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DEAR READER,

We are thrilled to present to you the Spring 2019 issue of the *Texas State Undergraduate Research Journal*. Our second and final year as managing editors is coming to an end and we could not be prouder of this publication and the work of the undergraduate authors and editors who made it possible. We hope you enjoy our new look and anticipate the continued growth and improvement of TXSTUR in the years to come as we move on and new managers take the reins.

This edition highlights exceptional student research in law, literature, sports, and human rights. Distributing in print for a third consecutive year, TXSTUR continues to evolve and we are eager to expand our reach across academia to encourage research-forward conversations among Bobcat students, staff, and faculty. We would like to especially thank Dr. Ron Haas for his dedication to TXSTUR and his mentorship, as well as Dr. Heather Galloway and the Honors College for their unending support of the editorial team. We would also like to thank all the incredible undergraduate students featured in this issue; we are so proud of our fellow Bobcats and the work they have produced. Finally, we thank our editorial board and faculty reviewers who worked to ensure quality above all else. Our publication would truly not be possible without them.

We look forward to seeing the new realms of research Texas State students will explore in the future and encourage our readers to consider publication of their own work in TXSTUR. View our previous publications and find out how to get your work published at our Undergraduate Research website, txstate.edu/undergraduateresearch/txstur.

SINCERELY,

RACHEL FREEMAN & SAWYER CLICK

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ENDING THE CYCLE

HOW RESTORATIVE JUSTICE IN SCHOOLS CAN DECREASE THE REACH OF THE SCHOOL-TO-PRISON PIPELINE

BY KAITLYN BENACQUISTO

Research shows that zero-tolerance punishments in school contribute directly to the school-to-prison pipeline, disproportionately affecting male students of color. Restorative justice methods, specifically discussion circles, are being implemented in schools to wean away from suspensions and expulsions that lead to students becoming entrapped in the criminal justice system. The school-to-prison pipeline has seen growth in recent years and needs to be addressed immediately, nationwide. Schools should be implementing restorative justice efforts that have already been proven to work in other schools, as well as training teachers to become adept in these methods. They must also become aware of cultural differences that can lead to miscommunication and misunderstanding between teachers and students of color and adapt accordingly to avoid such miscommunications.

Robert Williams, better known by his rapper name of Meek Mill, grew up as a black male in a single-parent household, in what he describes as a “ruthless neighborhood.” His first juvenile arrest was a trespassing charge as a result of going to school while suspended because he didn’t want to tell his mother, who would have to take off work to stay home with him. Thus, Williams was swiftly introduced to the school-to-prison pipeline. At age thirty-five, he has still not escaped the grasps of the criminal justice system due to what he claims are false accusations by police, technical probation violations, and “dysfunctional, discriminatory rules” (“Rapper Meek Mill”). Every day, kids—primarily black males—fall victim to the school-to-prison pipeline and can’t escape for similar reasons to Williams: bias in policing and technicalities in probation rules. This paper examines the role of zero-tolerance punishments, such as suspensions and expulsions, in the school system, and how

restorative justice efforts are being implemented to address this issue and evaluate the existing efforts.

The school-to-prison pipeline (STPP) is the national trend of school-age children being pushed out of schools and into prisons, just like Robert Williams. The STPP, which is blamed for the use of harsh punishments in schools, disproportionately affects minorities, those with learning disabilities, and those coming from poverty (“School-To-Prison Pipeline”). Zero-tolerance punishments became popular in policing in the late 1980s in response to the “War on Drugs” through strategies such as mandatory sentencing and “three strikes” laws. This shift bred a culture of viewing “tough-on-crime” stances as both good and necessary, which was quickly reflected within schools. Zero-tolerance policies within schools have been proven to create an environment not conducive to safety or learning, the latter being what most would consider the

primary purpose of schools (“Test, Punish, and Push Out”). Standardized testing, which began in the 1920s but has only recently been emphasized through legislation—the Every Child Succeeds Act (ECSA) and its predecessor the No Child Left Behind Act (NCLB)—has only exacerbated zero-tolerance punishments (Gershon; Schul).

The NCLB Act left schools scrambling to meet requirements to make as much money as possible and created an environment in which it was easier to get rid of lower-performing students rather than spend extra time and attention on them. The NCLB Act led to a significant spending increase in schools; however, federal return to schools did not reflect this. Schools were left with more costs, but limited funding to pay them, which explains the gross lack of resources many public schools are dealing with (“School-To-Prison Pipeline”). Many public schools are overcrowded and lack qualified teachers and necessities such as updated textbooks and counseling services. The lack of resources combined with the mild encouragement from the NCLB Act to push out under-performing students has paved the way for zero-tolerance punishments in schools, and thus, the STPP (“School-to-Prison Pipeline”).

While some system of discipline is necessary in schools to maintain order, school districts have arguably overused zero tolerance punishments to weed out underperforming students. Colorado has a “three strikes” rule that permits teachers to permanently remove students from the classroom after three disruptions over the course of the year and allows students to be expelled if they are suspended three times for classroom disruptions. In the Detroit Public Schools Community District, talking or making noise during class can lead to a 20 day out-of-school suspension or removal from the school entirely (“Test, Punish, and Push Out” 10). In the past, misbehaving has been viewed as fairly normal for kids. The current trend of punishments shows, however, that kids

misbehaving has gone from normal to a sign of danger and an indication of the increasingly “out-of-control youth” (Armour “Restorative Practices” 1000). Kids are effectively being pushed out of schools for miniscule reasons, often nonviolent, and schools are repeatedly missing the mark on effective punishments. Research also shows that school suspension is the number one indicator (over poverty, race, intelligence, etc.) that a child will drop out, become involved in the juvenile justice system, be unemployed later in life, be on social welfare, and be incarcerated (Long “Restorative Discipline Makes Huge Impact”).

If behavioral issues are addressed and dealt with when they present themselves at schools, then problems that will later develop as a result could be avoided. In other words, if schools addressed children’s issues head-on instead of taking the extreme measure of simply kicking them out of school, the STPP could be severed. When kids are removed from school, they

resort to the street or often unsupervised homes, which can lead to falling behind in school, increased alcohol or drug use, and increased likelihood of arrest (“Test, Punish, and Push Out” 17). Ultimately, there is evidence to suggest that if disciplinary issues were properly addressed in schools, future incarceration could be avoided, reducing the mass incarceration problem that this nation faces.

Zero tolerance punishments have clear negative effects on school children; however, while some children never face this system, others face it all too often. These punishments disproportionately affect black students, specifically boys, from as young as preschool. Black students are twice as likely to be referred to the office at the elementary school level and four times as likely at the middle school level. This racial disparity exists in both the frequency and severity of punishments (Armour “Restorative Practices” 1006). In an investigation done by the Government Accountability Office

In the Detroit Public Schools Community District, talking or making noise during class can lead to a 20 day out-of-school suspension or removal from the school entirely.

for the 2013–2014 school year, it was found that although black students made up fifteen point five percent of public-school students, they made up thirty-nine percent of students suspended (Blad and Klein). Other marginalized groups are disproportionately disciplined as well, including students with disabilities and those who identify with the LGBTQIA+ community (Armour “Restorative Practices” 1007).

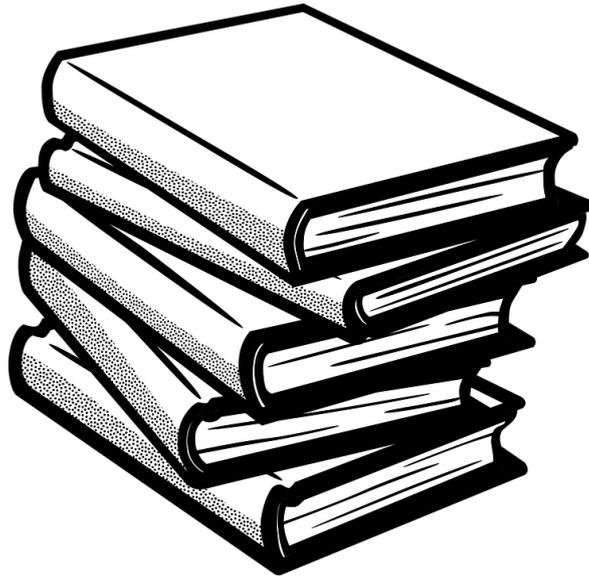
While these disproportionate punishments and their effects are often talked about, the affected individuals are not. In chapter two of *The School to Prison Pipeline: The Role of Culture and Discipline in School*, Decoteau J. Irby relays personal narratives from two black men about their experiences in school and the pipeline. The overarching theme of the chapter is that black males must not be looked at as a group to be dealt with, but rather, as individuals, with individual stories and struggles (Irby 17). Through each of the boys’ narratives, it is revealed that the systems in place and the punishments given to them made them feel alienated, abandoned, and fearful (Irby 33). Irby analyzes that the relationships in their lives made them feel undignified and diminished, which can, in part, be attributed to the fact that no one was paying attention to them; in other words, no one was asking “the simple question ‘what’s wrong?’” (25, 35). These feelings of otherness brought on by the school system and its punishments put the boys on a downward trajectory with no real support system in place to help them get back on track. These first-hand accounts prove that zero tolerance punishments aren’t an effective way to punish school kids, hindering their relationships and potential.

