explanations for IPV are crucial in bringing about social change. When feminist scholars and legal practitioners abandoned this ideology and adopted the individual/social psychological explanations, as shown by the cases, they were not making the shift by choice. Rather, they had to make such ideological compromises as a strategy to win cases for battered women who kill. In other words, one of the original goals of feminist legal scholars was to challenge and reform the gender imbalance/injustice in existing self-defense laws; yet later in the movement, they changed their major focus to fighting to win cases for battered women who kill. Oftentimes, their courtroom strategy was to accept the social structure (patriarchy) and the gender-blind laws they originally questioned and criticized. Eventually, they no longer fought to reform the law. Instead, they used what could be conveniently used in the

law to win the cases. In the short run, they helped bring “justice” (clemency) that battered women deserved. In the long run, however, this paper argues, such compromises made in the courtroom are exactly the reason why the battered women’s movement is still a movement today, a phenomenon observed by Lehrner and Allen (2009). Gagné (1998) has observed similar kinds of compromises made in the *political* field and identified them as evidence of cooptation of the battered women’s movement. However, Gagné’s (1998) findings did not reveal what happened in the legal branch of the movement. As Gagné (1998) herself pointed out, “[the legal reform) branch has been the one perhaps most overlooked in the social movement literature” (p. 15). The current study aims to fill this gap in feminist criminology literature and social movement literature by showing how compromises have been made in the legal arena of the battered women’s movement.

### *Theories on Battered Women Who Kill*

Lenore Walker (1977) was one of the first scholars who studied battered women. Almost all studies and legal practices today can be traced back to Walker’s (1977) early conceptualization and theorization of battered women. Even those who criticize Walker use the term “battered women” in Walker’s (1977) sense. Walker’s (1977) study answers the question of who counts as a battered woman. In her study, Walker interviewed over 100 battered women and caseworkers in the Denver area from September 1975 through March 1977. Based on her interviews, Walker (1977) defined a “battered woman” as “a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her into doing what he wants without regard for her rights as an individual” (Walker 1977, p. 53). Walker further clarified this definition by operationalizing “women” and “forceful psychological behavior” by an abusive man. In Walker’s terms, “battered women include wives and women in any form of intimate relationships with men”. To operationalize psychological abuse, Walker suggests that “the frequency, severity, and/or effect on the women must be evaluated” (Walker, 1977, p. 53).

Based on her interviews, Walker (1977) identified three phases in a cycle commonly found in abusive relationships. The three phases include: (1) the tension-building phase in which period of time, the batterer becomes edgy and prone to respond negatively to frustrations; (2) the acute battering phase, when “the explosion occurs” (p.53); and (3) the tranquil/honeymoon phase, which features “contrite, forgiving, loving behavior” from the batterer (p. 54). In her book published 10 years later, *Terrifying Love: Why Battered Women Kill and How Society Responds*, Walker (1989) further expanded these findings and developed what is now known as the “cycle of violence” theory. Walker’s (1977) interviews showed that this three-phase cycle of violence repeats itself over time in battering relationships.

The cycle of violence theory is pertinent to the current case study for the following two reasons. First, it is directly related to the reasonableness standard in self-defense laws. As will be shown in the case studies, battered women know from experience that the cycle of violence repeats itself with escalation in frequency and severity. Therefore, for them, it is reasonable to assume that their batterers’ sleeping is not the end of the violent crime committed against them. Feminist expert witnesses and lawyers who are familiar with the cycle of violence theory know that the battered women’s choice of timing is reasonable given the nature of IPV. However, they had to make a compromise and use the battered woman defense, claiming that they believed those battered women lost their mind when doing so. By making this compromise, this paper

argues, feminist scholars and legal practitioners abandoned their beliefs in the theories on IPV and battered women who kill.

Second, this cycle of violence theory is also directly related to the imminence rule of self-defense laws. Similar to the point in the last paragraph, the cycle of violence theory proves that the violence is ongoing even in the tension-building phase and the tranquil/honeymoon phase. Therefore, to battered women who have experienced many rounds of the cycle, the danger does not seem to go away as the batterer falls asleep. The imminence rule of existing self-defense laws is made for cases involving two men fighting each other. It overlooks the physical power imbalance between the two genders and the unique nature of IPV.

### *Self-Defense Laws*

The cases in this study took place in two jurisdictions: North Carolina and Iowa.

In North Carolina, a defendant is entitled to an instruction on perfect self-defense as justification for homicide where, viewed in the light most favorable to the defendant, there is evidence tending to show that at the time of the killing: (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm (*State v. Norris*, 1981).

In Iowa, once self-defense is raised, the burden is on the State to prove beyond a reasonable doubt that the asserted justification of self-defense did not exist, by proving: (1) the defendant initiated or continued the incident resulting in injury; (2) the defendant had an alternative course of action, which was not utilized; (3) the defendant did not have reasonable grounds for the belief he was in imminent danger of injury or death; (4) the defendant did not actually believe he was in imminent danger of injury or death; or (5) the force used by the defendant was unreasonable (*State v. Rubino*, 1999).

### *The Cooptation of the Battered Women's Movement*

Building shelters is one of the most important helping strategies in the early days of the battered women's movement. However, in 1981, only one decade after the emergence of the battered women's movement, Johnson noticed that the battered women's shelters had been co-opted: "Many shelters were founded or influenced by feminists, so one might expect there to be an inherent conflict between such social control hierarchies and feminist ideology. But in actuality, most of the conflict is rhetorical, as most shelters (including most feminist ones) have been co-opted by official social control agencies, an unintended consequence of accepting financial support from official sources" (Johnson, 1981, p. 828). A little different from Johnson (1981), Davis (1988) observed that the feminist shelter workers did fight to preserve the feminist ideology. However, "rules have multiplied, even as the political discourse has been neutralized" (p. 411).

While both Johnson (1981) and Davis (1988) focused on the cooptation of the battered women's shelter movement, Gagné (1996) took a different approach to understanding the strategies feminists employed in the battered women's movement. In her study, Gagné (1996) used a snowball sampling interview method, beginning with First Lady of the state of Ohio, Dagmar Celeste, who helped in promoting battered women's clemency in Ohio. Gagné (1996) found another form of compromise that feminists made in the Ohio correctional system—a strategic rhetorical compromise. "As ideological outsiders within the systems they wanted to change, they created a climate more favorable to clemency by framing issues in terms authorities were likely to understand and accept" (p. 90). Gagné's (1996) observed that feminists who were active in the Ohio state government branches worked to support legislation on battered woman syndrome. They also made sure that the cases of all the battered women in the state prison "who were eligible for review make it to the governor's office" (p. 87).

While Johnson (1981), Davis (1988), and Gagné (1996) examined the cooptation of the battered women's movement in the social service and political fields, the current study focuses on the legal reform branch of the battered women's movement, which is most overlooked in the social movement literature (Gagné, 1998, p. 15). Unlike feminist activists and shelter workers who compromised their ideologies for financial and political support, feminist legal reformers had other considerations which caused them to make compromises in the legal branch of the movement. The cases examined in this study illustrate what, how and why legal compromises have been made in the courtroom.

## **METHODOLOGY AND FINDINGS**

### *Methodology*

This paper takes Gagné's (1996) study one step further and examines what happens after the cases make it all the way to the legal system. The paper aims to answer the following questions: Have feminists made compromises in court? If yes, what were those compromises? And finally, why and how were they made in court?

The two primary databases used for this study are LexisNexis and Westlaw Campus. The study randomly selected two appellate court cases involving battered women who kill (BWWK). Since very few cases fall into the particularly narrow research field of this study (the shaded area within the grey area in Figure 1), the selection of cases did not have a particular consideration of the jurisdictions where the cases happened. The two jurisdictions happened to be North Carolina and Iowa. The study then randomly chose two other cases in North Carolina that cited the initial North Carolina case as precedent, and one other case in Iowa that cited the initial Iowa case as precedent. This study analyzed court opinions and dissenting judges' opinions on those five cases to delineate the rationales behind the court decisions and the compromises made by feminist legal professionals in the courtroom.

Defendants in all the cases were women who had been battered for a period of time by the decedents prior to the killing. Three of them killed the batterers while they were asleep; and two of them killed the batterers during an ongoing confrontation. Three of them used firearms; and two of them used knives. One defendant was convicted of first-degree murder under the law of North Carolina; two of them were convicted of second-degree murder under the law of North Carolina and the law of Iowa respectively; one was convicted of voluntary manslaughter under the law of North Carolina; and one of them was convicted of lesser offense of voluntary

manslaughter under the law of Iowa. Two of the defendants were sentenced to determinate term of imprisonment under the law of North Carolina, with one of them sentenced to 6 years' imprisonment and the other to life imprisonment; and the other three defendants were sentenced to indeterminate terms of imprisonment: one to a minimum term of 135 months and a maximum term of 171 months in prison under the law of North Carolina, one to a fifty-year term of imprisonment, required to serve a minimum of thirty-five years and ordered to pay \$ 150,000 in restitution to the decedent's estate under the law of Iowa, and one to an indeterminate term of imprisonment not to exceed ten years, along with the imposition of a fine and an order to pay fees and restitution, under the law of Iowa.

## CASE STUDY

### *State v. Norman*

On June 12, 1985, a man named John Thomas was found dead in his bedroom in Rutherford County, North Carolina. His wife, Judy Ann Laws Norman, told the officer that Thomas had been beating her all day and that she shot him with a .25 automatic pistol that she got from her mother's house. Norman was convicted of voluntary manslaughter in the Superior Court of Rutherford County and was sentenced to six years' imprisonment. Norman appealed. The Court of Appeals held that "alleged 'battered wife' was entitled to instruction on perfect self-defense in prosecution for shooting husband while he was asleep" and granted her a new trial. On April 5, 1989, the Supreme Court held that "woman who had been physically and mentally abused by husband over period of several years, and who had been diagnosed as suffering from battered woman's syndrome, was not acting in either perfect or imperfect self-defense when, out of alleged desire to prevent abuse in future, she shot husband while he slept." Based on that, the Supreme Court reversed the decision of the Court of Appeals.

Since the major concerns of the Supreme Court were already answered by Justice Martin's dissenting opinion, I focus here on some of the significant points raised by the Court of Appeals and by Justice Martin.

(1) The imminence rule of the self-defense law in North Carolina was questioned by the Court of Appeals when they stated that: "Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense." "Such a standard, in our view, would ignore the realities of the condition."

In this point, the unique nature of IPV and the contexts ("the realities of the condition") were emphasized. Even a woman who does not qualify for battered woman syndrome may find it hard to fight with a man during an ongoing attack. As Walker (1989) claims, "there is plenty of strong, sane rationale behind the battered woman's apparent passivity in the face of acute violence" (Walker, 1989, p. 44). Physical strength is one of them. The "acute battering incidents are often so vicious, so out of control, that innocent bystanders may be injured...even another strong man, is likely to get hurt" and "even [the police] view this kind of call as being extremely dangerous" (Walker, 1989, p. 44). It is then unrealistic and unreasonable for a woman "of ordinary firmness" to act in the face of acute violence or wait till the violence resumes (which is inevitable given the nature of IPV) to use force to protect herself. Fighting back in the tranquil period seems more realistic and reasonable for a battered woman to end the violence. The cycle of violence

distinguishes IPV from other types of violent crimes in that the cycle of violence continuously repeats itself. A batterer's sleeping does not end the violence but "a momentary hiatus in a continuous reign of terror" as stated in the opinion of the Court of Appeals. This unique nature of IPV is eventually learned by battered women, making them reasonably believe that the danger of death or great bodily harm is imminent even if the batterer is asleep.

(2) The subjective assessment of the imminent death or great bodily harm was paid special attention by both the Court of Appeals and Justice Martin. The Court of Appeals cited *State v. Mize* (1986) to show that "the inability of a defendant to withdraw from the hostile situation and the vulnerability of a defendant to the victim are factors considered by our Supreme Court in determining the reasonableness of a defendant's belief in the necessity to kill the victim." Justice Martin also pointed out that Judy Norman's prior experiences "with social service agencies and the law ...contributed to her sense of futility and abandonment through the inefficacy of their protection and the strength of her husband's wrath when they failed."

In this point, reasonableness was linked to the defendant's previous life experiences, including her prior experiences with the legal system. Though the law states that the assessment of the imminent danger and of the necessity to use deadly force is subjective, the underlying norm is often from a man's point of view. Both domination and subordination are social and political learning processes. Prior experiences undermine or reinforce the stigmas (Valian, 1998) individual people have and the status quo of the whole society. Through their everyday experiences, people from economically, socially, racially or culturally subordinated groups gain a certain "learned helplessness" (Seligman, 1972; Walker, 1977; Gondolf & Fisher, 1988; Launius & Lindquist, 1988).

Applying this social and political learning process to an individual level, people from different social groups develop different perceptions and understandings (sometimes misperceptions and misunderstandings) of each other and each other's behaviors. Those who do not have any experience of subordination do not feel, or cannot imagine, the difficulties and fears of those who do. Often, they see those difficulties and fears as "unreasonable". Feminists claim that "women's concrete experiences provide the starting point from which to build knowledge" (Brooks, 2007, p. 56). When the defendant is a battered woman, to gain the knowledge and then evaluate whether her belief at the moment of the killing was reasonable or unreasonable requires the jury to actually "walk in her shoes". A battered woman's perception of the situation is gained through her everyday life with the batterer, so every detail in her life could be relevant to the court decision.

The reluctance to seek help from the legal system is one of the many phenomena in IPV cases that reflect the intersectionality of inequality in our society, for it is more often seen in women from economically, socially, racially and culturally subordinated groups. For example, African-American women tend to be unwilling to turn for help to the police due to their perception of the police force "that is frequently hostile" (Goodmark, 2004. P. 11). Asian-American women, due to cultural stigmas and language barriers, tend not to seek for legal help either (Goodmark, 2004). Poor women face additional financial obstacles when considering legal assistance. Immigrant women (especially those who do not have legal status) have concerns about their legal status and thus are reluctant to seek legal help. (Goodmark, 2004, p. 12) Those are only several examples of the real difficulties and obstacles battered women face in addition to their fear of the batterers' retaliation. Failing to take these factors into consideration may result in asking

questions like: “Why didn’t they call the police?” Even if they do report to the police, what happens then? The “commonsense” assumption most of our courts share is that the legal system can and will solve the problem for them. Unfortunately, there is another characteristic that distinguishes IPV from other violent crimes: the severity and frequency of IPV escalate over time. It is then understandable that IPV victims are reluctant to seek outside help for fear of retaliation. As a matter of fact, some battered women do report that violence escalates after the legal system gets involved: “almost all of the women who had called stated later that the police had provided absolutely no help at all. In fact, they often made things worse; once they were gone, after some feeble and ineffective attempts to placate the batterer and after the batterer saw that nothing had been done to stop him, he often continued his abuse with renewed violence” (Walker, 1989, p. 63). This point is supported by the facts of Judy Norman’s case. During the twenty years of severe abuse, Judy Norman did not try to kill her husband. But after two days of intensive experiences with the police and social service agencies, she pulled the trigger. I do not imply here that there is any causal relationship between Judy Norman’s experiences with the police and her decision to resort to “homicidal self-help” (if there was any decision made at all); I highlight this fact simply to show the possibility that ineffective action (or sometimes inaction) of the legal system may worsen the situation, for it may verify a battered woman’s prior perception of her own inability to end the violence and the batterer’s invulnerability to the legal system.

Given the four experiences Judy Norman had with the police, it was reasonable for her to believe that her abusive husband was invulnerable to the criminal justice system and that the police would not effectively intervene and protect her at the same time. In addition to the police, several other people witnessed John Norman’s violent behavior toward Judy Norman. Those people included emergency personnel, the therapist in the hospital, John Norman’s friend, and the Normans’ family members, including Judy Norman’s mother, grandmother, two of the Normans’ daughters, one daughter’s boyfriend. None of them tried to stop the violence. Only Judy Norman’s mother called the police. However, no help arrived at that time. The indifferent and even cold reaction of those people to the violence Judy Norman received made it reasonable for Judy Norman to believe that no one but herself could help to solve the problem.

Time	Place	John’s Violence	Judy’s Resistance	Report to Police	Police Response	Other People Involved/Witnesses
Morning Jun.10	Truck Stop on Interstate 85	Forced Judy to prostitute herself; hit her in the face; slammed the car door into her; threw hot coffee on her.	No	No	NA	One of Normans’ daughters and the daughter’s boyfriend
Later that morning	On the way to Norman residence	No Record	NA	No	Arrested John for driving under the influence.	No Record
Morning Jun.11	Norman residence	Slapped Judy; threw things at her; forced	No	No	NA	Judy’s mother

		her to make sandwiches three times; smeared a sandwich in her face.				
8:00/8:30 p.m.Jun.11	Norman residence	No record for the moment.	Called the police.	Yes, by Judy.	Advised Judy to take out a warrant on John.	No Record
A short time later	Norman residence	Verbally humiliated Judy and threatened to kill Judy, her mother and grandmother (after the overdose incidence).	Took an overdose of pills (as resistance to prior violence instead of ongoing threatening).	Yes, but not clear by whom.	Arrived at Norman residence and chased John into the house.	Emergency personnel, the law enforcement officer
Later	Rutherford Hospital, then Judy's grandma's	NA	NA	NA	NA	Therapist. Judy's grandmother
Jun.12	Norman residence	Beat Judy all day long.	No	No	NA	No Record
Later	On the way to Spartanburg	Slapped Judy; poured a beer on her head; kicked her in the side of the head while she was driving; threatened to cut off her breast.	No	No	NA	Not sure if Lemuel Splawn witnessed the violence; but he could have if they were in the same car or two cars were close enough.
Later	Norman residence	Threatened to cut Judy's throat, to kill her and to cut off her breast; smashed a doughnut on her face; put out a cigarette on her chest.	No	Yes, by Judy's mother.	No help arrived.	One of the Normans' daughters Loretta, Judy's mother.
Later	Norman residence	Forced Judy to sleep on the floor; verbally humiliated her.	No	No	NA	Nobody
Soon after	Norman residence	N/A (John fell asleep)	Shot John to death after took her grandchild to her mother's house and took a gun back home from there.	No Record	Arrested Judy.	One of the Normans' daughters, Phyllis, Judy's mother, Judy's grandchild.

