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Discussing the present - Influencing the future

Department of Political Science & Criminal Justice

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Critical Issues in Justice and Politics is a refereed (peer-reviewed) journal which contributes to the theoretical and applied nature of justice and politics. We are a scholarly journal which requires all articles to undergo an extensive review process for both content and format. Our emphasis is on the exchange of qualified material in order to generate discussion and extend the often limited boundaries of scholarly exchange.

Critical Issues in Justice and Politics is sponsored by the Department of Political Science and Criminal Justice at Southern Utah University. The editorial board is comprised of faculty from the department as well as select faculty and practitioners from around the United States.

Published three times a year (Winter, Spring & Fall), *Critical Issues in Justice and Politics* focuses on emerging and continuing issues related to the nature of justice, politics, and policy. A special emphasis is given to topics such as policy, procedures and practices, implementation of theory, and those topics of interest to the scholar and practitioner alike.

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Critical Issues in Justice and Politics is considered a serials publication under definitions by the Library of Congress and the International Standard Serial Number (ISSN) system. The ISSN number, along with identifying information for the serial publication, appears on all copies of the journal. The journal may be obtained online or through many of the traditional research databases in academia.

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We are an electronic journal which is published using the Portable Document Format (PDF).

Submission Guidelines

Critical Issues in Justice and Politics welcomes submissions from anyone who can write a high quality scholarly article. We are especially interested in scholarly, critical, and constructive articles which focus on an emerging or continuing issues in justice and 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/or politics. We also encourage submissions from practitioners, students, and others who have an interest in the topics.

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We prefer manuscripts which are not under review by other journals or publications. We endeavor to review all manuscripts in a timely fashion, so simultaneous submissions are not usually necessary.

Refereed submissions are submitted within forty-eight hours of acceptance and we generally ask reviewers to complete their assignment within ten (10) working days. In most instances an editorial decision may be reached within a month of submission.

Non-refereed materials usually receive attention within the first week of submission. An initial editorial decision is often made within five business days.

All papers submitted for refereed publication will be sent to at least two reviewers. We use a blind-review process which submits papers in anonymous format. If there is a clear split between the reviewers then a third reviewer may be used when necessary for clarification or additional comment. We do rely very 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 on the basis of their scholarly competence as well as the potential contribution to appropriate theory or related areas. Authors may not contact reviewers during the process, and reviewer names are not disclosed unless the reviewer agrees to such disclosure.

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

For more information or to submit an article or other material for review please see our webpage.

Journal Webpage: http://www.suu.edu/hss/polscj/CIJP.htm

From The Associate Editor

This edition of *CIJP* completes Volume 2 of our journal. How time flies – and how times have changed since publication of Volume 1 Number 1 only twenty months ago!

Through the first four issues, we've had the pleasure of publishing twenty-two articles covering a myriad of topics. We have received submissions from authors all over the world.

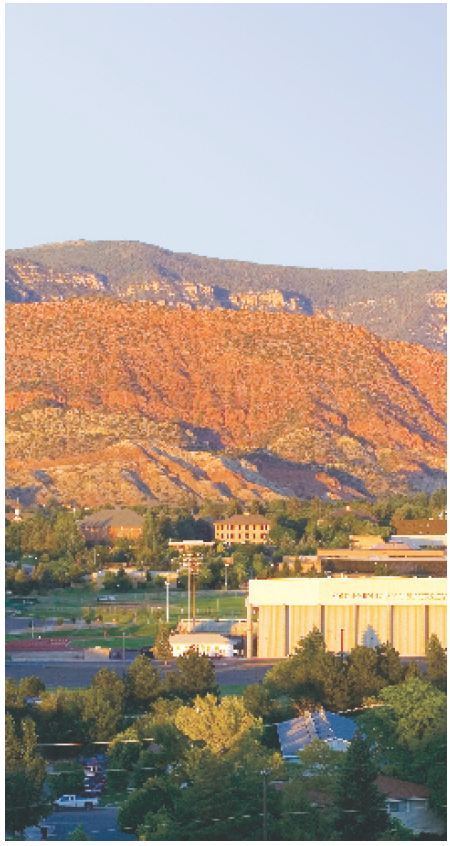
You wouldn't think that an electronic journal would feel the pinch of an economic recession – after all, where is the cost involved? There's no paper, no printing, little or no graphic design; so what's the problem?

The cost comes in the form of time. The editorial board of *CIJP* consists of the faculty/staff of the Department of Political Science & Criminal Justice at Southern Utah University. SUU, like virtually every other public institution in the United States, has been hit with a series of budget cut mandates over the last two years. And with the economic downturn, positions are not being immediately refilled, with some being eliminated entirely.

Despite this, enrollment is up nationwide. People now out of work are entering college to finish a degree or garner a new skill. Universities and colleges across the country are teaching more students with fewer faculty. Faculty members are teaching larger classes and more classes with less support staff than in the past.

Our department fits into this description perfectly. In spite of the expanded workload, we are still committed to publishing *CIJP*. We feel it is an important platform giving voice to issues that may not fit into another publication. What we are short of is time. That shortfall has made this edition, Volume 2 Number 3, out a month late. We apologize for this delay, and hope that you can understand the circumstances under which we are all operating.

We hope you enjoy the articles in this edition and sincerely appreciate your continued support of *CIJP*.



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Caveat Emptor and Jackpot Justice: Money in Alabama's Judicial Elections

Phillip B. Bridgmon, Ph.D.,
University of North Alabama

"If you cheat us, we'll make you pay"
Circuit Judge William Robertson (Barbour County, Alabama)

The recent *Caperton* decision by the Supreme Court held that judges must recuse themselves in cases where they receive significant campaign contributions from parties in a particular case. This decision has added heft to the debate over money in judicial elections at the state level. Without argument, Alabama's judicial elections are a prime case for examining the issue of money and decisions in judicial elections and behavior, respectively. Since 1993, Alabama's Supreme Court candidates have raised and spent more money than candidates in any other state. Onlookers are left to wonder how such a system can promote justice and whether judicial decisions are for sale. This study examines the role of money in getting elected, deciding cases once seated, and whether or not efforts to reduce the influence of money are likely to be successful. As such, a basic model of campaign finance in court elections is tested. The recent controversial Exxon decision is briefly analyzed, and the likelihood of success for judicial selection and campaign finance reform efforts.

Introduction

The *Caperton v. Massey Coal* (2009) decision by the United States Supreme Court now requires judges who receive significant campaign contributions to recuse themselves in cases where their campaign benefactors have cases pending in their courts. What might seem isolated – judges receiving extremely large sums of campaign money from single sources who have business in the courts – is actually not rare. In Alabama, for example, control over the judiciary has become hotly contested since 1994, primarily over the issue of tort law. As such, Alabama's Supreme Court elections are the most expensive in the United States (Sample, Jones, Rice, 2007). Each election cycle sets new records for campaign expenditures by both parties. Table 1 summarizes the total spending for all elections from 1994-2006. During the 2006 election cycle, 15 Supreme Court candidates raised approximately $13.5 million. Sue Bell Cobb, the lone Democrat victor in 2006 was outspent by her Republican opponent, sitting Chief Justice Drayton Nabers, by over $2 million ($2.6 to $4.9 million, respectively). In 2000, thirteen candidates spent $12.3 million in five races. The previous election cycle, 1994, eleven candidates spent a modest $6.4 million.

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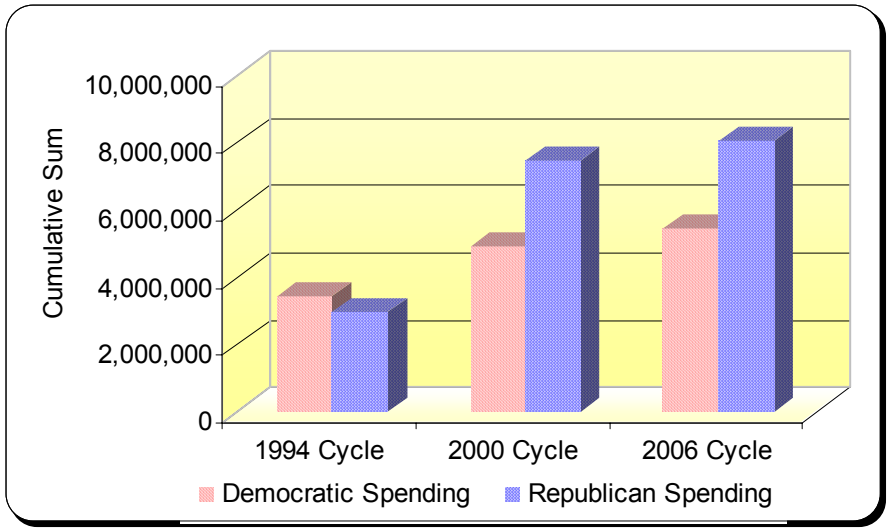
Much has been made of the near doubling of money in Alabama's Supreme Court elections from the 1994 cycle to the 2006 cycle; however, the cascade of money is not the only peculiar aspect of Alabama's judicial elections.

Table 1
Total Spending By Party In Alabama Supreme Court Races 1994-2006



Partisanship dominates Alabama's judicial elections along with the nastiest political rhetoric at any level of politics. Currently, the Alabama Supreme Court is composed of eight Republicans and one Democrat. Conversely, after the 1994 election cycle, the Court was composed eight Democrats and one Republican. Interestingly, the lone Republican elected during the 1994 cycle was Perry Hooper, the first Republican elected to the Court since Reconstruction. His election served as the first domino that began toppling Democratic control of the state's highest court. The 1994 cycle was also unique in that it brought with it the overtones of the nasty rhetoric that had largely been absent in Alabama judicial elections. Using political guru Karl Rove, Hooper was able to paint Democratic justices as pawns of trial lawyers. Hooper and his slate of business backed candidates used outcomes of select tort cases to buttress the closely held notions that "jackpot justice" was very much alive with the Democrat-controlled courts, and that Alabama was all too hospitable for suing business and individuals. Perhaps the most damning insinuation during the campaign was the assertion that sitting justices could have their decisions "bought" by liberal interests.

Questions

This research seeks to gain a more modest understanding of the role money plays in Alabama's judicial elections. What precisely are the influences of money and partisanship on getting elected to the Alabama Supreme Court? The proliferation of money in Alabama's judicial elections could have several influences: the money could buy votes, undermine support for the judiciary and justice, or there may be no influence. An additional question is whether or not a connection exists between money and voting in Court decision-making. Recently, the Supreme Court ruled in favor of Exxon, part of an industry that has given substantially to Republican judicial candidates, in a long-running dispute with the Department of Conservation and Natural Resources over royalties owed for excise of natural gas in Mobile Bay. Substantial verdicts for the State of Alabama (on two occasions Exxon was ordered to pay $3.5 billion), have been set aside by the Supreme Court on party-line votes. This case is utilized to examine the connection between party, interests, and appearances of these controversial decisions, as well as discern which explanations best account for the role money plays in Alabama's judicial system

Finally, what is the likelihood of reforming judicial selection in Alabama? Some suggestions for reform include removing party labels, limiting contributions, and even moving toward a merit/retention system. These suggestions are not new, but there is growing momentum nationally and within the state to critically examine the way judges are selected. Thus, public statements of elected officials and political leaders form a basis for assessing these proposals, which is commented upon later in this paper.

Significance

How judges make decisions is of paramount importance for justice. Currently, very little empirical work as been conducted that examines which judges make decisions on particular types of cases. The only systematic study to date used qualitative methods to align Alabama Supreme Court Justices' decisions with their party identification in business cases. As expected, business backed judges side with business in economic cases at each level of decision-making. In Alabama, Republicans are typically backed by business interests. This dearth of empirical research currently leaves our understanding of money and justice in Alabama rather incomplete. As Alexander Hamilton noted in Federalist 78,

> "Independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of

> particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."

The current state of judicial elections in Alabama comes nowhere near this perspective.

Literature Review

State Supreme Court races have seemingly become more expensive and heated in the past fifteen years. While the role of money in legislative and executive races is better understood (Gierzynski and Breaux, 1991), our understanding of the role of money in judicial races is a bit more modest. Bonneau (2004) finds in his examination of campaign spending and competitiveness that from 1990-2000 judicial elections across both partisan and nonpartisan elections saw significant increases in campaign spending and a corresponding decrease in competitiveness. We are left the question of what caused the influx of growth and the corresponding decrease in competitiveness.

Using the same dataset, Bonneau (2005) seeks to precisely gauge the effects of incumbency in Supreme Court judicial elections in hopes of better understanding competition. He finds that judicial incumbents have increasingly gone down to defeat at greater rates than their legislative and executive counterparts, which he deems a sign of competitiveness. His exploration of incumbent defeats finds candidate characteristics (quality and spending), and institutional arrangements (partisan election and term length), all serve to explain the success or failure of judicial candidates seeking reelection.

Despite knowing that money plays an increasingly important role, competitiveness in judicial races cannot totally be explained by campaign spending, we are left with the fact that money has grown tremendously without much of an explanation for its effects. Particular to our question, the explanation of why so much money has proliferated has not been fully explored. Bonneau (2005) sets out to explain why states vary in their campaign spending for Supreme Court elections. He finds that competitive and open-seat races generate the most spending. Support is also found for higher spending for longer terms, but not for partisan or non-partisan elections. Finally, a higher percentage of tort cases allocated on the court's docket is a positive contributor in Supreme Court races.

The prevailing literature on judicial elections points toward electoral pressures which are similar to legislative and executive races. Hall (2001), for

example, finds that judicial retirements are influenced by institutional choices that are both strategic and contextual. The law has an indirect effect on their decisions, whether it be voting on cases or deciding to retire. Apparently the most significant indicator of judicial behavior is electoral vulnerability in partisan or retention elections. Her finding is significant in that judges in partisan elections readily appear to be affected by electoral pressures. Within a democracy, electoral pressures are a requisite for making sure democracy is healthy.

Hall (2000) further elaborates that advocates of judicial reform fail to properly estimate the accountability mechanisms that direct election provides. She contends that much of what passes as a normative view on selecting judges is without merit. Her analysis fails to properly account for why judges lose, who challenges incumbents, the precise role of money, and the proper linkage between elections and public opinion. Our understanding of the precise role of money is unclear. There are those who take a very negative view (Wohl, 2000), while others find support that is consistent with spending across election types (Schotland, 1985). Money has also been demonstrated to be of particular importance for challengers. Taken on balance, an overly negative view of judicial elections has yet to emerge in the scholarly literature.

Despite these efforts, a void currently exists for a precise explanation of what money does in judicial elections and the influences upon judicial decision-making. Hall (1995, 1997, 2000, 2001) has done serious work that undermines the arguments for wholesale reform efforts that remove elections, whether partisan or not. Thus, we are left with determining who gets elected, how, and what explains his or her behavior once on the bench (Burbank, 2002; Brace and Hall, 1995). Alabama's judicial elections, given their characteristics, provide an optimal case for testing these various explanations.

Data/Methods

This examination utilizes data from multiple designs: case study, secondary data analysis, and elite interviews. Financial data for judicial elections are housed with the Alabama Secretary of State's office. Nonprofit, nonpartisan organizations such as the National Institute of Money in State Politics maintain databases of information collected from the various states and Federal Election Commission. These reports contain details of total spending, broken down by primary and general election. Moreover, they contain lists of contributors by individuals and political action committee or type of interest – labor, trial lawyer, business, oil, etc. This type of data can be used to describe the extent to which money is involved in Alabama's judicial races. Given the importance of ideology, mass and elite ideology scores provided by Richard C. Fording at the

University of Kentucky are utilized in the election model. Election returns were gathered from the Secretary of State, and computed using victory margin as the primary dependent variable.

Findings

Campaign spending totals for all contested Alabama Supreme Court races from 1994-2006 yields a total of twenty races (n=20). Table 2 contains the summary statistics for spending by party. The statistical verdict for Democrats in Alabama's judicial races is as dire as their electoral fortunes have been during the period under review. On average, Republicans outspend Democrats by an almost two-to-one margin, $1.5 million to $888,514. Over two-thirds of Republicans spent more than $1 million each in their victories.

Democrats did not fare particularly well in winning seats from 1994-2006. The average margin of victory for Democrats was a meager 2.8% while their Republican counterparts enjoyed a more comfortable 10.1% margin of victory. Further, most of the Democratic successes were during the 1994 election cycle where they also enjoyed a near two-to-one money advantage. Since 1994, Democrats have only been able to pick off two judicial races (1998 and 2006) with no incumbents winning reelection.

Table 2. Campaign Spending in Alabama Supreme Court Races 1994-2006

Party	Mean Spending	Average Victory Margin
Democrats	$ 888,514	2.80%
Republicans	$ 1,487,541	10.10%

With such a small pool of cases, a well-specified model of spending effects is not precisely estimable. By taking the natural log of total spending, it is possible to determine what exactly money buys in judicial elections. Money should matter more for challengers than incumbents. In Alabama, most judicial incumbents are Republicans. Thus, it is hypothesized that spending should matter more for Democrats. Using Ordinary Least Squares (OLS) to estimate the impact of spending on securing votes, regression results yield predictable findings consistent with prior work in the areas of money and elections. Table 3 reports the coefficients from the OLS estimates. Democrats enjoy some gain of vote share for their expenditures, but not enough to overcome the ideological advantage Republicans enjoy with the electorate. Both higher spending by Democrats and more liberal mass ideology scores work to make Alabama's judicial races more competitive. On the contrary, Republican spending and elite ideology were insignificant in a predictably positive direction.

Table 3.
Estimates of the Effects of Campaign Spending and Ideology on Victory Margin in Alabama Supreme Court Races 1994-2006

Predictor	b (s.e)
Democratic Spending	-3.57 (1.1)**
Citizen Ideology	-.64 (.31)*
*p.<05 **p<.01	Adjusted R Square = .33
N=20	Note: Campaign spending is logged.

This monetary and ideological advantage enjoyed by Republicans in Alabama has flipped partisan control of the judiciary. Before the fall 1994 election, the entire Alabama Supreme Court was comprised of Democrats. Less than a decade later (2002), the entire Court was controlled by Republicans. This partisan stranglehold begs the question of electoral accountability of the Court and the impartial dispensation of jurisprudence. Moreover, eighteen of the nineteen statewide elected judges in Alabama are Republicans, which includes the courts of Criminal and Civil Appeals. Since 85% of respondents in statewide polls are unable to name at least one statewide elected justice, party label must matter, at the barest minimum, for the purpose of voting. Do similar patterns emerge between the connection of party and judicial decisions?

Decision-Making

The lone examination of judicial decisions in Alabama has focused exclusively on arbitration cases. Using reported cases from 1995-1999, Ware (2002) finds almost perfect correlations between votes in contract cases and the sources of a particular justice's campaign funds. Business-backed justices always (one justice dissented with regularity) voted for arbitration, while plaintiff-backed justices perfectly voted against arbitration. Even in routine, lower-profile cases, justices held along party lines in voting for and against business interests in contract cases. Ware finds that even in areas of the law such as contract formation, interpretation, and waiver, "areas of law to be sufficiently 'neutral,' i.e., sufficiently drained of ideological content, that judges would not fall into easily recognized patterns. Even seemingly bland questions of contract formation, interpretation, and waiver are apparently battlegrounds between the interest groups." (p.22)

Exxon vs. DNR

In 1999, the Alabama Department of Natural Resources (DNR) sued Exxon Mobil over required royalty payments called for in oil and gas leases. One year later, an Alabama jury awarded a $3.5 billion in compensatory and punitive damages (New York Times, 2000). At the time, the amount represented the largest single verdict against a company. The apparent death knell for Exxon was sounded when attorneys for the state introduced into evidence an internal memo where Exxon officials derided the intelligence and abilities of DNR staff members, including usage of the derogatory term "bubbas." Upon appeal in 2002, the Alabama Supreme Court set aside the verdict and ordered a new trial, primarily on the issue of the inadmissible "bubba" memo (New York Times, 2003).

At the second trail, the jury ordered Exxon to pay a total of $11.9 billion to the state for damages, interest, and punitive awards. However, Circuit Judge Tracy McCooey reduced the figure to $3.5 billion to meet prior rulings of appropriateness in the calculation of punitive damages (Wall Street Journal, 2004). Exxon once again sought to have the verdict set aside by arguing that Exxon never intended to defraud the state and that the dispute was simply a disagreement over computing the amount owed to the state (New York Times, 2007). With the same success as in 2002, before an all Republican Supreme Court, Exxon was able to secure an 8-1 party line vote for setting aside all punitive damages in the case (Houston Chronicle, 2007). All eight Republicans voted in favor of Exxon. Sue Bell Cobb, the lone Democrat, cast the dissent.