Despite recent policy reflecting the movement of schools away from zero tolerance punishment, the idea has already established itself in the school system. The climate of schools often

mimics that of prisons, with police patrolling the hallways and a strict rule of law and order (Armour “Restorative Practices” 1002–1003). The rise in prominence of school shootings has also contributed to the rise of police officers in schools. Fifty-seven percent of schools now have some sort of security officer, up forty-two percent from ten years ago, and the government is pushing to raise that number in an effort to decrease school shootings (Sherfinski). Increased police presence turns minor matters into criminal behavior: hallway fights turn into battery charges, taking a classmate’s supplies turns into a theft or robbery charge, and talking back turns into disorderly conduct. Schools are also putting school officers in charge of dealing with tardiness and attendance through expensive tickets and even suspensions and court dates (“Test, Punish, and Push Out” 10). Whereas student misbehaviors used to be viewed as “normative,” they are now overly criminalized to the point that students are forced into the juvenile justice system as well as the criminal justice system for often nonviolent behavior (Armour “Restorative Practices” 1000).

In short, zero tolerance policies in schools do more harm than good. A study done by the American Psychological Association Zero Tolerance Task Force found that schools with higher suspension and expulsion rates had “less satisfactory ratings of school climate...less satisfactory governance structures, and [spent a] disproportionate amount of time on disciplinary manners” (“Are

Zero Tolerance Policies Effective in the Schools?” 854). Not to mention, these punishments are being dealt out disproportionately to minorities and those with learning disabilities, specifically black boys (Armour “Restorative Practices” 1007; Blad and Klein). Zero tolerance policies are not conducive to learning nor beneficial to the youth of America.



The relationships that the circle creates allow problems to be faced as they present themselves.

With so many students falling victim to the STPP, many are looking to restorative justice to help combat the system. Restorative justice is an approach or philosophy that involves repairing the harm between the wrongdoer and the victim as well as the community through a process that includes all involved. In schools, this consists of holding students accountable to repair and consider the damage of their actions instead of merely kicking them out of school (O'Donnell). Restorative justice efforts that already exist within schools are mainly variations of discussion circles and restorative conferences. (O'Donnell; Healy 16). Restorative justice also involves a lot on the teacher's part in terms of training in restorative methods as well as becoming more responsive to the different cultures and backgrounds students are coming from in order to bridge the gap in differences in punishments of minorities versus white students (Potter, Boggs and Dunbar; "Test, Punish, and Push Out" 36).

Restorative justice efforts are typically grassroots and community-based. Parent advocacy groups and teachers seem to be restorative justice's biggest supporters. In some cases, federal reports regarding zero tolerance punishments in schools, the racial disparity within those punishments, and the role of these punishments in the STPP have helped to push schools to take action. For example, after a juvenile justice advocacy group revealed a report showing that Dallas was one of the worst cities in the state for suspending elementary school students, the Dallas National Education Association and Dallas ISD worked together to implement restorative justice methods in their schools (Long "Restorative Discipline Makes Huge Impact"). This is not an uncommon situation; often after seeing the startling numbers and reports, school districts decide to use restorative practices to move away from zero tolerance punishments. For the most part, it is

the parents and teachers who see the effects of punitive punishments firsthand that inspire the transition to restorative justice. Often, parents of students of color are the most involved because their children are most affected by the change (Long "Chronicling the Voices"). Mark Warren, the author of a book on the educational justice movement, said, "... [white people] are really unaware of what's happening in communities of color. There are two Americas. People are shocked when they hear these stories, but because of the segregation that still exists, these stories aren't well known" (qtd. in Long "Chronicling the Voices"). The work that advocacy groups do helps to bridge this gap between the "two Americas."

The foundation of restorative justice can be found in discussion circles (also called restorative circles, check-in circles, or simply "circles") which are meant to establish relationships and create a sense of trust amongst community members. Essentially, discussion circles serve to get everyone on the same page as well as "help students feel obliged to the community and invested in repairing harm" (Healy 17). The relationships that the circle creates allow problems to be faced as they present themselves. Discussion circles are also intended to "provide a respectful space for establishing the values for the class based on human dignity and democratic principles" (Armour "Restorative Practices" 1017). Discussion circles are a necessary first step in order for the rest of restorative justice to occur effectively; without the foundation of trusting relationships that discussion circles allow, any other restorative justice efforts would be ineffective. Discussion circles can be thought of as the necessary first step for a successful implementation of restorative justice.

Restorative conferences are the next level up from discussion circles. They are "used

for more intensive interventions that include repairing damage, reintegrating back into the school after a student absence, and resolving differences” (Armour “Restorative Practices” 1017-1018). Whereas discussion circles, in a school-setting, typically only involve students and a teacher with the possibility of an administrator or someone higher up within the school, restorative conferences will include all parties involved and affected. For example, the victim, the perpetrator, witnesses, parents of the students involved, school administration, and possibly outside community members. Troi Bechet, head of the Center for Restorative Approaches in New Orleans, says some questions asked during a restorative conference can include, “Who was impacted by what happened? How were they impacted? How might you feel if you were in that situation? Now what do you think you can do to repair the harm that was done?” This process is supposed to give a sense of working “with” the perpetrator rather than doing something “to” them. Bechet said, “If we want children to grow up to be socially responsible adults, we need them to believe that they should do the right thing because it is the right thing to do” (qtd. in O’Donnell). Restorative conferences are intended as direct combatants of zero tolerance policies. Instead of turning immediately to suspension or expulsion, these conferences encourage students to take responsibility for what they’ve done and invoke a long-term change in the offender’s actions and behaviors.

An essential part of a successful restorative justice implementation is efficient training for all teachers and administration. In incidents where restorative justice has failed in a school or a school district, it can almost always be traced back to inadequate training of staff (Watanabe and Blume; Armour “Restorative Practices” 1028; O’Donnell). Without proper training, schools are essentially asking teachers to reduce zero tolerance

punishments without an alternative method of punishment. Los Angeles Unified School District implemented restorative justice district-wide, but only had the resources to train 307 of the 900 schools in the district. A union representative for one of the schools said, “Teachers with a high number of students with discipline issues are walking a fine line between extreme stress and emotional meltdown” (Watanabe and Blume). It is important to recognize that this is an implementation flaw and not a flaw of restorative justice, because it has been proved that with proper training, restorative justice can succeed (Armour “Restorative Practices” 1016). It is also important that teachers recognize the goal of restorative justice itself through planning goals for the four main areas—systems, learning and growth, resourcing, and policy—and not just view it as an effort to reduce suspensions and expulsions to meet a certain criterion (Armour “Ed White Middle School” 89).

Restorative justice, through methods such as discussion circles and restorative conferences as well as proper training of implementers, is a nonviolent method of combatting zero tolerance policies and the STPP. However, it is complex and involves more than simply eliminating zero tolerance policies. Different methods, such as discussion circles and restorative conferences, must replace suspensions and expulsions. Of course, it is not a one-size-fits-all method either, and some zero tolerance punishments may still have to be used; restorative justice is meant to reduce the frequency of them.

Restorative justice has proven to be successful in schools that have had enough resources to implement it fully. For example, at Jordan High School, the restorative justice effort is led by a dean and two counselors who are trained to meet with students and resolve conflicts through circles and conferences. They have a designated room for conferences that has educational posters about restorative justice

This process is supposed to give a sense of working “with” the perpetrator rather than doing something “to” them.

practices. The school had just one suspension compared to 22 at the same time the previous year (Watanabe and Blume). Here is evidence which proves restorative justice is an effective way of disciplining children while avoiding zero tolerance punishments when possible. However, the overarching problem with restorative justice is implementing it on a large scale in a climate where public schools are already struggling with funding and resources (Leachman, Masterson, and Figueroa).