**Table 1. Judy Norman's Experiences with the Police**

Dr. Tyson testified: “I believe that ...Mrs. Norman believed herself to be doomed ...to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable.... I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family.” Dr. Rollins testified: “[s]he saw herself as powerless to deal with the situation, that there was no alternative, no way she could escape it.” After a close examination of Judy Norman’s life and her four specific experiences with the police, it is clear that Judy Norman’s perception of her powerlessness to deal with the problem and John Norman’s invulnerability to the law was not groundless.

(3) As for the third criterion of the self-defense, both the Court of Appeals and Justice Martin redefined the “affray” or “confrontation” in the context of IPV. Given the distinctiveness of the case, the Court of Appeals viewed the decedent’s sleep as “but a momentary hiatus in a continuous reign of terror by the decedent” and the defendant’s shooting as “[t]aking advantage of her first opportunity to protect herself”. Justice Martin, similarly, viewed the “affray” as “lasting twenty years, three days, or any number of hours preceding his death.”

In this point, the distinctiveness of IPV plays an important role in the judgment of the Court of Appeals and the opinion of Justice Martin. Viewing IPV as “a continuous reign of terror” accurately describes the reality of the cycle of violence in Walker’s (1989) theory. One of the reasons why the Supreme Court did not accept such an understanding was that they believed that during this period of time, Judy Norman had “ample time and opportunity to resort to other means of preventing further abuse by her husband,” which, as explained in the last point, was not exactly the case. She may have had “ample time and opportunity to resort to other means”, but those “other means”, to the best knowledge of Judy Norman, could not help her “prevent further abuse by her husband”, which seems also reasonable to us, knowing Judy Norman’s prior experiences with the legal system.

(4) Additionally, Justice Martin pointed out that “defendant does not have the burden of persuasion as to self-defense; the burden remains with the state to prove beyond a reasonable doubt that defendant intentionally killed decedent without excuse or justification.” This point will be further discussed in the analyses of the two cases in Iowa.

With regard to the reasonableness in the criteria of self-defense in North Carolina, one point could be added to support the conclusion that Judy Norman’s belief that she was in imminent danger even when her husband was asleep: To predict an unreasonable person’s behavior, reasoning is the least realistic tool to use. Understanding the situation this way reflects the reality of IPV more accurately than classifying the battered woman’s behavior under the category of “insanity” or “syndrome”. Walker’s (1989) framework of the cycle of violence supports this point. The cycle, which continuously repeats itself over time, makes battered women “see [the violence] as unpredictable” and “the acute battering incident ...somehow inevitable” at the same time (Walker, 1989, p. 43). The unpredictability of the batterer’s behavior contributes to a battered woman’s fear of the batterer, which sometimes seems unreasonable to outsiders. In fact, a close examination of Judy Norman’s tragic experience living with John Norman reveals that it is John Norman, instead of Judy Norman, who is insane and unreasonable. Perceiving and treating his behavior as unreasonable and unpredictable is the most reasonable thing Judy Norman could do under the circumstances. Although it may seem unreasonable or even strange

for outsiders, battered women have their own ways of perceiving and predicting the violent situation. “[Battered] women develop nuanced knowledge of men’s facial expression, tone of voice, and body language. They knew when he was in a particularly bad mood. ...From previous assaults, women knew that [some certain] looks signaled a serious beating or death” (Ferraro, 2006, p. 161). Assuming the batterer to be a reasonable person and the battered to be unreasonable ignores the concrete reality of IPV.

### *State v. Grant*

Seven years after Judy Norman shot her sleeping husband to death, another woman in North Carolina, Pamela Warick Grant, stabbed her husband while he was asleep and shot him to death after he awoke. According to Pamela Grant, her husband awoke and said, “I ought to kill you.” She then removed a .357 Magnum revolver from a cabinet and shot him three times. A forensic pathologist testified that either the stab wound or the brain wound would have been fatal. Pamela Grant was convicted of first-degree murder and sentenced to life in the Superior Court, Cleveland County, in North Carolina. Pamela Grant appealed. The Supreme Court, Webb, J., held that evidence that she suffered from battered woman syndrome did not entitle her to jury instruction on self-defense. The decision of the County Court was affirmed.

No detailed description of Pamela Grant’s life with her husband prior to the incident was provided in the court report. Two major points are noteworthy in the court decision: (1). *State v. Norman* was cited as a precedent in this case; (2). Seven years after Judy Norman’s case, the Supreme Court of North Carolina stood by its original ruling that battered woman syndrome does not entitle a battered woman to jury instruction on self-defense.

### *State v. Everett*

On August 30, 2001, Karen Elaine Everett was convicted in the Superior Court, Wake County, Howard E. Manning, Jr., J., of second-degree murder in shooting death of her husband during a confrontation between them and was sentenced to a minimum term of 135 months and a maximum term of 171 months in prison. Everett appealed.

On March 2, 2004, the Court of Appeals, McGee, J., held that: (1) trial court’s failure to instruct jury regarding defendant’s right not to retreat in her own home was error, and (2) error entitled defendant to new trial. Therefore, a new trial was granted. Following the new trial, Everett was convicted in the Superior Court, Leon Stanback, J., of second-degree murder. Everett appealed for the second time.

On June 20, 2006, the Court of Appeals, Tyson, J., held that: (1) witness’s testimony regarding victim’s violent behavior at car dealership, and defendant’s testimony that her former employee told her that victim threatened to “shoot up” his house, were relevant where defendant contended she acted in self-defense; (2) trial court’s error in excluding witness’s testimony was prejudicial; (3) victim’s statement to former employee, in which victim threatened to “shoot up” former employee’s house, was admissible hearsay as evidence of a then-existing intent to engage in a future act; and (4) evidence that defendant once shot a dog was not sufficiently relevant to be admissible. Therefore, they reversed the decision of the Superior Court and remanded for new trial. Gee, J., dissented and filed a separate opinion.

On January 26, 2007, with one justice taking no part in the consideration or decision of the case, three members of the Court voting to affirm and three others voting to reverse the decision

of the Court of Appeals, the decision of the Court of Appeals was left undisturbed and stood without precedential value.

Although the decision of the Court of Appeals was left undisturbed and stood without precedential value, the decision of the Court of Appeals to grant a new trial has important implications. The rationale of the decision of the Court of Appeals was its claim that the trial court erred in refusing to instruct the jury that defendant had no duty to retreat. Unlike the previous two cases that emphasized on the criterion of reasonableness in the self-defense law, the raising of the “duty to retreat” turned its focus onto the criterion of necessity in the self-defense law. It is significant because it took the distinctiveness of IPV into consideration. Unlike other types of violent crimes perpetrated by and against strangers, IPV occurs in the victim’s home most of the time. Then the question of whether IPV victims have the duty to retreat from their own home is crucial in deciding whether it is necessary to use deadly force to protect oneself or a third person.

Some scholars contend that “why the battered does not leave” is not a correct question to ask (Johnson, 2008). Asking “why the battered does not leave” rather than “why the batterer batter in the first place” reflects a typical way in which sexism is practiced: blaming the victim. This point is well illustrated by Nourse’s (2001) insightful observation: the law does not ask a man why he did not leave the barroom when he fought back in a confrontation, but asks a woman why she did not leave when she acted in self-defense. The double standard in the application of “the right not to retreat” reflects bias resulting from gender stereotype. Female is the weaker sex; women are supposed to be weak. When there is a danger, they should retreat. Those who fight back are seen as deviant under such a norm and thus receive no sympathy. On the other hand, when men are in dangerous situations, they are not expected to retreat. Running away from a fight is what a coward (or a woman) would do; a “real” man fights back. This gender stereotype is too often observed in the legal system’s dealing with IPV, especially when they frequently ask, “why didn’t you just leave?”

Another issue brought up by the courts is the admissibility of evidence: what is relevant and what is not. In the State’s view, the incident regarding the defendant’s character is relevant to the case while two incidents regarding the victim’s character are not. This double-standard judgment is obviously biased. The evidence admissibility debate is actually on the question whether prior incidents affected a party’s perception towards the other. Behind this question are two major concerns: the credibility of Everett’s testimony and the reasonableness of Everett’s assessment of the imminent danger she was facing at the moment of the shooting. Since the victim was dead, the question on his part turned into whether Everett’s prior conduct affected his perception of her at the moment of the killing. As Judge Geer argued, the dog-shooting incident was relevant because it made the victim be aware of Everett’s ability to use a gun, which, according to Judge Geer’s understanding, made him not likely to charge Everett while she was pointing a gun at him and had already fired once. If this is the case, according to the State and Judge Geer, the credibility of Everett’s testimony regarding her husband’s move towards her during the shooting should be questioned. Another issue is the reasonableness of Everett’s fear of imminent danger at the time of the shooting. The State and Judge Geer claimed that the two incidents regarding the victim’s violent character were irrelevant because the victim’s damaging a car and threatening to “shoot up” a house did not make Everett’s fear of imminent death or great bodily harm reasonable. Comparing the “admissible” and “inadmissible” evidence, we see a huge difference in perceiving the defendant’s and the victim’s prior behaviors. In the State’s

point of view, the victim's violent behavior was not sufficient to make the defendant's fear of him reasonable; but the defendant prior conduct (shooting a dog) undoubtedly made the victim believe he was facing danger when she held a gun. This double-standard treatment of the same kind of evidence reflects the State's, the trial court's, as well as Judge Geer's assumption: a theoretical reasonable person is a man. They took his side because they walked—or at least were willing to walk—in his shoes.

### *State v. Shanahan*

On October 30, 2003, the State prosecuted Dixie Shanahan for first-degree murder along with use of a firearm. The prosecution of first-degree murder was based on Iowa Code section 707.1 and section 707.2. Shanahan filed a plea not guilty, a motion to suppress (regarding the affidavit of the search warrant), and a notice of defense (based on evidence of justification by self-defense).

In the jury trial, Shanahan's trial counsel moved for a judgment of acquittal, based on their claim that there was no evidence of malice and their argument that the state did not present a prima facie case as to murder in the first or second degree. The Court overruled the motion, but their rationale was not reported in the document. Then the State offered Shanahan to allow her to plead guilty to voluntary manslaughter, the reason of which was not shown in the document either. Shanahan rejected the plea, being aware of the possible sentencing ramifications, the reason of which was not reported. Then the State prohibited Shanahan's trial counsel from arguing she acted in defense of Zachary or Ashley, who are Shanahan's children and were not at home at the moment of the shooting. The Court sustained the State's decision. The jury found Shanahan guilty of the lesser included offense of murder in the second degree and that she was in the immediate possession and control of a firearm at the time of the offense. Then Shanahan filed a motion for new trial. The Court overruled her motion, sentenced her to an indeterminate 50- year term of imprisonment, required her to serve a minimum of 35 years, and ordered her to pay \$ 150,000. Shanahan appealed for two reasons: (1) she claimed that the trial court erred in overruling (a) her motion to suppress and (b) her motions for judgment of acquittal and for new trial; and (2) she asserts her trial counsel was ineffective. But the Supreme Court of Iowa affirmed the District Court's decision at last, because (1) they found no basis to reverse her conviction; and (2) they decided to preserve some of Shanahan's claims of ineffective assistance of counsel for postconviction relief.

Surprisingly, self-defense or battered woman defense was not emphasized in Shanahan's appeal. Instead, she focused on the affidavit of the search warrant, the ineffectiveness of her trial counsel, which are not claims that were most favorable for Shanahan. Another noticeable fact in the decision of this case is that the court barely took the history of IPV into consideration, and Shanahan's counsel did not choose to attack that.

### *State v. Price*

Megan Nicole Price was convicted by the District Court, Scott County, of voluntary manslaughter in fatally stabbing Allen Johnson with whom Price had been involved in a romantic relationship for nearly a year and with whom she lived three to four days a week. Price pled not guilty and filed a notice of self-defense and diminished responsibility. The State amended the trial information to change the charge to second-degree murder. Price applied for expert witness and

got the District Court's approval. But the expert testimony was excluded by the District Court at last. Price appealed. The Court of Appeals of Iowa held that the trial court abused its discretion in prohibiting Price from presenting expert testimony concerning battered women's syndrome and that the record did not affirmatively establish a lack of prejudice. The Court of Appeals of Iowa reversed the trial court's decision and remanded for a new trial. Compared to the ruling on *State v. Shanahan* (2006), the Court of Appeals was more open to the expert testimony and battered woman defense in this case.

Looking at the two cases in Iowa together with comparison to the three cases in North Carolina, a major difference could be seen in the reasoning of self-defense in the two states. While the fundamental assumptions and criteria of self-defense are similar in the two states, the difference lies in the practice of judging whether a person acted in self-defense. In Iowa, once self-defense is raised, the burden is on the State to prove beyond a reasonable doubt that the asserted justification of self-defense did not exist, by proving: (1) the defendant initiated or continued the incident resulting in injury; (2) the defendant had an alternative course of action, which was not utilized; (3) the defendant did not have reasonable grounds for the belief he was in imminent danger of injury or death; (4) the defendant did not actually believe he was in imminent danger of injury or death; or (5) the force used by the defendant was unreasonable. However, in North Carolina, except for Justice Martin's mentioning of the State's burden, the burden of the State to prove a person did not act in self-defense was technically transformed into a burden on the defendant to prove that she did act in self-defense. This transformation reflects, on some level, the State's punishment of the defendant for her challenging of the State's monopoly in using force. This point is echoed in the State's fear of the so-called "homicidal self-help". As pointed out by Kaufman (2007), the underlying philosophy of the imminence rule is based on the State's monopoly in its use of force. When this monopoly is challenged, the authority of the State and its legitimacy in the role as the sole punisher of any unlawful act is threatened. Ironically, the State does not punish batterers for their using force to "discipline" their wives, which is contradictory to the theory that the State is the only legitimate punisher. The State's punishment of battered women who kill reflects institutional oppression of women in patriarchal societies. This argument is well supported by the five cases studied in this thesis, but still needs to be further developed by feminist sociologists and legal philosophers in the future.

## FINDINGS

The five cases feature the conceptual and legal practical compromises that feminist sociologists and lawyers make in court to defend battered women who kill. Based on careful analyses of the court opinions and dissenting judges' opinions, this study finds four major compromises feminist legal professionals make when fighting cases for battered women who kill. The paper also lists the challenges and obstacles faced by feminist scholars and legal professionals. Those challenges and obstacles are the rationales behind the compromises.

Compromise #1. Battered woman defense is often used to avoid challenging the gender-blind imminence rule in existing self-defense laws. The obstacle faced by feminist legal professionals is the court's fear of "homicidal self-help" as a result of successful self-defense defense in IPV cases.

Compromise #2. Battered woman defense is often used to avoid challenging the “reasonable man” standard in existing self-defense laws. The obstacles faced by feminist legal professionals are the admissibility of evidence and feasibility of examination of detailed lived experiences (Brooks, 2007) of battered women before their fatal acts to end the violence against them.

Compromise #3. Explanations of why battered women do not leave their abusive relationships are often made in court to avoid challenging the double standard in the application of “the right not to retreat”. The obstacle faced by feminist legal professionals is the court’s fear for the expansion of the law of self-defense beyond the limits of immediacy and necessity.

Compromise #4. In states where the burden is on the State to prove beyond a reasonable doubt that the asserted justification of self-defense did not exist, the state’s responsibility is often overlooked, and the burden of proof gets transferred onto the battered women on trial to prove that they did act in self-defense, which is not necessary according to law. The obstacle faced by feminist professionals is the State’s efforts to maintain its monopoly in using force.

### **CONCLUSION**

Justifiable IPV in the form of perfect self-defense is a complex research field. It intersects with homicide study, IPV, and the study of self-defense laws. Past research on IPV provides three major types of explanations for this crime -- psychological, social-psychological, and social-structural -- where feminist criminology provides a macro-level analysis of IPV. Accordingly, a feminist criminological solution to the problem is a social-structural reform. However, in practice, feminist scholars and legal professionals make compromises that counter this ideology. Past social movement researchers (Johnson, 1981; Davis, 1988; Gagné, 1996) observed cooptation of the battered women’s movement in the social service and political arenas. They found that such cooptation was caused by concerns for financial and political support. The current research fills the gap in IPV literature and social movement literature by focusing on the legal reform branch of the battered women’s movement. By analyzing five appellate court cases involving battered women who kill their abusers, this study has found four major compromises made in the courtroom and four obstacles faced by feminist legal professionals in the legal battlefield of the battered women’s movement. These obstacles constitute the rationales behind the compromises.