On the surface, as veteran political scientist Bill Stewart observed, "justice, as we've seen, is partisan." (Jacksonville Times Union, 2007). J udicial behavior during the election cycle of 2006 would also confirm that present judges would be in agreement. During the 2006 Chief Justice race between Cobb and Drayton Nabers, Cobb accused Nabers of being backed by PACS controlled by Exxon-connected lobbyists. During the campaign, in an effort to inoculate himself against the charge of being in the pocket of big oil, the Administrative Office of the courts issued a statement that Nabers would no longer be part of any proceedings involving the Exxon suit since he was state finance director during the initial appeal and subsequent retrial. These efforts were not enough to stave off defeat. Alabama's populist streak has consistently found the actions of Exxon to be intentional and flagrant (everyone knows about the "bubbas" memo whereby Exxon officials use the word Bubba to describe Alabama officials). The jury verdicts are a testament to a populist's sense of fairness when a large, extremely profitable company seeks to defraud the state simply because they surmise they can easily get away with the ruse.

More objective observers like Stewart acknowledge both the partisan tilt to the case, as well as the potential opportunism that may arise if the verdict is used in subsequent judicial elections. As he notes, talk of selection reform subsided when Democrats saw they may be able to use the verdict to gain back seats. Democratic Party Chair Joe Turnham was less diplomatic in his assessment, "It is time to replace the corporate board of Republican justices on the Supreme Court with Democratic jurists that understand that Alabama's highest court is not a toll to protect corporate interests." (Jacksonville Times-Union, 2007). Mike Hubbard, Republican Chair, was equal to the task in his assessment that "Democrats long for the day when plaintiffs' trial lawyers rule the Supreme Court and jackpot justice made Alabama a national joke [judicial hellhole]." (Jacksonville Times-Union, 2007).

Reform Efforts

When Democrats dominated Alabama's courts, they were hesitant to loosen their grip on the levers of power. Now that Republicans dominate the Alabama high courts (one Democrat among the 19 statewide elected judges), they are equally recalcitrant in their opposition to reforming a system that welcomes their electoral strengths. Despite the unlikelihood of any alteration in the way judges are seated in Alabama, political elites continue to beat the drum of reform.

Chief Justice Sue Bell Cobb has been a strong proponent of selection reform and campaign finance reform since taking office in January 2007. She routinely speaks to county and city Chambers of Commerce gatherings, the primary sources of her opposition, to detail the detrimental effects of money, partisanship, and rhetoric in Alabama's judicial elections. One of her allies in the legislature, state representative Marcel Black, Chair of the House Judiciary Committee, has sponsored legislation during recent sessions that would alter the way judicial vacancies occur. Currently, no universal mechanism is in place to fill a vacant seat. Larger metropolitan areas have Constitutional provisions that allow for methods other than election to take place. Black, D-Tuscumbia, currently is pursuing three strategies in the House that would fundamentally change elections for courts inferior to the Supreme Court. His proposals would 1) establish a statewide plan for utilizing nonpartisan commissions to appoint judges to vacant posts, 2) create nonpartisan appellate court elections and 3) create nonpartisan appellate court elections with retention elections at the beginning of the second term.

Black's legislative allies are few. Nevertheless, both he and others are concerned about the amount of money proliferating into Alabama's courts. As Black noted "there is a perception by the public that there is an attempt to "fix" a

verdict. It appears that judges are more concerned about their contributors." (Marcel Black, Personal Communication, 2008). Current Associate Chief Justice candidate Deborah Bell Paseur hinted that the taint of money also undermines the legitimacy of verdicts and the "esteem" in which judges need in order for their perspective to carry weight in the political realm (Personal Communication, 2008). In her own race, ironically, the specter of having to raise significant sums of money to be competitive was not part of her strategic calculus.

Alabama's reform efforts are not isolated political wrangling. In 2007, Georgetown University Law Center hosted the Sandra Day O'Connor Project on The State of the Judiciary. The conference theme, "The Debate Over Judicial Election and State Court Judicial Selection," examined such topics as judicial independence, case law in judicial elections, and reform (Project Background Papers, 2007). Clearly, this topic is the forefront of scholars, practitioners, and court administrators. Despite this interest, the imbedded system of selecting judges is difficult to alter. Representative Black, a conference attendee, is not overly confident his legislation will pass. Having failed last year, coupled with opposition by the Business Council of Alabama, puts the legislation near the bottom of priorities, especially in a tight budget year. Moreover, party opposition is strong, as already mentioned. Thus, the prospects of reform are not good even in light of the many normative arguments for how the judiciary is supposed to function.

Discussion

Clearly, money has come to dominate judicial elections in Alabama due to the committed efforts of the Republican Party, their benefactors, and a handful of issues they exploit to stoke the masses into their camp. The 1994 election saw the Business Council of Alabama fund a slate a Republican candidates all running on a "tested" theme developed by Karl Rove, famous political guru. His advice to all candidates was to utilize sensationalized tort cases to demonstrate how Alabama's Democrat-controlled judiciary was a pawn of the trial lawyers that let unmerited cases defy common sense and put good people out of business. In every subsequent election, Republicans have exploited such issues as tort reform, until it was taken off the table in the late 1990's through reform, violent crime, juvenile death penalty, and religion for their electoral benefit. Democrats have yet to figure out the winning play against such charges. Chief Justice Cobb may have opened up a sliver of hope by running an aggressive campaign that struck a balance between tough on crime and showing good judgment along with painting her opponent as a pawn of the big and powerful. Alabamians usually liken themselves to the "little guy."

It is argued here, however, that Alabama's Republican Party has enjoyed their electoral fortunes not because of a money advantage, but because of an exploitation of issues. Money, of course, helps in this exploitation but is not significant. This is perhaps a confirmatory finding that money helps challengers, which Democrats always seem to be, particularly in judicial elections. Republicans have been able to leverage their ideological/partisan advantages with well-funded candidates who preach messages that are politically attune to the Alabama electorate.

This Republican domination appears to have skewed justice in favor of the conservative attitudes of those who are elected to the Court. Ware's analysis (1999) found significant correlations between party and votes in contract cases before the Court. An analysis of the recent Exxon case finds severe flaws in the conservative majority's legal reasoning and departures from prior decision rules in such matters, i.e. the Court rarely substitutes its judgment for a jury's. In the Exxon case, the Court contradicted the jury twice. We are left to conclude, even if imperfectly, that justice is indeed partisan in Alabama.

Restoring judicial independence in Alabama is highly unlikely. Calls for reform have gone unanswered for nearly a century. Given the relative low profile of jurisprudence and low information judicial elections, this issue is largely a contest among political elites. Once reform of any ilk appears likely to occur, special interests will then turn to the people for aid in blocking any change that will take away the people's voice even though public opinion supports removing party label at the least. Alabama's Constitution essentially gives special interests many opportunities to defeat any changes to the way power is divided. Nonetheless, leaders like Chief Justice Cobb will continue to try to "keep the dialogue going" in regards to this issue (Personal Communication, 2008). There is an acute awareness that reforming judicial selection is not on the horizon.

Conclusion

Money will continue to dominate Alabama's judicial elections. Democrats may pick off a few seats here and there when they can exploit the issues and opportunities that will arise. The lopsided control of the judiciary seems to benefit a conservative ideology as Republicans appear to be squarely in line with moneyed business interests. Altering the way judges are selected that includes reducing the effects of partisanship and money are unlikely to make progress in the legislature or with the people. Alabama's judiciary continues to be a less than desirable place for democracy and justice to flourish.

The problems with this scenario are that citizens will lose confidence in the judiciary. As noted in the Caperton case, when a party in a case looks up at

the bench and sees a judge who received millions of dollars in his or her campaign from the person that has wronged them, there is not much hope for fairness. Impartial jurisprudence is essential to the proper functioning of the courts and their place in a democratic society. So long as money and partisanship color images of justice, there can be no equality before the law, blind justice, or faith that the merits a case in relation to the law are the basis for judicial decisions.

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Clash of the Titans: A Theoretical Competition Between Self-Control and Social Bond

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For many years, researchers have lauded the utility of oppositional theoretical inquiry. However, criminologists have not made concrete determinations as to the viability of many theories that lack empirical support. As a result, several perspectives continue to attract attention even though they lack explanatory power. With this in mind, this study subjects self-control and social bond theories to a competition in an attempt to determine which is the better explanation of three forms of crime in a National sample. Logistic regression results indicate that self-control is a more robust explanation of drug and property crime than it is of violence. On the other hand, social bond also partially explains drug and violent crime while only weakly contributing to property offending. These findings indicate that these two unique perspectives contribute in different ways to our understanding of criminality. Based on the results obtained here, self-control "wins" the competition but only by the narrowest of margins.

Introduction

Since the days of Lombroso, theories and their utility in explaining criminal behavior have been oppositional in nature (Hirschi, 1989). One reason for this is that they are designed to directly challenge others and are forced to be clear as to their propositions (Hirschi, 1989, p. 39). It was thought that as a result of such combat, criminological inquiry improved over time because it afforded scholars the opportunity to make statements regarding which theories are relevant to the explanation of crime (Hirschi, 1989, p. 27). Today, "oppositional theoretical inquiry" is referred to as theoretical competition. The purpose of this article is to subject two of the most popular theories in criminology – self-control and social bond – to a theoretical competition to determine if either of the two theories or a combined general one, better predicts property, drug, and violent crime.

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Over the last several decades, criminologists have benefited from a cornucopia of popular traditions. To some, this is a good thing as it encourages debate, revision, and policy discourse. To others, it has become tedious as some theories that lack empirical support have not been discarded. As a result, one can select from anomie (Merton, 1938), general strain (Agnew, 1992), interaction (Thornberry, 1987), life course (Sampson & Laub, 1993), and differential association (Sutherland, 1947) just to name a few. Whatever one's theoretical persuasion, it is difficult to find two theories that have generated more study and spirited debate than self-control and social bond (Geis, 2000; Hirschi & Gottfredson, 2000).

For three decades, Travis Hirschi has been at the forefront of American criminological thought and in 1969 he developed social bond theory (Hirschi, 1969). It has also turned out that his paradigm has become one of the most frequently tested (Greenberg, 1999) with one of the reasons for this fact being that the theory is easy to test. The core of it asserts that individuals enmeshed in conventional institutions and relationships are insulated from crime (Junger-Tas, 1992). Hirschi borrowed many of his concepts from a number of Durkheim's writings (1964; 1961; 1951) and consolidated those ideas into what he called the social bond. In a nutshell, Hirschi argued that the likelihood that delinquent acts would occur increased when an individual's bond to society is damaged.

According to Hirschi, there are four conventional parts to the social bond: attachment, commitment, involvement, and belief. Attachment is the most important part of the bond and it operates in three different arenas: parents, school, and peers and they address an individual's feelings. For example, if an adolescent was close to his or her parents, he or she possessed high levels of parental attachment. Hirschi also felt that the parental tie was the most important attachment as it was his view that if adolescents were strongly bonded to their parents they would be more likely to try to please them by not engaging in delinquency. Commitment is thought of as the aspect of the bond that indicates aspiration to conventional goals, such as doing well in school. Involvement refers to time spent engaging in conventional activities, like doing homework. Lastly, belief is an indicator of an individual's attitude toward societal rules. Hirschi also stated that if one element of the bond strengthened, then the others were more likely to as well. On the other hand, if any one or more aspects of the bond weakened, that individual would become "free to deviate." In 1990, Gottfredson & Hirschi developed a new perspective.

In 1990, they co-wrote *A General Theory of Crime* and explicated what has come to be known as self-control theory. While the perspective is almost twenty years old, scholars remain interested in testing its utility (Higgins, Tewksbury, & Mustaine, 2007; Higgins, Fell, & Wilson, 2007; Love, 2006).

Actually, scholars are now beginning to test a revision of the theory (Piquero & Bouffard, 2007) that Hirschi recently authored (Hirschi, 2004). In fact, one could argue that the current test is problematic given that Hirschi's revision is similar to the bond. However, Cretacci (2009s) asserts, contrary to Hirschi's claims, that the "new" measure of self control and the "old" cognitive measures are not the same and explain crime differently. Given these findings, a test such as the current one is still relevant because it may be that one measure outperforms the other and may need to be discarded. Generally, the paradigm states that individuals engage in crime because they are unable to restrain themselves (Paternoster & Brame, 2000) and because they have the opportunity to do so. The theory differs from other perspectives in that it claims to explain all crime.

Basically, self-control and criminal opportunity, make up the theory and Gottfredson & Hirschi (1990) argue that low self-control is stable over time (Longshore, Chang, Hsieh, & Messina, 2004). However, some investigators are now questioning whether low self-control is invariant (Mitchell & Layton-MacKenzie, 2006; Winfree Jr., Taylor, He, & Esbensen, 2006) and whether childhood care-giving is the most important factor in the development of the trait (Burt, Simons, & Simons, 2006; Latimore, Tittle, & Grasmick, 2006). Additionally, acquiring this trait also predisposes individuals to a life of crime that is manifested in personality, attitudinal, and behavioral problems (Tremblay & Paré, 2003). Scholars have identified seeking immediate gratification (Muraven, Pogarsky, & Shmueli, 2006; Piquero, MacDonald, Dobrin, Daigle, & Cullen, 2005), low impulse control (Wiebe, 2006), an unusual desire to take risks (Stewart, Elifson, & Sterk, 2004), laziness (Morris, Wood, & Dunaway, 2006), and aggression as indicators of low self-control (Schulz, 2004). Recent research also suggests that those that suffer from low self-control are more likely to have higher levels of non-response on surveys due to their inability to stay on task (Watkins & Melde, 2007). Gottfredson and Hirschi (1990) also propose that fluctuation in offending rates is due to changes in the opportunities that people have to commit crimes and most studies ignore the possibility that this interaction effect exists (Grasmick, Tittle, Bursick, & Arneklev, 1993).

Another matter to consider is that while a number of studies pit self-control against other theories (Chapple, 2005; Fiftal-Alarid, Burton, & Cullen, 2000; Peter, LaGrange, & Silverman, 2003; Simpson & Leeper-Piquero, 2002), very few test self-control against social bond (Nakhaie, Silverman, & LaGrange, 2000; Nakhaie, Silverman, & LaGrange, 2001). In fact, in those rare instances where both paradigms are included in the same test, it is usually the case that a modified self-control model includes social bonds (Higgins & Tewksbury, 2006; Hope & Chapple, 2005; Nakhaie et al., 2001; Stewart et al., 2004) or utilizes

them as controls (Gibbs, Giever, & Martin, 1998; Hope & Chapple, 2005; Nakhaie et al., 2001).

For example, Longshore et al. (2004) posit an integrated model that uses bonding variables as intervening constructs and found that some bonds mediated the effect of self-control on drug use. They further discovered that self-control was also inversely related to the bonds when they were placed in the equation as outcome variables (Longshore et al., 2004 p. 542). Brannigan (1997) suggests integration; and that self-control, power control, and developmental theory combined could potentially provide a more complete explanation of offending. Further, Nakhaie et.al. (2000, p. 42) states that the bond interacts with self-control in explaining delinquency in addition to its independent effects. Of the studies that consider the bond in conjunction with self-control, only Nakhaie et al (2000, p. 42) examines the separate effects of these two theories making the current test important for an additional reason. However, Nakhaie et al (2000) does not include several important indicators, such as opportunity and risk. This is an important drawback since recent research asserts that these concepts are vital to a complete test of the theory. This article also addresses this gap by including these measures.

Method

All items used in this study employ some form of the Likert scale. The separate and combined models, demographic controls, and the property, drug, and violent crime variables will be operationalized at Wave 1. Due to skewness observed in the data, dichotomous dependent variables were constructed and logistic regression was employed. This technique estimates odds ratios and allows an investigator to determine the probability that offending will occur (Cretacci, 2008; Piquero et al., 2005).

Sample

The data were extracted from the initial two waves of the National Longitudinal Study of Adolescent Health (Add Health) because they include items that scholars have utilized to measure self-control in the past. Despite this, only a few articles have used this data set to test the theory (Cretacci, 2008; Cretacci, 2009a; Perrone, Sullivan, Pratt & Margaryan, 2004). Unfortunately, data limitations prevent the use of the third wave. Add Health is a National, high-school-based study of adolescent behavior in Grades 7-12 (Kelley & Peterson, 1998). Wave 1 was conducted from September 1994 through December 1995 (response rate 78.9%), and Wave 2 about 1 year later (response rate of 88.2%) (Kelley & Peterson, 1998, p. 5). In-home interviews were con-ducted with the 90,000 respondents who completed the in-school questionnaire and a

sample of 27,000 was drawn from that group (Kelley & Peterson, 1998, pp. 4, 5). Topics of the interview ranged from delinquency to family relationships (Kelley & Peterson, 1998, p. 4). Wave 2 in-home interviews were similar to those at Wave 1. A public-use data file that includes 6,500 cases was used for this study.

Measures

Self-Control

Some investigators have argued for a behavioral measure (Tittle, Ward, & Grasmick, 2003) while others prefer cognitive (Romero, Gomez-Fraguela, Luengo, & Sobral, 2003), or combination measures (Gibbs et al., 1998). Further, recent research claims that most studies have not accurately measured self-control (Marcus, 2004). Given these concerns, a 25-item factor of self-control was constructed that reflects traits such as alcohol use, moodiness, the ability to focus on tasks, and sexual attitudes (Grasmick et al., 1993).

Of the twenty-five items, twelve asked about the prior year's time frame. Of those, four ("How often do you cry frequently?", "How often do you have trouble relaxing?", "How often do you have difficulty with moodiness?" and "How often are you fearful?") had the following responses: *never* (coded 1) to *everyday* (coded 5). Four items are prefaced by: "During this past year, how often did you have trouble…" "Getting along with your teachers?", "Paying attention in school?", "Getting your homework done?" and "Getting along with other students?" and their responses range from: *never* (coded 1) to *everyday* (coded 5). Three items addressed drinking patterns and began with: "How often during the past year…" "Did you have five drinks in a row?" and "Did you get drunk?" both had the same response sets: *never* (coded 1) to *everyday* (coded 7). One other drinking question asked how often respondents had been "hung over" during the past year and it had the following responses: *never* (coded 1) to *5 or more times* (coded 5). The final item that solicited information from the prior year, asked respondents how often they had worn a seat belt and its responses were: *always* (coded 1) to *never* (coded 5).

Seven of the twenty-five items gauged agreement or disagreement with different statements. All seven had responses that ranged from *strongly disagree* (coded 1) to *strongly agree* (coded 5). Five of the seven items addressed sexual attitudes: "Birth control is too much of a hassle to use.", "It takes too much planning ahead of time to have birth control on hand when you're going to have sex.", "If you had sexual intercourse, your friends would respect you more.", "If you had sexual intercourse, it would make you more attractive." and "If you had sexual intercourse, you would feel less lonely." Two personality items, ("You frequently rely on your gut feelings to make decisions." and "You are upset by difficult problems."), were also used.

The final six items were prefaced by, "In the past week…" and asked about the respondent's mood: "You felt that you could not shake off the blues, even with help from your family and your friends", "You had trouble keeping your mind on what you were doing", "You felt depressed", "You felt sad", "You felt that people disliked you" and "You felt that you were just as good as other people." Responses ranged from *never* (coded 1) to *all of the time* (coded 4). As with prior research, higher scores indicate greater levels of low self-control which will positively impact crime. Principle components analysis indicated that the items loaded on several factors. However, recent scholarship asserts that such results can indicate a single factor provided a significant drop-off in eigenvalue between the first two factors and smaller ones among the others (Tittle et al., 2003). Results obtained show that the difference in eigenvalue between Factors 1 and 2 is 1.47, while for the others the range is from .93 - .10. Following others that obtained similar results, one factor is used. Further, the largest negative value was added to the entire factor to facilitate construction of an interaction term with criminal opportunity. Further testing also indicated that the factor constituted a reliable measure ($\alpha = .78$, $M = 2$, $SD = 1$).

Criminal Opportunity

Gottfredson & Hirschi (1990) argued that if criminal opportunity decreased individuals with low self-control would be harmless (Bolin, 2004; Tittle & Botchkovar, 2005). In an attempt to test this hypothesis, standard scores were calculated for fourteen items and combined into an opportunity index ($\alpha = .63$, $M = 12.45$, $SD = 5.69$). Six dichotomous items began with "In the past week…" and asked the respondent whether or not they had "Gone to a male or female friend's house?", "Met a male or female friend after school?" or "Spent time with a male or female friend?" Responses for these items were *no* (coded 1) and *yes* (coded 2) to facilitate the calculation of standard scores. Six other items asked if the respondent's "Mom or Dad was home…" "When they went to school", "Came home from school" or "When they went to bed" with responses ranging from: *always* (coded 1) to *never* (coded 5). One additional dichotomy asked, "In the past year, did you ever spend the night somewhere without permission?" with *no* (coded 1) and *yes* (coded 2) as the responses. The final item, "In the past week, how often did you hang out with friends?" had a response set ranging from *not at all* (coded 1) to *five or more times* (coded 4). The greatest negative score was added to the entire measure to facilitate the creation of the interaction term ($M = 26.23$, $SD = 20.47$). Higher scores indicate higher levels of criminal opportunity and assume a positive relationship to crime.