I believe the first step to expanding restorative justice efforts is to keep encouraging and expanding local grassroots efforts. Teachers and parents within communities have the opportunity to create legitimate change locally. They are the ones who see the effects of zero tolerance policies firsthand. Educators especially have the power to create immediate change by implementing restorative justice methods in their individual classrooms, even if their school doesn't decide to implement it school-wide or district-wide. Parent advocacy groups and other advocacy groups fighting for restorative justice have the power of education. As quoted earlier, "...[white people] are really unaware of what's happening in communities of color. There are two Americas" (Long "Chronicling the Voices"). Spreading awareness on topics, such as the role of zero-tolerance policies in the STPP and the racial disparity within the punishments, to people who simply are not aware of what is happening could serve to create a larger support for restorative justice within schools.

To address the bigger picture, the U.S. Departments of Education and Justice jointly issued civil rights guidance in 2014 that alerted schools they could be found in violation of federal civil rights laws if they enforce intentionally discriminatory rules or if their policies lead to disproportionately higher rates of discipline for a specific racial group (Blad and Klein). The positive effects of this guidance are present, but the negatives are also making themselves known; there are reports that schools have become unsafe due to failure to discipline or report students' misbehaviors in fear of federal repercussions (Blad and Klein; Camera). However, in the Final

Report of the Federal Commission on School Safety released in December 2018, Education Secretary Betsy DeVos recommended repealing the Obama-era guidance. The report says that "it is inappropriate for the federal government to pressure schools to establish such quotas" regarding the guidance's attempt to diminish racial disparities in punishment in schools, as well as that the guidance "offends basic principles of federalism and the need to preserve state and local control over education" ("Final Report" 71). School districts will have the option to stick with the practices they've adopted for the guidance (Klein).

The mixed results of the federally mandated guidance go to show that restorative justice must be backed up with training and the proper philosophy if it is going to succeed. Simply asking schools to reduce suspensions and expulsions without offering a clear alternative is not the way to go about repairing the STPP. Federal guidance is a step in the right direction to getting everyone on board; however, I think the government should create a set of guidelines and an outline of philosophies for restorative justice, a method that has proven competent in combatting zero tolerance punishments. I also think that for success, the federal government must accompany this with enough money to train staff and administration. For the 2020 discretionary budget

The school had just one suspension compared to 22 at the same time the previous year.

request, President Trump has requested \$718.3 billion for defense, about fifty-five percent of the total budget, as well as an almost five percent increase from the previous year's budget. The President requested \$62 billion for education, just under five percent of the total budget as well as a cut from the previous year's budget ("A Budget for a Better America" 135). The money necessary

for training could be taken from the defense budget and used towards the education budget. In addition to training on restorative justice methods and philosophies, I think teachers in schools with prominent racial disparity in punishment should receive cultural competency training. Often, these disparities in punishments are thought to be linked to cultural differences and misunderstandings (“Test, Punish, and Push Out” 36). With a set of guidelines and philosophies to follow, paired with proper training, I believe restorative justice could be successful across the nation’s public schools.

The STPP is a national crisis that should be of everyone’s concern. The facts are all there: it is up to the government, the schools, and the people to determine if they want to keep sending kids to schools in which blatant racism is taking place through zero tolerance punishments; which ultimately is a system that rather than gives extra attention to those who are marginalized and underperform, chooses to spit them out into a criminal justice system that locks people up by the millions in a manner that many refer to as the “new Jim Crow” (Alexander). Decoteau Irby, a contributor to the book *The School to Prison Pipeline: The Role of Culture and Discipline in School*, described the issue as follows: “The roots of the pipeline are founded in the disposability of Black boys” (36). America’s use of zero tolerance punishments in schools must be addressed, and the racism that is demonstrated in the use of these punishments must be addressed as well. Restorative justice can be the answer to the issues at hand if we recognize how critical it is to make the change. It must be applied at all schools on a national scale, and education, parent, and juvenile justice advocacy groups must continue to raise awareness and push for restorative justice until it is used in every school.

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FOSTA: THE LAW ALLOWING STATES TO FIGHT ONLINE SEX WORK

BY KATHRYN MCDANIEL

Without the ability to use ads online, they have no choice but to go to the streets if they intend to survive.

In April 2018, President Trump signed into law the politically popular bill, “Allow States and Victims to Fight Online Sex Trafficking Act.” The law, referred to in short as FOSTA, intends to eliminate online sex trafficking but instead forces already marginalized sex workers into even more vulnerable situations and makes it more difficult to locate and prosecute traffickers. Prior to FOSTA, § 230 of the Communications Decency Act of 1996 (CDA) protected internet service providers (ISP) from the liability of their users’ actions, including trafficking and prostitution. FOSTA no longer allows this protection for ISPs; in response, many ISPs like Reddit, Facebook, Tumblr, and Twitter have responded by removing sex workers’ safe means of advertisement and law enforcement’s easy access to traffickers and their victims. By rejecting the input of sex workers, legislators have designed a remarkably ineffective law. This paper illuminates the voices of sex workers, which have been politically ignored but provide powerful insight into the fight against sex trafficking.

Following President Donald Trump's signing of the "Allow States and Victims to Fight Online Sex Trafficking Act" (FOSTA), Congresswoman Ann Wagner (R-MO), a notable proponent of the act, expressed her support in a press release. In her words, likely mirroring the opinions of her peers in the House and Senate, both Republicans and Democrats, "The Allow States and Victims to Fight Online Sex Trafficking Act will bring us closer to ending this horrific crime." Senator Kamala Harris (D-CA) conveyed similar high expectations only a month before when the Senate passed its version of the bill (SESTA), "for those who continue to support sex trafficking online, our message is clear: your time is up." Since the Communications Decency Act of 1996 (CDA) was signed with the addition of Section 230 (§ 230), which was designed to protect websites from the liabilities of user-generated content, there has been controversy over the prohibitions to prosecute website operators for allowing users to engage in sex trafficking of women and children. With an overwhelming majority in the Senate (97-2), SESTA was passed, and in the House, FOSTA was passed under similar terms with a 388-25 vote. FOSTA has been marketed as a law to battle sex trafficking online by finally punishing offenders who had been protected by § 230, so it is clear why FOSTA had such overwhelming political and popular support. However, the way FOSTA has been characterized and the actual objectives of the law have huge disparities. The conflation of sex work with sex trafficking has allowed for equal punishment against both sites advertising sex traffickers and sex workers, two vastly different subjects. A victim of sex trafficking has been forced into selling sex while a sex worker has made a deliberate choice to sell sex-related performances, products or exchanges. The inclusion of sex work calls into question the goals of the representatives who pushed this law and muddled the impact of FOSTA on sex trafficking. FOSTA was drafted with a narrow goal of punishing Backpage, a website comprised of classifieds, many of which advertised from either an involuntary trafficking victim or voluntary sex worker. The political rhetoric surrounding FOSTA indicates the goals

of the House and Senate, but it will be the voices of sex workers, as individuals and organizations, that assess the impact of the law. Sex workers' voices must be heard if Congress hopes to make an effective law to handle sex trafficking. Without their input, FOSTA only inhibits women from engaging in consensual sex work and prevents actual sex trafficking victims from escaping trafficking situations.

Background: The CDA and § 230

The invention of the internet created a debate over censorship in the United States. With the broad capability and application of the internet, legislators were aware of the possibility it could be used in inappropriate or malicious ways. To address this concern, the Communications Decency Act of 1996 (CDA) was drafted, passed, and signed into law in 1997. Congress designed the CDA to provide protections for internet users, but internet service providers and website operators demanded protections from the liability of user behavior. Unlike newspapers and magazines, which have complete control over what is published before final print, internet service providers like AT&T and website operators such as Facebook have little control over the content a user can upload to the internet. Even though the internet and news providers served similar roles in disseminating information to the public, the ISPs and website operators did not have the luxury of filtering everything users posted or uploaded. Congress heard the concerns of ISPs and website operators and made concessions by including § 230 in the final bill.