The contribution of this research is to shift the focus of feminist legal reform back to its original goal. The ultimate goal of battered women's movement should be to no longer need shelters for battered women. The ultimate goal of research like this should be for battered women like Judy Norman to no longer resort to killing. Without challenging the fundamental gender-blindness and power imbalance in current self-defense laws, the short-term victories of individual trials may only jeopardize the possibility for long-term legal reform. Just as feminist scholars have cautioned, “the master’s tools will never dismantle the master’s house” (Lorde, 2007, p. 110), this paper aims to call attention to the potential risk of cooptation in the legal branch of the battered women’s movement. Making strategic compromises in court and abandoning the original goal of challenging existing laws will not bring about the social change feminist scholars and legal professionals have envisioned and may even hinder them from achieving their ultimate legal reform goals.

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## ***Regulating Cyber Space: Advanced Persistent Threats***

American corporations and governmental agencies have fallen victim to increasingly more frequent and complex cyber-attacks over the past 16 years. Many of these attacks are reported to originate from a specialized unit of the People's Liberation Army of the People's Republic of China. This study examines the structural, institutional, and regulatory factors that may be contributing to this continued victimization. Data are derived from interviews, observations, and published works, including previously-classified "leaks." While internal issues, such as a lack of codified security standards, contribute to reduced online security, this research suggests communication, cooperation, and trust between nodes, in accordance with guidelines from the "responsive regulation" literature, will lead to the greatest reduction in cyber-attacks.

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### **Introduction**

International cybercrime is an increasing problem with attacks becoming both more frequent and more sophisticated (Hamid, 2010). At both the national and international levels, however, there remains no consensus on the best course of action to detect, deter, and respond accordingly. International agreements, such as those offered by the United Nations' "Tallinn Commission" fail to become law due to politics (Croft, 2012). Thus, the current state of affairs leaves defense at the national level as the preferred course of action.

The United States of America and the People's Republic of China have two very different strategies for responding to international cyber-attacks. The U.S. has a web infrastructure comprised of privately-owned hardware and very few laws governing the operation and defense of this hardware. The PRC, on the other hand, operates on a majority state-owned infrastructure complete with a far-reaching "Great Firewall of China" capable of controlling not only content, but connections themselves (Zurcher, 2014).

While both countries follow different defensive practices, they also appear to have highly developed *offensive* practices. China, alone, has been linked to breaches of hundreds of companies worldwide in industries such as defense, energy, aerospace, and technology in attacks named "Operation Aurora," "Operation Shady RAT," and "Operation Night Dagon" (Alperovitch, 2011). The U.S. has deployed a "cyber weapon" against the Republic of Iran and has monitored phone calls, text messages, and emails worldwide (Greenwald, MacAskill, & Poitras, 2013; Langner, 2013).

In light of this, there remains a dearth of criminological and general social scientific scholarship covering international cybercrime (or cyber "war"). This study aims to address the current lack and answer a few questions, namely: "How do the (offensive and defensive) online capabilities of the U.S. and China affect U.S.-China relations or 'cyber war'?" and "How can cyberspace be best regulated?" To accomplish this, the study adapts Kshertri's (2005) *cyberwar framework*.

### **Advanced Persistent Threats**

On March 11, 2013, Thomas Donilon, President Obama's national security advisor gave a speech at the "Asia Society" in New York City (White House, 2013). The speech focused on a variety of issues affecting U.S.-China relations, but made specific mention of cyber security and noted increased Chinese "aggression." He described a digital landscape where American companies fell victim to "sophisticated, targeted theft of confidential business information and proprietary technologies through cyber intrusions emanating from China on an unprecedented scale." Donilon, an official representing the Obama administration, ended his speech requesting Chinese government officials in Beijing do two things: first, to respond to "the urgency and scope of this problem and the risk it poses – to international trade, to the reputation of Chinese industry, and to our overall relations," as well as, to "take serious steps to investigate and put a stop to these activities" (White House, 2013).

The strongly-worded speech came in response to years of corporate espionage at the hands of the Chinese ("The Great Brain Robbery," 2016). While cases of corporate espionage are common, the guilty parties tend to be other corporations. For example, American company Cisco Systems Inc., famous for its consumer and enterprise networking equipment, sued Chinese corporation Huawei Technologies Co. Ltd. in early 2003 (Thurm, 2003). Cisco alleged that Shenzhen-based Huawei "unlawfully copied and misappropriated Cisco's IOS software including source code" and that the company had been selling routers of a slightly-modified Cisco design (Thurm, 2003). What makes Thomas Donilon's speech unique is that he, along with the Obama administration, knew that these intrusions were *not* simply private company versus company affairs. The U.S. government knew the Chinese government was responsible for the majority of these intrusions, but only because of the U.S. government's *own* international hacking (Kaplan, 2016).

### **The National Security Agency's "Tailored Access Operations"**

The U.S. military recognizes five core capabilities under Information Operations (IO) Information Warfare. These are Psychological Operations (PSYOP), Military Deception (MILDEC), Operations Security (OPSEC), Electronic Warfare (EW), and Computer Network Operations (CNO). CNO is a broad term that encapsulates three types of computer use: computer network attack (CNA), computer network defense (CND) and computer network exploitation (CNE) (Wilson, 2007). Conventional wisdom is that information is power and, as more information is digitized and conveyed over an ever expanding network of computers, gaining information superiority or denying the enemy this capability has become increasingly important.

The Office of Tailored Access Operations (TAO) is the cyber-warfare intelligence-gathering unit of the National Security Agency (NSA) (Der Spiegel, 2013). While the NSA is reluctant to share information, interviewees believe TAO has been active since at least 1998. TAO identifies, monitors, infiltrates, and gathers intelligence on computer systems being used by entities foreign to the United States under the guise of "computer network exploitation" or CNE. Document leaks by Edward Snowden during the summer of 2013 shed light on TAO; these documents describe a set of tools that can break into most common "routers, switches, and firewalls from multiple product vendor lines" (Der Spiegel, 2013).

Originally based at NSA headquarters in Fort Meade, Maryland; TAO now has remote operations centers (or ROCs) in Wahiawa, Hawaii; Fort Gordon, Georgia; San Antonio, Texas; and

Denver, Colorado (Peterson, 2013). TAO is reportedly “now the largest and arguably the most important component of the NSA's huge Signals Intelligence Directorate (SIGINT), consisting of more than 1,000 military and civilian computer hackers, intelligence analysts, targeting specialists, computer hardware and software designers, and electrical engineers” (Aid, 2013).

The Office motto is “Your data is our data, your equipment is our equipment - anytime, anyplace, by any legal means” (Spencer, 2015). And the group is responsible for the NSA's formerly-top secret, but now remarkably famous *XKEYSCORE* program used to sort through “meta data” collected from American phone companies and internet service providers (ISPs) (Spencer, 2015). That software was incredibly robust and allowed operators to do a number of advanced searches including detecting people using PGP to encrypt their email, showing the usage of virtual private networks (VPNs), tracking the source and authorship of a document, and monitoring users on the encrypted TOR network.

Through TAO and their use of computer network exploitation (CNE), the U.S. government knew that the Chinese government was assisting hackers access both top-secret government networks as well as the computer networks of private American enterprises, such as Cisco. However, national security adviser Thomas Donilon delivered his speech in March 2013, a full three months *before* the information above would become public knowledge during the “Summer of Snowden.”

### **Advanced Persistent Threat 1: PLA Unit 61398**

A month and a half before Thomas Donilon's speech in New York, on February 19<sup>th</sup>, 2013, computer security firm Mandiant released a seminal report detailing the actions of a group it had termed “APT1” or Advanced Persistent Threat 1 (Mandiant, 2013). An advanced persistent threat is a set of stealthy and continuous computer hacking processes, often orchestrated by hackers which target a specific entity. An APT usually targets organizations and/or nations for business or political motives and, as such, APT processes require a high degree of covertness in order to operate over a long period of time. The *advanced* process signifies sophisticated techniques that typically require considerable investment in both time and money. The *persistent* process suggests that an external command and control system is continuously monitoring and extracting data from a specific target and the *threat* process indicates human involvement in orchestrating the attack (Mandiant, 2013).

The term “advanced persistent threat” was created in 2006 by U.S. Air Force Colonel Greg Rattray to describe targeted, socially-engineered emails that deposited trojans to “lift” sensitive information from various western governments, specifically the United States and United Kingdom (Arsene, 2015). An APT usually refers to a group, such as a government, with both the capability and the intent to target, persistently and effectively, a specific entity. Mandiant's report was entitled “APT1: Exposing One of China's Espionage Units” and, while APTs are traditionally unnumbered, the designation of “APT1” was purposeful; Mandiant wished to convey the sentiment that, of all known APTs, this is the furthest-reaching, longest-running, and most advanced threat in existence.

The report begins with a quote from the Chinese Defense Ministry: “It is unprofessional and groundless to accuse the Chinese military of launching cyber-attacks without any conclusive evidence” (Timberg & Nakashima, 2013) and over the next 74 pages Mandiant does just that. The report alleges that there are no less than *twenty* APTs acting from within China and that “the

Chinese Government is aware of them.” Through an extensive 3-year investigation the security firm concludes that APT1 is believed to be the 2<sup>nd</sup> Bureau of the People’s Liberation Army (PLA) General Staff Department’s (GSD) 3<sup>rd</sup> Department, which is commonly known by its Military Unit Cover Designator (MUCD) as Unit 61398. Thus, not only has Mandiant offered digital evidence, it has traced the group to a specific subunit of the PLA, going so far as to offer a physical location: “Unit 61398 is partially situated on Datong Road (大同路) in Gaoqiaozhen (高桥镇), which is located in the Pudong New Area (浦东新区) of Shanghai (上海). The central building in this compound is a 130,663 square foot facility that is 12 stories high and was built in early 2007” (Mandiant, 2013, p. 3).

Comparable to the NSA’s TAO, Unit 61398 employs over a thousand hackers, crackers, and analysts. The Unit exclusively utilizes internet access via the state-owned telecommunications giant China Telecommunications Corporation (China Telecom).

It is believed that most of the active employees are fluent in English and the Unit has recently expanded to Shanghai. While initially shrouded in secrecy, Mandiant researchers have been able to provide publicly-available documents that not only affiliate academics with the Unit, but also demonstrate some of the techniques they’ve developed. For example, “a graduate student of covert communications, Li Bingbing (李兵兵), who openly acknowledged his affiliation with Unit 61398, published a paper in 2010 that discussed embedding covert communications within Microsoft Word documents” (Mandiant, 2013, p. 5).

TAO’s nebulous motto, and the Snowden leaks, reveal the intent of the NSA office, which is primarily to collect any and all data that may be useful to the U.S. spy industry. The attack patterns of the PLA’s Unit 61398, however, demonstrate a much more commercial intent. Since 2006, Mandiant has observed the Unit compromise 141 different companies in 20 major industries. These network intrusions have targeted companies and government institutions worldwide, but the vast majority of targets have been within the United States. Japan, United Arab Emirates, South Africa, Luxemburg, France, Belgium, and Norway had all fallen victim to exactly *one* detected intrusion related to the Unit between the years 2006 and 2013. Taiwan, Singapore, India, Israel, Switzerland, Canada, and the United Kingdom were each hacked more than once, but five times or less. Entities based in the United States, however, were attacked *115* times over the same period (Mandiant, 2013).

Unit 61398 intrusions primarily targeted the Information Technology, Transportation, Electronics, and Financial Services industries. While less common, there were also targeted attacks against Education, Healthcare, and Mining industries. Mandiant notes that four of the seven emerging industries detailed in China’s 12<sup>th</sup> “Five Year Plan” had been targeted. There appear to be at least six distinct attacks that can be directly attributed to, if not Unit 61398 specifically, then the Chinese government generally. These attacks are: *Titan Rain* (2003 to 2006), *Shady RAT* (2006 to 2011), *Operation Aurora* (2009), *Operation GhostNet* (2009), *Operation Night Dragon* (2009 to 2011), and the unnamed *Office of Personnel Management (OPM) data breach* (2014 to 2015).

## China on the Offensive

Titan Rain, Shady RAT, Operation Aurora, Operation GhostNet, Operation Night Dragon, and the OPM data breach differ only slightly. When viewed in the aggregate, the attacks paint a comprehensive picture able to be analyzed by Kshetri's (2005) comprehensive *cyberwar framework*.

### *Titan Rain*

Titan Rain was a series of coordinated attacks on American computer systems between 2003 and 2006 (Thornburgh, 2005). At the time of discovery, the attacks were believed to be Chinese, but analysis lacked any definitive conclusion due to the use of proxies and "zombie" computers. In 2005, however, the Escal Institute of Advanced Technologies (SANS Institute), argued the attacks were "most likely the result of Chinese military hackers attempting to gather information on U.S. systems" (Thornburgh, 2005). The hackers attacked systems at both the American Department of Defense (DOD) and British Ministry of Defence (MOD). The attacks caused immediate friction between the U.S. and China because, though the U.S. had no conclusive evidence, it believed the attacks required "intense discipline" and that "no other organization could do this if they were not a military" (Thornburgh, 2005). In addition to the DOD and MDO, the hackers accessed computers at defense contractors Lockheed Martin, Sandia National Laboratories, Redstone Arsenal, and the National Aeronautics and Space Administration (NASA). Because the Titan Rain attacks were detected by the U.S. federal government and were against government agencies and government-affiliated corporations, few other details have been revealed.

### *Shady RAT*

Apart from the more recent OPM hack, *Shady RAT* remains China's most impressive "hack," if only because of scope. The series of hacks was so stunning that the story featured prominently in not only technology and news publications such as *Ars Technica* (Bright, 2011) and *The Washington Post* (Nakashima, 2011), but also *Vanity Fair* (Gross, 2011b), which ran a multi-page exposé as well as a sister story on the later *Operation Night Dragon* (Gross, 2011a). Revealed by McAfee in 2011, the series of attacks breached 71 parties across dozens of fields, including, but not limited to: U.S. government agencies at the federal, state, and local levels; the governments of Canada, Vietnam, Taiwan, and India; companies within the energy, electronic, computer, media, and communications markets; as well as real estate, agricultural, and sports organizations. The last group, sports, seems out of place given the other Shady RAT hacks, indeed, given other Chinese hacks in general, however, the target sports organization was the International Olympic Committee (IOC) and the hacking occurred in the months leading up to and including the 2008 Summer Olympics in Beijing (Riley, 2011). Again, the list of victim countries displays a familiar pattern: targets in Asia (Indonesia, Vietnam, Singapore, Hong Kong, India, Japan, Taiwan, and South Korea; but *not* China) and the west (the U.K., Germany, Switzerland, and Denmark), with the vast majority (49 of 71) of the targets within the United States (Alperovitch, 2011). The shortest network intrusion lasted less than a month, the longest lasted a full 28 months, and the average intrusion was approximately one full year.

The attack was named after "RATs," or remote access Trojans, a commonly used hacker tool that gives full access of the targeted machine to the RAT operator. The tool allows for the hacker

to access a computer fully, as if he were physically operating the machine at its home location. This includes mirroring the monitor output and keyboard/mouse functionality. Some advanced RATs even allow the hacker to surreptitiously (hence “shady”) activate the computer’s webcam and microphone in order to record audio and video of the people *near* the target machine!

While the “RAT” itself was a generic tool modified by the suspected hackers, the delivery system, “spear phishing,” has become somewhat of a Chinese specialty. “Phishing” emails are malicious emails disguised to look like something appealing to the recipient. By sending massive amounts of these emails, the hacker hopes at least a few users “bite” at the proverbial “fishing line” that has been dangled. These emails tend to be poorly worded, filled with grammatical and spelling errors, and are very rarely written by a native-language speaker. Most tech-friendly people can recognize these emails; email subject lines promising “penis enlargement” or requests from “Nigerian princes” are commonplace. Some interviewees believe these emails are *purposefully* designed to appeal to only to the most foolish of people, those that dismiss the email outright are the ones least likely to fall for a “phishing” scam.

What sets the Chinese method apart from traditional phishing, and why it is designated “spear phishing,” is the believability of the email itself. The emails are not sent out *en masse*, instead they are usually sent (and addressed) to only one or two high-ranking people within an organization. The subject line is relevant to work (“Here are the scans you asked for,” etc.) and the “From:” field has been “spoofed,” or faked, to make it appear as if the email is coming from someone the target knows, such as a workplace colleague or superior, thus helping erase some doubt about the validity of the message. The English-language proficiency required by hackers working at Unit 61398 makes crafting plausible emails much more likely. Furthermore, by targeting one or two specific *high-ranking* people within an organization, the hackers are able to gain access to sensitive systems more effectively without wasting time attempting to navigate a network using the credentials of a low-security/low-access employee.

### *Operation Aurora*

Operation Aurora was a series of cyber-attacks conducted by advanced persistent threats such as the Elderwood Group based in Beijing, China, with ties to the People's Liberation Army. First publicly disclosed by Google on January 12, 2010, in a blog post, the attacks began in mid-2009 and continued through December 2009.

The attack has been aimed at dozens of other organizations, of which Adobe Systems, Juniper Networks and Rackspace have publicly confirmed that they were targeted. According to media reports, Yahoo, Symantec, Northrop Grumman, Morgan Stanley and Dow Chemical were also among the targets.

As a result of the attack, Google stated in its blog that it plans to operate a completely uncensored version of its search engine in China “within the law, if at all”, and acknowledged that if this is not possible it may leave China and close its Chinese offices. Official Chinese sources claimed this was part of a strategy developed by the U.S. government.

The attack was named “Operation Aurora” by Dmitri Alperovitch, Vice President of Threat Research at cyber security company McAfee. Research by McAfee Labs discovered that “Aurora” was part of the file path on the attacker's machine that was included in two of the malware binaries McAfee said were associated with the attack. “We believe the name was the internal

name the attacker(s) gave to this operation," McAfee Chief Technology Officer George Kurtz said in a blog post.