Perceived Risk

Self-control theory asserts that individuals with low self-control do not recognize risky behavior (Sellers, 1999). Gottfredson & Hirschi (1990) imply that perceived risk is related to crime and scholars have argued that this measure be included in the perspective (Grasmick et al., 1993). To address this matter, a two-item index of perceived risk was created (α = .81, M = 3.51, SD = 1.69). One item asked, "What do you think your chances are of getting AIDS?" and the other, "What do you think your chances are of getting a sexually transmitted disease, such as gonorrhea or genital herpes?" Responses range from *none* (coded 1) to *very high* (coded 5). It is assumed that higher scores will positively impact deviance.

Perceived Consequences

Sims-Blackwell and Piquero (2005) found that the opinions of those closest to adolescents impacted their behavior. This reasoning is similar to Gottfredson & Hirschi (1990) concerning the inability of those with low self-control to restrain themselves when faced with the disapproval of others. To test this proposition, a two-item index of perceived consequences (α = .87, M = 3.65, SD = 1.82) was constructed and the items are "How does your mom feel about your sex life?" and "How does your mom feel about you having sex with a steady?" The responses range from *strongly disapprove* (coded 1) to *strongly approve* (coded 5) to indicate low levels of perceived consequences. Higher scores indicate *low* levels of perceived consequences which will result in *higher* levels of involvement in criminality.

Attachment

To address the aspect of the bond that deals with the feelings that individuals have for others, maternal, school, peer, and delinquent peer attachments are included. Higher scores on each attachment construct indicate higher levels of the specific type of attachment. It is expected that all of the attachment items will have a negative impact, except for *Delinquent peer attachment*, which has been linked to higher levels of deviance in the past. Due to a large number of missing cases for the paternal items, a five item, *Maternal attachment* index (α = .85, M = 22.15, SD = 3.18) was constructed. The items "Most of the time, your Mother is warm and loving to you", "You are satisfied with the way your mother and you communicate with each other" and "Overall, you are satisfied with your relationship with your mother" all have the following responses: *strongly disagree* (coded 1) to *strongly agree* (coded 5). "How much do you think your mother cares about you?" and "How close do you feel to your

Mother?" are coded similarly but range from *not at all* (coded 1) to *very much* (coded 5).

A five item index of *School attachment* (α = .76, *M* = 18.28, *SD* = 3.74) was created to measure an adolescent's feelings towards school. Four items: "I feel like I am part of this school?", "You are happy at school?", "I feel close to people at school" and "The teachers at your school treat students fairly?" have the following responses: *strongly disagree* (coded 1) to *strongly agree* (coded 5). The responses for the fifth item, "How much do you feel teachers care about you?" range from *not at all* (coded 1) to *very much* (coded 5).

One item, "How much do you think your friends care about you?" comprised *Peer attachment* (*M* = 4.24, *SD* = 0.80) and its responses are: *not at all* (coded 1) to *very much* (coded 5). *Delinquent peer attachment* (α = .75, *M* = 2.45, *SD* = 2.62) was included because Hirschi addressed it in his original formulation of the theory. Although, Hirschi did not include this attachment, he did say that an individual so attached would be just as likely to *not* offend as the person that had the conventional tie. He argued that even delinquent attachments mitigated criminality, "We honor those we admire, not by imitation but by adherence to conventional standards" (p. 152). Even though most studies do not test this proposition, it is legitimate to include a delinquent peer attachment item based on the original model. The measure is comprised of three items which are prefaced by: "How many of your three best friends…" "Smoke?", "Drink alcohol at least once a month?" and "Smoke pot more than once a month?" Higher scores show that the respondent's friends have been involved in delinquent activity.

Commitment

Following prior research, commitment and involvement were collapsed into commitment and measured by quantifying the adolescent's participation in school, religious, and family activities. These concepts are highly correlated and as a result, scholars have argued in the past (Cretacci, 2003; Krohn & Massey, 1980;) that due to complications with disentangling their effects, it is permissible to collapse them into a single measure. Although Hirschi (1969) did not include family commitment in his original formulation, it is within the parameters of the theory to argue for its inclusion since the parental tie is the most important aspect of the bond. Also, scholars have found that engaging in activities with one's parents can constrain deviance (Rankin and Kern, 1994; Wagman-Borowsky, Ireland, & Resnick, 2001).

Nine dichotomous items, asking about activities that adolescents engage in with their parents, are utilized for an index of *Family commitment* (α = .74, *M* = 5.28, *SD* = 3.23). Each variable is prefaced with, "Which of the following

have you done with your Mom or Dad in the past four weeks?" The list of items is: "Gone shopping?", "Played a sport?", "Gone to a religious service?", "Talked about life?", "Went to a movie?", "Discussed a problem?", "Talked about grades?", "Worked on a school project?", and "Talked about school or other things?" The responses for all items are: *no* (coded 0) and *yes* (coded 1). Hirschi (1969) argued that a good measure of school commitment was academic performance. Following prior scholarship, four items that ask the respondent what grades he/she most recently received in Math, Science, History, and English were combined to form a *School commitment* index ($\alpha = .68$, $M = 22.80$, $SD = 4.26$). The responses are: "Did not take this subject" (coded 1) to "A" (coded 5). Finally, standard scores were calculated for five items and combined to form *Religious commitment* ($\alpha = .87$). One item asks: "In the past year how often have you attended religious services?" while another asks: "In the past year how often have you participated in activities such as youth groups, Bible classes, or choir?" Both have the same responses: *never* (coded 1) to *once a week or more* (coded 5). "How often do you pray?" has the following response set: *never* (coded 1) to *once a day at least* (coded 5). "What religion are you?" was recoded as a dichotomy *no religion*, (coded 1) and *religion* (coded 2) so as to allow for the calculation of standard scores and to avoid the appearance of bias towards any faith. Finally, "How important is religion to you?" has the following responses: *not important at all* (coded 1) to *very important* (coded 4).

Belief

This concept addresses the adolescent's views towards conventional rules (Hirschi, 1969) and measures his or her attitudes towards regulations imposed in the home. The item, "How much do you feel that you want to run away from home?" ($M = 3.82$, $SD = 1.24$) has responses ranging from: *very much* (coded 1) *to not at all* (coded 4). It is assumed that adolescents that do not want to run away from home do not disagree with the rules that are imposed therein.

Dependent Variables and Controls

Self-control theory claims to explain all forms of deviance, however investigators have included different types of crime in single measures (Perrone et al., 2004). To clarify the issue, a crime categorization strategy will be used. Utilizing such an approach has support in prior research (Nakhaie et al., 2000; Rebellon & Van Gundy, 2005) and allows for a test of whether or not one theory outperforms the other in this regard. To assess whether or not either theory is better at predicting crime type, three dichotomous, endogenous variables (property, drug, and violent crime) were included. Approximately 33% of the sample engaged in some form of property or violent crime and 20% in drug crime. All

items utilized for the dependent variables have the following responses: *no* (coded 0) or *yes* (coded 1) and they also serve as controls at Wave 1.

Seven items were used to create a *Property crime* index (Wave 1, α = .78, *M* = .38, *SD* = .49; Wave 2, α = .80, *M* = .33, *SD* = .47). Each question is preceded by "In the past 12 months…" The questions are: "How often did you paint graffiti or signs on someone else's property or in a public place?", "How often did you damage property that did not belong to you?", "How often did you take something without paying for it?", "How often did you steal something worth less than $50?", "How often did you steal something worth more than $50?", "How often did you steal a car?", and "How often did you burglarize a building?" Four dichotomies were combined to form an index of *Drug crime* (Wave 1, α = .74, *M* = .18, *SD* = .38; Wave 2, α = .73, *M* = .19, *SD* = .39). Two items ask whether in the last thirty days respondents have smoked marijuana or used other drugs. A third indicator asks if they were ever high while at school. A final question asks if the respondent had sold drugs during the past year. Six dichotomies were combined to form the *Violent crime* index (Wave 1, α = .71, *M* = .42, *SD* = .49; Wave 2, α = .74, *M* = .30, *SD* = .46). Each item begins with "In the past 12 months…" and the specific questions are: "How often did you injure someone badly enough to need bandages or care from a doctor or nurse?", "How often did you get into a serious physical fight?", "How often were you in a group fight?", "How often did you pull a knife or gun on someone?", "How often did you shoot or stab someone?" and "How often did you use a weapon in a fight?"

Several other controls are included. One dichotomous item, "What is your sex?"(*M* = .48, *SD* = .50) has the following responses: *female* (coded 0) and *male* (coded 1). Another item, "What is your age?" (*M* = 15.48, *SD* = 1.93) has various ages as the responses. Race (*M* = .25, *SD* = .43), is a dichotomy with *non-black* (coded 0) and *black* (coded 1) as the response set. The item for urbanity is: "What is the dominant land use?" (*M* = 2.13, *SD* = .92), and was coded by the interviewer with its responses ranging from *rural* (coded 1) to *retail, non commercial* (coded 5).

Results

Tables 1 and 2 show the logistic regression results for self-control, the social bond, and the combined model on the crime categories. The exp (b) is an odds ratio reported in the text and in the tables for all outcome variables and it indicates that when the independent variable increases by 1, its influence on the dependent variable will vary by the factor of the exp (b). Results at or close to 1 show that the variable has little or no effect.

Self-Control & Bond (Property Crime)

Results obtained show that for self-control, 2/5 variables performed as expected. High levels of low self-control (1.30) and perceived risk (1.05) and prior involvement in property offending (5.07) predicted an increased likelihood of involvement in property crime. The higher impact of low self-control may indicate that the type of property crime examined is partially explained by a high level of impulsivity possessed by the offenders. While it is true that perceived risk is significant, its impact is much lower than self-control. Age (.96) negatively predicted the dependent variable. The model explained a moderate amount (21%) of the variance in the likelihood that property crime would occur.

Results for social bond theory yielded little in the explanation of property crime. Delinquent peer attachment (1.04) was the only variable that attained significance from the theory. The fact that the model predicted 21% of the variance in the likelihood of involvement in property crime is deceptive since that result is comprised mostly of the negative effect of age (.94) and the positive impact of prior involvement in property crime (5.98). These results underscore the point made above that property crime in this sample may not be a function of deteriorating relationships and is at least partly due to poor impulse control.

Table 1
Wave 2 Logistic Regression Results for Property, Drug, and Violent Crime

	Property Crime (N = 3,199)		Drug Crime (N = 3,138)		Violent Crime (N = 4,177)	
Variable	Exp(B)	p	Exp(B)	p	Exp(B)	p
Self-Control Theory						
Low self-control	1.30	.00**	1.60	.00**	1.02	.79
Opportunity	1.03	.08	1.11	.00**	.99	.56
Control-Opp.	.99	.28	.99	.11	1.00	.84
Perceived risk	1.05	.02*	1.09	.00**	1.04	.13
Consequences	.99	.58	1.08	.01**	.99	.66
Sex	.96	.53	1.07	.49	1.65	.00**
Race	.98	.79	1.00	.99	1.07	.45
Age	.96	.04*	.95	.03*	.95	.01**
Urbanity	.97	.48	1.05	.37	1.07	.11
Property/Drugs/Violence	5.07	.00**	9.61	.00**	5.89	.00**
Constant	.20	.00**	.02	.00**	.24	.00**
Nagelkerke R^2	.21		.34		.23	

	Property Crime (N = 3,053)		Drug Crime (N = 2,984)		Violent Crime (N = 4,090)	
Variable	Exp(B)	p	Exp(B)	p	Exp(B)	p
Social Bond Theory						
Maternal attachment	1.01	.70	1.02	.39	.99	.44
School attachment	1.01	.58	.99	.30	.99	.40
Peer attachment	.99	.88	.99	.85	1.09	.09
Delinquent peer attachment	1.04	.03*	1.03	.16	1.11	.00**
School commitment	1.01	.16	1.03	.04*	.96	.00**
Religious commitment	.99	.26	.99	.64	.99	.28
Family commitment	.99	.29	.96	.02*	1.00	1.00
Belief	.94	.07	.96	.38	.94	.07
Sex	.94	.44	1.05	.63	1.67	.07**
Race	1.02	.82	1.03	.82	1.18	.09
Age	.94	.00**	.99	.83	.86	.00**
Urbanity	.93	.09	1.00	.98	1.06	.20
Property/Drugs/violence	5.98	.00**	16.41	.00**	4.88	.00**
Constant	.49	.18	.08	.00**	3.11	.05*
Nagelkerke R^2	.21		.32		.26	

* significant at the .05 level.
** significant at the .01 level.

Self-Control & Bond (Drug Crime)

The data indicate that low self-control (1.60), opportunity (1.11), perceived risk (1.09), and perceived consequences (1.08) all positively predicted an increased likelihood that drug crime would occur. Of the controls, age (.95) negatively predicted drug offending while prior involvement in drug crime (9.61) positively predicted it. It appears that self-control theory is a good predictor of involvement in drug offenses as the model explains an important amount of variation in the likelihood of involvement in drug crime (34%).

The bond again performed the poorer of the two perspectives as school commitment (1.03) and prior drug crime (16.41) predicted a greater likelihood of involvement in drug crime while family commitment (.96) predicted a lesser one. The school variable shows that regardless of the feelings that students have about school, they still engage in drug activity. The model explained 32% of the variance in drug crime and allows for the contention that individuals in this sample are committing drug crimes primarily because they have difficulty resisting an opportunity to do so.

Self-Control & Bond (Violent Crime)

Unexpectedly, no element of self-control attained significance. This may indicate that the violence in this sample is planned and not the result of impulsive behavior. Of the controls, sex (1.65) positively predicted a greater likelihood of involvement in violence while age (.95) negatively did. Once again the amount of variance explained (23%) was due primarily to the impact of involvement in violence (5.89) at an earlier time.

The social bond performed the better of the two models for the prediction of violence. Delinquent peer attachment (1.11) was the aspect of the bond that was expected to positively predict the increased possibility of involvement in violence. This result implies that perhaps an element of learning or imitation is involved in this behavior. School commitment (.96) negatively predicted involvement in the dependent variable. Three controls attained significance, with sex (1.67) and prior involvement in violence (4.88) predicting an increased probability of involvement in violent crime while age (.86) predicted a decreased likelihood. The model accounted for 26% of the variation in the likelihood that violence would take place.

Combined Model & (Property Crime)

The data indicate that 5/13 variables performed as expected. However, only one was a bond construct. Self-control (1.32), criminal opportunity (1.03), and prior involvement in property offending (5.29) predicted an increased likelihood of involvement in property crime while belief (.93) predicted a decreased likelihood. Self-control is the greater contributor to the model, indicating that inability to control one's desire is an important part of property offending in this sample. Of the controls, age (.94) predicted a decreased likelihood of involvement in property crime and the model predicted a moderate amount of variance (22%) in the dependent variable.

Table 2
Wave 2 Logistic Regression Results for Property, Drug and Violent Crime

	Property Crime (N = 2,777)		Drug Crime (N = 2,726)		Violent Crime (N = 3,650)	
Variable	Exp(B)	p	Exp(B)	p	Exp(B)	p
Combined Model						
Low self-control	1.32	.01**	1.44	.01**	1.02	.87
Opportunity	1.03	.05*	1.11	.00**	1.00	.86
Control-Opp.	.99	.28	.99	.32	1.00	.87
Perceived risk	1.04	.14	1.09	.01**	1.05	.05*
Consequences	.97	.25	1.08	.01**	1.00	.87
Maternal attachment	1.01	.63	1.01	.57	.98	.27
School attachment	1.01	.52	.98	.34	.99	.53
Peer attachment	1.00	.99	.97	.65	1.11	.05*
Delinquent peer attachment	1.03	.11	1.01	.61	1.11	.00**
School commitment	1.02	.15	1.03	.05*	.96	.00**
Religious commitment	.99	.18	.99	.57	.99	.41
Family commitment	.99	.41	.98	.15	1.00	.80
Belief	.93	.04*	.97	.52	.94	.12
Sex	.98	.78	1.13	.26	1.73	.00**
Race	1.01	.88	1.06	.63	1.17	.11
Age	.94	.01**	.97	.26	.85	.00**
Urbanity	.95	.22	1.01	.91	1.07	.13
Property/Drugs/Violence	5.29	.00**	9.97	.00**	5.02	.00**
Constant	.19	.01**	.01	.00**	2.62	.14
Nagelkerke R^2	.22		.26		.27	

* significant at the .05 level.
** significant at the .01 level

Combined Model & (Drug Crime)

Results show that six concepts attained significance for this equation. Self-control (1.44), criminal opportunity (1.11), perceived risk (1.09), perceived consequences (1.08) prior involvement in drug crime (9.97), and school commitment (1.03) all predicted an increased likelihood that the dependent variable would occur. These results may indicate that self-control is a good predictor of drug crime because opportunity is needed for its commission.

Further, many have also suggested that drug users have little restraint and do not consider what could happen to them as result of their behavior. The model accounted for 36% of the variation in the drug crime.

Combined Model & (Violent Crime)

Results indicate that seven variables attained significance. Peer attachment (1.11), delinquent peer attachment (1.11), and perceived risk (1.05) predicted an increased likelihood of involvement in violence while school commitment (.96) predicted a decreased likelihood. Of the controls, sex (1.73) and earlier involvement in violence (5.02) predicted an increased likelihood of involvement in violence while age (.85) negatively did so. Overall, the model predicted 27% of the variation in the likelihood that violence would occur. These results imply that deteriorating relationships are a more robust predictor of violence in this sample than low impulse control.

Discussion

Obviously, the two models explain crime differently. Generally, self-control performed better for both property and drug crime while the bond partially explained violence and drug crime. This may be because property and drug crimes in this sample may be the result of impulsive behaviors. If true, self-control would explain more of those two indicators than it would for violence, especially if violence as measured here were more intentional and not impulsive. Some support for this assertion is found in the items used in the property and drug indices. Specifically, the property index is comprised of four items that ask the respondent about theft. Another asks whether the respondent had ever damaged someone else's property and an additional one asks whether the adolescent painted graffiti on a building. Further, drug crime is composed primarily of items that ask about drug use at school and within the last 30 days. Taken together, one might argue that property and drug crime, as measured here, are indicators of impulsive behavior and as a result, self-control was more likely to explain these behaviors than violence.

Secondly, if the violence that is evident in this sample is the result of the deterioration of internal controls and not the fruit of impulsivity, then one could reasonably argue that the bond would be a better explanation. Once again, based upon the construction of the violent crime index, some support exists for this argument as it is made up of items that ask about participation in gang fights, other fights that result in injury, and the use of deadly weapons in encounters with others. These are not offenses that most would consider impulsive as they involve some form of planning. While it may be true that self-control is more amenable to explaining property and drug crime and the bond more amenable to

explaining violent crime; these conclusions present an additional problem for self-control. It is now inescapable that the central assertion of self-control, that it is the best predictor of all crime, is undermined given that several indicators retained their significance with low self-control present in the equations, in a national sample.

However, an important caveat needs to be made. Self-control theory has been tested close to seventy times and this is one of only a few tests that have relied upon national data. Other scholars have obviously tested these theories on more serious crimes and both theories have garnered support. Researchers have looked at serious crime including homicide, and results of those studies have been clearer than this one. As a matter of fact, a plausible alternative to the conclusions of this study exists.

Most tests of both of these theories are based upon regional or state-level data. If a "regional effect" existed, then such an impact could be masked by a dataset such as the one employed here. In fact, scholars have argued that the reason why research found no effect between religiosity and crime was because data were collected in "secular" parts of the country. Stark, Kent, & Doyle (1982), Stark (1996) and others examined this assertion and found that the impact that religiosity on crime had varied by region. These studies touched off a flurry of studies and currently, a consensus has developed that such an effect exists. In fact, based in part on his geographic hypothesis, Stark has now publicly changed his position to where he now believes that the effect of religiosity on crime is important. It then stands to reason that if people are more impulsive (or not), in different parts of the country, then the impact of self-control and/or the bond may also vary in other locales. If one could show that conventional ties were stronger in a particular part of the country (perhaps the South), then it may be that the impact of the bond also varies by region. Conversely, if one could show that people were impulsive, say on the West Coast, then the impact of self-control may vary as well. If that is the case with either or both of the theories tested here, then stronger effects may be masked in a sample like this one.

While this study is important, so are its flaws. First, only two waves of data were utilized so no concrete statement can be made about the ability of the models to explain criminality over time. Further, no attempt is made here to assess to what degree the impact of one theory might mediate the effects of the other. Moreover, this study provides one interaction term and that was between self-control and opportunity. While other researchers assert that such an effect may exist between the self-control and the bond (Nakhaie et al., 2000), no attempt was made to explore that possibility here. Relatedly, Hirschi (2004) redefined self-control but this study did not address that revision. Fifth, SES

(socio-economic status) has been left out due to data limitations, which is significant, since most believe that this variable impacts crime. Additionally, this study does not test the possible "geographic effect" mentioned above. Given the earlier point about intentional and impulsive behavior, this study fails to determine the importance of the hypothesis.