§ 230 directly demonstrates Congress's struggle to screen inappropriate material, namely pornography, from the internet to protect children while simultaneously allowing the internet to flourish in a capitalist environment. These two goals were both important to the CDA but were perceived as contradictory. At least initially, it was unclear how the government could effectively censor pornography and other content without infringing on the creativity and entrepreneurship already flourishing through the nascent internet. The solution came with § 230; essentially, it

protected ISPs and website operators from the liability of users. Congress intended to protect ISPs and website operators with the expectation they would, in turn, develop screening and blocking programs so users could filter inappropriate images for themselves or for their children. Part (b) of § 230 outlines the policy that it will enforce: the allowance of unfettered development and use of the internet while still encouraging the creation and use of blocking and filtering technology. The law includes immunity for ISPs and website operators so long as they do not take part in generating the illicit content. On the other end, § 230 gives these parties the freedom to take down any offensive content without

fear of retaliation from users through the “Good Samaritan” clause. Daphne Keller, a scholar of internet law and frequent legislative advisor on intersections between the use of the internet and society, pointed out the challenge of proving an ISP participated in the creation of content. By using Backpage as an example, Keller demonstrates that legal opinions can differently interpret the involvement of the ISP or website operator.

It is important to note that legislators did not anticipate the problem with trafficking when drafting and passing the CDA, especially with the inclusion of § 230. The CDA predates both the Trafficking Victims Protection Act of 2000 (TVPA) and the United Nations Palermo Protocol (2003). The TVPA and the Palermo Protocol were the defining trafficking laws that initiated legislative actions toward ending sex trafficking. Congress designed the CDA to address the possibility of children encountering excessively violent or lewd information online, specifically pornography, but sex trafficking was not considered a problem at the time. Although trafficking was not explicitly considered with § 230, there is debate over whether or not it should have been an implied violation of the CDA despite

§ 230. According to the analysis of Mary Graw Leary, a professor of law at the Columbus School of Law, Congress did not intend to give ISPs “absolute immunity” for the content generated by users. Instead, its intention was for ISPs to take

part in monitoring content before it became a problem. In Keller’s classifications of intermediary liability law, the attribution of liability outlined in § 230 is the clearest and provides the most freedom to ISPs and users. The intermediary liability adopted by legislators for FOSTA makes every illegal post a liability for the ISP, not the user. This method of attributing liability is what Keller calls “the worst law: strict liability.” In

short, Congress rejected § 230, which provides conditional freedoms, for FOSTA, which seriously limits the freedoms of ISPs.

Until FOSTA, courts repeatedly recognized broad interpretations of § 230 by always deferring to freedom of speech above the responsibility of the ISP to regulate inappropriate content. The courts consistently upheld § 230 as a broad protector of ISPs case after case. Despite Congress’s intentions to encourage ISPs to regulate content to protect children, the courts have rejected this and found their own interpretation, one that provided almost complete immunity. In the case of *Doe v. America Online, Inc.*, one of the first suits to challenge § 230, the courts ruled in favor of AOL because of the explicit language protecting ISPs in the CDA. Even though the case dealt with the dissemination of child pornography through AOL, an act obviously outside of Congress’s intended protections of § 230, the courts adhered to the exact language of the law. Since *Doe v. AOL* was decided in 2001, courts have decided in favor of ISPs and maintained their immunity, marking § 230 as an ironclad piece of law.

Without the protection of § 230, ISPs are now afraid of the consequences of FOSTA. Many

The conflation of sex work with sex trafficking has allowed for equal punishment against both sites advertising for sex traffickers and sex workers, two vastly different things.

ISPs such as Craigslist have taken down pages to avoid any possibility of violating FOSTA. Craigslist even cites FOSTA as its reason for taking down its “personals” ads, so there is no doubt about the depth of FOSTA’s impact. Even though much of the site is not in violation of FOSTA, Craigslist recognized it could not prevent users from abusing the platform, so it “can’t take the risk.” Most website operators cannot afford the criminal or civil liabilities of users’ illegal posts, so there is no choice but to take down pages that may suggest illegal activity. As much as the ISPs and website operators feel the consequences of FOSTA, sex workers and trafficking victims face harsher ramifications.

FOSTA

The U.S. Department of Justice (DOJ) issued a press release April 9, 2018, announcing the seizure of Backpage.com, and the indictment of seven individuals with the crimes of conspiracy to facilitate prostitution using a facility in interstate or foreign commerce, conspiracy to commit money laundering, concealment money laundering, international promotional money laundering, and transactional money laundering. Backpage was indictable due to its finances, but it garnered attention because of its actions facilitating commercial sex. Classified advertising sites like Backpage frequently featured ads for “erotic services” or more explicitly, prostitution. These ads became problematic when it became clear many were for children, not just consenting adults. The case of Backpage.com is significant to the fight to pass FOSTA and ultimately negate § 230 of the CDA. Initially, the financial crimes incriminated Backpage.com, but two days later, FOSTA made ISPs suddenly liable for the sex trafficking crimes users had committed, not just the companies’ own financial crimes. In theory, making an effort to criminalize and punish online sex trafficking is a positive legal innovation. Despite good intentions, Congress passed and President Trump signed a poorly designed law. Its supporters, primarily legislators and celebrities, focus too heavily on the goals of

the law rather than the expected outcomes. Its critics see the flaws in future contexts as well as within the context of the Constitution. It is clear in the case of Backpage, the ISPs were abusing § 230 and the users of the site were abusing freedom of speech. These abuses of liberty seem to justify FOSTA and even obligate legislators to hold ISPs accountable for the actions of users. However, the implications of FOSTA only present greater danger for victims of sex trafficking as well as for sex workers.

The objective of FOSTA is to amend § 230 of the Communications Decency Act to directly state the facilitation of or participation in sex trafficking, sexual exploitation of children, and prostitution is no longer protected under § 230. As a result, providers and users of internet services engaging in any of these activities via the internet are subject to federal and state criminal and civil law. Among the problems of this law, one is that it allows for ex post facto prosecution, which is considered by many, including the U.S. Department of Justice, to be unconstitutional. FOSTA also conflates sex work with the sex trafficking of women and children by assigning the same criminal sentencing parameters to sex traffickers and a consensual sex worker.

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Assistant Attorney General Stephen Boyd, representing the U.S. Department of Justice, addressed a letter to U.S. Representatives Jerrold Goodlatte, Jerrold Nadler and Ann Wagner before FOSTA’s passing. The DOJ’s judgment of FOSTA concluded there were several problems that needed to be amended before it became law – none of these changes were made. Boyd implored the House of Representatives to reconsider and revise three technical aspects, as well as a constitutional concern, before passing the bill. Of these concerns, Boyd included the broad

language intended to criminalize consensual and commercial sex, which is of little federal concern compared to the sex trafficking and sexual exploitation of children. FOSTA allows for ex post facto prosecution of violations of the law, meaning an ISP that violated FOSTA prior to it being signed into law could be prosecuted. The DOJ has already highlighted this provision as a constitutional violation. The DOJ's critiques were not considered seriously by Congress even though the DOJ is the department that would be in charge of enforcing FOSTA.

Even though sex workers' voices were not amplified by the DOJ or dissenters of FOSTA in Congress, the problems they predicted were echoed. In the past several months since FOSTA was signed by President Trump, sex workers' stories have made evident the impacts of FOSTA's flaws. For the sake of sex workers and victims of trafficking, there is a desperate need to either repeal or amend FOSTA.

Sex Workers' Voices

The objective of FOSTA is to make illegal the "promotion of prostitution and reckless disregard of trafficking." In the act designed to "fight online sex trafficking," sex work is criminalized before trafficking. The simple order of the words in the law provide clarity as to the intentions of Congress. This interpretation aligns closely with the views of many sex workers who have spoken out against FOSTA and SESTA. With nearly every piece of legislation signed into law, the sex working community loses some of its agency and is criminalized more heavily. The general consensus is that FOSTA has made life more dangerous for sex workers and no less complicated to locate and prosecute traffickers. The conversations within the sex worker community predicted the consequences of FOSTA.