According to McAfee, the primary goal of the attack was to gain access to and potentially modify source code repositories at these high tech, security and defense contractor companies. "(The SCMs) were wide open," says Alperovitch. "No one ever thought about securing them, yet these were the crown jewels of most of these companies in many ways—much more valuable than any financial or personally identifiable data that they may have and spend so much time and effort protecting."

### *GhostNet*

GhostNet is the name given by researchers at the Information Warfare Monitor to a large-scale cyber spying operation discovered in March 2009. The operation is likely associated with an Advanced Persistent Threat. Its command and control infrastructure is based mainly in the People's Republic of China and has infiltrated high-value political, economic and media locations in 103 countries. Computer systems belonging to embassies, foreign ministries and other government offices, and the Dalai Lama's Tibetan exile centers in India, London and New York City were compromised.

GhostNet was discovered and named following a 10-month investigation by the Infowar Monitor (IWM), carried out after IWM researchers approached the Dalai Lama's representative in Geneva suspecting that their computer network had been infiltrated. The IWM is composed of researchers from The SecDev Group and Canadian consultancy and the Citizen Lab, Munk Centre for International Studies at the University of Toronto; the research findings were published in the Infowar Monitor, an affiliated publication. Researchers from the University of Cambridge's Computer Laboratory, supported by the Institute for Information Infrastructure Protection, also contributed to the investigation at one of the three locations in Dharamshala, where the Tibetan government-in-exile is located. The discovery of the 'GhostNet', and details of its operations, were reported by The New York Times on March 29, 2009. Investigators focused initially on allegations of Chinese cyber-espionage against the Tibetan exile community, such as instances where email correspondence and other data were extracted.

Compromised systems were discovered in the embassies of India, South Korea, Indonesia, Romania, Cyprus, Malta, Thailand, Taiwan, Portugal, Germany and Pakistan and the office of the Prime Minister of Laos. The foreign ministries of Iran, Bangladesh, Latvia, Indonesia, Philippines, Brunei, Barbados and Bhutan were also targeted. No evidence was found that U.S. or UK government offices were infiltrated, although a NATO computer was monitored for half a day and the computers of the Indian embassy in Washington, D.C., were infiltrated.

### *Operation Night Dragon*

The final mass intrusion, apart from the final OPM hack, is *Operation Night Dragon*. Discovered by McAfee Security in 2011, the security company was able to trace intrusions dating all the way back to the year 2006 (Gross, 2011a). As the attacks were so long lasting, some intrusions lasting multiple years, the hackers utilized a rotating set of tools to stay current. Furthermore, since the attack covered a period of years in which other Chinese intrusions occurred, the attacks provide a veritable "best of the best" among Chinese hacking techniques. The hackers utilized "spear phishing" attacks, "watering hole" attacks, the use of "command and

control” servers, as well as installing “RATs” where necessary. The hackers targeted global oil, energy, and petrochemical companies in the United States and Europe (Gross, 2011a).

### **Pattern of the Global Cyber War and Crime: A Proposed Model**

In 2005, Kshetri (2005) drew attention to the growing concern around international cyber-attacks. Deciding to eschew an attempt to clearly delineate *cybercrime* from *cyber war*, Kshetri argued that, regardless of title, nation-states were orchestrating attacks online and the first step to understanding any attack would be to contextualize it. This sentiment is echoed throughout the responses of interview subjects; one cyber security researcher commented: “Trying to understand cyber warfare by studying malware is a bit like trying to understand World War I by studying a grenade.” The critique is valid, most cyber war literature focuses on either the legal requirements that must be met before launching a counter-offensive, as the *Tallinn Manual* was chiefly concerned, or the technical nature of an attack in order to fix vulnerabilities and recover, with no concern for “who-attribution” as discussed earlier. Instead, Kshetri believed that by fully understanding every aspect of an attack, including the attackers and targets, that future attacks may be prevented or damage lessened. In 2005, not much was known publicly about large-scale cyber offenses, but by 2016 there are dozens of cases involving China alone. Both the frequency and scale of the Unit attacks allow Kshetri’s framework to be tested.

### **Characteristics of the source nation**

Given the advanced techniques of attribution discussed above, it can be claimed with relative certainty that there have been five Unit 61398-associated mass cyber intrusions (Titan Rain, Shady RAT, Operation Aurora, Operation Night Dragon, and the Office of Personnel Management hack) and one Chinese government-associated intrusion (GhostNet). Extensive research has been conducted on China throughout the past two decades, which focuses on many of the factors Kshetri believes are related to cyber-attacks. By applying this broad knowledge of China with Kshetri’s framework a more vivid picture of China’s online presence appears.

### **Institutions**

Viewed from a rational perspective, institutions are mechanisms that provide efficient solutions to predefined problems (e.g., decision regarding involvement in hacking activities and choice of a website to attack) (Olson, 2003; Williamson, 1975). Institutions do so by aligning individual and collective interests. North (1990) and Kshetri (2005) describe institutions as macro-level “rules of the game” and distinguish them from organizations, or rule followers. These institutions can broadly be mapped into three categories: regulative, cognitive, and normative.

#### *Regulative institutions*

Regulative institutions consist of “explicit regulative processes: rule setting, monitoring, and sanctioning activities” (Scott, 2014, p. 35) and, within the context of this study, regulative institutions include both existing *rules* (laws) and *rule-making bodies* (such as the U.S. Department of Justice). Kshetri (2005) argues that a lack of a strong “rule of law” is associated with the origination of more cyber-attacks. This association appears to hold true, especially within Russia and its ex-satellite states; countries with stronger and less-corrupt legal bodies tend

to prosecute their cyber criminals at a rate much higher than countries where law-makers are trusted (Kshetri, 2013).

Rule of Law in China is a discipline unto itself (Jones, 1994; Pan, 2003; Peerenboom, 2001, 2002), but most scholars agree China does not currently have true Rule of Law and, in fact, suffers from a number of impediments to the implementation of Rule of Law. These include: The National People's Congress is ineffective at executing its constitutional duty to legislate and supervise the government, the Chinese Constitution is not treated as the supreme law and it is not enforced, the judiciary is not independent from political pressure, there is a high level of corruption among public officials, and the legal profession is inadequate for lack of qualified attorneys and judges (Peerenboom, 2001, 2002). Given these issues, it is apparent that the Chinese government may have issues with maintaining a strong rule of law and, thus, be able to effectively punish law-transgressors, including hackers. While China does have the world's largest force of "internet police," these officers are instructed to catch subversives within China, not to catch offenders with targets outside China (Hunt & Xu, 2013).

Apart from issues concerning Chinese rule of law, Unit 61398 is part of the People's Liberation Army and its hackers are not subject to Chinese law in the same way that a non-military citizen may be.

### *Normative institutions*

Normative institutions introduce "a prescriptive, evaluative, and obligatory dimension into social life" (Scott, 2014, p. 37). Practices that are consistent with the value systems of the national cultures are likely to be successful (Schneider, 1999). For example, the habits for queuing in line vary greatly from culture to culture, some cultures produce very orderly lines with large areas of personal space whereas other cultures form "lines" that are not so orderly and may include a lack of personal space so extreme it includes personal contact. Likewise, some cultures may be more tolerant of computer crimes; software piracy in China is just one example of this. Annual studies by Microsoft report staggering rates of piracy for its Windows Operating System among Chinese users (Hagerty & Ovide, 2014). The American company estimates that, in 2009, 79% of PCs in China were running a pirated version of Windows. The company announced this was less than the 92% piracy rate China had 5 years earlier in 2004 (Hagerty & Ovide, 2014).

The "Honker Union" hacker collective provides another normative institution operating within China. With active membership as high as 80,000 members, the group dictates its own code of conduct, which serves to normalize hacking behavior (Muncaster, 2013). Thus, members within the Honker Union may feel pro-hacking social norms from both national culture and the hacker collective.

### *Cognitive institutions*

Cognitive institutions are associated with culture (Powell & DiMaggio, 1991). These components represent culturally supported habits that influence hackers' behavior. In most cases, they are associated with cognitive legitimacy concerns that are based on subconsciously accepted rules and customs as well as some taken-for-granted cultural account of computer use (Berger & Luckmann, 1990). Cognitive programs affect the way people notice, categorize, and interpret stimuli from the environment. One of the most potent cognitive programs is *ideology*.

Ideological hackers, such as those behind the GhostNet intrusions, attack websites to further political purposes.

Kshetri (2005) argues that differences between the ideology of a hacking unit and the government in power will result in an increase in attacks from the hacking unit against the government in power. In this case, his analysis can be adapted: in countries where the ideology of a hacking unit and the government in power are in *alignment*, there will be an increase in attacks against third parties that *differ* in ideology. This is demonstrated most clearly in both the GhostNet intrusions and Operation Aurora, where information related to anti-Party activist Ai Weiwei and Tibetan leader-in-exile, the Dalai Lama, were stolen.

### **Stock of hacking skills relative to the availability of economic opportunities**

Kshetri (2005) posits that cybercrimes are a “skill intensive” crime, unlike “rape, burglary, and murder.” Again using Russia as an example, he states, “The rate of origin of online crimes in an economy is positively related to the stock of hacking

skills relative to the availability of economic opportunities” and adds, “The combination of over-educated and under-employed computer experts has made Russia and some Eastern European countries fertile ground for hackers” (Kshetri, 2005, p. 8).

Unlike the depressed economies in Eastern Europe, legitimate job opportunities for Chinese hackers abound; the difference is that these jobs are for the Chinese military and its cadre of digital warriors.

The *characteristics of the source nation* reveal a compelling argument for China’s continued online transgressions. The combined push of lax regulative institutions, pro-hacking social norms, nationalistic ideological agreement between hackers and the government in power, and a military demand for high-skilled workers, plus the ability to satisfy that demand, results in a nation with the ability to support an *advanced persistent threat*.

### **Motivation of Attack**

A deeper understanding of web attacks requires an examination of motivation (Coates, 2002) that energizes the behavior of a hacking unit. The nature of web attacks allows us to draw an analogy with conventional wars. Just like in the physical world, wars on the web are fought for material ends as well as for intangible goals such as honor, dominance and prestige (Hirshleifer, 1998). These motivations can be split into two broad categories: *intrinsic* and *extrinsic* motivations.

#### *Intrinsic motivation*

According to Ryan and Deci (2000), intrinsically motivated individuals do activities for “inherent satisfactions rather than for some separable consequence” and they argue that “when intrinsically motivated, a person is moved to act for the fun or challenge entailed rather than because of external prods, pressures or rewards.” These internal motivations can be *enjoyment-based* or *obligation/community-based*. While there have always been enjoyment-based hackers, such as those who deface websites “for the lulz,” obligation and community-based hacks are growing in number. Both terrorist organizations and, even, street gangs have begun using the internet to attack their adversaries (Lake & Rogin, 2015).

Within China, these obligation or community-based attacks have become the majority of non-economic hacks. For example, throughout 2012, pro-China hackers defaced websites at universities throughout the Philippines and Vietnam with messages referring to both countries as “pawns” of the U.S. and Japan, adding, “South China Sea is China’s inherent territory, China’s territorial inviolability” (Adel, 2015).

### *Extrinsic Motivation*

While intrinsic motivations can serve as a primary motivator for both street crime and cybercrime, extrinsic factors tend to be more powerful and apparent. Like street crime, financial motivation proves to be the most common cybercrime motivation; this is the reason online casinos, banks, stock markets, and other e-commerce hubs are victimized more than websites without a monetary aspect. Common, low-level attacks target individuals for financial gain in a number of ways, all of which tend to have immediate or relatively quick “payouts” including: “ransomware,” identity theft, credit card theft, “sextortion,” and online auction fraud (Francescani, 2016; Krebs, 2016; Zetter, 2015).

What is apparent with the Chinese attacks is that financial motivation is most certainly the driving factor, but the sought payouts are much more long term. The theft of proprietary information and patents is just one example. With intrusions at Lockheed Martin (Titan Rain), Northrop Grumman (Operation Aurora), and multiple defense contractors (Shady RAT), there is a seriousness to the situation

Designing, testing, and creating a fully-functional fighter jet is a massive undertaking. For example, the F-16 “Fighting Falcon” was designed by General Dynamics (now Lockheed Martin) throughout the 1970s. The company had been awarded a \$37.9 million government contract to do so; this contract would be worth approximately \$218.1 million today (Axe, 2014). There is no immediate payout when stealing jet fighter schematics, but with jet development costs so high, the long-term financial incentives make sense. Stories such as this exist across industries: Chinese hackers have stolen Google’s proprietary search engine algorithms (Operation Aurora), Dow Chemical paint formulas (Operation Aurora), and NASA rocket designs (Titan Rain).

In addition to monetary *extrinsic* motivations, some hackers may have been threatened or otherwise compelled to conduct cyberattacks. A February 2013 White House report entitled, “Administration Strategy on Mitigating the Theft of U.S. Trade Secrets” notes that Chinese nationals working for American corporations had been strongly encouraged to sell, or otherwise transfer, sensitive information to both the Chinese government and Chinese corporations. On March 23<sup>rd</sup>, 2016, Su Bin, a businessman from China, was accused of doing just that (Vincent, 2016).

### *Combination of motivations*

Like most human activities, crime can result from a variety of motivations working in combination. It is this orchestra of motivations that affects the Chinese hacker.

## **Profile of Target Organization**

The cultural norms and skilled workforce in China may explain the amount of cyber-attacks that originate from the country, but Kshetri (2005) also accounts for target selection within his framework; why are the United States, and its corporations, the frequent targets for *advanced*

*persistent threats*, in general, and China, in particular. The *profile of target organization* covers all aspects that make a target both desirable and attackable. There are three main factors that affect a target's desirability: *symbolic significance and criticalness*, *digitization of value*, and *weakness of defense mechanisms*.

### *Symbolic significance and criticalness*

"The ideal targets for terrorists of September 11, 2001 were the World Trade Center's Twin Towers, the White House and the Pentagon, the ones with tremendous symbolic significance" (Coates, 2002, p. 24). Hackers similarly have ideal targets. There are trivial hacks, attacks with aims of website defacement or denial of service, that do target specific symbolic targets. For example, a "smear" campaign against human rights activist Ai Weiwei attempted to discredit Weiwei by publicizing the fact the artist had had an extramarital affair (Xuecun, 2014). The GhostNet hacks against the Tibetan embassy could have likewise attempted to attack the Dalai Lama with website defacement; however, instead of targeting these computers for *symbolic significance*, they were selected for their *criticalness*.

"Criticalness" is loosely defined as the importance of a network or system. Questions such as "does this system host guarded information?" and "would disruption of these systems be detrimental to the target?" help describe a target's criticalness. Analysis of target selection can not only help solve who-attribution, but also provide insight regarding an attacker's desires.

Proprietary, copyrighted, and classified information such as search engine source code, jet fighter designs, or information on dissidents all serve as viable critical targets and systems hosting all of the above have been successfully attacked by Unit 61398. While American information is valuable, Kshetri's proposition also explains why American corporations are not involved in conducting their own widespread attacks: there is widespread agreement that there simply is "nothing worth taking" perhaps "other than political and military information" (Interview 2-2-7). Operating under the assumption that American jet fighter research and development is superior to that of the Chinese, or that Cisco's routers are better than Huawei's, it is clear that corporate espionage may appear one-sided (Chinese corporations hacking American ones) simply because it is. Furthermore, revelations from the Snowden files reveal that, while American corporations may be innocent of corporate espionage, the American government was guilty of traditional espionage; the difference between this and the spying of the past was the mass availability of sensitive information. The types of information with value to the U.S. (political and military information) were sought after and collected by the NSA's TAO; these collection efforts included both "enemies" and "allies," such as Germany (Reuters, 2015).

Apart from the information contained within a system, the function or use of a system may dictate its *criticalness* as well. The computers operating the power grid, water processing plants, traffic lights, stock exchanges, weather monitoring systems, and many more secure systems are attractive targets for would-be attackers. The U.S. and Israeli attack on Iranian nuclear centrifuges, named *Stuxnet*, is just one example. Iranian nuclear centrifuges were based on a design stolen from Pakistan, which was stolen from the Netherlands, which had been copied from the centrifuges used by the United States (Zetter, 2014). Accordingly, collecting information about these centrifuges may have been useful militarily, but certainly not for American corporations looking to improve their designs. Instead, *Stuxnet* attacked and disabled

approximately 1,000 centrifuges in an effort to halt, or temporarily stall, Iran's nuclear enrichment abilities (Zetter, 2014).

Within the U.S., critical systems such as the power grid and water processing plants have already been compromised by Chinese hackers (Leyden, 2013). While these attackers have not issued any destructive commands, for example overloading a generator in an effort to destroy it, long-term and uninterrupted access to these systems through the use of RATs means that destruction *could* happen. Dismissed as hyperbole for years, the claim that American public utilities had been compromised by the Chinese military was tested by researchers at Trend Micro in 2013 (Liebelson, 2013).

### *Digitization of value*

Another characteristic within the profile of a target organization is the *digitization of value*, the process in which things of worth are digitized. When money existed simply in physical form, bank robberies were effective. As money has shifted from physically being located within bank vaults to instead being stored on a computer server in the form of a digital ledger, cyber-attacks against banks have increased (Sanger & Perloth, 2015). Companies, however, do not just digitize money, they also digitize nearly everything else.

Technological advances have made the intellectual property of American companies incredibly desirable, while these same technological advances have meant the accelerated digitization of value (Manyika et al., 2015). Thus, technological advancement has led to technological reliance. The irony remains: because China is largely considered "behind" the U.S., in terms of both technological advancement and technical reliance, the country is better-equipped to resist an attack. It remains impossible to digitally steal gold from a bank vault, for example (Marx, 1981).