In the end, one could assert that self-control narrowly "won" the competition but if true, it is only "on points" since both perspectives partially explained crime. The fact remains that the overall results were moderate in strength. As a result, others should use caution when interpreting these findings. In fact, no one should conclude from this test that one theory is better than the other or that either should be discarded.

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How Social Sciences Can Right Thirty-Five Years Worth of Obscenity Wrongs

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Obscenity laws offer a unique set of circumstances to defendants in the legal system in that they rely entirely on community standards. As such, defendants may not know if they are guilty of a crime until the jury reaches its verdict. The current article traces the history of the obscenity laws, and discusses concerns that have arisen regarding the law. These concerns begin by addressing the lack of clear definitions within the law which have led to challenges of vagueness. Further, judges and researchers alike have concerns that jurors may not be able to adequately ascertain community standards. Despite these concerns, the authors offer a variety of solutions in which research can be used to help improve the current misunderstanding regarding obscenity.

Introduction

Obscenity laws pose a unique legal situation in the United States for a couple of reasons. First, the defendant does not know if he has committed a crime until the verdict is returned.[1] Legally, a defendant is guilty if he has distributed or possessed material that community standards deem to be obscene. Despite this simplistic legal rule, it is difficult for a defendant to know community standards; even juries sometimes struggle to determine what community standards are. Second, the prosecution does not have to actively prove the charges against the defendant.[2] The prosecution is not required to admit evidence that states the material is obscene; prosecuting attorneys only have to submit the material itself as evidence and let the jury decide.

This unique situation exists because obscenity laws are based primarily on community standards. The legal definition of obscenity states that jurors must

[1] Joseph E. Scott. *What is obscene? Social science and the contemporary community standard test of obscenity.* 14 International J. L. PSYCHIATRY 29, 29 (1991) [*hereinafter* Scott].

[2] *Paris Adult Theater v. Slaton,* 413 U.S. 49, 49 (1973).

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determine the community standards as to what is patently offensive[3] and what material appeals to a prurient interest.[4] There are many potential concerns with this legal definition. For example, community standards depend on social norms. Similarly, social norms regarding racial segregation have changed over time. As society began to reject segregation, laws changed. The obscenity law should be no different: as norms regarding obscenity change, so too should the obscenity law.

The purpose of this article is to define and describe the federal and various state obscenity laws, address concerns that surround the current obscenity laws, illustrate the role of social psychological research in obscenity cases, and propose changes in obscenity laws. The analysis of obscenity laws and suggestions for change can serve as a foundation for policy reform and provide an opportunity to illustrate the complexity and major issues surrounding obscenity laws.

Part I outlines the history of obscenity laws, focusing specifically on the laws leading to the current standard, which was established in 1973 by *Miller v. California*.[5] Part I also describes subsequent decisions that are important in clarifying the definition of obscenity.[6] Although the federal standard was established in a Supreme Court case, each state allows variation by providing specific examples of what is considered to be patently offensive material.[7]

Part II addresses concerns with the current obscenity standard. Over the years, many concerns have been identified with the *Miller* standard. As the laws changed and new case outcomes emerged, challenges to problematic standards also arose. Critics, judges, and researchers have worried about the vagueness of the laws.[8] In addition to vagueness, early cases challenged the ability of jurors to determine community standards, a concern that has yet to see judicial

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[3] Patently offensive means patently offensive sexual material as determined by state examples and community standards as determined in *Miller v. California* 413 U.S. 15, 16 (1973).

[4] Prurient means and unhealthy, morbid, or shameful interest in sex *Miller* 413 U.S. 15, 15.

[5] *Miller,* 413 U.S. 15, *supra* note 3 at 15.

[6] *See, e.g., Smith v. United States,* 431 U.S. 291, (1976) or *Pinkus v. United States,* 436 U.S. 293, (1978).

[7] *Miller,* 413 U.S. 15, *supra* note 3 at 15. (*Miller* establishes that states have the ability to define what the state considers to be patently offensive).

[8] *See generally Ward v. Illinois,* 431 U. S. 767, (1977); Javier Romero. *Unconstitutional vagueness and restrictiveness in the contextual analysis of the obscenity standard: A critical reading of the Miller test genealogy.* 7 U. Pa. J. Const. L. 1207 (2005) [*hereinafter* Romero]. (In *Ward,* a defendant challenges the obscenity law on grounds that it is vague. In Romero, the author discusses in detail several complaints about the vagueness of the obscenity laws).

agreement.[9] Most recently, the outcome of *Lawrence v. Texas*[10] opened the door to more challenges of the obscenity laws. Specifically, the acknowledgement of sexual privacy provided by *Lawrence* brought into question the need for federal obscenity statutes.[11] This section outlines several such concerns that have been identified by both defendants of obscenity prosecutions and researchers.

Part III addresses the role that social science can or has played in determining if material is considered to be obscene. Social science researchers have provided survey evidence and expert testimony for various types of legal cases,[12] including obscenity. Even before *Miller,* judges had issued differing rulings concerning the role of social science in establishing community standards.[13] Early cases ruled that experts were not necessary in obscenity cases;[14] however, later courts disagreed as to the need for experts in helping the jury to determine what constitutes obscenity.[15] Some have ruled that survey data is uniquely suited to inform the jurors about the community's sentiments,[16] and social science researchers have provided this survey data to the courts.[17] These represent only a few of the disagreements as to what role (if any) social sciences can play in informing obscenity decisions.

Part IV makes suggestions for ways that social science researchers can address many of the concerns that have arisen. The section integrates parts I through III by discussing potential solutions to the many concerns with the

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[9] *See generally Jacobellis v. Ohio,* 378 U.S. 184, (1964). (in which Justices argued over the ability of jurors to determine community standards without the help of expert testimony).

[10] *See generally Lawrence v. Texas,* 539 U.S. 558, (2003). (In *Lawrence,* courts ruled that individuals have a right to sexual privacy).

[11] *See generally United States v. Extreme Associates, Inc.,* 431 F.3d 150, (2005). (The obscenity law was challenged for being a violation of privacy rights. The district court agreed and dismissed the case. However, the Supreme Court disagreed and reversed the decision).

[12] *See generally* John Monahan & Laurens Walker. Social Science in Law (Foundation Press, 2006) (1985). (The entire case book is devoted to discussing the ways that social science has impacted the legal system including cases where researchers have provided expert testimony and survey research as evidence in obscenity cases).

[13] *See generally Jacobellis,* 378 U.S. 184, *supra* note 9 (Justices discuss the need for expert testimony in obscenity cases and have some disagreement as to what should be done) and *Smith v. United States,* 431 U.S. 291, (1976).

[14] *See generally People v. Muller,* 96 N.Y. 408, (1884). (The Courts ruled that experts were not necessary to determine obscenity cases).

[15] *Jacobellis,* 378 U.S. 184, s*upra* note 9 at 187-189.

[16] *Saliba v. State,* 475 N.E.2d 1181, 1185 (1985).

[17] Philip Holley, Obscenity and child pornography: sociology in defense of sexually oriented materials. In P. J. Jenkins & S. Kroll-Smith Witnessing for Sociology: Sociology in Court (Praeger, 1996). [*hereinafter* Holley]. (Holley provides social science evidence in court cases as what is considered obscene by the community).

obscenity standard and suggesting the increased need of social science research to inform policy. Social scientists can help improve obscenity statutes by helping to clearly define what is meant by community and providing survey research to illustrate local community standards.

Part I. History of Obscenity Law

A variety of obscenity standards have emerged throughout the years. The most recent standard began its evolution with *Roth v. United States* when the term community standard was used in relation to obscenity.[18] *Roth* determined that "the standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."[19] The *Roth* case set the foundation for the current federal obscenity guidelines established in *Miller v. California*.[20] *Miller's* standard built on the *Roth* decision and instituted a three-prong test for obscenity. For material to be considered obscene, an average person applying community standards must determine that the material 1) appeals to a prurient interest in sex, 2) depicts sexual activity defined by the state as patently offensive, and 3) lacks any artistic, scientific, literary, or political value.[21] The *Miller* test remains the national standard for determining if material is obscene.

Subsequent cases have helped to further define the *Miller* standard.[22] *Miller* states that prurient interest is defined as a shameful or morbid interest in sex.[23] Patently offensive, however, is not defined other than to say that the term is to be determined by the state.[24] To rectify this shortcoming, *Smith* determined that both prurient interest and patently offensive are to be determined by an average person applying contemporary community standards.[25] The concept community standard is also vague, as *Miller* said only that the courts determined that community is not a national standard.[26] *Pinkus* extended the definition by

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[18] *Roth v. United States,* 354 U.S. 476, 476 (1957).

[19] *Id.*

[20] *See generally Miller v. California* , 413 U.S. 15, (1973). (The premise of the entire *Miller* case is the development of the current obscenity standard).

[21] *Id.*

[22] *See generally Smith v. United States,* 431 U.S. 291, (1976), and *Pinkus v. United States,* 436 U.S. 293, (1978). (Both *Smith* and *Pinkus* presented challenges to the obscenity law. Their case outcomes helped to clarify the legal definition).

[23] *Miller,* 413 U.S. 15, *supra* note 3 at 16.

[24] *Id.*

[25] *Smith,* 431 U.S. 291, *supra* note 22 at 292.

[26] *Miller,* 413 U.S. 15, *supra* note 3 at 15.

stating that community standard only includes the adult population.[27] Later obscenity cases offer no further clarification, leaving the *Miller* standard and subsequent definitions the national criteria for determining obscenity.

Definitions at the state level vary, however. Forty-three states have established definitions through state legislation or the courts, while seven states do not have obscenity laws.[28] Of those states that do, most adhere to the national standard established in *Miller*, but also provide additional definitions including examples of defined patently offensive material. That is, each state has the opportunity to provide examples of patently offensive material in its obscenity definition. For example, in a decision following soon after *Miller,* the Illinois state court named bestiality and sadomasochism as examples of patently offensive sexual conduct.[29] Other states include different definitions. For instance, Louisiana's obscenity definition states that material is obscene if it is patently offensive, hard-core sexual conduct such as the public portrayal of sexual acts, masturbation, or sadomasochistic abuse.[30]

In an interesting state case, an Alabama statute[31] made it illegal to produce, distribute or sell sexual devices designed to stimulate the genitals. The ACLU challenged the 1999 law, and it was overturned in 2002, only to be reinstated by a federal judge in 2004.[32] Thus, states have the ability to define specifically what they consider to be obscene, at least until successfully challenged or changed by the state.

In sum, the *Miller* standard has come to be the national standard by which obscene material is judged.[33] Future cases attempted to clarify the *Miller* test, and established that patently offensive and prurient interest are to be determined by an average person applying community standards[34] and that the community standards only concern the adult community.[35] Definitions are also provided within each state as to what is considered patently offensive. The foundation

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[27] *See generally Pinkus,* 436 U.S. 293, *supra* note 6. (The courts determined that children are not included in the community of community standards, the community only includes adults).

[28] National Obscenity Law Center, New York. (2001) http://www.moralityinmedia.org/nolc/index.htm?statutesIndex.htm. (This website lists federal and state obscenity laws).

[29] *Ward,* 431 U. S. 767, *supra* note 8 at 767.

[30] Louisiana statute §106 lists these and other public portrays (actual or simulated) as hard core sexual conduct in the same definition with obscenity.

[31] Ala. Code. Â§ 13A-12-200.1 (1999).

[32] *See generally Williams v. Pryor,* 41 F. 2d 1257, (1999).

[33] *Miller,* 413 U.S. 15, *supra* note 3 at 15-16.

[34] *Id.*

[35] *Id.*

definition, however, is still vague and has not been updated since 1973. Because of this, several potential concerns have arisen.

Part II. Concerns with Obscenity Standard

The current obscenity standard has several identified problems.[36] Specific concerns include the vagueness of definition, the assumption that juries understand community standards, concerns about how the rise of the internet affects obscenity laws, violation of the privacy rights, and an uncertain role of social sciences in determining obscenity.

II.A. Unconstitutional Vagueness

One of the primary concerns with the obscenity standard is that it is too vague.[37] Justice Brennan once remarked that it is unconstitutional to criminalize the possession or sale of obscene material "since the concept of obscenity cannot be defined with sufficient specificity."[38] This concern is mirrored by researchers, as one expresses, "any attempt to define obscenity inevitably results in an impermissibly vague law."[39] These remarks reflect the concern that the term obscenity itself is overly broad in that the definition includes materials that are not actually obscene.[40] Obscenity is never clearly defined in the case law, making it difficult to determine whether someone has broken the law. The second concern is that the term *community standard* has never been legally defined. The courts clarified that a community standard is not a national standard[41] and that it only involves the adult population.[42] Yet, no cases have defined community. Lacking definitional specificity, community standards of prurient interest and patently offensive material are difficult to determine. This lack of definitional precision has led the obscenity statutes to be repeatedly challenged in the legal arena for being unconstitutionally vague or overbroad.

One of the earliest challenges came in *Ward v. Illinois,* a case in which the defense challenged the state obscenity statute on the grounds that it was

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[36] *See generally* Romero, *supra* note 8.

[37] Romero, *supra* note 8 at 1228. (Romero provides a contextual analysis of the overlap between restrictiveness and vagueness of the obscenity standard by comparing two Justice's interpretations of the same aspect of the obscenity statute. He determines that the standard is too vague to be of use).

[38] *Pope v. Illinois,* 481 U.S. 497, 497 (1987).

[39] H. Franklin Robbins, Jr. & Steven G. Mason. *The law of obscenity or absurdity.*15 ST. THOMAS L. REV. 517, 530 (2003).

[40] Romero, *supra* note 8 at 1228.

[41] *Miller,* 413 U.S. 15, *supra* note 3 at 15.

[42] *Pinkus,* 436 U.S. 293, *supra* note 6 at 299.

unconstitutionally vague.[43] The court ruled both that the list of patently offensive materials need not be exhaustive and that the statute was not unconstitutionally vague.[44] The term *prurient interest* has also been challenged on vagueness.[45] In *Spokane Arcades, Inc v. Ray* the district court found that prurient was overly broad and included material that is protected by first amendment rights.[46] The case was appealed to the Supreme Court, where the court ruled that the Court of Appeals erred in this decision and that statute was not too vague.[47] Both the *Ward* and *Spokane Arcades* courts ultimately ruled that the statute was not vague. However, more recent challenges have been met with more success.[48]

Several Colorado adult businesses challenged the state obscenity law on grounds that is was unconstitutionally vague.[49] The Colorado Supreme Court ultimately affirmed the lower court's decision that the definition of patently offensive in the obscenity statute was unconstitutionally overbroad.[50] A Kansas court raised a similar issue concerning the state obscenity statute.[51] Police arrested the owner of an adult store for promoting sexual devices and challenged the obscenity law on multiple grounds. The court ruled that the law's definition of prurient interest was overly broad.[52] Other courts have also found the obscenity statute overly broad.[53] In *State of Louisiana v. Brenan*, the defendant

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[43] *See generally Ward,* 431 U.S. 767, *supra* note 8.

[44] *Id.* at 773.

[45] *Id.* and *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 491 (1985). (Both cases challenged the current state obscenity statutes which included the federal standard as being too vague. In both cases the court ruled that the current statue was not unconstitutional broad or vague).

[46] *Spokane Arcades Inc. v. Ray,* 449 F. Supp. 1145, 1158 (1978).

[47] *Brockett,* 472 U.S. 491, 491.

[48] *See generally Colorado v. Seven Thirty-Five East Colfax, Inc.,* 697 P.2d 348, (1985) (State obscenity law's patently offensive definition was found unconstitutionally overbroad); *State of Kansas v. Hughes,* 246 Kan. 607, (1990). (The manager of an adult store was arrested for promoting obscenity by selling obscene devices including a vibrator and a blow up doll. The court ruled that parts of the obscenity statute - K.S.A. 21-4301(1), (2), and (3)(c)- were overly broad and the case was dismissed); and *State of Louisiana v. Brenan,* 772 So. 2d 64, (2000). (This particular statute banned promotion of sexual devices. Brenan was arrested for selling obscene devices and challenged the constitutionality of the statute. The court ruled the state was too broad).

[49] *Colorado,* 696 P.2d 348, 348.

[50] *Colorado,* P.2d 348, *supra* note 48 at 353.

[51] *State of Kansas,* 246 Kan. 607, *supra* note 48 at 607.

[52] *Id*. (K.S.A. 21-4301 (2) includes the prurient interest part of the obscenity requirement).

[53] *State of Louisiana,* 772 So. 2d 64, *supra* note 48 at 65.

was arrested on three occasions for selling obscene devices.[54] She challenged the state obscenity law, which bans selling of obscene devices.[55] The court ruled the statute unconstitutional because it violated due process clause as it was overly broad and could be accomplished through less restrictive means.[56]

A final concern with the vagueness of the obscenity statute is with the third prong of the *Miller* test, which considers the value of the material taken as a whole. Unlike the first two prongs, which rely on community standards, the value of the material does not.[57] This means that jurors must determine the value of the work, (e.g., artistic value), a concept that is unique and open to interpretation of jurors.[58] Justice Scalia has argued that "it is impossible to come to an objective assessment of literary or artistic value."[59] Researchers concur, noting that the term artistic is subjective and may be hard to understand without expert testimony.[60]

A series of cases with divergent rulings illustrates the trouble with determining artistic value of obscene material.[61] In one case, *Castillo v. State*, a professor of Asian studies and a comic book artist testified to the artistic, literary and political value of a comic book.[62] The testimony of the professionals included culture based information about the relevance of certain objects and artistic styles in the comic book and identified themes in the comic which have value in both Japanese and American culture.[63] The prosecution offered no

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[54] *Id.* at 65-66.

[55] Louisiana Revised Statute § 14:106.1.

[56] *Id.* at 66.

[57] David Greene, *Is anything obscene anymore: The need for expert testimony to prove lack of serious artistic value*. 10 NEXUS 171, 171-176 (2005). [*hereinafter* Greene].

[58] *See generally* Greene, *supra* note 57, and Rev. Ric Marchi, *Obscenity, tolerance, and the moral community*. 10 NEXUS 159, 159 (2005). [*hereinafter* Marchi]. (Each author offers an opinion that art is a subjective term, and references examples in support of this notion. Greene makes the argument that artistic value must be judged by expert testimony in order to be accurate).

[59] *Pope,* 481 U.S. 497, *supra* note 38 at 504. (Justice Scalia, concurring).

[60] *See* Greene, *supra* note 57 at 174. (Greene presented three case studies of differing opinions related to expert testimony in determining value of potentially obscene material. These case studies are used to demonstrate a need for required expert testimony to in obscenity cases to determine value); Elaine Wang. *Equal protection in the world of art and obscenity: The art photographer's latent struggle with obscenity standards in contemporary America.* 9 VAND. J. ENT. &TECH. L. 113 (2006).

[61] *Id.*

[62] *Castillo v. State,* 79 S.W.3d 817, 821-822 (2003).

[63] *Id.*

testimony to the contrary, only the comic book itself. Despite testimony from professionals in the area, jurors found the material to be obscene.[64]

This case demonstrates the lack of clarity as to how to determine value. If beauty is in the eye of the beholder, art cannot be objectively judged. Without testimony to the value of material, jurors may be unable to determine artistic, literary, or political value on their own, as they may not be educated in terms of art, literature, or political meaning to the extent an expert would. This has led to speculation that value is too subjective and requires expert testimony.[65] Others believe a national standard would be better suited to deal with the value prong of the *Miller* test.[66]

In sum, several objections to the obscenity standard have been raised that concern the vagueness of multiple terms used in the obscenity law. The term obscenity itself is a broad concept, as noted by judges and researchers.[67] Its subcomponents increase its vagueness and provide room for legal challenges to the obscenity statute.[68] Finally, the *value* of the obscene material is also a concept in need of clarification.

II.B. Assumption That Jurors Understand Community Standards

A second concern with the obscenity standard is the assumption that jurors can ignore their own personal standards of obscenity and instead judge the material based on the community's standards of obscenity. Justices disagree as to whether jurors are capable of determining community standards on their own.[69] The Justices in *Jacobellis* questioned the need for experts in determining community standard; while some argued that expert testimony was needed, others argued that jurors are capable of determining community standards merely by examining the material in question.[70] This concern is repeatedly addressed in obscenity cases.[71]

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[64] *Id.*

[65] Greene, *supra* note 57 at 175.

[66] *See generally* Marchi, *supra* note 38.

[67] *Pope,* 481 U.S. 497, *supra* note 38 at 504. (Justice Scalia, concurring); Greene, *supra* note 57 at 174.

[68] *See generally State of Louisiana,* 772 So. 2d 64, *supra* note 48 at 65.

[69] *Jacobellis,* 378 U.S. 184, *supra* note 9 at 187-189. (In oral arguments some justices noted that experts are needed in determining community standards while others argued that the jury should be allowed to decide on their own).

[70] *Id.*

[71] *See generally Smith,* 431 U.S. 291, *supra* note 13; *People v. Nelson,* 410 N.E.2d 476, (1980); *Saliba,* 475 N.E. 2d. 1181, *supra* note 16.