A significant part of the loss that came with the signing of FOSTA into law was the loss of Backpage. As blogger and sex worker Caty Simon writes in her article for Tits and Sass, "anyone regardless of identity with \$5 to rub together, could put up a Backpage ad." Simon

describes Backpage as what was the best option for many who could not afford to place an ad on another site or were purposefully excluded based on their race, gender identity, or sexuality. Under the newspaper model, it cost Simon \$200 a week to pay for an ad in the back pages of a newspaper. Backpage was liberating in that it gave sex workers the opportunity to safely advertise their work at little cost. Backpage allowed sex workers to afford their safety. Without the luxury of indoor sex work and the additional help of online screening, many sex workers have been driven to the streets to support themselves. The lack of an affordable site like Backpage has put sex workers in financial binds. As FOSTA was signed, more and more sites shut down their advertising pages for sex work leaving few options for those who cannot afford to move to more high-end sites. Without the ability to use ads online, they have no choice but to go to the streets if they intend to survive.

The most critical blow to sex workers came with the loss of their safety in the aftermath of FOSTA. Outdoor sex work, work initiated on the streets, is comparatively more dangerous compared to indoor sex work, work that occurs and is arranged off the streets. Online advertisements have a significant impact on making sex work safer and put the sex worker in greater control of her job. Economists Scott Cunningham, Gregory DeAngelo, and John Tripp studied the impact that Craigslist's erotic services page had on the homicide rates of women in certain cities as well as proposed market explanations for the correlation. Their arguments have been indirectly corroborated by the experiences of sex workers themselves in the aftermath of FOSTA. Cunningham and colleagues found a reduction of 17.4% in homicide rates of women between 2006 and 2012, the period when Craigslist had an erotic services page. This is significant considering sex work to be the most dangerous type of work for women with a crude mortality rate of death by homicide of 229 per 100,000 women. They explain the decrease in homicide rates was likely because of the growing transition from the streets to the indoor market that allowed the ability to find better matches for dates, the opportunity to

conduct background checks, and the trace left behind by criminal clients. The ability to conduct background checks is especially critical to a sex worker's ability to ensure her safety and the safety of others in her community. Cunningham and colleagues' central claim is that Craigslist's erotic services page restructured the sex market which ultimately resulted in making commercial sex safer for sex workers. Sex workers' voices verify the assertions made by Cunningham and colleagues.

Simon's article about Backpage is full of her own opinions and anecdotes relaying the impact of FOSTA, but she includes a particularly powerful reference to Facebook conversations between sex workers. The online conversation occurred on the Facebook page of sex worker group "bidibidibombom." The poster, Vincent Chadsworth, captioned a picture with updates on the number of women who had gone missing, been raped, been murdered, or committed suicide in San Francisco alone in the three days after FOSTA was signed. He stated that thirteen sex workers had gone missing, two found dead, and two sexually assaulted at gunpoint. He also refers to a report from St. James Infirmary, a sex workers' services nonprofit located in San Francisco, that says four times as many sex workers were on the streets in the three days after FOSTA was signed. This is only accounting for a small group of sex workers in one city. Even so, it supports the point that sex workers have been making time after time before FOSTA and SESTA were passed. As stated by Jessica Peñaranda of the Sex Workers' Project, "if these bills pass, sex workers will die... that is not hyperbole." Statements like Peñaranda's comprise the repeated message of sex workers. They knew this would make their already dangerous work even more unsafe, yet nobody with any power cared to listen to them. Emily McCombs's article for the Huffington Post consists of short interviews with nine sex workers each selling sex in different forms, from full service

to pornography. No matter the type of service the sex workers provide, their experiences relate. One interviewee said, "It's forcing me to go back the streets, walking up and down trying to find clients." This interview only restated what sex worker's rights organizations and individuals had been saying early on in opposition to FOSTA. Now, the early anxieties are being realized on the streets. Sex workers are forced to resort to the streets to pay their bills. Without the ability to use ads online, they have no choice but to go to the streets if they intend to survive.

As a result of all the sites coming down or being taken down out of fear of FOSTA, sex workers have had to change their avenues of communication. These transitions included a move from Twitter to the sex work friendly Twitter-like platform, "Switter." Jack Chendo discusses the creation of Switter and the goals of re-liberalizing speech for sex workers with his and his team's innovation. Switter demonstrated a move from mainstream communication to the underground. Chendo explains that he purposely used Cloudflare as the site's content delivery network (CDN) because of its supposed commitment to free speech (the last site that it had taken down was a neo-nazi site in 2017). In a statement with Motherboard, Cloudflare admitted it had taken down Switter because of FOSTA. Censorship has been damaging for nearly all uses of online communication whether it involves advertising sex work or not. Many sex workers have commented on the threat to bad date lists. These bad date lists serve as a caution for the community. Sex workers can notify others about dangerous dates through bad date lists. One sex worker told McCombs in her interview that one of the bad date list sites she had previously used to "warn other workers of a man who had raped and scammed [her]" had begun to self-censor. The absence of bad date lists robs sex workers of a critical tool for protection. As sex workers become more heavily criminalized and

**Backpage allowed sex workers
to afford their safety.**

increasingly isolated from each other, it is more difficult for them to protect one another.

In spite of the damage FOSTA has done to sex workers and trafficking victims, sex worker rights activists are responding and mitigating the situation to the best of their abilities. A wide variety of organizations (i.e. Sex Workers Outreach Project (SWOP USA), Global Network of Sex Workers Project (NSWP), St. James Infirmary), ranging from the global scale to the local scale, are spreading information about FOSTA-SESTA and providing services for the sex workers they aim to protect. An NSWP publication implored sex workers to communicate within their communities and share information and resources before losing this ability to FOSTA. The goal of these messages from organizations was to help sex workers stay safe. However, in light of FOSTA's provisions and the serious threats it made to the viability of many ISPs, these warnings have limited impacts. As long as ISPs facilitate sex work to any degree, their sites are liable for criminal prosecution under FOSTA. One good sign for the sex working community is the fact that these organizations still have active pages on safety in sex work. It was a sincere fear that pages on safety would have to come down due to FOSTA.

Laws like FOSTA, that conflate child sex trafficking and consensual, adult sex work, have increased the criminalization of sex workers and has done little to remedy the trafficking problem. Despite the lack of results from past laws, Congress continues to pass ineffective laws to criminalize sex work along with trafficking. Given the impacts on sex workers, it is no wonder they feel as if these laws are personal attacks. Over and over they describe FOSTA as if it were specifically designed to endanger their lives. The joint statement, presented by the Desiree Alliance and signed by over 150 sex worker's rights organizations and individual signees, argues for an end to the legal attacks against sex workers under the pretense of solving the problems of human trafficking. The signing organizations make their stance clear with the single line: "We consider the unbalanced policing of online adult-oriented websites as a direct assault against the sex worker community." The entire joint statement carries the weight of

thousands of sex workers and activists. This same view towards Congress is repeated in the words of sex workers speaking up in interviews. This sentiment is clear in the words of one sex worker in the interview:

The powers that be don't care about victims. They don't care about sex workers. They want to abolish sex work and eliminate the demand for it while providing no concrete solutions for those who do wish to leave sex work.

Considering the serious damage that FOSTA and other laws have done to the community, it makes sense for sex workers to feel this way towards their representatives in Congress. As harmful as legislation has been towards sex workers, it is evident that they are not considered to have equal rights or liberties compared to constituents in traditional work. Sex workers deserve fair treatment under the law but will not receive it until they receive real representation in legislatures.

Some of the most critical points sex workers make, at least for legislators, is the impact FOSTA will really have on sex trafficking. As Lola Li from the #LetUsSurvive campaign stated in an interview with SWOPBehindBars:

There's a reason a lot of service providers that serve trafficking victims... oppose this bill. It's because this bill is going to make their job harder. Sites like Backpage already cooperate with investigators on trafficking investigations. When sites like Backpage shut down, traffickers don't stop trafficking. They just move their victims onto the streets or onto non-US hosted sites, where it is much harder to identify and support these trafficking victims.