### *Weakness of defense mechanisms*

Marcus Felson and Lawrence Cohen's "routine activity theory" served as the basis for the majority of early cybercrime research (Holt & Bossler, 2008; Kigerl, 2011; Yar, 2005). The theory is a sub-field of crime opportunity theory that stipulates three necessary conditions for most crime; a likely offender, a suitable target, and the absence of a capable guardian, coming together in time and space (Clarke & Felson, 2004; Cohen & Felson, 1979). In other words: for a crime to occur, a likely offender must find a suitable target with capable guardians absent. While the theory has been criticized for being a simplistic macro theory of victimization, the applicability of the theory to a digital context makes sense. Computers with minimal security measures provide suitable targets and are more likely to be attacked than those that have been "target hardened." At the most basic level, the theory suggests that increasing security will result in less victimization.

It is these methods of increasing security that differ most greatly between the United States and China. The Chinese government owns and operates a large amount of the underlying network hardware within China via the state-owned-enterprise China Telecom. In contrast, the vast majority of internet infrastructure within the United States is owned and operated by six private telecommunications companies: Level 3 Communications, TeliaSonera International Carrier, NTT, Cogent, GTT, and Tata Communications. Because China is the world's most populous country and the Chinese government owns a large chunk of the hardware within China,

the government is uniquely situated within a position of power. This power has been abused at least once; on April 8<sup>th</sup>, 2010, China Telecom rerouted about 15% of foreign Internet traffic through Chinese servers for 18 minutes (Anderson, 2010). The traffic included the commercial websites of Dell, IBM, Microsoft, and Yahoo! as well as government and military sites in the United States. Though China Telecom has denied hijacking any Internet traffic the feat would not have been possible without the cooperation of the company. Unlike government-owned China Telecom, the six American internet backbone companies operate in the free market through “peering agreements.” These agreements serve as network interconnects between companies, which allow internet traffic to follow multiple, redundant paths. Because Americans tend to be anti-regulation and anti-regulatory agencies (Morrissey, 2014; Murray, 2015; Roff, 2015), these companies are very loosely regulated. This is evidenced by the recent “net neutrality” fight between customers, internet service providers, and the U.S. federal government.

### Conclusion

Both the United States of America and People’s Republic of China host offensively-minded government “computer network exploitation” teams; the U.S. group is the National Security Agency’s “Tailored Access Operations” and the Chinese is the People’s Liberation Army’s “Unit 61398.” It remains difficult to properly attribute cyberattacks to a host nation, but a wide range of techniques has allowed the researcher to state with relative certainty that at least six major network breaches can be attributed to the Chinese government. These breaches cover a wide range of targets and employ a vast number of attack methods, but some commonalities can be found: the use of advanced “spear phishing” and “watering hole” attacks, economic and political targets, and a continued interest in information collection instead of system disruption.

When viewed through the lens of Kshetri’s (2005) cyberwar framework, these intrusions are easily understood. First, China is host to pro-hacking regulative, normative, and cognitive institutions as well as a large and highly-skilled workforce. Second, the combination of both intrinsic (obligation to community) and extrinsic (monetary) motivations provides ample interest in launching attacks. Third, the *criticalness* of proprietary American trade secrets, high rates of *digitization* of those secrets, and relatively *weak defense mechanisms* allude to a routine activity explanation for repeated U.S. victimization.

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## ***“Good Kids” and “Bad Guys”: Prosecutorial Constructions of Juvenile Offenders***

Criminal cases involving juvenile offenders often pose moral dilemmas for prosecutors who are tasked with making decisions about the most appropriate legal outcome. Although the law is fairly clear about such notions as causal and legal responsibility, issues of culpability and just deserts are more ambiguous. This paper presents qualitative data from fifty semi-structured interviews conducted with chief and assistant prosecutors in the State of Kansas over a nine-month period, showing how prosecutors construct juvenile offenders in order to make moral sense of them. Distinctions are made between “good” and “bad” kids on the basis of character evaluations, between “child-like” and “adult-like” offenders on the basis of their conduct and appearance, and between “salvageable” and “disposable” juveniles on the basis of their presumed rehabilitative prospects. Detailed descriptions of each of these themes, as well as possible implications for future research, are also shared.

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### **Introduction**

The past twenty years have proven to be an especially turbulent time for criminal justice practitioners dealing with juvenile offenders. Details of school shooting incidents that took place in Paducah, Kentucky; Jonesboro, Arkansas; Pearl, Mississippi; and Littleton, Colorado in the late 1990s and the early years of the twenty first century have been overtly troubling in that these cruel and sudden attacks were perpetrated against relatively peaceful, middle American communities, as opposed to inner-city urban slums where such actions are expected (if not tolerated). Moreover, the juvenile offenders responsible for these attacks were not the stereotypical “hard-core” chronic offenders. On the contrary, almost without exception, they were teenagers who had never before been arrested for any lawbreaking behavior, some who had been described as “good kids” by the neighbors and relatives who thought they knew them intimately, and others who had been “good students,” marked for academic achievement and success in later life (Danner & Carmody, 2001).

Unsurprisingly, then, questions soon began to circulate and inquiries began to be made as to possible explanations behind these atrocities. It seemed inexplicable that such “good kids” could wreak such havoc, and while lawmakers, parents, and educators called for drastic changes in everything from gun control legislation to school curricula to stricter classifications on various media of popular culture, another avenue of research has remained largely unexplored: namely, what is thought to be the appropriate way to deal with “good kids” who do “bad” things? Indeed, how do such constructions of “good” and “bad” come to be formulated, and how do they impact upon the decision-making processes of those agents in the criminal justice system, like prosecutors, who hold a tremendous, yet relatively unchecked, amount of power determining their fate?

## Literature Review

American prosecutors wield, quite possibly, more power than any other group of criminal justice practitioners (O'Brien, 2009). Former Attorney General Robert Jackson, who later became a Supreme Court Justice, stated in 1940 that "the prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous" (Walther, 2000, p. 283). More recently, Gershman has similarly posited that "the prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law" (1993, p. 513). Prosecutors have an ethical duty "to seek justice" (American Bar Association, Center for Professional Responsibility, 1980, EC 7-13), a special duty that distinguishes them from other lawyers by virtue of the fact that they represent the government and should therefore ensure that their actions are fair and consistent with the public interest. This duty entails a strong commitment to pursue the guilty, commensurate with an equally strong desire to protect the innocent (Green, 1999). Zacharias (1991) suggests that this duty involves the simultaneous need to proceed against offenders who are guilty and the desire to consider the best interests of those very offenders in an almost ministerial or advocacy capacity. Prosecutors must ensure that only people who are legally guilty of their crimes are processed by the criminal justice system.

The intrinsic duality associated with the prosecutorial position informs prosecutors' perceptions of their role. This is a subjective notion, and largely depends upon how a prosecutor views his or her function and what he or she believes members of the public (as well as fellow prosecutors) expect. In his discussion of the morality of lawyers, Shaffer (1981) contends that this perception of function may be related to the profession of law itself and the need to be regarded as useful. This interpretation of their function guides prosecutors as they make decisions on a day-to-day basis by acting as a moral compass against which they can compare their actions and their feelings. Jack and Jack (1989) describe the unique dualistic position of lawyers with regard to morality. They assert that lawyers "occupy two moral worlds" (1989, p. 49), and the position of prosecutors could be said to be even more specialized than that of lawyers on the whole given that they have no one particular client: their client is the community they serve and the people whose interests they purport to represent. Their role perception, therefore, sets the guidelines for them in terms of how they should act and with what they should be concerned. It suggests to them which ways of thinking and acting are indeed morally correct (according to personal and professional standards of morality) and which ones would be construed as morally reprehensible.

Yet legal responsibility and moral responsibility do not always coincide, and this potential discrepancy creates the danger for prosecutors that some individuals against whom they may choose to proceed legally may be morally undeserving of punishment; likewise, there may be situations in which individuals who are morally responsible for certain actions are allowed to escape legal punishment unscathed. Corcoran (2014) discusses the potential for an exercise of prosecutorial discretion grounded in extra-legal factors, citing that while the decision to decline to prosecute is occasionally based upon lack of evidential sufficiency, prosecutors may likewise be motivated by "their own personality, whims, and preferences, which have little, if nothing, to do with the defendant and the alleged conduct" (p. 161). O'Brien (2009) contends that the

way in which prosecutors make decisions about offenders and cases is the product of “a unique constellation of incentives, goals, and norms” (p. 1003), one comprised of both internal cognitive biases and external incentives and deterrents. The prosecutorial decision to charge, then, is entirely premised upon the idea that there is a particular outcome they want to reach or accomplish, and that that outcome can best be achieved by charging a particular offender. Tevlin (1993) refers to this end-based thinking as the prosecutorial motive, and argues that it is fundamental to the prosecutorial decision-making process.

In clarifying their motives in any particular case involving a juvenile offender, prosecutors must first make sense of that juvenile’s character, conduct, and prospects in a way which is symbolically meaningful to them. Prosecutors may use common vernacular to describe these offenders, such as “evil,” “sophisticated,” “just a kid,” or “serious,” but to them, these concepts form a sort of symbolic shorthand that allows them to understand an offender in a particular way, and consequently to formulate what they see as that offender’s just deserts, on the basis of a given assessment. In other words, prosecutors may say that a juvenile offender is a “good kid,” when what they mean is crucial to their understanding and construction of that offender and subsequently to any decisions they make relative to the case.

This paper posits that the driving force behind prosecutors’ exercise of discretion is a coherent and sound professional interpretation of the prosecutorial role as administrators of both legal and moral justice, and examines the process by which prosecutors make sense of the juvenile offenders with which they are confronted on the basis of their perceived character, their conduct and appearance, and their rehabilitative prospects.

## **Methods**

With approval secured from the Institutional Review Board of the university with which the author was affiliated, chief district attorneys in each county in the State of Kansas were contacted to ask whether they (or their subordinates) would be willing to participate in the research project. Kansas was chosen because it is one of only two states in the country that sets the minimum age for transfer to criminal court at ten years and the researcher was primarily interested in whether the decision-making processes of prosecutors in cases involving younger juveniles being tried in criminal court would differ from those in cases involving older juvenile offenders. Due to reasons of convenience, interviews were to be restricted to subjects living and working within a five-hundred mile radius of the city of Kansas City. The National District Attorneys Association was consulted and provided a map of all the geographic divisions of county lines in the relevant area, along with the mailing address and telephone numbers of all the current county attorneys, prosecuting attorneys, district attorneys, and their deputies. Fifty-six individuals were contacted, given a description of the aims and objectives of the research, promised complete confidentiality, and asked whether they would be willing to participate. Fifty individuals, or 89% of those invited to participate, consented to be interviewed.

Subsequently, fifty semi-structured interviews were conducted over a nine-month period with prosecutors at different levels and in different counties in the state of Kansas. Seventy-six percent of the interview subjects (n=38) were male. Twenty-six percent (n=13) were chief district, prosecuting, or county attorneys; the remaining 74% (n=37) were assistant district, prosecuting, or county attorneys. The mean number of years of experience as a prosecutor was

8.18 years. Extensive planning went into the design of the interview schedule. A number of articles and books were reviewed in order to learn as much as possible about the terminology and concepts used by prosecutors and incorporated into their daily work routines, and questions were formulated accordingly. The interview schedule consisted entirely of open-ended questions in which the respondents were asked to provide answers in their own words. Questions asked during the course of the interviews pertained to the prosecutorial decision-making process in general and in particular to charging, plea bargaining, and sentencing decisions in criminal cases involving juvenile offenders. Examples of questions included: What are the charges most frequently brought against juveniles in your jurisdiction? What kind of information about the case and the defendant do you receive? How much discretion do you feel that you have in determining what is in the public interest? How do you feel about trying juveniles as adults in criminal court? Could you explain to me how you go about putting a case together? A draft of the interview schedule was submitted to a prosecutor with whom the researcher was acquainted in order to pilot the questions and determine whether any rewording or reordering of questions was needed; no changes were suggested and none were made.

The interviews took place at the prosecutors' own offices and ranged from a duration of thirty minutes to three hours, with the mean time being one hour and twenty minutes. Familiarity with the interview schedule was believed to be of the utmost importance, as some of the questions needed to be adapted slightly to suit the circumstances of particular interview subjects. For example, questions seeking to uncover the relationship between the prosecutor being interviewed and the other attorneys in the office were stricken as superfluous in those instances when the interview subject was the sole prosecutor in the county. Occasional probing was utilized to elicit more in-depth responses to some of the questions, and this was accomplished by providing such prompts as, "How is that?" or "In what ways?" With the interview subjects' consent, the conversations were recorded and then transcribed. As an additional precaution so as not to misrepresent any of the information shared by the prosecutors, all participants were given the option of reviewing the transcripts before any of the data analysis took place in the event of human error. Sixteen of the participants wanted to review the transcripts and no changes were made. Direct quotes from the prosecutors who were interviewed are shared anonymously below and discussed vis-à-vis relevant philosophical and scholarly literature that clarifies the context in which those statements were made.

Although the responses gathered from the fifty in-person interviews yielded very rich information, the researcher believed that the data would be more valid if corroborated with data collected via self-administered questionnaires. The six prosecutors who were invited to participate in the interview process but declined indicated an interest in contributing to the research project but lamented that they lacked the time to meet in person. They were asked whether they would consent to completing and mailing back a survey with five closed-ended and five open-ended questions and, following snowball sampling techniques, whether they would be willing to share details about the research project with colleagues who might also be interested in participating. Each mailing contained a cover letter outlining the purpose of the research, a confidentiality statement and informed consent form, the survey instrument, and a self-addressed stamped envelope. The holiday months of November, December, and January were avoided since mail volume is generally high during that period, and the researcher was

concerned that potential respondents would be more likely to discard the survey inadvertently if it arrived accompanied by other mail rather than during “slower” times of the year.

Thirty-four individuals at various levels (nine chief prosecutors and twenty-five assistant prosecutors) completed surveys and signed consent forms to indicate that they were aware their responses would be shared anonymously. A number of respondents took the time to enclose additional information along with their completed survey. Some submitted articles that they had written themselves, which proved to be quite informative as to the nature of community prosecution and developments on the legal front in the state of Kansas. Others returned the completed survey with a note expressing their interest in the findings of the research. In order to protect the identities of those respondents, specific demographic details about their gender, race, position, and county are withheld. Their responses are not included in this paper. Instead, they were used to corroborate and validate the themes that emerged from the in-person interviews.

### **Results**

The first prosecutor interviewed expressed her view that seeking justice means “trying to put the bad guys where they need to be” (Respondent 1, chief county attorney, female). That remark set the tone for the interviews that followed, which all served to elaborate upon the process by which prosecutors determined what that dispositional outcome should be. As another prosecutor explained, “Sometimes a conviction is not the answer to the problem” (Respondent 30, chief district attorney, male). The data collected from the semi-structured interviews conducted with fifty prosecutors at various levels illustrate the distinction between “good” and “bad” juvenile offenders, including the origins of this differentiation and the ways in which it manifests itself in the prosecutorial decision-making process. A further point of difference highlighted by prosecutors pertains to their belief that in dealing with adult offenders, the emphasis tends to be placed on the offense, whereas in dealing with juveniles, the emphasis tends to be placed on the offender. One prosecutor explained that “prosecuting juveniles is different than prosecuting adults, in that greater weight must be given to one’s potential to rehabilitate” (Respondent 34, chief prosecuting attorney, male). Those juveniles who are recidivists or chronic violators of the law, and whose offenses are viewed as more grave or severe, contravene societal expectations of age-appropriate behaviors and are therefore perceived as “adult-like,” morally deserving of the same modes of formal intervention and punishment as adult offenders. The aforementioned prosecutor elaborated, “I’ve had a number of cases where juveniles have proven by their actions that they should be treated like adults. Great weight was provided them but they came up short on rehabilitative potential” (Respondent 34, chief prosecuting attorney, male). The following sections present direct quotes and explanations gathered as part of the research study in order to clarify the distinctions prosecutors make between “good” and “bad” juvenile offenders on the basis of perceived character, between “child-like” and “adult-like” offenders on the basis of their conduct and appearance, and between “salvageable” and “disposable” juveniles on the basis of their rehabilitative potential.

### **“Good Kids and “Bad Guys”**

The first theme revealed by the interview data pertained to how prosecutors attempt to make sense of the overall character of juvenile offenders in a way that is symbolically meaningful to them. Drawing upon information provided to them by the police (and in some cases, by members of the community), prosecutors indicated that they consider such factors as family support, previous delinquent or criminal history, school and employment performance, and attitude, and construct a juvenile offender as either “good” or “bad.” A “good” juvenile, as these prosecutors discussed, is one who has never had any previous run-ins with the law or any allegations of lawbreaking, whose offense is relatively minor whose parents are both physically and emotionally available to offer support and guidance on the road to rehabilitation, whose school and job performance have been above-average, and whose attitude demonstrates remorse, guilt, shame, or concern for the long-term implications of a foolish isolated incident. For example, one prosecutor described a “good” juvenile as meeting several of these criteria, and explains how her “goodness” affected his determination about her moral just deserts and the course of action he ultimately took:

There was a young lady who made a criminal threat against another student at school, and in the span of about a week’s time, she racked up probably about a total of six to seven charges. And instead of proceeding against all the charges, we made the decision to get this young lady into some counseling. And she was a good kid, she had been an A/B student up until just this spot in the school year where things just crashed, and she went on like a week or two binge of nothing but bad acts. And so we determined that it wouldn’t necessarily be in her best interest to charge her with all the crimes that she had committed, if we could get her some help, get her in to see a psychiatrist or family therapy of some sort.