Over the years, the courts have determined that the defense has a right to introduce expert evidence in obscenity cases[72] and have noted that poll data might be exceptionally well suited to inform jurors of community standards in obscenity cases.[73] The fact that courts have allowed expert testimony from survey results[74] and that Justices have argued over the need for experts[75] demonstrates the concern that jurors cannot adequately determine community standards on their own.

Social science research supports this concern. Researchers have illustrated that varying demographic variables, such as age and gender, influence perceptions of obscenity.[76] Younger individuals and males are more liberal in their views on obscenity. These individual differences may lead to a misperception of community standards; the outcome of the case may be contingent on the jurors that are selected. For example, a jury of primarily young, male jurors may decide a material is *not* obscene; while a jury of older and mostly female jurors might decide the same material *is* obscene. Further demographic research indicates that town size may play a role.[77] Individuals in urban areas are more liberal in their views of obscenity than individuals in rural areas.[78] This, too, may impact a jury. It is possible that individuals from a rural area who have moved to an urban area may still rely on their conservative views when judging if material is obscene.

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[72] *Smith,* 431 U.S. 291, *supra* note 13 at 316.

[73] *See generally People v. Nelson,* 88 Ill.App.3d 196, *supra* note 71; and *Saliba,* 475 N.E.2d. 1181, *supra* note 16.

[74] *Id.*

[75] *Jacobellis,* 378 U.S. 184, *supra* note 9 at 187-189. *Also see generally Paris Adult Theater I v. Slaton,* 413 U.S. 49, (1973). (The court ruled that the material was evidence enough alone and did not require expert testimony), or *Kaplan v. California,* 413 U.S. 115, (1973). (The courts here ruled that the defense should be free to introduce expert testimony of what contemporary community standards exist).

[76] *See generally* Scott, *supra* note 1. (Scott conducted a multi-site obscenity telephone survey to get a better idea of community standards of obscenity and to determine if demographic variables played an important role in determining community standards. Although he found demographic variables significant predictors in some cases, he notes that demographics are not the best predictors of ratings of obscenity).

[77] *See generally* Marc B. Glassman. *Community standards of patent offensiveness: public opinion poll data and obscenity law.*42 PUB. OPINION. Q. 161 (1978). [*hereinafter* Glassman]. (Glassman found that community standard vary with the size of the community).

[78] *Id.*

Additionally, research has shown that community standards change over time.[79] Community standards may change from liberal to conservative and back again with the changing norms of society.[80] These findings suggest that community standards are flexible and may be difficult to interpret. Jurors of different ages and backgrounds may not be able to accurately determine the standard of the community (e.g., an older juror may find material obscene because it may have been obscene years ago, but may not be obscene now).

Further, researchers have found that there is a significant difference between individuals' personal perceptions of obscenity and their perceptions of the community's standards.[81] Specifically, individuals hold more liberal views of obscenity than they perceive the community holds.[82] Therefore, jurors in obscenity cases might be overly conservative because they believe the community has more strict standards. This would lead to an undeserved conviction, given the jurors' misconceptions about community sentiment. In sum, the combination of legal cases and research indicate that jurors may not be good judges of community standards and may thus have difficulty in determining what the community considers to be obscene.

II.C. Concerns With The Rise Of The Internet

A recent concern with obscenity statutes is how to deal with obscenity on the internet.[83] The primary concerns are how to control distribution of obscene material on the internet,[84] how to define community standards when the community is world wide, and how to regulate digital instead of physical

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[79] Norman J. Finkel, John E. Burke, & Leticia J. Chavez. *Commonsense judgments of infanticide: Murder, manslaughter, madness, or miscellaneous?* 6 PSYCH. PUB. POL. AND L. 1113, 1114 (2000).

[80] *Id.*

[81] Alicia Summers & Monica K. Miller, *Obscenity is a four letter word, or is it? An investigation into community standards of obscenity.* In M.K. Miller (ed.), Contemporary perspectives on legal regulation of sexual behavior: Psycho-legal research and analysis. (2009) [*hereinafter* Summers]. (This research asks subjects to rate material as to how obscene it is. Subjects were then asked to rate how obscene they believe community members would find the same object. Results indicate that perceptions of community standards are more conservative than individuals' ratings of obscenity on the same items).

[82] *Id.*

[83] *See generally* Lawrence G. Walters & Clyde DeWitt. *Obscenity in the digital age: The re-evaluation of community standards.* 10 NEXUS 59 [*hereinafter* Walters]. (Walters and DeWitt argue that community standards need to be reevaluated in the new digital age).

[84] *See generally* Robert K. Magovern. *The expert agency and the public interest: Why the department of justice should leave online obscenity to the FCC* 11 COMM LAW CONSPECTUS 327 (2003). (Magovern suggests that the FCC should regulate online obscenity).

material.[85] One particular reason that elimination of online obscenity is so difficult lies in the method of prosecution. A noted decline in federal prosecution of obscenity cases has been attributed to the rise of the internet, which makes online obscenity hard to prosecute.[86] Two possible concerns with prosecution exist. The first difficulty is determining the physical location that should be used to prosecute obscenity crimes. The second concern is the variety of community sentiment that exists across the country.

The *Miller* standard was developed during a time when the internet did not exist, and was meant to include community standards based on physical locations.[87] The *Miller* standard was developed to prosecute violators in the community where the material was delivered, not the community from which it originated.[88] That is, material that is placed online in New York City and is viewed in small town, Tennessee will be held to the community standards of Tennessee, not New York. This can be problematic for individuals who post online material that is not considered obscene in their community, but may be in more rural areas. The case of *United States v. Thomas* illustrates this point exceptionally well. Thomas and Thomas created a website in their home state of California. Their website was accessed by a man in Tennessee,[89] who filed obscenity charges. The case was tried in Tennessee, where a jury found that the material violated the community standards of obscenity.[90]

In later cases, however, the court ruled that prosecutions can occur either in the district where the material originates or where it is delivered.[91] This ruling creates more ambiguity surrounding community standards and online material. If prosecution can occur in either district (i.e., either community), then prosecutors can choose the most conservative of communities in which to try the case. More conservative communities would increase the chance of conviction.[92] This may also lead to cases in which individuals challenge the location of the trial, especially if their jurisdiction is more liberal. It must be noted, however,

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[85] Walters, s*upra* note 83 at 60-68.

[86] Christopher S. Maravilla. *The enforcement of first amendment obscenity jurisprudence and the new technologies* 4 FL. COASTAL L. J. 67, 67 (2002). [*hereinafter* Maravilla].

[87] *Miller,* 413 U.S. 15, *supra* note 3 at 16.

[88] *Id.*

[89] *See generally United States* v. *Thomas,* 74 F.3d 701, (6th Cir. 1996).

[90] *Id.*

[91] *United States v. Bagnell,* 679 F.2d 826, 830 (11th Cir. 1982).

[92] *See generally* Glassman, *supra note* 77. (Glassman discovered that rural areas are more conservative and urban areas are more liberal in their views of obscenity. If the prosecution chooses the site of prosecution, choosing more rural areas would increase the likelihood of more conservative community standards and thus conviction).

that the courts have consistently ruled that subjecting defendants to varying community standards is not unconstitutional.[93]

The other related concern is the variability of conservativeness in different parts of the country. If the material is posted online and accessible across the country, then prosecution can occur in "any district from, through, or into which" the material is obtained.[94] Because the defendant can be prosecuted anywhere that the material is viewed, it is difficult to determine exactly what community standards exists and how to know if posted material violates said standards. As individuals from rural areas are more conservative, they would be the most likely to find the material obscene.[95] This would essentially make standards of more conservative communities the national standard to which material is applied.[96] Using the most conservative standard creates, in a sense, a national standard, which directly violates the standard set forth in *Miller,* which clearly articulated that community standards are not national standards.[97]

According to defendants and the American Civil Liberties Union via *Amicus Curiae,* community, in internet cases, requires a new definition.[98] They believed that the community should be defined based on the 'broad ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial."[99] The court, however, rejected this argument.[100] Other researchers have suggested that community should consist of only voluntary adult (i.e., adults who have voluntarily entered sites which may have obscene material) consumers.[101] No consensus has arisen and the courts still have no set answer in responding to online obscenity.

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[93] *See, e.g., Hamling v. United States,* 418 U.S. 87, 106 (1974); *United States v. Sandy*, 605 F.2d 210, 217 (1979).

[94] 18 U.S.C. § 3237.

[95] *See generally* Glassman, *supra note* 77.

[96] *See generally* Matthew Towns. *The community standards of Utah an the Amish county rule the world wide web.* 68 MO. L. REV. 735 (2003).

[97] *Miller,* 413 U.S. 15, *supra* note 3, at 30.

[98] *United States* v. *Thomas,* 74 F.3d 701, 711 (1996).

[99] *Id.*

[100] *Id.*

[101] Arnold H. Loewy. *Obscenity: an outdated concept for the twenty-first century.* 10 NEXUS 21, 26 (2005).

II.D. Violation Of The Privacy Standards

A final concern with obscenity laws is that they violate the right to privacy.[102] Early challenges to the constitutionality of obscenity cases included challenges that it violated the Constitutional right to privacy.[103] In both *Colorado v. Seven Thirty-Five East Colfax, Inc.* and *Kansas v. Hughes,* obscenity laws were challenged and found to violate privacy rights. Although not an obscenity case, the recent legal case of *Lawrence v. Texas*[104] found that individuals have a right to sexual privacy. *Lawrence* sparked a new interest in challenging obscenity laws, allowing a consumer of alleged obscene material to challenge the federal obscenity law on privacy grounds.[105] A federal district court agreed that the obscenity statute, as it was applied, was unconstitutional and violated the due process rights guaranteed in the Fifth and Fourteenth Amendments.[106] The decision was challenged and the higher court reversed the lower court's decision.[107] The appeals court decided that the federal obscenity statute had withstood constitutional attack for 35 years, and thus, the court had no authority to strike it down.[108] Thus, the recent challenge to the obscenity law was rejected by the appeals court,[109] leaving the 1973 standard still standing as the federal obscenity guideline.

In sum, there are several important concerns with the current obscenity standard. It is wrought with vague concepts and is not clearly defined in *Miller* or subsequent cases. This is further complicated by the fact that jurors seem to have trouble ascertaining community standards and may be too conservative in their application of community standards to the case at hand. The rise of the internet and the widespread distribution of material that may be considered obscene is also a concern. With no consensus as to how to apply community standards to a digital media, it will remain a challenge to enforce obscenity standards via the internet. The final concern is that the obscenity statute violates

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[102] *See generally Colorado,* 697 P.2d 348, *supra* note 49; *United States v. Extreme Associates,* 431 F.3d 150, *supra* note 11. (In both cases, the courts ruled that the current obscenity statute violated the right to privacy).

[103] *See generally Colorado,* 697 P.2d 348, *supra* note 49; *Kansas,* 246 Kan. 607, *supra* note 48. (In both cases the defendant challenged the obscenity law as unconstitutional on several grounds, one of which being privacy. The Supreme Courts of both Kansas and Colorado found the current obscenity statutes to violate due process rights to privacy and were struck down by the courts).

[104] *Lawrence,* 539 U.S. 558, 558.

[105] *United States v. Extreme Associates,* 431 F.3d 150, *supra* note 11 at 150.

[106] *United States v. Extreme Associates,* 352 F. Supp. 2d 578, 579 (2005).

[107] *United States v. Extreme Associates,* 431 F.3d 150, *supra* note 11 at 151.

[108] *Id.*

[109] *Id.*

privacy rights guaranteed by Fifth and Fourteenth Amendment rights of due process. These challenges suggest a need for social science research that can inform the debate.

Part III. The Role of Social Science in Obscenity Cases

From early on, social science has played a role in obscenity cases.[110] Judges attempted to use social science research to establish a need for obscenity laws.[111] Judges sought social science research to demonstrate the negative impact of obscenity and pornography on juvenile delinquents.[112] A report from a psychologist argued that there is no evidence that pornographic material is related to juvenile delinquency or anti-social behavior in general.[113] This lack of research spurred the government to seek out research in this area, culminating in a report on obscenity.[114] The Commission on Obscenity and Pornography elicited research in this area and determined that there is no evidence that indicates obscene material causes anti-social or delinquent behavior.[115] However, a dissent by one commissioner noted that he believed the conclusion of this report would be 'deeply offensive' to Congress and the people.[116] He continued to argue that, just because no evidence supports the notion that pornography is related to criminal acts, does not mean it is harmless.[117] At this point, the dissenting commissioner announced that the reason for obscenity statutes was not to prevent overt criminal acts, but to prevent moral corruption.[118]

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[110] *See generally People v. Muller,* 96 NY 408, (1884). (Early case which cited concern over whether an expert was needed to determine if material is obscene).

[111] *See generally Roth,* 237 F 2d. 796, *supra* note 18. (The judges enlisted social science research to determine the role obscenity plays in juvenile delinquency. They found no such evidence to support this).

[112] *Id.*

[113] *Id.* (Circuit Judge Frank discussed the work of Dr. Jahoda, who summarized findings from an paper written to inform the censorship debate (1954) which clearly states that no evidence has been found linking pornography to anti-social behavior).

[114] *See generally* Report of the Commission on Obscenity and Pornography (Bantam, 1970). [*hereinafter* Report]. (This report by the commission on obscenity cites several research studies which attempted to determine the effects of exposure to explicit material. Among the studies was research comparing delinquents and non delinquents in terms of exposure to sexually explicit material. No differences were found between the two groups. Other studies which attempted to examine the relationship of availability of erotic material and sex crimes in the United States found mixed results. No real support was found for the assumption of obscenity causing violence).

[115] *Id.* at 26-32.

[116] *Id.* at 606-624.

[117] *Id.*

[118] *Id.*

Essentially, when social science failed to meet the needs of the commission, the reason for the laws was changed so that research did not matter. Nevertheless, social science still had a lot to offer obscenity cases in terms of expert testimony.

Judges have continually disagreed as to whether research is necessary in interpreting community standards of obscenity.[119] The courts have decided the defense has the right to enlighten a judge or a jury with an expert's opinion as to what community standards are,[120] however, the prosecution does not have to offer expert testimony to prove the material is obscene.[121] The court has also indicated that public opinion polls are uniquely suited for determining community standards of obscenity.[122] These rulings suggest that social science research can be used to inform juries in obscenity cases by providing evidence from social psychological studies that demonstrate community standards.

Although research in the area of community standards of obscenity is not that prominent, several important findings have been reported.[123] Research in the area of obscenity and community standards has found that obscenity depends largely on the size of the community.[124] Small, rural areas hold more conservative community standards than large urban areas.[125] Gender, age, and ethnicity also influence ratings of obscenity.[126] Younger adults and males are generally more liberal in their attitudes toward obscenity.[127] Minorities also seem to hold more conservative views toward obscenity.[128] Therefore, the demographic make up of the jury can influence perceptions of community standards. Additionally, merely viewing material considered to be obscene can change perception of the material.[129] To determine the impact of viewing

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[119] *Jacobellis,* 378 U.S. 184, *supra* note 9 at 187-189. (In this case, Justices questioned the need for expert testimony to establish community standards of obscenity).

[120] *Smith,* 431 U.S. 291, *supra* note 13 at 292.

[121] *Hamling,* 418 U.S. 87, 87 (1974).

[122] *Saliba,* 475 N.E.2d 1181, *supra* note 16 at 1185.

[123] *See, e.g.,* Glassman, *supra* note 77 at 167. (Glassman found that community standard vary with the size of the community); or *see generally* Scott, *supra* note 1. (Scott found that demographic variables were related community standards).

[124] *See generally* Glassman, *supra* note 77. (Glassman conducted a study with community standards and determined community standards depend largely on the size of the community. Smaller communities are more conservative in their views of obscenity).

[125] *Id.*

[126] *See generally* Scott *supra* note 1 and Summers *supra* note 81.

[127] *Id.*

[128] *Id.*

[129] Daniel Linz, Edward Donnerstein, Kenneth C. Land, Patricia L. McCall, Joseph Scott, Bradley J. Shafer, Lee J. Klein, & Larry Lance. *Estimating community standards: The use of social science evidence in an obscenity prosecution.* 55 Pub Opinion Q. 80, 96-98 (1991). (Linz and others had subjects evaluate material in terms of prurient interest and patently

material on individuals, volunteers watched an 'obscene' film and were given an 'obscene' magazine. They rated the material before and after viewing it in terms of how much it appealed to a prurient interest in sex. Following observation of the 'obscene' material, participants found that it appealed to prurient interest less than before viewing.[130]

Perhaps the most striking finding is that jurors are not good judges of community standards.[131] In fact, most individuals feel their opinions of what kinds of material constitute obscenity are more liberal than their community, which means they believe community standards are more conservative than they actually are.[132] Both legal rulings and social science research indicate that public opinion polls and other forms of social science research can specifically inform obscenity cases by providing the jurors with expert opinions of what community standards are. Some social scientists have already assumed this role by providing expert testimony and tailored surveys to the defense in obscenity cases.[133]

Part IV. How Social Science Can Address Obscenity Issues

The four concerns mentioned above include concerns with vagueness, concerns that jurors do not understand community standards, concerns with prosecuting obscenity on the internet, and concern that obscenity laws violate privacy rights. Social science researchers can help to eliminate these concerns in a variety of ways. All of these concerns will be addressed in the following suggestions for policy implications. Specific tasks that can be performed by social scientists are suggested, followed by details as to what role these tasks might play in addressing the problems with the obscenity laws.

The first thing that needs to be done, before social scientist can help, is to clearly define what is meant by community. The law does not clearly indicate what is meant by community, nor do any subsequent laws further this definition. Before community standards can be understood, community must be defined.

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offensiveness, then watch the film and rate it again. Those who watched the film later rated it as less appealing to prurient interest than before watching it).

[130] *Id.*

[131] Summers, *supra* note 81. (Summers examined ratings of obscenity, comparing personal perceptions of obscenity with individual's perceptions of community standards of obscenity. They found that individuals consistently believe that their views are more liberal than their community, despite the size of the community in which they reside).

[132] *Id*.

[133] Holley, *supra* note 17 at 194-210. (Holley surveyed community members regarding both their perception and what they believe is okay for their neighbor to do in the privacy of his or her home. She uses this research to provide expert testimony in obscenity cases).

Although it could be defined as a city or town, a simple solution might be to define community by court jurisdictions within the state. Following this definition, there are many ways social scientists might help.

IV.A. Social Scientists Can Survey The Community

The first thing social scientists can do to help improve the obscenity law is to survey the community. Large scale state funded public opinion research should be conducted by each state. Because previous research[134] has indicated that the size of the town is important in determining how individuals view obscenity, each state should conduct statewide obscenity polls that examine views of obscenity, which will be analyzed according to the size of the community as defined above. Lists of obscene material will be compiled based on public opinion to form specific definitions of what is considered to be obscene. These definitions can be used to help determine what is considered patently offensive at a state level, broken down by town size.

The first step to accomplishing this is to conduct a random sample of communities within each state that represent rural, suburban, and urban populations to enable adequate defining of obscene material at each community size. Residents of these randomly selected communities will be given a survey with questions regarding multiple materials (i.e., magazines that portray sex, selling sex toys) that might be considered obscene and asked to indicate if they consider it obscene or not. A large list of items will be used to try to provide an exhaustive list of materials that may be obscene. Every community in the state need not be studied. By randomly sampling communities of every size, a representative sample will emerge which should hold across communities within the state.

Following the survey, the research will be compiled and items that the majority (i.e., at least two thirds) of individuals find to be obscene will be included in the state statute as examples of patently offensive material. The lists of offensive materials will be created for each size of community within each state. A state should list examples of patently offensive material (as determined by survey research), for rural jurisdictions, jurisdictions that include smaller towns and cities, and large metropolitan jurisdictions. Each size of community should have their own examples, and these should be used for obscenity trials. Specifically, if an individual is suspected of obtaining or distributing obscene material, the prosecution can examine the material in question and see if it matches material that is listed. If the material is on the list, then the individual can be prosecuted. At this point, it is the jury's job to determine if this material

[134] Glassman, *supra* note 77 at 167.

does indeed fit into the criteria of material in the example. If the material is not on the list, then the prosecutor should request that social scientists conduct a new survey, which will address whether the material should be added to the list.

Some states already provide state-wide examples of what is considered obscene. For example, Alabama lists the selling of objects meant to stimulate the genitals (sex toys) as obscene.[135] This example, however, is statewide and does not take into account the size of the jurisdiction. Large urban areas, for example, might not consider selling of sex toys to be obscene, but small rural areas might. Sex toys would be listed on the state examples for small jurisdictions, but not for larger ones. Thus, a person in a large city could not be prosecuted for selling sex toys but a person in a small town could be. Then, the jury's job is not to determine whether selling sex toys is obscene but to determine if the object in question fits the description of a sex toy and thereby fits the material on the list.