FOSTA does not suddenly make traffickers afraid of trafficking online. All it does is make ISPs afraid to keep advertisements for sex work up, especially considering there is no way they can be sure if it is consensual sex work or if it is trafficking. ISPs do not have the resources to investigate every advertisement. Under § 230, the users were liable, and in the case of sex trafficking,

the traffickers were liable. Now with FOSTA, the ISPs are liable and many are too small to risk the potential legal fees of leaving advertisements up. As a result, sites or parts of sites are taken down by the ISPs, and traffickers just move to a different site. In an interview on the podcast Reply All, Carol Smolenski, the executive director of ECPAT USA (End Child Prostitution and Trafficking) and supporter of FOSTA said she would prefer for trafficking to be driven further underground because “that is where it should be.” However, in that case, the problem of trafficking is then only aggravated. If ISPs are not encouraged to provide information on traffickers but rather encouraged to remove evidence of traffickers’ online presence, it will be more difficult to locate and prosecute traffickers. In Smolenski’s opinion, the overt presence of child prostitution websites like backpage is just normalizing trafficking and desensitizing people. In opposition to FOSTA, Freedom Network USA, a group of organizations fighting trafficking in communities across the US, reinforces the points of Lola Li. Freedom Network emphasizes that public advertisements were trafficking victims best chance of being found by an organization or law enforcement; the loss from FOSTA only drives traffickers deeper into the shadows making both traffickers and victims more difficult to find. Jessica Peñaranda, executive director of the Sex Workers’ Project, argues Congress is oversimplifying trafficking if it thinks that erasing traffickers’ presence is an easy solution to the problem. As sex workers know, trafficking is a highly complicated problem and removal of advertisements is not a viable solution. Even if Smolenski’s concern for the impact of online sex trafficking is a reality, the consequences of driving it further underground are far worse than a desensitized public. The result is impunity for the traffickers who are able to disappear with trafficked children when their advertisements are removed. As one trafficking victim said in response to FOSTA for an article in

Even if Smolenski’s concern for the impact of online sex trafficking is a reality, the consequences of driving it further underground are far worse than a desensitized public.

the Guardian, “How is this protecting us? How is this saving us?”

The Voices of Congress

The most significant gap between the statements of sex workers and those of Congress are their assessments of the laws. Sex workers are in obvious opposition to the laws and feel legislation on trafficking is only increasing the criminalization of their labor. On the other hand, supporters of the legislation feel there is not enough legal action to successfully suppress trafficking. The problem, however, isn’t the number of laws; it is the approach of the laws. Sex workers have pointed out the flaws in over-criminalization of consensual, adult sex work. Their experiences alone indicate the need for a lighter hand of the law. Congress does not listen to sex workers when drafting legislation. Their attention is captured by the heartbreaking stories of trafficking victims’ families. As poignant as their testimonies are, these family members do not have a view of trafficking from the inside. Their highly personal, outside views cloud the judgment of the legislators attempting to address the trafficking problem. This is not to say that victims’ families do not contribute to the discussion. Their stories must be included but should be used to aid the stories from sex workers. Senator Rob Portman (R-OH) credits the victims of sex trafficking and their families for helping lawmakers see FOSTA through to law. It is significant that their voices were included in developing FOSTA. Although this was an important step, without the inclusion of sex workers and sex worker rights activists, trafficking cannot be prevented effectively.

While sex workers have feared FOSTA would cause sites with the slightest fear of indictment to remove pages, Congress ensures that FOSTA is only targeting the ISPs committing truly illegal acts. Congress-member Ann Wagner

(R- MO) claims that FOSTA will only take effect on the sites like Backpage that are aware they are facilitating sex work or sex trafficking. Despite the reassurance of Congress-member Wagner, the response of sites like Craigslist to FOSTA being signed into law give credence to the anxieties of sex workers. In Craigslist's statement upon removing its "personals" section, it regretfully explained that FOSTA had motivated it to remove its "personals" section commonly used by sex workers. The same NPR article commented on Reddit's similar decision to ban certain transactions on its website, one of which being "paid services involving physical sexual contact." Considering the prevalence of Craigslist and Reddit, it is alarming that these two ISPs, with likely a great pool of resources, have made concessions in response to FOSTA. Smaller websites with fewer resources to fight FOSTA would have no choice but to pull pages that could possibly violate the law. The White House record of the statements made as President Trump signed FOSTA into law contains important notes of the impact FOSTA made within the day it was signed. Representative Wagner commented about receiving a text from the Manhattan DA reporting that "we have already shut down 87 percent — 87 percent — of the online sex trafficking ads out there. And we're after the remaining 13 percent." It is unclear who exactly "we" is referring to. It also seems unlikely that anyone or any institution would be able to document the number of sex trafficking ads that exist, especially when many may not even be for trafficking but for legitimate sex work between consenting adults. This makes the actual statement dubitable and the impact cannot be said to be positive.

An additional question created by FOSTA is the fate of any actual victims currently trapped in trafficking. FOSTA seems to offer civil and criminal justice for survivors who have already been freed from trafficking but fails to offer assistance for those trapped at the time. As websites pull down pages and advertisements, victims will be driven further into obscurity; there is little hope for them there. The only hope is for the survivors or the families of victims. Senator Heitkamp (D - ND) commented that FOSTA is

what will finally give victims justice for the hurt inflicted by Backpage. Even if victims get justice from Backpage, they still may not see justice for the crimes their traffickers committed. There is absolutely no doubt that Backpage facilitated trafficking, and that can never be justified. However, basing a law on one specific site, a law that will impact the entirety of the internet is only aggravating the problem of trafficking. Congress cannot continue to make myopic, rushed decisions in regards to trafficking and prostitution.

FOSTA and SESTA, the Senate version of the bill, received overwhelming bipartisan support in both the Senate and the House. Similarly, the House passed FOSTA with a vote of 388-25. Similarly, SESTA passed with a majority of 97-2. Senator John McCain (R-AZ) was the only senator who did not vote as he was too ill. Senator Rand Paul (R-KY) and Senator Ron Wyden (D-OR) were the only two to vote "no" against passing SESTA. Aside from these outliers, the bill received a great deal of support and was passed easily. Paul remained silent on his vote, but it is likely he voted in line with his libertarian sensibilities. Wyden, however, made a formal statement to explain his decision against FOSTA. The press release comprised of a simple two paragraphs, one to address the internet problem and another to reinforce his stance on trafficking. He predicted that FOSTA will only impede innovation, make it an even greater challenge to incriminate sex traffickers, and ultimately become "something that this congress will regret." Additionally, Wyden echoes the voices of sex workers and activists arguing FOSTA/SESTA will only create an environment more dangerous for victims and drive traffickers deeper into the "shadowy corners of society that are harder for law enforcement to reach."

When it comes down to it, the lives and rights of sex workers simply are not valued by Congress. This was made clear in an interview with Senator Rob Portman (R-OH) when asked about the impact on sex workers. His spokesperson's response completely evades the question replying, "Tell that to the mothers and fathers of daughters who've been murdered after being trafficked on Backpage." All Senator Portman's words tell sex

workers is that their lives and their rights do not matter to him.

It is important to note that the stories of exploitation cited by the members of the Congress are not completely unfounded and definitely not untrue. The documentary *I am Jane Doe* tells the story of three girls who were trafficked and prostituted via Backpage and chronicles a years-long, uphill battle for justice. Throughout the legal turmoil, the girls and their families are repeatedly disappointed by outcomes favoring Backpage. *I am Jane Doe* argues that the only avenue for justice would be through Congress; it calls for Congress to write legislation effectively ending § 230. The result, FOSTA, is the legislation these girls and their families asked for, but its intended impacts do not portray reality. The stories of the families are poignant. The sexual exploitation these girls experienced was real. It is horrifying and beyond disturbing what happened to these girls. However, the fact of the matter is that without the visibility online, police would not have been able to find the trafficked girls as quickly as they did. In a *Techdirt* article, police officer Sgt. John Daggy shares that as much as he hated Backpage, it was a tool to find traffickers. Without visibility online, these girls would have simply disappeared without a trace.

Furthermore, the film's argument is very specific to Backpage. All of the evidence it presents pertains to Backpage but likely is not unique to Backpage. It makes a convincing argument for Backpage's culpability in the trafficking of minors through its website. The ISPs allowed for users to type out phone numbers (two-1-5-six...) and make transactions with Bitcoin, supposedly to enable traffickers to evade police. The film also contains interviews with former ad moderators from Backpage. These moderators recalled allowing for code language on ads, which ultimately kept up many of the child prostitution ads. They admitted the existence of an unspoken knowledge of the illegal ads, a knowledge that makes Backpage complicit in sex trafficking of minors. worker Katy Simon writes, "poor fucking Backpage." Her sarcastic sympathy for Backpage is rooted in frustration with the profits they made off exploiting herself

and other sex workers primarily. Backpage caused families serious suffering that led them to call on their legislators to help them get justice. And, as Simon points out, Backpage had both positive and negative connotations for sex workers. As bad as Backpage is, the singular focus on it as a reason to pass FOSTA was simply unreasonable considering the ripple effect the new law has already had.