(Respondent 10, assistant prosecuting attorney, male)

As this anecdote reveals, this “young lady” was one that the prosecutor had constructed as a “good kid,” and as such, he believed that her spree of “bad acts” was an isolated incident in an otherwise spotless record. The prosecutor’s specific selection of semantics, opting to refer to the juvenile as a “young lady,” is very telling. In making sense of her and her moral just deserts, he attributed meaning to her school performance and her lack of prior record; the fact that she was “an A/B student” meant, to him, that she was an individual who was typically very concerned about and involved in scholastic pursuits, and therefore would not be the kind of person who could realistically be painted as a troublemaker. It could even be inferred that the fact that this juvenile was a female factored into his construction of her as “good,” in that prevailing social gender roles may have prompted him to believe that females are more likely to behave properly than males and to be naturally and innately “good” (Kratcoski & Kratcoski, 2004).

A second prosecutor similarly referred to a juvenile as “good,” based upon his evaluation of the aforementioned criteria:

You have a good kid here who obviously has made a mistake, obviously has committed a crime, and the kid’s a 4.0 kid, just being a kid, doing something stupid. You know that if you let this kid have a break, he’s never going to come back. (Respondent 15, assistant prosecuting attorney, male)

Like his fellow prosecutor, this particular county attorney painted a picture of a specific juvenile offender as someone who could only be understood as “good” by virtue of his

exemplary academic achievements and lack of prior criminal record. As this juvenile was “a good kid,” the prosecutor did not anticipate future recidivism on his part.

If symbolic “goodness” of character is determined by prosecutors on the basis of such factors as academic performance, family support, attitude, and prior record, then it stands to reason that those same aspects, when inverted, could point to symbolic “badness” of character. Interview data suggest that a “bad” juvenile, to prosecutors, is someone who has very little concern and sensitivity for the feelings and well-being of others around him, one whose crime was of such a vicious or cruel nature that it overshadowed all other extra-legal considerations, including scholastic performance and family support. This is someone who poses such a high level of risk or threat to the community that the only moral outcome which would be just would involve ensuring the public safety and dealing with said juvenile as harshly as possible. One prosecutor described “bad” juveniles as follows:

Some juveniles commit a crime that is of sufficient magnitude that you just know they are not going to be amenable to treatment. We have one case right now, three juveniles who are charged with hailing a cab and then murdering the cab driver for a small amount of money, I forget what it was. The youngest at the time was thirteen. These ones I’m talking about are bad guys, not some kid who steals a car. Bad guys. Well, then, the way I look at that is, that’s when you say society has to be protected. We have this person who is extremely violent and whatever age he is, we have to make sure they don’t inflict this violence on somebody again. I mean, it’s not unusual to see a bad guy who did a violent crime when he was fifteen and he was sent to a juvenile home for a year and he gets out and he does it again. (Respondent 2, chief county attorney, male)

Unlike the previous examples, where the circumstances suggested that the juvenile offenders in question could be constructed as “good” in that they had a good track record and indicated likely amenability to treatment, the kinds of juveniles to which this prosecutor referred seemed to suggest by their behavior, by their attitudes, and by the nature of their crimes that any attempts at rehabilitation would be unsuccessful. A “bad” juvenile, then, is one whose actions eclipse any glimmer of “goodness,” someone whose character is presumed to be so suspect and so malevolent that the word “kid” is not even attached as an epithet. The previous prosecutors, referring to “good” juveniles, alluded to them as “good kids,” yet these juveniles are so “bad” that to call them kids would be inappropriate. They have crossed some invisible line not only from “good” to “bad” but from “kid” to “guy.” Even without consciously citing their behavior as “adult-like,” this prosecutor has indicated that juveniles who exhibit violence and malice through their actions can no longer be regarded as children. This, then, begs a closer examination of the process of differentiating between those juveniles who are “child-like” and those who are “adult-like.”

### **“Child-Like” and “Adult-Like” Juvenile Offenders**

The second theme suggested by the interview data relates to judgments which prosecutors make about the maturity level of the juvenile offenders with which they are confronted. Not all individuals who have attained chronological maturity in the eyes of the law will have necessarily attained the emotional maturity that the law presumes them to possess. As one prosecutor noted:

Picking ages and speculating about whether it is proper to expect certain behaviors from certain people is a futile exercise. I have seen thirty-year-olds who were child-like and fifteen-year-olds that were seasoned criminals with little conscience or concern. (Respondent 22, assistant district attorney, male)

Although the law makes distinctions between individuals on the basis of objective criteria, prosecutors clearly do not. They are cognizant of the fact that some adults will be “child-like” and that some juveniles will display traits or characteristics that would be perceived as “adult-like.” The more “child-like” a prosecutor believes a particular juvenile offender to be, the easier it is for that prosecutor to reconcile the image of that juvenile with the ideal type described by the Child Savers in the creation of the juvenile court: namely, one who is deserving of mercy, treatment, and compassion. Conversely, the more “adult-like” a prosecutor believes a juvenile offender to be, the harder it is for that prosecutor to reconcile the image of that juvenile with the ideal type, and the more likely it is that the prosecutor will regard that juvenile as an adult: namely, one who is deserving of being held accountable and punished for his or her actions.

The first criterion prosecutors draw upon in making judgments about the maturity levels of juvenile offenders pertains to issues of competency. Prosecutors must make subjective determinations not as to whether or not a juvenile offender is objectively competent but rather relating to the extent of that competency. One prosecutor explained:

There’s always a competency issue in any case of any kind, the ability to form criminal intent, ability to advise counsel, direct their case. But, I mean, if you have a Doogie Howser or somebody, they could obviously form perhaps criminal intent or whatever maturity more than the average child. (Respondent 9, chief district attorney, male)

This notion of “the average child” is vague, because some juveniles will, by definition, be more mature and others less mature than that standard. Part of this distinction relates to whether or not a juvenile is fully able to grasp the seriousness of his or her actions. One prosecutor commented:

I see fifteen-year-old kids who don’t know what they’ve done, and I see ten-year-olds who know exactly what they’ve done. There was a case that came down in 1997 and it was *In re B and B*, and that was a case about a ten-year-old boy who had literally penetrated a six-year-old girl in the sandbox. And did the kid know what he was doing? I don’t know. You’re charging a ten-year-old kid with a sex offense, and is a ten-year-old able to grasp the seriousness of that? (Respondent 5, chief prosecuting attorney, female)

The juvenile’s age, in the aforementioned case, made it difficult for the prosecutor in question to believe that he was in fact capable of grasping the severity of his actions. That same prosecutor admitted that sometimes, the difficulty in making those determinations is exacerbated by a juvenile’s physical appearance. As she tries to determine how capable a juvenile offender may be of understanding the wrongfulness of his actions, inevitably the fact that he looks “like a kid” factors into her assessment:

I have a kid upstairs right now who I’m trying to decide what to do with, who is eleven. And he walked into two people’s houses, two separate homes, and stole three video games out of one house and out of another house he stole a gold dollar coin and some Pokemon cards. And that’s two residential burglaries,

and if he were convicted of both of those, he would have those two felonies for the rest of his life. They would always go against him. So yes, he absolutely committed those residential burglaries, there is no doubt about it. But you have to weight that against, is there any way to impose a punitive consequence on the kid, rehabilitate the kid, and leave him with a chance at not having a record like this. He's eleven, my gosh, and I mean, he walks in and he's like this tall. Is a kid that young really getting what district court is about, the seriousness of it? (Respondent 5, chief prosecuting attorney, female)

There was no doubt in this prosecutor's mind that the juvenile in question was responsible for the burglaries in the causal sense, but she was uncertain about the extent to which he is legally responsible, largely because of his size and stature. Physical appearance, then, is another criterion on which prosecutors base their determinations of a juvenile's maturity; in other words, a juvenile offender who looks more "like a kid" is more likely to be constructed as "child-like" than one who looks more "adult-like."

The final criterion for determining whether juvenile offenders are more "child-like" or "adult-like" has to do with their overall conduct, which one prosecutor described as, "are they living like an adult?" (Respondent 12, assistant district attorney, male). The actions and behaviors which prosecutors consider as proof of "adult-like" status include, "holding down a job and [not] going to school" (Respondent 12, assistant district attorney, male). Another prosecutor elaborated and noted, "If they're already driving, if they have jobs and other responsibilities, I believe they need to be responsible for their actions as well. They're adults in my book" (Respondent 29, assistant district attorney, female). The implication associated with each of these criteria is that, even if the prosecutors were deceived or fooled during their courtroom encounters with the juvenile offenders in question (or indeed, outside of the courtroom), and subsequently made the wrong inferences about them, if those juveniles are "old enough and "responsible enough to be doing these adult things" (Respondent 41, assistant county attorney, male), then they can be presumed to be "old enough" and "responsible enough" to know better than to break the law and therefore to be held legally responsible for their actions.

### **"Salvageable" vs. "Disposable" Juvenile Offenders**

The interview data demonstrated that how prosecutors make sense of juvenile offenders, whether they construct them as "good kids" who are unlikely to turn bad or as "bad guys" who are clearly set on a path toward a criminal career, and whether they perceive them as "child-like" and naïve or as "adult-like" and "old enough" to be held legally responsible for their actions, invariably colors how prosecutors make sense of those offenders' just deserts and their rehabilitative potential. This construction of juvenile offenders as "salvageable" or "disposable" is the third theme that emerged from the in-person interviews.

The ideology behind the Child Savers' movement and the drive to create the juvenile court was premised on the belief that juveniles constituted a group that would be amenable to treatment and capable of being redirected. One prosecutor discussed this perception:

I think, generally speaking, this is a population that should be rehabilitated or susceptible to being rehabilitated. It ought to be. I mean, it's not like they've got forty years of a criminal lifestyle and drug abuse under their belts. They may

have two or three years of it, but they should be susceptible to treatment.

(Respondent 11, chief county attorney, male)

Prosecutors indicated that they construct juvenile offenders as either “salvageable” or “disposable” on the basis of their understanding of them as “good” or “bad” and “child-like” or “adult-like.” Those juveniles who are constructed as “salvageable” will be dealt with in way which will seek to maximize their presumed rehabilitative prospects (that is, their potential to “be saved”), while those who are constructed as “disposable” will be dealt with more harshly and more punitively. The latter are likely to include individuals who have committed more serious offenses and who are regarded as “unlikely to become productive members of society” (Respondent 39, assistant county attorney, male) and who are believed to “have no further use for society. We’re done with them” (Respondent 17, assistant district attorney, male). These are the individuals who, “if we never saw them again, if they were locked up until the end of time, we as a society would be no worse off” (Respondent 21, chief prosecuting attorney, male).

In making the distinction between those juvenile offenders who may still be “salvageable” and those who are understood to be “disposable,” prosecutors consider the same factors that informed their evaluations of character and maturity. For example, the same lower chronological ages, remorseful attitudes, and less than intimidating physical presence all combine to induce prosecutors to believe that “some kids are young enough to turn their lives around” (Respondent 18, assistant county attorney, female). Prosecutors ask themselves in these types of situations, “How can I help turn this kid around?” (Respondent 10, assistant prosecuting attorney, male). Early intervention seems to be key in this process, as described by one prosecutor:

I would hope that if you get a kid into the system early enough, and are able to get all of the necessary resources to aid that child in her development, there is a chance that you can change that child’s behavior before it escalates. And we have to try. (Respondent 31, assistant county attorney, male)

Another prosecutor expressed the desire to act early and to focus on treatment rather than punishment, regardless of an inability to predict whether or not her efforts would be successful:

We had a twelve-year-old that killed a three-year-old, and we made a decision in sentencing to place the twelve-year-old in a treatment program as opposed to a detention facility, hoping that that twelve-year-old was salvageable. I knew, in my heart, that this was the only chance this kid was going to get. And if we just locked him up at that point, we’d better make sure we locked him up for the rest of his life. May turn out to have been the wrong decision, but I hope not. Don’t know ahead of time. I keep waiting for that crystal ball, but no one’s giving it to me. (Respondent 1, chief county attorney, female)

Another prosecutor concurred, stating:

It’s different than when you look at an adult because in most of the time when you get an adult case, they’re repeat offenders or it’s a pretty serious case, and you’re not looking to try to save them. You want to be fair in all your prosecutions, but when you’re dealing with juveniles, if you get a kid early enough and you’re able to offer them some help, then perhaps they won’t become offenders the rest of their lives. Perhaps it’ll just be an isolated one-time

incident, just difficulty being a kid. So you have to try to save them. (Respondent 16, chief district attorney, male)

Conversely, those juveniles who have been understood as “bad” and “adult-like” on the basis of their extensive criminal history, the seriousness of the current offense, their poor academic performance, and their lack of social and family support are likewise constructed as “bad” rehabilitative prospects. Prosecutors review their files, notice that this is the second or third time (at least) that they have violated the law, and conclude that if previous attempts at rehabilitation have failed, then this time should be no different. Moreover, they conclude that morally, these individuals no longer deserve “another bite at the apple” (Respondent 41, assistant county attorney, male). As one prosecutor stated:

If this is somebody that we have seen time and time again, what possible reason do we have of giving them another break when we know that they haven’t taken advantage of any of the other breaks they got? If they haven’t learned their lesson yet, why would this time be any different? (Respondent 1, chief county attorney, female)

Another prosecutor highlighted the difference between those juvenile offenders he has constructed as “salvageable” and those he sees as “disposable” on the basis of their “child-like” or “adult-like” behavior:

Generally speaking with juveniles, yes, our concern is not only in protection of the community but also how can we get this kid some help, how can we make the kid a productive member of society through some kind of rehabilitation. I believe the more grown up they are, the less time is spent thinking about rehabilitation. I’m more willing to do punitive action to one who’s more grown up. They know better. They’re members of society, they’ve been trusted with responsibilities, they should know better. Younger kids just think impulsively sometimes, they just act. And that’s not to excuse their behavior. But I think that with juveniles, we have to take that into consideration. We’re going to treat a seventeen-year-old who commits a battery at school a lot different than a kid who’s eleven years old and commits a battery at school. So we have to consider that when we look at it. (Respondent 15, assistant prosecuting attorney, male)

In his mind, this prosecutor would regard younger juveniles as more likely prospects for rehabilitation, still young enough and impressionable enough to respond well to treatment, while older juveniles would be believed to pose more of a danger to society by virtue of their age and supposed experience, and therefore be presumed to fail at rehabilitative attempts should these be afforded them. Yet symbolic constructions on the basis of chronological age are far from clear-cut, which is why the determination rests on other considerations as well. One prosecutor elaborated on the difficulties involved in the process:

There have been juveniles through the system who were as appropriate for capital punishment as any adult. Now, do I think a ten-year-old and a seventeen-year-old can be treated the same? No. So that gets you down into, well, what about the thirteen-, fourteen-, or fifteen-year-olds? Well, that makes it a little harder for me to just say yes, because there are other things that have to be taken into consideration, like have they done this before, how often have we seen this before. And when you’re dealing with someone who’s under eighteen,

again, are you willing to say that this person is disposable? Is this person never going to have any use for society again? (Respondent 31, assistant county attorney, male)

### Discussion

There are three points to consider in analyzing the data gleaned from the in-person interviews. Firstly, it is noteworthy that, in constructing juvenile offenders in their own minds as “good” or “bad,” prosecutors essentially attempt to make sense of who they fundamentally are in a way that is symbolically meaningful. Emerson proposes that the use of concepts such as these implies a fundamental concern with juveniles’ moral character, suggesting that a “‘real delinquent’ is seen as not simply a youth who has committed a delinquent act, but as one whose actions indicate he or she is the kind of person who has or will become regularly and seriously engaged in delinquent activity” (Emerson, 1999, p. 257).

Understanding prosecutors’ explanations of their character assessments of juvenile offenders through this lens, then, clarifies that what they are attempting to do is understand the true nature and character of the individuals with which they are confronted in order to make valid and appropriate risk assessments and evaluations of their likelihood of recidivism, as well as of their rehabilitative potential. Much of what prosecutors know about a juvenile offender is based upon the information gathered and presented by law enforcement officials, as well as any other personnel (such as social services officers or intake officers, if the juvenile in question has previously come into contact with the authorities). Consequently, it is possible that the information will have already undergone some sort of screening based on external parties’ constructions of that individual and their just deserts before it makes its way to the respective prosecutor. This screening or filtering out of seemingly irrelevant or extraneous extra-legal information is not deliberate nor ill intentioned. Rather, just as prosecutors may be tunnel-visioned (or motive-driven, as described earlier) in attempting to make sense of the individuals before them, so too are other agents of the criminal justice system similarly focused on securing the most appropriate outcome given the circumstances of the case.

Secondly, prosecutorial constructions of juvenile offenders as “child-like” or “adult-like,” based at least in part upon physical appearance (i.e., height, size, or stature) can perhaps best be explained in the context of what Goffman (1971) describes as the interaction order. Although personal interactions between the prosecutor and the juvenile offender are frowned upon (if not prohibited outright by law), such physical distance and emotional detachment is much easier to maintain in a larger urban setting than in a small rural county. In the latter, prosecutors may, in the course of their daily routines, come across the very juveniles whose cases they are currently in the process of reviewing. Such encounters, whether deliberate or inadvertent on the part of either party, offer prosecutors a unique opportunity to see the juveniles for themselves and to make judgments about “how they look,” whether they appear to display remorse or belligerence, whether they appear to be “good” or “bad,” whether they appear to have strong familial supports, and so on.