Follow up research determining community standards should be conducted periodically because community standards change over time. Large scale research should be conducted approximately every 5 to 10 years, in order to keep up with changing standards. The information gathered from this survey can be used to update the existing lists of state defined patently offensive material, adding or deleting items as needed. Follow-up studies conducted periodically will also help to address the concern about violation of privacy. In the recent *Lawrence v. Texas* case, the Supreme Court decided on the issue of privacy regarding sodomy laws, overturning the Texas sodomy law.[136] In prior Supreme Court cases, laws such as this had been challenged on privacy grounds and upheld.[137] The more recent successful challenge may have been a result of changing community standards of what is acceptable in society. Therefore, periodic surveys which address community standards of obscenity can help to address concerns with violation of privacy rights.

Using social science research to survey communities and provide lists of patently offensiveness has both pros and cons. On the plus side, this approach can help individuals to know if the material they wish to purchase or sell is obscene. Providing a list of obscene material that is part of the state obscenity law can help inform those who wish to know what is considered obscene. Of course this information needs to be public and easily accessible, potentially on an internet site that has state laws. This would solve the problem of individuals

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[135] Ala. Code. Â§ 13A-12-200.1 (1999).

[136] *Lawrence,* 539 U.S. 558, *supra* note 10 at 558.

[137] *See generally Bowers v. Hardwick,* 478 U.S. 186 (1986). (A Georgia sodomy law was challenged on the grounds that it violated privacy. The Supreme Court decided that the law was constitutional and upheld the current sodomy laws).

going to court and not knowing whether or not they are guilty. Additionally, providing survey information for each community size would allow for within state variations, as community size is important in determining what is considered obscene. This should make both the defense and the prosecution of obscenity cases easier as clearer definitions are in place. This method would also reduce the chances that an obscenity statute could not be considered unconstitutionally vague because it specifies both a definition of community and specific examples. Finally, social scientists surveying communities would solve the problem of jurors not being capable of determining community standards. Allowing survey research to inform the law removes the need of jurors to decide if something violates community standards, as the standards are already provided.

The major drawback with providing survey research for a random sample of communities in every state is the potential cost. Completing a large scale survey will not be cheap. It will take time and money for researchers to call enough people to adequately sample an entire state, compile and analyze the information, and provide the best information of what is considered obscene. Periodic research to review the list and make changes may also be costly.

IV.B. Social Scientists Can Help To Define And Survey A Virtual Community

In addition to surveying physical communities to help legally define obscenity, community members can help to define and survey a virtual community. As noted above, there are several concerns with the rise of the internet and prosecuting obscenity in the digital age.[138] One of the concerns is where to prosecute the crime. Prosecution can occur at the site of delivery, the site of origination, or anywhere in between that the media passes.[139] This can be problematic because the community at the site of origination may be more liberal than the site of delivery, making online material susceptible to the most conservative of community sentiment. Social scientists can help with this problem by identifying a virtual community and surveying them to determine if the material is obscene.

Many sites that have potentially obscene material require credit card payment or another form of age verification to enter. Therefore, individuals who enter the sites knowingly and willfully do so. These individuals may have different views of what is obscene than individuals who do not choose to enter

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[138] *See, e.g.,* Walters, *supra* note 83, or Maravilla, *supra* note 86. (Both Walters or Maravilla discuss potential concerns with the obscenity on the Internet).

[139] *Bagnell,* 679 F.2d 826*, supra* note 91 at 830.

the sites. Therefore, it makes sense that the online community that consists of individuals who seek to view this material should be separated from those who do not seek to view it, regardless of their geographic location. This would create a virtual community. Social scientists can survey the general population, seeking to determine how individuals who choose to view this material rate obscenity of various items. This information can be used to inform laws (or juries) as to how a virtual community would view the material. This way, the material is not judged by the most conservative community, but by a typical community that would be viewing similar material.

IV.C. Social Scientists Can Testify About Social Framework Evidence

A third way social scientists can help is to offer social framework testimony about how jurors are supposed to determine community sentiment. Social framework refers to "the use of general conclusions from social science research in determining factual issues in a specific case."[140] If the above survey suggestion is not taken, the jurors will still need help to determine what community standards are. There are several things researchers can testify to, which might help jurors to determine community standards without incorporating their own biases. For example, research indicates that people think the community standards are more conservative than their own.[141] By testifying to this effect, researchers can instruct jurors to not rely on their own perceptions too much, as they might be too conservative. Additionally, researchers can testify as to the fact that community size is important in determining community standards. Individuals who grew up in a different area may consider their hometown standards instead of their community of residence. By informing them that community size is important, and that urban areas are more liberal, jurors will be better informed when determining community standards.

This method has the potential to be very helpful to jurors and may be cheaper than conducting a state wide survey. The major advantage of this is that experts can be brought in on a case by case basis to testify to the jury of the potential problems with establishing community standards and provide information to help the jurors make informed and unbiased decisions. The only drawback is that jurors still may rely on their biases when making a decision. This approach does not help to better define community standards, only helps determine whether material has violated the standards. Additionally, there would

[140] John Monahan & Laurens Walker, Social Science in Law: Cases and Materials 384. (6TH ed., Foundation Press, 2006)

[141] Summers, *supra* note 81.

be substantial cost associated with paying experts to testify about community standards.

IV.D. Social Scientists Can Provide Expert Testimony As To The Value Of The Material

A final way social scientists can help resolve the dilemmas surrounding obscenity is by providing testimony as to what is considered to have artistic value. Art is a very subjective concept. What is considered art by one person, may not be considered art by others. There is a concern that jurors cannot accurately determine the value of material without testimony to the fact.[142] Because of this, it is important to allow obscenity defendants to provide expert testimony of what has artistic, scientific, and political value. Experts in the field can provide reasons why the material is considered to have value, including testifying as to the artistic value of an item. These experts may be able to further help individuals to see something in the work that they would not normally recognize, like an artistic style or message of value. Social scientists can help with this by interviewing or surveying experts in the field. If the material's value is in question, social scientists can survey leading experts regarding the material and provide evidence as to the general perception of the material.

Another potential solution is that store owners who are concerned that some may think their material is obscene can *certify* the material as to its value. If owners preemptively attempt to ensure their material is not considered obscene, by certifying its value, this could decrease prosecution against individuals who own or distribute this material. Social scientists could seek out and survey experts in the field. If survey results indicated that the material had artistic value, then the store owner could get the material certified, and use this later to demonstrate the value of the material.

Part V. Conclusions

With the vast number of articulated concerns with the obscenity law, it is time that something is done to drag the 1973 statute into the 21st century. The statute and subsequent legal cases failed to specifically define many terms; this has resulted in continuous legal challenges across the country on the grounds of unconstitutional vagueness.[143] There is no aspect of the three-prong *Miller*[144]

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[142] *See generally* Greene, *supra* note 57.

[143] *Spokane Arcades, Inc. v. Ray*, 449 F. Supp. 1145, 1145. (Obscenity law was challenged as being overly broad).

[144] *See generally Miller,* 413 U.S. 15, *supra* note 3.

test that has not been challenged either in court[145] or in articles[146] attacking the very foundation of obscenity statutes. That is not to say that obscenity laws should be abolished. Commissioners of the obscenity and pornography report in the 1970's articulated best how the country might respond to lack of an obscenity law when they said the findings of the report would be "deeply offensive" and implying obscenity is harmless is "patently ridiculous."[147] If this is true, the United States, as a moral community, *needs* statutes in place to show that obscene material is not tolerated.

Even so, the statutes do not have to include terms so ambiguous that they cannot be accurately interpreted or followed by the individuals whose constitutional rights said laws are meant to protect. Policy changes can help reduce the vagueness of the statute and allow social science researchers an opportunity to do their job, a job previously ignored or given little weight in the obscenity laws. First and foremost, community must be defined. For example, defining community as jurisdiction, (i.e., court jurisdictions within the state), would allow specificity for the courts and researchers in establishing community standards.

Regardless of how community is defined, it must be defined before steps can be taken to fix the other concerns. After a definition of community is established, social science researchers can inform the obscenity debate by surveying communities across the country and helping to establish exactly what is considered obscene. These surveys can inform new laws and help jurors to know what the rest of the community thinks, instead of relying on their own biases and assumptions. Jurors will no longer have to determine community standards. They will only have to determine if the material in question meets the definition of material already listed in the law as obscene. This should ensure a fair trial for obscenity defendants by establishing a list of what is considered obscene. They will no longer have to go into court unsure if the material they possess fits the bill. They will have a list of examples for comparison.

Further, survey research conducted periodically can help to solve concerns with privacy issues. As community standards change, items previously considered obscene may no longer be so. Therefore, periodic research can help to identify these changes in public perception and modify current laws before they become an issue. Surveying, then not only helps with concerns about

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[145] *See, e.g., United States v. Extreme Associates, Inc*., 431 F.3d 150, *supra* note 11 at 150. (Obscenity law challenged on grounds that it violates right to privacy).

[146] *See, e.g.,* Romero, *supra* note 8. (Throughout the article, Romero discusses the vagueness of obscenity laws).

[147] Report, *supra* note 114 at 617-622.

vagueness and jurors being good judges of community standards, but also addresses the concern of violation of privacy.

In addition to surveying physical communities, social scientist can also help by discovering and surveying a virtual community to help with the problems of prosecuting online obscenity. By creating a virtual community, social scientists can eliminate the need to judge obscenity by the most conservative standards. Virtual communities will be identified and surveyed and this information will be presented to jurors or used to update the laws, thereby helping with two potential concerns – the internet, and jurors as good judges of community standards.

The final ways social scientists can help are to provide social framework evidence and survey experts as to opinions of what constitutes artistic value. Surveying as to artistic value allows jurors to know what experts in the area think about the material in question in terms of its value, as art is often objective in nature. Social framework evidence helps jurors make decisions by providing them with information as to why they may think a certain way and what current social psychological research indicates regarding issues relevant to the case at hand.

Social science researchers have been helpful to the legal system for years. Allowing researchers to help inform obscenity cases and obscenity laws can be beneficial to society. Although it will not eliminate obscenity, providing scientific evidence can help reduce vagueness and increase constitutionality of the law and further ensure individuals get a fair trial. In sum, social science has the potential to broadly impact the legal system and improve a legal standard that has been fraught with problems for thirty-five years.

Earthly Powers: Religious Justifications for Non-State Political Violence and the Strategy of "De-Coupling"

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I do not feel obligated to believe that the same God who has endowed us with sense, reason, and intellect has intended us to forgo their use.
-- Galileo Galilei

You can safely assume that you've created God in your image when it turns out that God hates all the same people you do.
-- Anne Lamott

Recent acts of violence directed at civilians all over the world – in New York, London, Madrid, Algiers, Istanbul, Moscow, Islamabad, Mumbai, Colombo, and Bali, among others – perpetrated by organizations claiming religious motivations, have understandably raised questions about religious attitudes to violence and what governments might do to deal with such behavior. Moreover, many violent conflicts such as those in Northern Ireland, the Balkans, Chechnya, Darfur, Israel/Palestine, Iraq, and Kashmir contain inter-religious attributes, sparking discussions of religious justifications of war between states and rebellions within them.

Unfortunately, Western policy-makers and scholars charged with mitigating these conflicts are often ill-equipped to deal with perhaps the most significant issues involved, the strongly-held religious convictions of the parties. Over the past century or so religion has often been reduced to stereotypes or simply ignored by social scientists and security professionals who prefer to view political violence through the lenses of rationality and pragmatism. While the events of September 11, 2001 and the so-called "Global War on Terror" that followed thrust religion front and center in international security circles, many of the policy prescriptions put forward thus far unintentionally continue to view religiously-motivated political violence through a secular lens.

This article is an attempt at course correction. It examines the phenomenon of religiously motivated violence undertaken by non-state actors directed against non-combatants, both past and present in order to frame a

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discussion of a strategy to confront such violence. This piece will focus on the religious goals and motivations of violent groups rather than draw conclusions about underlying conditions outside of religion in which political violence may germinate such as poverty and lack of education. Moreover, while it is clear that states can and all too often do commit acts of violence against non-combatant populations, the issues of whether states with significant religious identities commit acts of religious "terrorism," or can, by definition, commit acts of terrorism at all, is a topic that will be reserved for other fora. Finally, this piece does not address all types of aggression across the spectrum of violence, including conventional warfare in the modern Western understanding, but focuses on that activity specifically and purposefully directed at non-combatant populations. While this activity is popularly referred to as "terrorism," the term often obscures more than it illuminates due to the value judgment the use of the word connotes. The word "terrorism" is therefore avoided in this work.

Religion, Ideology, and Political Violence

A great deal of ink, not to say blood, has been spilled over efforts to understand conflict in general and politically motivated violence by non-state groups in particular, especially since 2001 and the subsequent US "War on Terror." It has become clear over time that struggles that might otherwise be justified on political or economic grounds often gain another level of intensity and complexity when a religious justification for the effort is invoked because religious conflict involves fundamental values and self-definition that strike at the heart of what one considers ultimately just. This allows what may otherwise be a political group to avail itself of thinking that justifies the use of violence in what they perceive as a cosmic struggle of good and evil, order and disorder, that they have identified with some temporal struggle here on earth.[1]

Moreover, in most circumstances the State holds the monopoly on the legitimate use of violence. "Those who want moral sanction for their use of violence, and who do not have the approval of an officially recognized government, find it helpful to have access to a higher source: the meta-morality that religion provides."[2] Religion therefore is often used, consciously or unconsciously, to justify and legitimate otherwise political claims and the use of violence to achieve them by actors outside of the state system.

Americans became acutely aware of this phenomenon on September 11, 2001 and the US Government moved swiftly to confront the threat thereafter but

[1] Jurgensmeyer, Mark. *Terror in the Mind of God: The global Rise of Religious Violence*. Berkeley, Ca: University of California Press (2000), p. 176.

[2] Ibid.

the attacks on that day, devastating as they were, were not the first of their kind. Around the world and throughout history, religiously motivated actors have drawn from a variety of sacred teachings to justify violence to achieve what may be reasonably considered political goals. Various religiously motivated movements have employed violence as a tactic and continue to do so today. A brief examination of what makes religiously motivated political violence unique is therefore instructive in devising a strategy to confront today's threat.

Distinguishing Religiously Motivated Political Violence

Lethal violence directed at non-combatant or "civilian" targets are typically "acts that are meant to demonstrate the strength of a movement and its ideas in the public sphere."[3] 19th century Russian anarchists advocated a "propaganda by the deed," in which violent action was seen as the most effective means of galvanizing revolution as opposed to conventional forms of propaganda.[4] What is distinctive about this type of violence is that the object of hostility is not the direct victim, but some larger audience. What, then, makes religiously motivated aggression distinctive from justifications for political violence?

The politically motivated actor typically performs violent acts in full public view in order to communicate his or her vision for society. Yet in the case of exclusively religiously motivated terrorism "the primary audience is the deity, and depending upon his particular religious conception, it is even conceivable that he does not need or want to have the public witness his deed."[5] Such a perspective, however, does not take religiously motivated violence against civilians out of the realm of politics altogether. As with many other human acts, motivations, justifications, and audiences for violence are often mixed.

Most religiously motivated armed groups do in fact target a public audience because their interpretation of divine will commands or permits them to pursue tangible and worldly political goals. Religiously motivated armed actors often synthesize, to varying degrees, "an ideology of transformative significance" that "is usually couched in the rhetoric of traditional religion and touches on a great many aspects of daily life."[6] In short, divine will is seen as the underlying justification for violence that also has a political agenda, often in

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[3] Juergensmeyer, Mark. "Terror Mandated By God," *Terrorism and Political Violence.* 9:2, Summer 1997., p. 17.

[4] Martin, Gus. *Understanding Terrorism: Challenges, Perspectives, and Issues.* Thousand Oaks, CA: Sage Publications (2003), p.. 38.

[5] Rapoport, David C. "Fear and Trembling: Terrorism in Three Religious Traditions." *The American Political Science Review.* 78:3, September 1984, p.660.

[6] Juergensmeyer, "Terror Mandated By God." p. 17.

the contexts of ethnic or nationalist goals. In such cases racial, ethnic, economic, and religious goals are commingled to form syncretic movements that may use religious justifications for what might otherwise be considered purely political actions.

When discussing religiously motivated political violence, bright lines between the sacred and the secular rarely exist. Instead, worldly and other-worldly aims often blend together and reinforce one another. Many "Islamic" instances of religiously motivated political violence tend to "combine strong religious fundamentalist commitments with strong nationalist, anti-imperialist tendencies."[7] Indeed, some argue that "the fundamentalist attack on Western values is…the Muslim version of the attack on 'neoimperialism' that characterizes many Third World polemics against the current international order."[8] Likewise, "Sikh" radicalism often combines religion with nationalism.

This blending of the worldly and cosmic, however, does not imply that religiously motivated political violence is just like other types of armed activity. While they may exhibit characteristics that are political in nature, "fundamentalist movements are also genuinely religious, which puts them in an analytical category distinct from other social protest movements or political opposition parties. We will fail to understand these movements if we neglect their irreducible religious dimension."[9] Such actors may in fact be more capable of indiscriminate violence than their secular counterparts because for the religiously motivated, "terrorism assumes a transcendental dimension…unconstrained by the political, moral, or practical constraints that seem to affect other terrorists."[10] Girded in a perceived theological imperative and a Manichaean view of the world, the religiously motivated armed group would seem to allow or even demand the use of any means to achieve the desired end, the ultimate just cause of carrying out the will of the deity in a "total war" against those whom the belligerents consider to be "outsiders."[11] Quite often these "outsiders" include coreligionists whom the activists do not consider sufficiently faithful.

Whether their violence is directed at coreligionists or outside groups, the current inquiry into religiously motivated violent groups is driven in large part by the perceived lethality of such movements, particularly as it applies to the

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[7] Almond, Appleby, and Sivan, *Strong Religion: The Rise of Fundamentalisms around the World*, University of Chicago Press, Chicago: (2003), p. 115.

[8] Sohail Hashmi, "Interpreting the Islamic Ethics of War and Peace," in *The Ethics of War and Peace*, Terry Nardin (ed.) (Princeton: Princeton University Press, 1996), 146-66. p. 159.

[9] Almond, et.al., p. 219

[10] Id, p. 272.

[11] Id, p. 273.

"precision-guided" suicide bomb. While the conventional wisdom is that religiously motivated violent groups are more likely to use civilian-targeting suicide techniques in their attacks than their secular counterparts, secular terrorist organizations such as the Liberation Tigers of Tamil Eelam (LTTE) employed these extraordinarily lethal tactics regularly and with disturbing effectiveness.

Rather than tying the lethality of a terrorist group to its religious motivation or lack thereof, Mark Sedgwick asserts that "the distinction being made…is not so much one between secularism and religion as one between reformism and revolutionary radicalism."[12] For Sedgwick, the revolutionary nature of an armed group correlates to its lethality rather than its religious nature. Religiously motivated armed groups may simply be more likely to be revolutionary radicals in outlook rather than reformist, thus explaining their frequent proclivity for extreme lethality.

This lethality is precisely what has focused minds around the world on confronting the common threat of religiously motivated political violence. An understanding of the historical context of such violence across time and religious traditions is helpful in formulating responses to it.

Historical Examples of Religiously Motivated Violence

Prior to the nineteenth century, religion was the preeminent justification for lethal violence directed at non-combatant populations and property.[13] Religiously motivated terrorism predates the introduction of "traditional" secular justifications for political violence by centuries. Three examples from history of what modern audiences might label "religiously motivated terrorism" are the thugs, zealots-sicarii, and assassins. Each group could be considered the forerunners of modern religiously motivated non-state violent organizations. However, important philosophical and tactical points differentiate them from one another, as well as from many of today's religiously motivated organizations.

Thugs

The Thugs of India were one of history's longest continuously operating religiously motivated violent groups, spanning centuries. Their practice, known as *thugee,* was to apprehend travelers along the highway, then to strangle, rob, dismember, and bury the victim. This gruesome practice resulted in the deaths of hundreds of thousands of people over the course of several centuries.

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[12] Sedgwick, Mark. "Al-Qaeda and the Nature of Religious Terrorism." *Terrorism and Political Violence.* 16:4, Winter 2004, p. 808.

[13] Rapoport, p. 659.

Unlike many religiously motivated groups, the Thugs seem to have committed these atrocities without any worldly political or social end in mind. Rather, the Thugs believed that the pain they inflicted on victims brought pleasure to the goddess Kali. In this sense, the Thugs were perhaps the quintessential *religious* terrorist group, because both their justification and their audience was the deity. For them, the attacks afforded religious benefit to both victim and perpetrator. Such violence was a routine, almost cheerful activity for the Thugs, rather than a random deed fueled by the hatred and anger as the deeds of many religiously motivated terrorist organizations are often characterized. Lacking any discernable political component, the Thugs were truly unique for their limited desire to inflict pain only on their victims. They may in fact have been more of a religious movement that practiced human sacrifice rather than a religiously motivated violent group as we tend to think of the concept today.[14]

Zealots-Sicarii

Unlike the Thugs, the Zealots-Sicarii of Roman-controlled Judea exhibited a desire to achieve at least short-term political objectives. The Zealots were spurred to action by political and cultural events they perceived as signs of an impending apocalypse. The Sicarii were named for the short daggers they wielded to perform assassinations of symbolic figures in the Roman ruling class, Greek population, and the Hellenistic Jewish establishment. They were a militant component of the larger Zealot community resisting Roman occupation. The Sicarii also carried out numerous other acts of irregular warfare against the Romans as well as direct military assaults.[15] While the first century Jewish revolt largely consisted of civil disobedience in its early days, violent elements in the Zealot community ultimately sealed the fate of the revolt by provoking the Romans into the destruction of the Second Temple, the exile of the Jews from Judea and, ultimately, the mass suicide at the fortress of Masada.