Conclusion

FOSTA was signed into law almost exactly eight months ago, a short period of time, but its impacts are already visible and widespread. Backpage was the main target of FOSTA and obviously the first to go with the law. It only took a short amount of time for Craigslist to pull its "personals" page to avoid noncompliance with the law. Even Facebook, one of the only supporters of FOSTA from Silicon Valley, is facing charges for facilitating sex trafficking because the conversations between the victim and trafficker took place on Facebook messenger. Another attempt to avoid noncompliance with FOSTA is seen in Tumblr's recent announcement to ban all "adult content" on its site. As writer Matthew Rodriguez said for *Into More*, "This is part of the war on sex workers and the war on sex." FOSTA has already affected websites that are used by sex workers and non-sex workers alike. Even the ISPs like Facebook that seemed invincible are experiencing the consequences. Throughout it all, the ramifications trickle down to the most vulnerable internet users, those in the sex work community. While a loss of Facebook messenger may mean a loss of communication with a friend or loved one for the average person, it may mean a threat to a sex worker's livelihood. Sex work must be recognized as legitimate work, and legislators must adjust FOSTA to protect sex workers. Until then, this population's rights will be violated over and over again. As a sex worker, Kate D'Adamo comments in the aftermath of FOSTA, "sex workers are not collateral damage." Even if that is how the government views sex workers, they form a community determined to prevail.

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CONTROLLING

JOYCE JOHNSON AND SELF-DEFINITION IN WOMEN'S BEAT LITERATURE

BY GLORIA RUSSELL

Recounting her 1962 trip to India with Gary Snyder and Peter Orlovsky, Beat poet Joanne Kyger writes, “Here I am reading about your trip to India/with Gary Snyder and Peter Orlovsky. Period./Who took the picture of you three/With smart Himalayan backdrop/The bear?” (R. Johnson). In this poem, Kyger complains about Ginsberg’s refusal to acknowledge her involvement in their trip to India and, in writing the poem, she inserts herself back into a narrative from which she had been erased (R. Johnson). The patriarchal structure within the Beat movement created a means to silence many women’s narratives, something which prompted many of those women to write and publish memoirs years after the fact. This paper analyzes how Jack Kerouac attempts to control or subdue Joyce Johnson’s narrative, as portrayed in her memoir, *Minor Characters*, and how this control manifests in her novel, *Come and Join the Dance*.

THE NARRATIVE

Recounting her 1962 trip to India with Gary Snyder and Peter Orlovsky, Beat poet Joanne Kyger writes, “Here I am reading about your trip to India/with Gary Snyder and Peter Orlovsky. Period./Who took the picture of you three/With smart Himalayan backdrop/The bear?” (R. Johnson 20). In this poem, Kyger complains about Ginsberg’s refusal to acknowledge her involvement in their trip to India and, in writing the poem, she inserts herself back into a narrative from which she had been erased (20).

The Beat movement was a literary counterculture from the 1950s which often rebelled against post-World War II capitalism-driven expectations of a suburban, materialistic lifestyle. While the men of the Beat movement, namely Jack Kerouac, have become iconic figures, the women of the Beat movement have been obscured by time. Joyce Johnson, a woman Beat writer, discusses the struggles Beat women faced both in her memoir, *Minor Characters*, and in the novel loosely based on her own experiences, *Come and Join the Dance*. The patriarchal structure within the Beat movement created a means to silence many women’s narratives, something which prompted many of those women to write and publish memoirs years after the fact. This paper analyzes how Jack Kerouac attempts to control or subdue Joyce Johnson’s narrative, as portrayed in her memoir, *Minor Characters*, and how this control manifests in *Come and Join the Dance*.

Beat Women as Caretakers

Johnson took on the conventional woman’s role in her relationship with Kerouac during his ascent to fame, putting her own art on hold to sustain his. In *Minor Characters*, she

notes the common Beat character type, the artist’s wife, when discussing her relationship with Fee Dawson, one of the young artists in the Beat circle. She considers becoming his ‘old lady,’ which would involve straightening him out, cleaning up his workspace, and effectively achieving “old-ladyhood, [becoming] the mainstay of someone else’s self-destructive genius” (*Minor Characters* 170). In her relationship with Kerouac, though, Johnson describes a life very similar to that which she rejects in pursuing a relationship with Fee. When Kerouac visits New York, she cooks him food the way he likes (132); he uses her home as a shelter from the storm of publicity arising from new fame (191); and to do so, puts her own art on hold: towards the end of the memoir, she writes “I could never manage to write anything when Jack was with me. I always wanted to be with him more than I wanted to be at the typewriter” (243). In doing this, she becomes subservient to Kerouac and fulfills gender norm expectations by acting as his caretaker.

Outsiders also view Joyce as Kerouac’s personal caretaker. Johnson recounts one of Kerouac’s editors taking her hands and saying, “take care of this man” (*Minor Characters* 186). This insinuates that her role is primarily to take care of Kerouac because as a woman, her own identity ought to exist to serve the male, and in this case, the woman ought to exist to sustain the male artist. Within the context of the 1950s, to be a woman was to be a domestic servant in subordination to one’s husband. In her relationship with Kerouac, she becomes his old lady, stunting her own growth as an individual to serve the self-destructive genius she loves, remaining overlooked as an artist and treated more as a caretaker for Kerouac, a woman as defined by mainstream society, than anything else.

One possible read of this relationship might be that Kerouac forced Johnson into a submissive, traditional role that she did not want to fill, effectively halting her ability to evolve as an individual. However, this only works if Kerouac forced her into this role. While Johnson finds herself subservient to Kerouac, she finds herself there due to her own conscious decisions, even though those decisions are made from a deeply complicated context. In an interview with Nancy Grace, Johnson discussed her time with Kerouac as an enlightening and positive experience. She described that while she would not or could not work on her own art when he was around, she found that in retrospect, he had, overall, a positive impact on her art. She said he encouraged her to take her art seriously, writing being something important that they shared, and her written correspondence with him inspired her own writer-ly voice, “writing up, writing in a looser way, writing with breath” (Grace 123). Although there may be some subtext here regarding Kerouac’s male voice entering Johnson’s artistic voice, the implication seems to be that overall, she believed he helped, rather than hindered, her art.

As for her domestic and subservient position, Kerouac did not force her to remain subservient to him. Johnson did express feelings of oppression in her later relationship with Peter Pinchbeck, saying that “there was just no possibility, no space in [her] life for any work of [her] own” (Grace 125), but in the same interview painted Kerouac as encouraging. “He felt I should follow his path,” she says, “but for course, that was impossible...for me...I was good at taking care of myself and I wasn’t going to jump off the deep end” (Grace 123). Johnson did not want to go on the road. She chose to stay away from the road due to her own fear. This is not to suggest that she failed to rebel in any significant way—she left her neighborhood; engaged in sex out of wedlock, which at one point led to an abortion; and failed to graduate college, to name a few transgressions

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against the mainstream. Like all Beat women, Johnson had to determine what it meant to be a woman in a liminal space created by the patriarchal counterculture. In this space, she seeks a relationship with Kerouac, who fits comfortably in the male-dominated Beat space and does not want to be pulled out of it. In pursuing this relationship, Johnson searches for something that fits neither the conventions of the Beat lifestyle nor those of the middle class she’s trying to escape, and there’s no model that exists on which to base such a relationship (Carden 154).

Beat Women In Domesticity

In Johnson’s 1961 coming-of-age novel *Come and Join the Dance*, a young woman named Susan begins spending time with two men named Peter and Anthony while waiting to go to Paris, where she hopes to be shocked and enlightened by the culture. Johnson frees her protagonist Susan from the domestic sphere, and by killing Peter’s car and sending Susan to Paris, Johnson reverses the patriarchal dynamic enforced by the Beat movement. Understanding how Johnson gives Susan the road requires an understanding of how Johnson takes the road away from Peter, and by extension, how Peter’s car is used to symbolize the male Beat split from domesticity. In *Come and Join the Dance*, Peter’s car is “the place where he really [lives]—he merely [inhabits] his apartment” (*Come and Join the Dance* 73). In an urban space like New York City, not everyone can drive, let

alone own a car, so the car represents Peter’s unique freedom within his context. Further, the car represents the male Beat’s escape of the urban and domestic. Society enforces domesticity upon women and labor on men, coding the workforce masculine (Kozlovsky 44).