Moreover, Goffman suggests that processing encounters “[enable] others to know in advance what he will expect of them and what they may expect of him. Informed in these ways, the others will know how best to act in order to call forth a desired response” (Goffman, 1973, p. 1). In observing juvenile offenders either formally inside the courtroom or outside of it,

prosecutors can obtain additional information about juvenile offenders and assess how those individuals appear to them, which can then further lead to an analysis of what that appearance seems to imply about their just deserts. In other words, throughout the course of their processing encounters with juvenile offenders, prosecutors will observe their gestures, cues, and behavioral patterns, and attribute symbolic meaning to these, which will then in turn affect their understanding of these individuals and their moral determinations of their just deserts. As Goffman asserts, "It is here that communicative acts are translated into moral ones. The impressions that the others give tend to be treated as claims and promises they have implicitly made, and claims and promises tend to have a moral character" (1973, p. 43). Consequently, a great deal depends on the basis of impressions formed by prosecutors of juveniles during these processing encounters, impressions of which neither the juveniles nor the prosecutors may be immediately conscious at the time.

The final point of significance which must be addressed in any analysis of these interview data pertains to the ideological and philosophical origins of prosecutorial notions of salvageability as these relate to juvenile offenders. Although the juvenile offenders who serve as the subject of this research study are processed through the adult criminal justice system, the premise behind the creation of a separate system of justice for juveniles cannot be overlooked, given that the principle of *parens patriae* speaks both to the belief about juvenile offenders' rehabilitative prospects and to the presumed role of those government authorities charged with making decisions about them (Mack, 1909). Making the determination that a particular juvenile can no longer be described as "salvageable" and is, sadly, "never going to have any use for society again," is sufficiently problematic in cases involving adult offenders, where the sole consideration tends to be the public interest and safety concerns. Yet in cases involving juvenile offenders, even those who have been constructed as "bad" and "adult-like," prosecutors will inevitably have doubts and reservations about obviating the best interests of the juvenile and ignoring what they could choose to continue to see as a cry for help. The ideological underpinnings of the juvenile court system will always remain an unseen, but not unfelt, influence on the prosecutorial decision-making process. Even in those instances where juveniles are constructed as "bad," "adult-like," and "disposable," and consequently dealt with punitively, prosecutors will always feel the need to justify both to themselves and to others why embodying the doctrine of *parens patriae* should be a secondary concern to the primary issue of protecting the community as a whole. Indeed, the very fact that the best interests of the individual juvenile offender and their moral just deserts should enter into the prosecutorial decision-making process at all merely underscores the challenge of carrying out the prosecutorial role as administrators of moral and legal justice.

### **Conclusion**

A number of opportunities for future research in this area present themselves. Firstly, the data gathered could be analyzed from numerous perspectives. Several differences between rural and urban prosecutors came to light which may be useful to investigate further, particularly those concerned with prosecutors' assumptions of responsibility for the well-being of their constituents. It is not surprising that prosecutors working in small, rural settings feel a stronger connection and sense of responsibility toward particular individuals as opposed to the generalized sense of responsibility that prosecutors in larger metropolitan areas feel toward

their constituency as a whole. Likewise, prosecutorial decision-making could be analyzed with respect to gender differences among prosecutors. It would be significant to learn whether female prosecutors are more or less likely than their male counterparts to experience quasi-maternal sentiments toward particular juvenile offenders, especially in light of existing sociological gender roles. Conversely, a future research study could investigate whether prosecutors make decisions differently (and construct juvenile offenders differently) on the basis of the gender of the juveniles in question; additional considerations may come into play that might be worth exploring.

Finally, there is also the opportunity to explore the relationship between prosecutors and crime victims, and to inspect in a comparative fashion the ways in which the former construct the latter in order to make sense of their needs. Traditional victimological approaches of victim-blaming or victim-defending could be analyzed in the context of the prosecutorial decision-making process, since the preponderance of existing research into victims and the criminal justice system has focused principally on the ways in which victims are treated by law enforcement officers and by judges. It would be interesting to investigate the extent to which prosecutors' perceptions of their role as administrators of moral and legal justice inform their interactions with victims of crime. With the foundation established for understanding prosecutors as professionals who attempt to construct juvenile offenders in specific ways in order to make what they regard as appropriate determinations regarding their just deserts, numerous applications are made possible.

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## ***Outsourcing, Urbanization, and Crime: Perspective of the BPO and MNC Employees in Delhi, A Case Study***

This paper explores sociocultural, developmental, and locational factors about crime and victimization from the perspective of employees at multinational corporations (MNC) and Business Process Outsourcing (BPO) in and around Delhi, India. The prime reason to focus on the MNC and BPO employees is to get information from the young workforce that has newly gained financial independence, has more expendable income, includes many women, and has greater mobility outside their family networks. Many of them work for businesses in the outsourced service sector that cater to the clients in the western countries. Due to different time zones, this workforce may not have the standard 9 AM to 5 PM work schedule. It exposes them to a higher risk of victimization due to poor public transportation, the problem of last-mile connectivity, inadequate security measures, weak social control, and unplanned urbanization.

**Keywords:** urban crime, outsourcing, crime in India, infrastructure, family networks

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### **Introduction**

This paper explores sociocultural, developmental, and locational factors about crime and victimization in Delhi (India) and urban areas in the neighboring states commonly referred to as the National Capital Region (NCR). The topic is studied from the perspective of the employees at various Business Process Outsourcing (BPO) centers and multinational corporations (MNC). The prime reason to focus on the MNC and BPO employees is to get information from the young workforce that also includes many women from different towns who move to the NCR in search of jobs. Many of them work in the outsourced service sector that caters to clients around the world. Due to the different time zones, this workforce may not have the standard work hours of 9 AM to 5 PM. Some of the factors taken into account are— mobility due to late night work and recreation, poor infrastructure including public transportation, the problem of last-mile connectivity, movement away from the protective networks such as family, greater expendable income, growing number of urban poor, and inadequacies of the criminal justice system. The paper employs an exploratory approach to study how people engage, analyze and interact with their environment.

### **Methodology**

The initial data for this paper was collected in 2013, and after feedback from other researchers, additional data was collected in 2015. The list of respondents was drawn based on the information provided by various job placement agencies<sup>1</sup>. These respondents provided further contacts of their friends, coworkers, and managers that snowballed into a larger sample. Surveys were emailed to 206 respondents: 68 males and 91 females. However, there were numerous incomplete items on surveys and therefore, further information was gathered through Skype and phone interviews. The findings presented in this paper are based on a combination of

items on structured surveys and semi-structured interviews. Due to the small sample size and non-probability method of snowball sampling, the study does not force fit larger generalizations. It is a case study that provides valuable insight from the perspective of the workforce that is aspirational, integral to the fast-evolving economic and sociocultural environment, and expects better governance.

The study included questions on the commute to work, mobility networks, reliance on public transportation, and after-work activities. The respondents were also asked about their income, work hours and shift, arrangements made by the employer for the late night shift, family and living arrangement, and perception of the criminal justice system.

### **Literature Review**

Rajendram (2013) notes that more than half of India's population is below the age of 25 years and 65 percent is below 35 years. According to Harjani (2012) one of India's largest private service providers, Tata Consultancy Services has employees with an average age of 28 years. This young workforce is growing up in the age of globalization that provides better economic opportunities. The MNC and BPO businesses have created immense opportunities to lift millions out of poverty, and the work environment is attractive to many youngsters. However, the surrounding urban environment exposes this workforce to many risks that can be explored by drawing concepts from theories of social disorganization, anomie, and routine activities. In their study of routine activities theory in China, Messner, Lu, Zhang, and Liu (2007) found that only some of the patterns of the routine activities and crime as found in the West applied to China and many others differed. It is not surprising as the environmental, economic, political, cultural, and familial factors vary from one country to another. Nonetheless, various concepts from these theories can be used to explore how variables interact, explain, and contribute to crime and victimization. For example, many previous studies show that the attractiveness of the victim increases with signs or visibility of affluence or wealth (Coupe and Blake, 2006; Cromwell and Olson, 2004; Osborne and Tseloni, 1998). Additionally, temporal factors also help predict the risk of victimization (Messner and Tardiff, 1985). This study used these factors to develop questions on late night work hours, and visible affluence of the potential victims especially in and around the shopping malls. It is especially applicable to cities that often have large areas of urban slums.

Though previous studies (Forde and Kennedy, 1997; Kennedy and Forde, 1990) note increasing support for risky behavior by the victim as compared to just the routine activities in predicting victimization, this paper focuses on everyday activities of respondents, such as commuting to the place of work or recreation. As noted earlier, the rise of urban slums has exacerbated the problem where urban wealth is visible, but not always accessible to those struggling to make ends meet. The reader must be cautioned not to equate all crimes with poverty; nonetheless, it remains an important predictor of economic and social strain that leads to crime. Hunter (1968) defines slums as areas that have substandard housing that is harmful to health and survival and terms it a menace to health, safety, morality and overall welfare of the inhabitants. Though there are many who argue that slums have become a permanent fixture, and it would be easier and advisable to convert them into regularized areas instead of attempting relocation that is often met with political resistance in countries like India, many argue that slums represent the devious ways in which the more dominant sections exert their control on the poor to meet their needs and subserve their own interests (Valentine, 1973). It is thus related to the

problem of inequality and stratification that makes upward mobility a lot more implausible for those in the lower strata due to the ecological conditions that surround them. In India, even the more planned and organized cities such as Chandigarh have seen fast population growth and even faster growth of slums. Slum dwellers are often seen as a monolithic entity and attract less compassion and more disdain by those on the outside. This economic and social marginalization further reduces social efficacy. The conflict and friction are expected when these physical, social, economic, and emotional elements interact with the visible signs of wealth and affluence.

The literature on the economic crimes has expanded the utilitarian thought related to free will, rational thought, hedonism, and purpose of punishment. It particularly explains the motivation to commit a crime as the correlate of economic reward and likelihood of conviction (Ehrlich, 1973; Becker, 1968). Becker (1968) focused on the cost and benefits analysis and expected utility, while Ehrlich (1973) explained unemployment in the legitimate sector as a critical predictor of increase in crime. Many other studies have established poverty, unemployment, and financial strain as key predictors of crime (Gumus, 2004; Coomer, 2003; Lee, 2003). Fleisher (1966) also noted that the people with low income who commit crimes usually calculate that they would not get caught or if they get caught, that is still a low cost to be paid for the likely benefit of the criminal act. It is all the more true in high crime areas where the likelihood of getting caught may be lower and criminal acts are more prevalent (Schrag and Scotchmerm, 1997; Sampson, Raudenbush and Earls, 1997; Cook and Goss, 1996). In such neighborhoods, there is little respect for law or fear of punishment as crime is normalized.

As in many developing countries, the disparities in income are clearly visible in India, especially in urban areas characterized by unplanned urbanization and lopsided development. This proximity between extreme poverty and affluence converts certain locations and time into convergent points that present an increased the risk of victimization. The physical incivilities such as poor lighting, coupled with unreliable public transportation increase the risk of victimization for people commuting at night. In his study, Nath (1989) argued that fast deteriorating urban and economic conditions in India created social unrest. Singh (1985) noted that there was a lack of balanced and hierarchal urban system and absence of an efficient network of central places to integrate the country's economy. As a result, more and more people gravitate to a handful of urban sectors where the infrastructure is in need of complete overhaul. According to Runckel (n.d.), many of India's rural population is moving to urban centers and within urban centers, there is a movement towards main hubs like Delhi, Kolkata, Bengaluru, and Mumbai. In such cities, a graduate out of college can earn \$300 to \$500 per month. More than two decades ago, Thakur and Parai (1993) noted that to keep pace with its rapid urban demographic growth, India must invest in heavy transport in the larger cities. These factors make infrastructure, in particular, public transportation an important variable to explore as more and more young people entering the workforce rely on it. Many earlier studies have also found such environmental factors as contributing to high crime (Herbert, 1982; Harries, 1981; Short and Bassett, 1981; Evans, 1980; Lewis and Maxfield, 1980; Phillips, 1973).

The crumbling infrastructure and physical dilapidation impact social cohesion in various urban neighborhoods. Knight and Hayes (1981) found that many working-class communities in inner-cities are characterized by social isolation. Hall (1981) also found that inner-city residents often feel disengaged if they sense that the whole area is falling apart. In their study of large Indian cities, Dutt and Venugopal (1983) found higher crimes in inner-city areas in relation to

physical, demographic and occupational characteristics. The physical incivilities lead to social incivilities and a deeper sense of alienation, socioeconomic disengagement, and isolation. Social isolation is a strong factor in predicting crime and victimization. Similarly, social alienation is an important factor in exploring the breakdown of informal control mechanisms (Spano and Nagy, 2005). Social isolation, on the one hand, lessens empathy and on the other hand, exposes an individual to a greater risk of victimization. It is evident in many cases (from road accidents to crime) in the NCR where there is general indifference among citizens to help anyone in need. At least in part, it is due to lack of familiarity and relatively formal interaction. These urban hubs, on the one hand, showcase rapid growth and fast development, and on the other hand, are characterized by social anxieties, physical decay, and material and emotional deprivation.

Schreck and Fisher (2004) found support for controls for unstructured and unsupervised activities helpful in reducing potential victimization. The way city is conditioned, the informal controls on the individual behavior are rendered ineffective making it conducive to anomie and deviance (Martindale, 1966; Wirth, 1940). The rapid social change leads to gaps in the adaptation from the old order to a new order and thus, creates conditions for normlessness (Durkheim, 1951 [1857]; Merton, 1938); the severity and prevalence of it vary based on the pace of social change.

There is violence within the confines of a home that needs further inquiry both at individual and community levels (Koenig, Stephenson, Ahmed, Jejeebhoy, and Campbell, 2006; Krishnan, 2005), however, that topic is outside the scope of this paper. Instead, it focuses on the decreased informal controls as people move away from family. It was taken into account while developing questions on mobility outside the protective networks, formal networks and controls, reliance on public transportation, weak criminal justice system and the resultant risk of victimization. Osgood, Wilson, O'Malley, Bachman, and Jonston (1996) found that absence of an authority figure that could exercise social control and presence of deviant peers lead to more deviant behavior. Similarly, Schwartz, DeKeseredy, Tait, and Alvi (2001) found that male peers who supported violence and consumed alcohol two or more times a week were more likely to commit crimes against women. Sasse (2005) also found alcohol abuse positively related to community offending. Many crimes in India in recent years have had among others, a common factor of peer-group or some sort of camaraderie among criminals. It has been earlier explored with reference to the influence of peers in committing crimes, weaker parental and educational influence in teaching a child right from wrong, and weak informal control in the community.

This paper also includes questions about crime in Delhi. According to Anand (2014), Delhi is even more violent "than states affected by Left-wing extremism and insurgency" (para.1). Delhi is the capital of India and focal point of most political activity. As a result, the police force is often deployed to serve politicians and bureaucrats instead of protecting citizens. Sharma (2012) notes that out of the 83,762 police personnel in Delhi, only 38,762 are available to protect the common public as the rest of them are deployed on VIP<sup>ii</sup> duty. A vast majority of police officers in India serve at the constable rank, work overtime, have very few benefits, and are woefully underpaid. There is little scope and incentive for promotion. The police, in general, have a perception problem where the public sees them as corrupt and ineffective. Additionally, only 7 percent of Delhi police force comprises of women officers (Pathak and Karthikeyan, 2015).

The questions about crime in Delhi were also critical due to a large number of women entering the workforce. For many of them, education and career are an expression of their independent decision-making. India has traditionally been a patriarchal society and the financial

independence for women is seen as the key to breaking gender and family restrictions. On the one hand, protective networks like the family could reduce the risk of victimization, but on the other hand, if these very networks become restrictive for women, in particular, it hinders them from gaining equal status. Many studies (Kalpagam, 1994; Dasgupta, 1989) have found women entering the workforce as an indicator and vehicle of breaking caste, communal, social, and familial barriers, and increasing their ability to support themselves and their families. The poor infrastructure and lack of security in urban areas are often used as a rationale to limit female mobility.

Based on the studies discussed above, questions were developed on a number of variables and indicators including mobility and lifestyle of potential victims, the motivation of potential offenders, role of the protective formal and informal networks and systems, locational, cultural, and economic factors.

## **Findings and Discussion**

### *Age, education, and income*

As noted earlier, the study employs the non-probability method of sampling and uses a small sample. Thus, it focuses more on descriptive and exploratory analysis instead of inferential analysis. The quantitative information explained in this paper refers only to the items that were completed on all questionnaires. The rest of the discussion is based on qualitative information collected through phone and Skype interviews. The most common age group in the study was 23 years to 27 years that made up 35 percent of the respondents, while 12.3 percent respondents were between 18 years to 22 years. 71 percent of the respondents were below the age of 32. Nearly 80 percent respondents mentioned about being socially more active than their parents. They also had a lot more expendable income, frequently visited malls and nightclubs, and in general, spent more time outside the family or home than their parents did when they were younger. Though male-female ratio is similar in lower age groups, there were a few more males in the higher age group. The first instinct is to assume that young women probably get married and leave work. However, in this study, the data on educational qualifications show that as compared to males more females had completed their Bachelor's degrees and stayed in college or university longer than males before entering the workforce. Nonetheless, an equal number of male and female respondents completed a skill-based diploma or certification course along with or instead of Bachelor's degree. Only six respondents in the age range of 43 years and older completed surveys. As a result, it is difficult to read too much into the responses of that age group or draw conclusions about upward mobility in the professional space.