The actions of the Zealots-Sicarii appear political but religion played a dominant role in the minds of its agents. Viewing corrupting Roman influences as a biblical reenactment of Canaanite encroachment on the land promised to the Israelites, the Zealots sought to bring about divine redemption through violent terror. It is noteworthy that Zealot activity correlated with a rise in messianic sentiment among the Jews.[16] Although the immediate actions of the Zealots-Sicarii – launched in public venues, against prominent figures, and often on holy

[14] Sedgwick, Mark, p. 798.
[15] Rapoport, p. 670.
[16] Juergensmeyer. *Terror in the Mind of God*, p. 24.

days – were political in nature, the greater aim of Zealot partisans was to bring about a messianic redemption.

Assassins

The Order of the Assassins conducted attacks for over 150 years in the Islamic world. Founded by Hasan ibn al-Sabbah of the Ismaili sect, the group is thought to have derived its name from the drug hashish, which some scholars contend they ate prior to carrying out their attacks against political figures.[17]

The Assassins, like many other religiously motivated violent groups, were willing to die for their cause, but they went further than most in that they regarded martyrdom as a compulsory part of any assassination.

> "It is significant that in all their murders…the Assassins always used a dagger; never poison, never missiles, though there must have been occasions when these would have been easier and safer….There is even a suggestion that to survive a mission was shameful."[18]

The sacred aspect of the Assassins' attacks is underscored by their self-designation as *fidayeen* – consecrated or dedicated ones.[19] By dying heroically in the process of assassinating a "tyrannical" political leader, the *fidayeen* achieved martyrdom, gaining entrance into paradise.

While each attack was viewed as affording religious benefits to the individual Assassin and ultimately to the Muslim community as a whole, the Assassin movement was also strongly tied to shorter-term political goals. The immediate political objective of the Assassins was to "reconstitute Islam into a single community again" through the seizure of mountain fortresses throughout the Middle East.[20] Although attacks were generally limited to Sunni Muslim and Christian leaders, these targets were of significant public stature to provoke widespread fear among local populations. The Assassins believed that they could eventually herald in a messianic age in which the *Mahdi,* or messiah figure, would emerge "to cleanse Islam."[21]

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[17] Martin, p. 16.

[18] Lewis, Bernard. *The Assassins: A Radical Sect of Islam.* New York: Basic Books (2003) p. 127.

[19] Rapoport, p. 665.

[20] Rapoport, p. 666.

[21] Rapoport, p. 665.

Contemporary Religiously Motivated Political Violence

The ancient examples cited above took place in distant eras and in disparate places both from us and from one another. We see today that religiously motivated violence still lacks respect neither for borders, nor for co-religionists who do not share their outlook. Unfortunately, every major faith contains an example of religiously motivated violence. We turn now to some contemporary examples of this phenomenon in order to obtain as broad and thorough an understanding of it as possible, all with an eye toward formulating a strategy to manage the threat.

Each of the groups discussed below has used violence in the name of a sacred tradition. When such movements are examined, certain "family resemblances" appear amongst politically, culturally, and religiously diverse groups. Some of the most significant of these resemblances are a set of shared criticism of and reactions to secular modernity.[22] Indeed, resistance to modern secularism is a defining feature of what is often termed "religious fundamentalism." While "the understandding of, and reactions against, secularization may vary… fundamentalists across religious traditions and regions of the world share an animus against political cultures that would deny religion what they feel to be its central place in ordering society."[23] For example,

> [R]adical Shi'ite Muslims in Iran and Lebanon, militant Sikhs in Punjab, Jewish extremists on the West Bank, Hindu nationalists at Ayodha, and Christian cultural warriors in the United States – despite being worlds apart from one another geographically, historically, and in the specific content of their beliefs and practices – were establishing … movements that looked to the past for inspiration rather than for a blueprint. Direction and models would come not only from a selective interpretation of the sacred past but also from imitation of what works in the present – including, of course, secular models.[24]

A useful framework is to consider religiously motivated political violence the genus (family) with individual religiously motivated groups the species. These are particularly virulent species however, especially when compared to the "traditional" methods of political violence present in the twentieth century, namely anarchism, anti-colonialism, and communism/socialism.

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[22] Almond, et.al., p. 6.
[23] Id at 20-1.
[24] Id at 10.

We now turn to examine contemporary examples of sacred violence drawn from the Sikh, Jewish, Muslim, and Christian traditions, among others. This is not an exhaustive list, but it captures the most active and dangerous religiously motivated terrorist groups and provides a broad cross section of faith, traditions and geography, remembering, of course, that it is often difficult to disentangle an ethnic or nationalist component from a religious one.

"Sikh" Non-State Political Violence against Non-Combatants

Like many other movements, Sikh separatist groups in India exhibit both religious and ethno-nationalist motivations for their violence. Some of these motivations include "the secularism of the Indian state, the moral decay of urban life, and the threat of Hindu religious nationalism."[25] The most extreme groups advocate the creation of Khalistan, an independent Sikh state.

The violence associated with Sikh groups has been particularly bloody, especially during the 1980s. More than a thousand lives were lost during the 1983 Indian Army invasion of the Golden Temple, which was occupied by rival Sikh groups. Indian Prime Minister Indira Gandhi was assassinated by her Sikh bodyguards in revenge.[26] Additionally, in 1985, 329 lives were lost when an India Air jet was blown up in mid-air.

"Jewish" Non-State Political Violence against Non-Combatants

In the wake of the Israeli victory in the 1967 war, many orthodox Jews considered the capture of land that constituted part of the historic Davidic Kingdom, Judea and Samaria, to be a sign of messianic redemption. This group saw the fulfillment of a religious mandate in the modern state of Israel - by reclaiming these lands, they believed they could hasten the coming of the messiah. Therefore, any action leading to the forfeiture of perceived holy land should be opposed, resulting in the creation of groups such as Gush Emunim, or "Bloc of the Faithful," which encouraged settlement in the West Bank and Gaza Strip.

While most Israeli religious activist groups promoted such policies through political participation, a contingent of radicals advocated violence against Arabs and insufficiently cooperative Jews. Two such organizations were Kach and Kahane Chai, the legacies of a political movement founded by American-born rabbi Meir Kahane, who believed that Arabs should be forcibly transferred from the biblical land of Israel.[27] In order to advance this goal Kach

[25] Almond, p. 159.
[26] Ibid.
[27] Martin, p. 126.

member Baruch Goldstein, an American-born physician, fired indiscriminately upon a group of Muslims praying at Ibrahim's Mosque in Hebron, killing 29 in 1994.[28] Just a year later, in the midst of the Oslo peace accords, Yigal Amir, a right-wing university student with ties to EYAL, a Kach offshoot, assassinated Israeli Prime Minister Yitzhak Rabin. Other political violence directed at civilians includes the 1984 attempt by a Gush Emunim-linked group to blow up the Dome of the Rock in order to rebuild the Jewish Temple on the site.[29]

The perpetrators and their supporters perceive these violent actions as justified because they send a forceful message to those who seemingly prevent biblical prophecy from taking its course. Like the Zealots before them, they view their contemporary society as weak and corrupt due to a decline in religious values. They also believe that what they perceive to be historically Jewish lands must be purged of "foreign" – in this case, Arab – influences, coupled with the incorporation of Jewish religious law as state law. These groups are therefore motivated by what they consider to be a religious mandate from God. This mandate, so the logic goes, manifests itself in a modern political entity: the state of Israel. Ironically, it may be argued that Israel's ability to deal with the Palestinian question is severely hampered by the all too real possibility of a violent response to any efforts at accommodation.

"Islamic" Non-State Political Violence Against Non-Combatants

In the Muslim world, the movements that gave birth to a multitude of religiously motivated violent groups largely "represented reactions to the Arab secular nationalism fostered in the nation-building of the immediate post-World War II decades."[30] It bears noting that these movements also gave birth to many legitimate political parties that actively, and peacefully, participate in national politics. The focus of this work, however, are the violent derivatives of the broader movement.

The al Qaeda network, because of its global reach, represents religiously motivated violence on a sensational and unprecedented scale. A staple of radical discourse are the twin claims that the traditional religious leaders of the Muslim world have been co-opted by dictatorial rulers and that the war against Islam, against true believers, was being waged not only by the West but also by

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[28] Nacos, Brigitte. *MassMediated Terrorism: The Central Role of the Media in Terrorism and Counterterrorism*. (2nd ed.) Lanham, MD: Rowan & Littlefield Publishers, Inc. (2007), p. 34.

[29] Stern, Jessica. *Terror in the Name of God: Why Religious Militants Kill.* New York: Harper Collins 2003 p.104.

[30] Almond et.al., p.107.

traitorous forces within the Muslim world.[31] Osama bin Laden, however, is "uniquely successful in driving the message home – literally – and thus operationalizing it."[32] He gave various undisciplined groups scattered throughout the Muslim world, many of whom were veterans of the Afghan resistance against the Soviets, a unifying cause encompassing most, if not all, of the grievances found today in the Muslim world, and organized a network of cells dedicated to that cause – the establishment of the Caliphate.

The resilience of al Qaeda is demonstrated by its adaptability. An extremely flexible and durable entity, al Qaeda is better described today as a movement rather than the tightly organized and centrally controlled group it once was. Its amorphous structure allows independently operating individuals and cells who subscribe to al Qaeda's principles to carry out their attacks on an ad hoc basis. Similar to the Assassins, al Qaeda believes it must rid the Muslim world of all ideological influences which do not accord with its specific interpretation of Islam. And, like the Assassins, al Qaeda operates across national boundaries, hoping to reconstitute its idealized Islamic state.

All of this should not be taken to imply that al Qaeda is a group of traditional or conservative believers. Rather, bin Laden and Ayman Zawahiri, the figureheads of the movement, are innovative manipulators of the Islamic tradition who cleverly reinterpret centuries of teachings in order to justify their use of violence. They seek to establish the *Caliphate* by taking forceful actions to overtake what they considered the modern-day *jahiliyya,* or state of ignorance, which marked Western and other insufficiently Islamic societies. To them, combatants as well as civilians are all potential targets for attack in this conflict. Hence the 1990s were marked by Al Qaeda attacks on, among other targets, the *USS Cole,* and U.S. embassies in Africa.

While the most spectacular al Qaeda operation was undoubtedly the attacks targeting the World Trade Center and Pentagon in the United States on September 11, 2001, the true target was the transnational Islamic community. Bin Laden hoped to create a crisis by attacking the United States (intending to provoke the US into lashing out against the Muslim world) that would force Muslims the world over to join a total war against the West or at least motivate Muslims to declare their loyalty to bin Laden's interpretation of Islam. Since the 9/11 attacks, al Qaeda has been credited with attacks in Europe, throughout the Middle East and South and Southeast Asia.

Another prominent group motivated by their particular interpretation of Islam is Lebanese Hizb'allah (Party of God). This group exemplifies the shades

[31] Id at 238-9.
[32] Id at 239.

of gray that so often accompany political movements. Although Hizballah's attacks targeting non-combatants are legendary, its militia is now strong enough that such activities may no longer be necessary. Moreover, the party is deeply involved in the Lebanese political establishment and is (and has been) widely recognized throughout the Arab and Muslim world as a legitimate resistance movement.

Hizballah initially appeared in 1982 during the Israeli occupation of South Lebanon, preceded by the 1979 Iranian revolution and tensions with the Palestinian Liberation Organization (PLO). Following the landing of multi-national, mostly Western, peacekeeping forces in Lebanon, Hizballah launched a spectacular suicide/martyrdom bombing campaign. The campaign killed hundreds and succeeded in persuading the French and American peacekeepers to leave Lebanon while confining the Israelis to a small zone in the south. Hizballah went on to take in excess of one hundred hostages over the course of a decade.

Significantly, "the use of suicide bombings by Muslims began in Lebanon and was popularized by [Hizballah]."[33] While martyrdom is a theme often expressed in Shi'a theology, martyrdom historically did not entail suicide per se, even among the medieval Assassins. Rather, individuals expected to die at the hand of the enemy during especially daring attacks. Former Hizballah spiritual leader Sheikh Fadlallah and others co-opted this religious tradition to justify suicide attacks. For example,

> The annual Ashura processions by the Lebanese [Hizballah], commemorating the martyrdom of Imam Husayn [who was killed in battle]…[has] been used as justification and as a driving force behind its own practice of martyrdom through suicide attacks.[34]

Hizballah uses religious terms to cast its enemies as antithetical to Islam. While the group certainly has political desires – it in fact controls much of the southern portion of Lebanon, which has been dubbed a "state within a state," – it is "not fighting so that the enemy recognizes us and offers us something. We are fighting to wipe out the enemy."[35] This enemy consists primarily of the state of Israel, other Western powers, and rival groups within Lebanon.

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[33] Wiktorowicz, Quintan. "A Genealogy of Radical Islam." *Studies in Conflict & Terrorism.* 28, 2005, p. 92.

[34] Ranstorp, Magnus. "Terrorism in the Name of Religion," *Journal of International* Affairs, vol. 50, iss. 1, summer 1996, p, 48.

[35] Laqueur, Walter. *The New Terrorism: Fanaticism and the Arms of Mass Destruction.* New York: Oxford University Press, 1999, p. 136.

Despite its record of violence directed at civilians, Hizballah has become a broad-based popular movement heavily invested in social and charitable activities and maintains a significant portion of seats in the Lebanese parliament. The group has evolved into more of a political party that often appears to be a champion of democracy. The difference between Hizballah and most political parties, however, is that it has an incredibly well trained and equipped militia.

"Christian" Non-State Political Violence Against Non-Combatants

Two contemporary iterations of what might be termed "militant Christianity" occur in, first, the ethno-religious conflict in Northern Ireland between Scottish and English-derived Protestants and Irish Catholics and, second, the sometimes racist sometimes "patriotic" actions of North American Protestants of various stripes.

The Irish case is unique in that religion is just one of many potential motivations or justifications for violence in play. The actions of the Irish Republican Army (IRA) were often justified on leftist or nationalist grounds more so than on religious ones and are fairly well known. An interesting contrast, however, lies between Irish and American Protestantism's violent iterations. "The Ulster Protestants are ethno-nationalist and anti-Catholic … followers rally around the political rather than the strictly religious cause; the religious rhetoric and mobilizing capacity is generally understood to be at the service of ethno-nationalist politics."[36]

The Paisleyite Ulster Protestants are an interesting contrast to the North American Protestants, who share religious doctrines and symbolism. While North American Protestants tend to prefer the language of restoration over that of transformation or revolution, the political and social context in Ulster often dictated a very different political mobilization patterns.

> The Ulster case suggests comparisons, instead, with other ethnonationalist movements that display a completely different religious portfolio (e.g., Sikhs, Sinhala Buddhists, perhaps even Hindutva militants). In each of these cases, the 'fundamentalist' movement adopts religious symbolism and discourse and strives for dominance of an ethnic opponent who is also constructed in religious terms (i.e., Ulster Protestants versus Irish Catholics, pure Sikhs versus false Sikhs and militant Hindus, Sinhala Buddhists

[36] Almond et.al., p. 111.

> versus Tamil Hindus, and Hindu nationalists versus upwardly mobile Indian Muslims).[37]

The now defeated Ku Klux Klan is perhaps the most striking example of violence motivated, at least in part, by North American Protestantism. After Civil War reconstruction and throughout the civil rights movement, the group initiated a reign of terror directed primarily against African-Americans, demonstrating the ethnic component of their motivation, but also against Jews and Catholics, demonstrating their religious prejudices.

A more current example of civilian-directed violence motivated by Protestant Christianity are certain anti-abortion activists. The disparate movement can be described as largely a reaction against the secular humanism of the 1960s and early 1970s, particularly the Supreme Court's decision in *Roe v. Wade* legalizing abortion in the United States. In order to resist this "undeclared war" on fetal life, activists systematically harass pregnant women by organizing sit-ins which block access to abortion clinics. They also threaten physicians and clinic personnel, damage property, and have been known to bomb and shoot at abortion clinics as well as target doctors for assassination.

What Is To Be Done? The Strategy of "De-Coupling"

The foregoing discussion of religiously motivated violent factions across time and religious traditions suggests certain commonalities among the groups examined that have a bearing on potential strategies to confront the phenomenon today. First, it is clear that many of the groups, especially the contemporary ones, are reacting against what we might call secular modernism. While this particular reaction is unique to the contemporary environment, it shares much in common with past religious motivations for violence that were often reactions against what were perceived to be weak, corrupt societies in need of "cleansing." A common thread that runs through most of these groups is a profound and abiding sense that their faith is under threat and in need of defending.

> All fundamentalism – whether Jewish, Christian, or Muslim – is rooted in a profound fear of annihilation. [Sayyid] Qutb developed his ideology in the concentration camps where Nasser interred thousands of the Muslim Brothers. History shows that

[37] Id at 154.

> when these groups are attacked, militarily or verbally, they almost invariably become more extreme.[38]

This insight into the sources of religiously motivated violence has significant implications for government strategies to confront the phenomenon. It demonstrates the potential for the counter-productivity of a strategy to deal with religiously motivated violence that directly attacks the religious basis of a violent group's motivations. Such a strategy may lead to broader and deeper radicalization and thereby entrench the problem even more.

Over the past eight plus years the US government as well as the academic community have grappled with how to confront religiously motivated violence and significant growth in the depth and nuance of understanding has emerged in that time. A very prominent improvement in the US and elsewhere came in the intellectual recognition that the religiously motivated violence we face is primarily a "political" (loosely defined) rather than a military issue. There is still a long way to go, however, in working out what this actually means in practice.

One part of the effort within the US Government to put this intellectual understanding into practice, particularly in the Department of Defense, is the strategic concept of "countering ideological support to terrorism." This phrase seems to capture the essence of the "battle of ideas" that so many characterize as the heart of today's security environment. Given the discussion above, one should be careful how this is carried out. There are better and worse ways to "counter ideological support for terrorism."

For instance, if doing so means, in essence, teaching Muslims how to be Muslims – whether directly or by supporting proxies – we are in for a tough go of it. Such a strategy would play directly into al Qaeda's narrative that "The West" is at war with Islam and is thus a threat to the Muslim world.

Instead, several years of working with security professionals from around the world, but particularly from North Africa, the Middle East, and South Asia, have led this author to suggest that an indirect approach to "countering ideological support to terrorism" will be the most effective. Such an indirect approach is best achieved by "de-coupling" the violence undertaken by the groups of concern such as al Qaeda from their religious motivations. This can be done in a number of ways, all of which revolve around the understanding that de-legitimizing the tactic of violence directed at non-combatants can be useful while

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[38] Armstrong, Karen. "Think Again: God." *Foreign Policy* (online edition). November/ December 2009. Available at: http://www.foreignpolicy.com/articles/2009/10/19/god_0 (last accessed 5 November 2009).

attempting to de-legitimize one's understanding of one's faith can be problematic at best and counter-productive at worst.

First, recognizing that religiously motivated violence across traditions and over time is often fanned by the perception that the tradition is under threat, governments should focus on the illegal, criminal, abhorrent behavior of the violent actors and remove the discussion from the realm of the religious altogether, at least insofar as the government itself is concerned. Religion is not an ideology like communism or fascism. It goes to the core of one's identity and to the ordering of the universe. By attacking the religious justifications for violence governments play on the oppositionists' field with their ball by their rules.

When approaching religious justifications for political violence, then, quite often "less is more." Instead of playing into the strength of the movement (as the ideological component often is) the government should allow the marketplace of ideas to work. Religiously motivated violent actors are often a minority – though a vocal and dangerous one – in their own communities and will eventually find themselves on the wrong side of history so long as others within their religious tradition are not pushed into their camp by an overbearing government that feeds into the narrative of a faith under threat. A good resource on how to accomplish this in practice is the Department of Homeland Security's document on "Terminology to Define the Terrorists: Recommendations from American Muslims."[39] This document can help establish habits of mind and practice that limit unintentionally aiding the cause of the violent actors that one hopes to counter by pushing people into their camp or granting them a level of legitimacy.

Second, the violent actors should be contrasted with the example of the government that enshrines civilian protection, restrains the use of force as much as possible, and recognizes the primacy of addressing legitimate grievances. Little needs to be said in this regard other than to note that it is important that the target population see these attributes of effective governance being done. This, then, can act as an effective counterpoint to the extremist narrative without saying a word. It is truly leadership by example.