There was little disparity in income at the entry to early mid-level jobs, but there was greater inequity in receiving bonuses. Nearly 50 percent of the female respondents complained of gender bias, while male respondents attributed it to their ability to work longer and "at odd hours<sup>iii</sup>" or the night-shift. Approximately 12 percent male respondents also attributed receiving the higher bonus to their negotiation and networking skills. In the follow-up interviews, three female respondents noted that what their male counterparts called networking, they saw as patronizing. There was a disproportion in payments for overtime as almost 48 percent respondents noted that unlike salaries, the payment for overtime was not fixed and rested on the discretion of the

supervisor, or more commonly, varied from one project to another. Most respondents felt comfortable in working overtime if they knew the payment in advance.

#### *Work hours, transportation, and the last-mile connectivity*

The respondents were asked numerous questions about their work hours and shift. Almost 90 percent respondents worked up to 60 hours in a week<sup>iv</sup>. Approximately 19 percent respondents worked on the night shift (10 PM to 6 AM<sup>v</sup>) and more than 90 percent of it was males. In a few instances, females worked at night;

- a) if it was a short-term project;
- b) if it was with a colleague (male or female) who lived in the same neighborhood (or nearby) as them;
- c) if the employer provided for transportation; and,
- d) if a family member (including extended family) was able to drop or pick them up to or from work.

The absence of reliable public transportation is seen as an important factor that increases the risk of victimization. 53 percent respondents had their own (including borrowed from family members) mode of transportation, mainly a two-wheeler. The male respondents outnumbered the female respondents almost 2 to 1 in having their own transportation. It also determined how likely the respondents were to work during late night or early morning hours. It denotes that more females had to either rely on coworkers, friends or family to commute to places of work and recreation. The rest of the respondents relied on a variety of options including bus, metro (train), or auto-rickshaw. About one-third (35 percent) of respondents reported that their employers provided transportation for the night-shift, but most of them even then felt safer if they were traveling with a coworker instead of traveling alone. Most respondents that relied on public transportation still had to wait for the metro, bus, cab or auto-rickshaw, out of which only the metro was considered reliable as per the timetable or schedule. The buses (at night) at times ran late and a few times did not show up. The respondents also noted that the walking distance from the drop-off location to their home as something that they had to take into consideration when accepting or declining to work at night. This *last-mile connectivity*, the distance that they have to cover on foot, is critical to women's safety in particular.

About 20 percent respondents sometimes used taxicabs that though considered to be reliable<sup>vi</sup> (especially those run by private companies and monitored by the GPS), were a more expensive option for daily use. A few respondents had worked out a fixed monthly charge with auto-rickshaw drivers as it was less expensive than using taxicabs. That is, they would pick up and drop off the respondents to and from work at the pre-set time while serving other customers during the day. The respondents' family members were also aware of the auto-rickshaw drivers and had their complete contact information. A few had even got the police verification of the drivers. All these steps added a sense of security for the respondents and their families. Overall, about 40 percent respondents reported having relied on family members (including extended family) at least a few times in a month for the commute to work as there was an enormous gap between the available public transportation and the needs of the growing workforce. Nearly 53 percent respondents said that they had started to save up to buy their own conveyance.

While further explaining the problem of the last-mile connectivity, respondents talked about the poor lighting around the bus-stop where they had to wait, and the street where they had to walk on foot. Both male and female respondents reported encountering drunken men as they waited for transportation or walked even the shortest distances at night by themselves. Along with urban slums, liquor shops have been mushrooming especially in the poor neighborhoods. Many young, poor males can be seen loitering around these liquor shops. It is not to suggest that alcohol alone is to be blamed for urban crime in India, but it is important to study alcohol abuse in relation to poverty, hopelessness, relative deprivation, socioeconomic disenfranchisement, and other environmental factors. The urban slums create a convergence of many such elements that contribute to high crime in cities like Delhi where the economic disparities are monstrous, obvious, visible, and experienced on a daily basis.

### *Family, urbanization, and socialization*

As previously mentioned, this paper also included questions on family and other living arrangements. Traditionally, Indians have had strong immediate and extended family structure that acted as a natural protective guardian. In this paper, a majority of respondents (60 percent) reported living with their family that included parents, grandparents, and siblings. This included almost the same percentage of male and female respondents. Fewer than 15 percent respondents lived with extended family members (female to male ratio is 2 to 1 in this paper), thus still providing some supervision or protective network. The rest shared accommodations with friends, coworkers or lived alone (6 percent).

As many as 45 percent respondents financially (fully or partially) supported their family. It included 68 percent male respondents and 25 percent female respondents. Most Indians still live in families comprising of grandparents, parents, and unmarried children. In a joint family structure, there would be grandparents, married brothers, and their children living together. With urbanization, there has been a growth of nuclear families, but in most cases, unmarried children (of all ages) still tend to live with their parents. It is due to economic and emotional interdependence as well as the cultural and social habit and expectations. For instance, most parents (especially in the middle-class) support their children's education, house them, and take care of them until they are married. Even after getting married, one of the sons is expected to take care of the aging parents as there are no social security networks or adequate assisted living facilities. However, economic and educational opportunities and globalization have brought about many changes, including increasing number of young adults living on their own as they pursue their educational and career goals. This applies to the international migration and also to the rural to urban and urban to urban migration as specific cities evolve as job-markets.

This study found that majority of respondents who lived away from immediate family visited their parents quite often especially during the festival season. Depending on the distance and family structure, some respondents visited once every three to four weeks. If the parents were alone and elderly, the respondents visited them more often as compared to if other siblings were living with the parents. Most respondents noted that their parents supported and trusted them in making their choices, but they worried about the environmental factors such as rental place, imposing on their relatives for an extended time, work hours, commuting to work, and so on. This concern was more pronounced in case of daughters, but most parents were largely supportive of their aspirations. This movement away from the family though necessary also

increases the risk of victimization as people navigate unfamiliar, formal, and undefined environments.

The stable and familiar community environment brings collective or shared responsibility, while more unfamiliar and formal environment seems to bring social alienation which is reflected through reluctance to help others, lack of empathy, high social and physical incivilities, and general lack of respect for shared public spaces. The situation is made worse due to inadequacies of the criminal justice system, especially police. According to Gill<sup>vii</sup> (email communication) most offenders commit many petty crimes before graduating to committing more serious crimes, some of which are picked up by media and garner public interest or lead to demands for change. She notes that the inadequate response of the criminal justice system in the first instance needs to be addressed. On the one hand, rapid and perceptible affluence and lack of protective networks and systems create more opportunities to commit crimes, and on the other hand, the ability to get away with crime repeatedly feeds the criminal motivation and compromises any potential for creating deterrence.

The majority of female respondents (73 percent) viewed financial independence as means to break patriarchal limits and regulations. In response to a separate question, most of the female respondents did not want to continue to work after getting married especially out of financial compulsions. That is, they hoped to work only if they wanted to, and not because they needed to; it relates to ability and choice. Being able to get from point A to point B by themselves, instead of relying on male members or coworkers, is seen as an extension of that independence. Generally speaking, this notion of being protected by male members strengthens patriarchy whereby in return of that protection females are expected to adhere to rules and boundaries set by male members lest they risk losing that protection. However, the reality is a lot more nuanced and layered. For instance, though most respondents argued against patriarchy, but due to inadequate systems in place, they chose to rely on male friends and colleagues even when going out for movies and shopping. For more than 65 percent respondents (males and females), the networks formed at work extended to their social lives. Almost 72 percent respondents talked about the widening of the gap between aspirations of the young people and the supporting infrastructure; the absence of which at times makes it difficult to challenge the traditional gender roles. A few respondents also clarified that having a male member did not by default ensure security or imply patriarchy, and even male respondents preferred to socialize and travel with other friends (males and females).

Among those who live away from immediate family, 50 percent respondents said that they would move back to their hometown if they could get a similar job. Though a few more (63 percent) felt that it would be nicer to move closer to family, but they did not want to live with the family as they valued their independent lifestyle. However, this was a more common sentiment among the respondents who had lived away from family for less than two years, and they also added that they would prefer to move back home after a few years. In the follow-up interviews, the female respondents elaborated that their circles would be more defined through familial responsibilities after they get married and therefore, saw it (working away from home) as a short-term arrangement anyway. Nonetheless, if possible, they wanted to live a few blocks away as that would allow them to receive and provide support, and yet be independent. There was almost 20 percent difference in the response for females for these two questions, while it changed only by 3 percent for the male respondents. That is, males who wanted to move closer

to home wanted to live with family, while females who wanted to move closer to home still wanted to live independently. At least in part, it might be related to the socialization of men to rely on women for household chores, and the environment that is generally more restrictive for women.

According to Gill (email communication), though more than half of India’s population still lives in villages, there has been an exponential growth in the urban population; a vast majority of which is concentrated in mega-cities and metropolitans. She argues that these urban spaces are defined by extreme affluence and extreme poverty, including disparities in income, housing, consumerism and overall quality of life. There is a convergence of elements of opportunity to commit a crime, ease of committing a crime, and lack of accountability for the same. In fact, the poor functioning and even poorer perception of the criminal justice system remains a pertinent factor for explaining increase in crime in India. As noted earlier, it is important to guard against taking these factors singly to explain crime. For example, there are many crimes committed against women in the rural sector, while the urban centers afford women more avenues to succeed; the debate should not be compartmentalized as either all positive or all negative.

Gill (personal communication) notes that given the pace and nature of urbanization, the absence of constructive role models, coupled with exposure to risky behavior in the cyber and social space, it inculcates deviant culture, both among affluent urbanites and those living in slums. Similarly, unfettered access to the Internet, the absence of meaningful sex education in schools, and the inability of law enforcement to gain legitimacy or trust means that many are left to their own devices and measures. It is critical to evaluate these factors in an Indian context and sensibilities instead of the temptation to look at them through a Western or Eurocentric prism where the sociocultural and legal dialogue on sex and sexuality is at a different pace and point. Additionally, one cannot simply transplant ideas across cultures but must strive to create room for societies to evolve from within. It is a common mistake to compare and contrast behaviors across cultures without taking into the account the larger framework within which those behaviors exist and take shape. It often creates a dynamic where modernization is confused with Westernization (specifically Americanization) leading to either resistance or cynicism.

### *Crime in Delhi*

**Table 1 shows data on crimes against women in Delhi from 2009 to 2013 (“Supreme Court lambasts,” 2013).**

Crime	2009	2010	2011	2012	2013 (till 10/15)
Rape	469	507	572	706	1330
Molestation	552	601	657	727	2884
Eve-teasing	238	126	165	236	793
Abduction of women	1655	1740	2085	2210	2906
Cruelty by husband/in-laws	1297	1410	1585	2046	2487
Dowry death	141	143	142	134	123

In India, the sharp increase in the number of rapes since 2012 is, at least in part, attributed to the increased reporting of crime by victims. Since the brutal Delhi rape case in 2012, there have been many programs in news media that encourage victims to come forward and seek justice, instead of blaming themselves for being victimized. The news media in India extensively covers stories about rape and sexual assault on a daily basis, thus creating more urgency for the criminal justice system to address them. In their interviews, the respondents explained that apart from increasing the number of women in policing, there is a need to challenge the patriarchal mindset that still encompasses police force, judiciary, corrections, and politics<sup>viii</sup>. For the most part, it is not the absence of laws but their lack of implementation that seems to ail India. Therefore, major changes are warranted in the police system that still relies on political patronage for its daily functions.

The police in India still see crowd control as its primary function rather than protecting the public. Most police officers, especially constables that constitute upwards of 80 percent of Indian police force, need to be paid better salaries and benefits and must be trained in gender sensitization. Many constables struggle to make ends meet, live in slum-like conditions, face abuse from senior officers, politicians, media and public alike. More than 68 percent respondents felt that the police officers who regularly engaged in serving politicians should serve the people. The criminal cases that make it to the court generally go on for years, if not decades. The victims either give up or feel harassed by the system itself. To gain public confidence and legitimacy, the criminal justice system has to deliver timely justice. Most respondents in this study were of the opinion that though crimes against women make more news, men were equally vulnerable in this new rapidly evolving urban landscape. There is a need for substantive social, cultural and politico-legal change and not just the convenient response of controlling female mobility.

In response to a question on the factors associated with the Delhi rape case, 20 percent identified poverty, 11 percent identified gender bias, misogyny and cultural attitudes towards women, 14.6 percent blamed poor law enforcement, 19 percent blamed inadequate public transportation, 11 percent blamed late work hours, 10 percent saw traveling alone that too without adequate protection as a problem (though the victim in Delhi rape case was traveling with a male<sup>ix</sup> friend), about 8 percent identified the sexually repressed society as the culprit, while a few others felt that Delhi has always had a high crime rate. There was no stark difference in responses among males and females. Though 1 in 5 respondents said that they would look for a job in another city, most respondents also noted that the fear or concerns were probably a temporary phase.

About 26 percent respondents believed that entertainment media (television and films) could do a better job of portraying men and women. The interaction between the two sexes could be shown as respectful, friendly and “normal,” instead of as over-sexualized, violent or taboo. However, most respondents felt that it was easy to blame the films and music instead of the actual institutions that are responsible for education, protection, and justice.

### **Concluding Remarks**

In summation, India is a fast developing economy, and materialism and consumerism are both drivers and products of the same. However, when it happens in a society that has extreme disparities, it creates cleavages of opportunity to commit a crime. For example, one of the

respondents noted that she felt safe inside the mall, but not around it including the parking lot where “young men from nearby slums” roamed around especially at night. She said that it was not uncommon for men to pass lewd remarks, but the parking attendant could do little to stop such miscreants as he could himself get beaten up or killed. These normal or routine urban spaces, therefore, are punctuated by many risk factors. The strain of poverty is aggravated when coupled with a sense of disenfranchisement and hopelessness about upward mobility. It is equally important to not romanticize with the idea of poverty in the ideological drive to challenge corporate corruption and lopsided capitalism. As many prior studies have found, one of the obvious findings was that India needs to address its extreme poverty in a serious and tangible manner and not just as a political slogan. The desperation to commit a crime may be due to poverty, but the ability to get away with crime is also part of the calculation that is often rooted in a wider range of factors including cultural attitudes, peer influences, and the inadequacies of the criminal justice system.

The rapid pace of globalization and development makes it critical for India to invest in its infrastructure including transportation, especially as India develops a large service sector catering to a global population that attracts younger and educated labor force. Though many respondents wanted to purchase their vehicle, a better alternative would be to have better public transportation which would help cities like Delhi in reducing its traffic woes, pollution, and improve the overall quality of life. Lastly, family, society, workplace, and criminal justice system are all part of the protective network. These formal and informal institutions have shared responsibility and if any one of these fails to deliver, there will be increased crime and victimization. As economic factors necessitate movement away from informal protective networks such as family and community, the formal protective networks need to be strengthened. It includes better infrastructure and transportation, increased security around places of work and recreation, gender-sensitized socialization at work and shared public spaces, and effective criminal justice system. The insight that the young workforce provided in this study is only a starting point, but can be valuable as the rural to urban and urban to urban mobility in India is only going to increase in the coming years.

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<sup>i</sup> At the time of planning this study, I contacted numerous MNCs and BPOS in the NCR that cater to local and global customers. None of the companies responded to assist with their employees being selected as respondents for the study. After about four weeks, I contacted academicians in universities and colleges in and around Delhi to get guidance, and received response from Dr. Manish Verma, Assistant Vice President-RBEF, Amity University. He suggested contacting placement agencies to get in contact with the young workforce. It was an invaluable suggestion as after a few deadends, I was able to contact a few participants, who in turn put me in contact with their friends and coworkers.

<sup>ii</sup> VIP is an acronym for Very Important Person characterized by people who feel entitled and too important than the rest of the public to stand in line at the airports, voting booths, hospitals, or get stranded in traffic. The Supreme Court of India has frowned upon the VIP culture that has become symbol of threat, power, and pomposity.

<sup>iii</sup> Though night shift is often referred to as graveyard shift (approximately midnight to 8 AM), in this study, the work shifts are divided into three broad categories, namely, day (start work after 7 AM and finish work before 6 PM), afternoon or evening (start work after 2 PM and finish before 10 PM), and night (start work after 10 PM and finish by 6 AM).

<sup>iv</sup> The majority of companies or organizations in India have a six day per week work schedule (48 hours per week).

<sup>v</sup> In the initial conversations with placements agents, it was learned that different people see night shift differently. For some it started after midnight, while for many it started at 10 PM. Therefore, the study used broad categories of shifts to get the best estimate.

<sup>vi</sup> The alleged Uber rape case in Delhi has thrown open the debate on the safety of these taxicab services. Uber though claims that its taxis have GPS in them, the reality is that the taxi drivers in Delhi use iPhones (mostly old models) and turn on the GPS on their phones. It also means that they can easily go off the radar by simply switching the phone off (Lakshmi and Gowen, 2014).

<sup>vii</sup> Dr. Rajesh Gill is a Professor of Sociology at the Panjab University (Chandigarh, India), and an expert on urban sociology. Her opinions were sought through email.

<sup>viii</sup> It is a commonplace for police officers, lawyers, judges, and politicians to make extremely misogynist remarks even in cases of crimes like rape and blame the victim. In November 2013, Tehelka's founding member and editor Tarun Tejpal was arrested for alleged sexual assault on a female colleague (Bhalla and Gottipat 2013). As the editor, Tejpal had supported the calls for stringent laws against rape, but after his arrest, his defense team argued that the laws framed after the Delhi rape were too draconian (Sanyal 2013).

<sup>ix</sup> For the most part, it is still considered safer to travel with men especially during late hours or at crowded places.