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[39] Department of Homeland Security, Office for Civil Rights and Civil Liberties. *Terminology to Define the Terrorists: Recommendations from American Muslims*. January 2008. available at: http://www.dhs.gov/xlibrary/assets/dhs_crcl_terminology_08-1-08_accessible.pdf (last accessed 5 November 2009).

Conclusion

Political violence that targets innocents has been a part of the human condition from time immemorial and it will be with us for the foreseeable future. The religiously motivated expressions of this tendency are little different from the more general phenomenon of political violence in this regard. The best any government or collection of governments can do is attempt to mitigate the damage and make such activities more of a law enforcement nuisance than a threat to the existence of the State.

Religiously motivated violent groups, like any movement, exist and change in time and space. Such an organization "is 'founded,' grows, spreads, develops new programs, changes strategy and tactics, wins and loses elections, succeeds or fails in revolutions, declines, disappears."[40] By "de-coupling" the violence undertaken by these groups from their religious motivations, governments can undermine their popular support and confront them effectively through indirection.

[40] Almond et.al., p. 120.

An Evidence-Based Treatment Model for Persons with Co-Occurring Diagnoses in the Criminal Justice System

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Evidence-based research and the concept of "what works" rarely guides criminal justice policies (MacKenzie, 2005). This paper examines an evidence-based approach to treating individuals with co-occurring disorders (COD). Rates of individuals in the criminal justice system with co-occurring disorders are significantly higher than that of the general population (Peters & Hills, 1997). Research has continually displayed that the integrated treatment of co-occurring disorders is the most effective approach to treating this population (Osher & Levine, 2005). This paper specifically examines The Integrated Dual Disorder Treatment model, an evidence-based treatment model for co-occurring disorders, and the extent to which this approach is being implemented in the criminal justice system. This paper concludes with recommendations for the continued improvement of treatment for co-occurring disorders in the criminal justice system.

Introduction

The number of people in the criminal justice system has significantly risen since the war on drugs was instituted (Peters & Hills, 1997). A number of these drug offenders under criminal justice supervision have a range of other problems (Abram & Teplin, 1991), including mental illness. This population has a higher rate of co-occurring disorders than the general population (Robins & Regier, 1991). Co-occurring disorder is a term used to describe individuals with a DSM-IV Axis I serious mental disorder and a substance abuse disorder (Drake et al., 2001; Peters & Hills, 1997).

Traditionally, mental health services have been separately offered from the substance abuse services (Hu, Kline, Huang, & Ziedonis, 2006), and this separation does not optimally serve people with co-occurring disorders (Osher & Levin, 2005). As a result of the separation in services, persons with a dual diagnosis are refused service, have been shuffled between providers, and very rarely received comprehensive and effective service. The National Survey on Drug Use and Health found that half of individuals with dual diagnosis do not receive mental illness or substance abuse treatment. The individuals who do receive treatment do not get integrated care, but only obtain treatment for one or the other diagnosis (Osher, 2005).

The separation of substance abuse and mental health treatment has had a complicated and extended history in the United States (Osher & Drake, 1996).

Due to the increase of individuals with co-occurring disorders being seen in courts and community corrections settings, jails and prisons, increased attention is being paid to the need for diversion and rehabilitation in the criminal justice system (Peters & Hills, 1997). After twenty years of development, refining, research, and evaluation in co-occurring disorders, integrated dual disorder treatment (IDDT) was the first comprehensive dual disorder model that was categorized as an evidence-based practice (EBP) (Boyle & Kroon, 2006; Drake et al., 2001). IDDT has been shown to be more effective than treating the disorders separately (Brunette & Mueser, 2006) and has been shown to reduce arrest and incarceration rates in this vulnerable population (Osher, 2006).

This paper discusses the population of individuals with co-occurring disorders in the criminal justice system, and will discuss the recent shift towards evidence-based approaches to treating the mentally ill. Then, the integrated dual disorder treatment (IDDT) model will be discussed and how it has been implemented to work with this population group. Ohio has implemented outpatient and inpatient IDDT programs across the state and has been a successful model for other states and facilities to copy. This state's program will be discussed and critiqued, and this paper will conclude with recommendations concerning the implementation of IDDT to the criminal justice system.

Co-Occurring Disorders and Criminal Justice

Individuals who suffer from severe mental illness are at increased risk for co-occurring substance disorders (Bellack, 2007; Brooks et al., 2007). Substance abuse is the most common comorbid (or co-occurring) disorder among individuals with severe mental illness (SMI) (Drake et al., 2001). Approximately two decades ago, comorbidity was barely recognized in the United States; however, since then, due to its high prevalence and severe consequences, more attention has been devoted to the subject matter (Mercer, Mueser, & Drake, 1998). The National Comorbidity Survey has suggested that approximately 51% of individuals with a lifetime mental illness have also had a lifetime substance abuse disorder (Kessler et al., 1996).

There is an overrepresentation of people displaying comorbidity in the criminal justice system (Osher, 2005). Those with co-occurring disorders frequently utilize the resources of the criminal justice system (Broner, Lattimore, Cowell, & Schlenger, 2004; GAINS, 2007). One of the effects of co-occurring disorders is that these individuals experience increased rates of incarceration (Bellack, 2007; Drake et al., 2001). Adults with co-occurring disorders who are noncompliant with medication have a threefold risk increase for arrest and are more likely to be at risk for violent behavior (Lattimore, Broner, Sherman, Frisman, & Shafer, 2003). These individuals are more at risk for returning to jail

from a probation violation as compared to individuals without a co-occurring disorder (GAINS, 2007).

Over time, the criminal justice system in the United States has become a provider for people with mental illnesses and substance use disorders (Cowell, Broner, & Dupont, 2004). An estimated 1,100,000 people, or eight percent, booked in jails annually have current symptoms of mental illness (GAINS, 2007). Approximately 75 percent of these individuals also have co-occurring alcohol and/or substance abuse problems (Lattimore et al., 2003; Osher & Levin, 2005). Abram and Teplin (1991) found that 72% of males and females detained in jail that had severe mental illness, also had substance use disorders. Ditton (1999) found that approximately 60% of offenders with mental illnesses incarcerated in prisons and jails reported that they were under the influence of a substance when they committed their offense. These people cycle in and out of substance abuse centers, mental health treatment centers, and the criminal justice system, receiving insufficient or unsuitable treatment (GAINS, 2007).

There have been some factors listed in research that contribute to the overrepresentation of co-occurring disorders in the criminal justice setting. Besides the "war on drugs" factor mentioned at the beginning of this paper, another factor is the association of dual disorders and homelessness and homelessness and incarceration (Drake, Osher, & Wallack, 1991; Michaels, Zoloth, Alcabes, Braslow, & Safyer, 1992). These people become revolving door clients of the criminal justice system. Another contribution to the overrepresentation of these individuals in the criminal justice system is the increased application of mandatory minimum sentencing guidelines that have resulted in longer periods of incarceration (Osher, 2005).

There are considerable complications in coordinating services for offenders with co-occurring disorders within the community setting (Peters & Hills, p. 4, 1997). This population is frequently excluded from treatment programs in the community due to their criminal justice involvement; however, many of these offenders would benefit from specialized community treatment services (Peters & Hills). People with co-occurring disorders produce extremely costly and time consuming outcomes for jails (GAINS, 2007). The IDDT model has been found to decrease arrest and incarceration rates among individuals who participate in its services (Kruszynski, Kubek, Boyle, & Kola, 2006).

Evidence Based Practices

Historically, services provided for mental illness often failed to conform to best-practices standards (Rosenheck, 2001). The President's New Freedom Commission, in 2003, concluded that the nation's mental health system is ill equipped to meet the complex needs of people with mental illness. Evidence-

based practices have been employed to try to overcome the ill history, or lack of clear and strong empirically guided research, to which mental health treatment has succumbed (Gold, Glenn, & Mueser, 2006).

Presently, evidence-based practices are the new standard for mental health treatment programs (Reyes & Ronis, 2006). However, wide spread adoption of evidence-based practices in community settings has been slow to occur (Drake et al., 2001). To qualify as evidenced-based practices, empirical research must demonstrate that a specific practice increases the likelihood of positive outcomes (Osher & Levin, p. 21, 2005). One of the barriers for people with a co-occurring disorder is that there is a gap between what is known to be effective treatment for these individuals based on scientific-evidence, and what services are actually offered at the community level (GAINS, 2007).

Mueser, Torrey, Lynde, Singer, and Drake (2003) identify six evidence-based practices for working with people with severe mental illness: collaborative psychopharmacology, assertive community treatment, family psychoeducation, supportive employment, illness management and recovery skills, and Integrated Dual Disorders Treatment. Treating severe mental illness and substance use simultaneously, in an integrated program, has been established as the best form of treatment (Tsuang, Fong, & Lesser, 2006).

Integrated Dual Disorders Treatment (IDDT)

Treating individuals with dual diagnoses is challenging because they are at increased risk for relapse, and they are less compliant with medication and treatment. In response to these challenges, there has been a calling for the integration of treatment for these offenders (Brooks, Malfait, Brook, Gallagher, & Penn, 2007). At the program level (Osher, 2005), Integrated Dual Disorders Treatment (IDDT) is an evidence-based model that integrates bio-psychosocial and educational interventions to address the needs of persons with co-occurring substance use and serious mental disorders (Ronis & Lenkoski, p. 108, 2004) and was developed at the New Hampshire-Dartmouth Psychiatric Research Center by Robert Drake and colleagues (Mercer-McFadden, 1998). The model overcomes several of the limitations that have plagued traditional approaches when intervening with co-occurring disorders (Biegel, Kola, & Ronis, 2007).

The Integrated Dual Disorder Treatment model combines program components and treatment elements to assure the dually diagnosed receive optimal treatment for both mental illness and substance abuse from the same treatment team providers (Osher, 2005). This model emphasizes several key elements: implementation, leadership, training, engagement, assessment, counseling for all patients, ancillary treatments for those that have multiple needs, secondary treatments for non-responders, and quality assurance regarding

process and outcomes (Drake, Morse, Brunette, & Torrey, 2004). Originally designed as an outpatient program (Wieder, Lutz, & Boyle, 2005), IDDT also emphasizes program components such as continuous treatment teams, assertive community outreach, motivational interventions, time unlimited and comprehensive services, stage-wise treatment, and client choice (Ronis & Lenkoski, 2004; Wieder, Lutz, & Boyle, 2005). IDDT promotes client and family involvement in service delivery, and stable housing and employment as important components in the recovery stage (Biegel, Kola, & Ronis, 2007).

The principles and strategies of IDDT include the integration of the treatment of substance abuse and mental illness, use of engagement treatment strategies, use of pharmacologic and psychosocial interventions that are individually matched to the client's stage of change and the use of long-term perspectives (Brunette & Mueser, 2006). Integrated Dual Disorders Treatment services have providers trained in both mental illness and substance abuse and provide a single treatment plan that addresses both sets of conditions to treat the individual (Osher & Levin, 2005). The model requires all team members to be educated in biological, psychological, and social issues impacting individuals with co-occurring disorders, as well as treatment modalities and resources that have been found effective in encouraging recovery (Ronis & Lenkoski, 2004).

As a general rule, success of IDDT is attained by involving all participants in the process and attending to the three phases of change: motivating, enacting, and sustaining implementation. The model is initiated with the principles of the integrated model and essential components, but IDDT programs do differ from one another (Osher, 2005). When programs that offer IDDT are faithful to the program's evidence-based principles, participants receive significant improvements in their outcomes (Torrey et al., 2001). There are some limitations to IDDT programs. Due to its complexity, not all programs are successful with implementation, and the quality of high fidelity programs may decrease over time (Torrey et al., 2001). Another limitation, and the most common reason for failure, occurs during the implementation process (Mills & Ragan, 2000). The time it takes to implement IDDT can be long and tedious. It can take two years or longer to fully implement the model, depending on a number of variables such as staff and other competing organizational resources (Kruszynski & Boyle, 2006). Also, although IDDT has been found to decrease arrests and incarceration, there is little data that has been gathered focusing on public safety outcomes for people that have been involved with the criminal justice system (Osher, 2005).

IDDT Implementation in Ohio

As of 2004, there were an estimated 11.5 million Ohioans. Approximately 615,000 adults had a severe mental illness, and out of those individuals, approximately twenty-one percent had a co-occurring substance abuse disorder (Boyle & Kroon, 2006). Policy-makers in Ohio were aware that a co-dependency of substance abuse with their mentally ill population increased criminal justice involvement for both males and females (Boyle & Kroon; Mercer-McFadden et al., 1998).

Ohio began using The Integrated Dual Disorders Treatment (IDDT) program in 2000 (Wieder, Lutz, & Boyle, 2005). The Department of Mental Health in Ohio established the Ohio Substance Abuse and Mental Illness Coordinating Center of Excellence (SAMI CCOE) to facilitate the implementation, maintenance, and outcome of the IDDT program (Ronis, 2005; Wieder, Lutz, & Boyle). The Ohio Department of Mental Health initially provided the funding to create the statewide coordinating center in 2000, realizing that significant barriers to implement EBP's in routine mental health settings would need such external expertise and support (Boyle & Kroon, p.73, 2006).

SAMI CCOE is a collaboration between the Department of Psychiatry and the Mandel School of Applied Social Sciences at Case Western Reserve University. Its mission is to promote and sustain IDDT programs. The collaboration created the Center for Evidence-Based Practices at Case Western Reserve University to help with the IDDT model. Seven full-time and five part-time staff, including social workers, psychiatrists, administrative staff, and research assistants encompass SAMI CCOE (Ronis & Lenkoski, 2004). The SAMI CCOE provides IDDT consultation, training, and evaluation/research services to help with the expanding number of community mental health agencies wanting to implement the program across the state (Wieder, Lutz, & Boyle, 2005).

IDDT was selected as one of the state's several "best practices" approaches to promote the state's "Quality Agenda" (Torrey et al., 2001). Nine IDDT "demonstration sites" were initially implemented with two year operating grants in 2000 from SAMHSA (Boyle & Kroon, 2006; Kruszynski & Boyle, 2006). Since then, the program has expanded to more than 52 community based IDDT teams across the state (Boyle & Kroon), with as many as 30 more in the early stages of development (Ronis & Lenkoski, 2004). IDDT has fidelity indexes that have been developed for scientific evidence purposes to show the program's effectiveness (Wieder, Lutz, & Boyle, 2005). These indexes will be discussed below.

Even though the program was initially created for outpatient settings, the success of IDDT has broadened the CCOE's goals to find ways to adapt IDDT to different populations and service settings that include the inpatient psychiatric hospital setting. In the summer of 2002, collaboration between the SAMI CCOE and SAMI inpatient programs at three of Ohio's Behavioral Healthcare Organizations (BHO's) was formed to adapt an IDDT model fit for inpatient service settings. Since 2002, all nine state psychiatric hospitals have implemented the IDDT model. Also, the IDDT Inpatient Adaptation Fidelity Index has been created and piloted in several of Ohio's BHO's (Wieder, Lutz, & Boyle, 2005).

The IDDT fidelity scale assesses essential structural processes and treatment strategies for successful implementation of the evidence based practice (Boyle & Kroon, 2006). The fidelity measure is vital to reviewing and monitoring the authentic execution of the model and in the planning necessary for decisions and accountability related to the execution procedure (Bond, Evans, Salyers, Williams, & Kim, 2000; Mowbray, Holter, Teague, & Bybee, 2003). Ohio utilizes the fidelity scale as a quality improvement tool and to organize the implementation process (Kruszynksi, Kubek, Boyle, & Kola, 2006).

There are five stages of change and implementation for any organization wanting to implement Ohio's IDDT model outlined in the state's IDDT guide created by Kruszynski, Kubek, Boyle, & Kola. The IDDT model is a community effort and involves many different people, including individuals and agencies from the criminal justice field. The first stage, the Pre-Contemplation stage, entertains ideas to reinvest in a practice and move in a new direction, but stakeholders do not necessarily see a need to change practice. The second stage is the Contemplation stage where stakeholders weigh the advantages and disadvantages of IDDT (Kruszynski, Kubek, Boyle, & Kola, 2006). One core feature of this stage is to work in collaboration with the Ohio SAMI CCOE (Kruszynski & Boyle, 2006). The third stage is the Preparation stage, where the organization works on motivating people in the organization and the community to recognize the value of IDDT and join in its implementation. The Action stage follows, and the service team begins to provide stage-wise interventions to clients with co-occurring disorders. The team and organization members attend training to help them translate IDDT principles into practice. According to Kruszynski and Boyle, research has demonstrated that if stage-wise strategies are correctly applied then the progression in recovery will occur during stages over time, and the severely mentally ill will recover from substance use and dependence with extended periods of abstinence. The last stage concerns Maintenance, whereby the organization will sustain its quality-improvement

process by continuing to integrate practices, principles, and the IDDT structure within the community and organization (Kruszynski et al.).

Ohio has had requests from other states regarding its IDDT model, suggesting that the model and its philosophy definitely warrants further interest (Wieder, Lutz, & Boyle, 2005). SAMI CCOE is so successful because it provides consultation, training, and evaluation for anyone interested in using and sustaining IDDT. The success is proven at a state level with over 50 service teams and treatment in nine in-patient psychiatric facilities statewide. Ohio has been successful with the implementation and process of IDDT and is a model to the rest of the field.

The Ohio implementation of IDDT has not gone without setbacks. Some of the original sites could not maintain services when the programs transitioned from grant funding to fees for services. Also, the growth in demand for IDDT services has stressed the CCOE's resources. Barriers exist when trying to implement, maintain, and sustain any treatment (Biegel, Kola, & Ronis, 2007), especially an evidenced-based treatment such as IDDT due to its complexity and longevity. Individuals and agencies providing the treatment must be 100 percent on board and willing to support the treatment model for it to be successful. Despite these concerns and limitations, the evidence-based program is a promising treatment option (Ronis & Lenkoski, 2004).

Conclusion

There is considerable research evidence that supports the use of IDDT as a more effective way of treating people with co-occurring diagnoses than traditional approaches (Kruszynski & Boyle, 2006; Torrey et al., 2001; Mueser, Noordsy, Darke, & Fox, 2003; Drake, Mueser, Brunette, & McHugo, 2004). Recent studies have shown that integrated treatment has been effective (Hu, Kline, Huang, & Ziedonis, 2006; Osher & Levin, 2005), and other studies have found dual diagnosis treatment programs to be more effective than treating the co-occurring disorders separately (Drake et al., 2001; Brooks et al., 2007; Mueser, 2004). The best chance for these individuals is a system that does not require the individual to have to participate in two separate programs (Peters & Hills, 1997).

Providers are being challenged to demonstrate that their programs are effective. Abundant research has suggested that IDDT core components are effective in working with individuals with co-occurring disorders (Drake et al., 2001: Osher & Levin, 2005). Implementing IDDT offers treatment providers an avenue to advance the value of services to individuals with co-occurring disorders (Kruszynski & Boyle, 2006). People who receive appropriate

treatment become productive members of the community and are at a decreased risk of returning to the criminal justice system (GAINS, 2007).

While IDDT is routinely presented to people involved in the criminal justice system, the model has not been studied as to its specific effects on criminal justice outcomes (Osher, 2006). As Ohio has demonstrated, the IDDT model has proven to be effective in the community and has started in inpatient settings. In the future, the model needs to be implemented in criminal justice settings such as jails and prisons, and research adequately evaluating the program must be initiated. Ohio has not implemented the model in criminal justice settings such as jails and prisons. Due to the high rates of individuals with co-occurring disorders already in the criminal justice system, it is recommended that IDDT be brought into these settings.

There is some evidence to suggest that individuals with co-occurring disorders continue to increase in numbers in the criminal justice system (Sacks, Sacks, McKendrick, Banks, Stommel, 2004). IDDT has been shown to correlate with the reduction of arrests of individuals involved in the criminal justice system (Drake et al., 2001). Data has suggested that the availability of integrated services to persons with co-occurring disorders that have been involved in the criminal justice system has resulted in positive public safety and health outcomes (Osher, 2005). The Ohio IDDT model suggests that IDDT decreases individuals' chances of incarceration and arrests; however, there is an absence of in-depth research testing this hypothesis. More research needs to be devoted to empirically assess whether individuals who have been arrested or have prior encounters with the criminal justice system and receive IDDT in community settings reduce their chances of future involvement with the criminal justice system.

In an ideal system, people with co-occurring disorders receive evidence-based treatment and services in the amount and type needed which are accessible and acceptable while promoting the individual's self-direction, choice, empowerment, peer support, and respect (GAINS, 2007). Integrated treatment has been policy-makers' primary recommendation. Despite these recommendations, a gap still exists between research, policy, and practice (Brooks et al., 2007). This gap must be closed to be able to provide optimal treatment for all individuals with co-occurring disorders. This will reduce the encounters these individuals have with the criminal justice system, thereby reducing the financial burden this problem puts on the system. More importantly, it will increase public safety and the quality of life for individuals with co-occurring disorders.

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