The men are expected to enter the workforce and start a family to support the female domestic structure.

To challenge this, Kerouac uses the car and highway as an “alternative spatial system to

a postwar domesticity centered on the nuclear family and consumer economy” (Kozlovsky 36). Kerouac celebrates the car for its function of travel and works to refute the idea of the car as a status symbol, refuting the middle-class focus on buying and possessing expensive worldly goods. The car is instead purely utilitarian: “the final goal of driving was to steer towards its mechanical destruction” (Kozlovsky 38). So, the car represents men escaping the feminine domestic and societal expectations, all without glorifying the car as a status symbol. Peter echoes this fatalistic perspective—“this car is going to shake itself to pieces one of these days!’ he called out cheerfully” (*Come and Join the Dance* 73)—and uses the car to drive away from attempting to get a fellowship to further his graduate studies (*Come and Join the Dance* 70), refusing to fulfill the expectation of becoming a conventionally productive member of society by finishing his thesis.

With this understanding, the death of Peter’s car takes on special significance within the context of *Come and Join the Dance* and, to an extent, *Minor Characters*. Peter drives the car until the rattling grows worse and worse, and eventually the transmission is shot and the car dies. While Peter laughs at the idea of the death of the car being something significant, “like a Lone Ranger shooting his horse” (*Come and Join the Dance* 164), Susan understands that the car represents Peter’s freedom and ability to maintain his unconventional lifestyle: “she was thinking about how it would be for Peter now, how he would wake up in his apartment at noon each day...how he would drift up and down Broadway until he was tired enough to sleep again” (164). This directly parallels Susan’s behavior at the beginning of the novel, traveling up and down the same six blocks during her time at Barnard. By placing this parallel here, Johnson insinuates that the death of Peter’s car is the death of his means to the road, and even representative of the unsustainability of the lifestyle supported by the male Beats.

The death of his car leaves Peter stranded in the domestic realm. After Peter’s car dies, he

and Susan have sex, which serves as the means through which Susan gains agency from Peter, and at this point it is implied that she goes to Paris. If we accept the reading that Susan goes to Paris, then she is given “the Beat road and [leaves] hipster men mired in the clutter of domestic life,

Johnson wanted to wander, but not under the inescapably patriarchal terms that accompanied that journey.

reversing the gender roles Beat culture subscribed to” (R. Johnson 23). If the reader accepts that Peter is a version of Kerouac, and Susan is based on Johnson, then this conclusion to her novel suggests something of a vengeful reading where Johnson implies Kerouac reverts to the position Johnson finds herself in the beginning of the novel, locked into place in the domestic sphere and without the means to leave it because of the inevitably self-destructive nature of his lifestyle. Johnson, on the other hand, gains her agency from Kerouac and goes to France in a move reminiscent of how men in literature leave their domestic spheres in search of enlightenment (Kozlovsky 44). This suggests that, despite her insistence she did not want to go on the road, Johnson wanted to wander, but not under the inescapably patriarchal terms that accompanied that journey.

Relabeling Beat Women In *Minor Characters*

In *Minor Characters*, Johnson describes how Kerouac categorizes her, inventing names and niches for him to fit her into, which makes it difficult for her to assert her individuality. Johnson describes reading Kerouac’s novel *Desolation Angels*, where she is described as a “Jewess, elegant middleclass sad... Polish as hell,” and asks herself: “where am I in all those categories” (*Minor Characters* 128)? Kerouac imposes titles and categories upon her in multiple places throughout

Minor Characters. He literally renames her “Joycey” at one point, a name she says no one else calls her, briefly after renaming her cat Ti Gris, to which Johnson’s reaction is to say that he “[seems] to like renaming things” (130). However, Kerouac pushes ideas with his labels. In giving Johnson and her cat new names, and in categorizing her the way he sees fit, Kerouac is imperialistic in his relationship with Johnson and overwrites her identity with characteristics he thinks better fit her. We see other men in the memoir use this approach towards women. Johnson describes that Lucien Carr calls her friend Elise Cowen either ‘Ellipse’ or ‘Eclipse,’ even after learning her real name, and plays it off as a joke (125).

In the instance of Kerouac’s labelling, Johnson has her own desires overshadowed so as not to disrupt the narrative Kerouac has constructed around her. She writes that he insists she only wants babies, because as a woman, she must want babies, even if she thinks she wants to be an artist (*Minor Characters* 136). Kerouac insists

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on putting Johnson’s title of ‘woman,’ which for him means a person who wants babies, ahead of her title of aspiring novelist, ignoring first that woman and novelist are not incompatible ideas, and second, the reality that Johnson wants no part in that categorization. By ignoring his own inaccuracy, Kerouac silences her by reducing “the complexities of Johnson’s experience to caricatures of femininity, caricatures with which she struggles as both constituting and obscuring her identity” (Carden 149) and pretending that femininity in and of itself is a simple thing. This phenomenon is made metaphor in the term “Silent Generation,” applied to the young adults of the fifties, a label that ignores the radical subcultures that were neither silent nor negligible.

Although Johnson expresses justifiable irritation at Kerouac’s inability to realize her as an individual as complex as himself—this ultimately drives them to split up—she benefits intellectually and artistically from the experience. Because the men in the Beat movement “deliberately and inaccurately [restrict] women to ‘everyday practices’” (R. Johnson 20), the women are overlooked, and with this comes a certain level of underestimation. They exist in a liminal space, and liminal spaces serve as fertile grounds for artistic endeavors. Their perception by society as silent hipster women and as merely women by the men within their movement “provided cover for them to develop despite prejudices against female literary expression” (12). As mentioned previously, some of the titles pushed onto these women meant that they had little time for art, as in Johnson’s statement about her life with Peter Pinchbeck. However, their actions within the space still constitute a contribution to the movement: “the roles they [perform]—wife, mother, lover, muse—obscure them as artists; nevertheless...their writing contains, engages, and modifies ‘beat’” (21).

This is not to insinuate that liminality is a pleasant or healthy experience—evidence to the contrary is everywhere. Bonnie Frazer, author of the Beat memoir *Troia*, endures horrible mistreatment during her time as a prostitute, which drives her to suicidal thoughts. Elise Cowen commits suicide.

Recognizing this cost, Johnson supplements *Minor Characters* with “an elegy for the lost and the missing in the wild recklessness of 1950’s Greenwich Village” (Friedman 238). I instead mean to suggest that if any benefit can be reaped from their liminality, it can be reaped in the art, when these women find time to make it, and in the growth of the individual. Johnson comes to a better sense of who she is because of her constant need to redefine herself. She defines herself first in opposition to the mainstream, rebelling against the expectation that she get an M-R-S degree by failing to graduate from Barnard altogether, then alongside the terms the male-dominated Beat space imposes upon her (R. Johnson 29).

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Relabeling Women In *Come and Join the Dance*

In *Come and Join the Dance*, male characters force labels and narratives onto Susan and Kay despite their protest. Johnson sets up the theme of Susan attempting to find her identity early on: in one scene, Susan says that the face looking back at her in the glass is not her own and asks what others see when they look at her (*Come and Join the Dance* 10). However, she refuses to accept identities forced upon her, instead pursuing one that she invents entirely on her own. In a conversation with Jerry the night they break up, Susan tells him she'd love to live in a sewer. He tells her that she would not, and she tells him, "maybe I'll do anything I want to," but he assures her that she would "be glad to come back here in the end" (35). She rejects his version of her as someone bound to return to the familiar, and later in the scene, rejects him along with it, and by symbolic extension the values of the middle class. Her refusal to graduate further distances her from the middle class.

The men in the countercultural movement are no less generous with the titles they give. When the reader first meets Anthony in *Come and Join the Dance*, he calls Susan's friend Kay "motherly," and even though she rejects that label, he again insists she is, in fact, motherly (*Come and Join the Dance* 53). This happens because Kay expressed concern for Peter's well-being, and because of her femaleness, concern is coded as maternal in Anthony's gaze. Kay refutes this by saying that her work is just living, implying that from her own perspective, her experiences cannot be so easily pinned down under the guise of "female." To Anthony, who views her from the perspective

of a man in a patriarchal society, her actions cannot be divorced from her femaleness because her femaleness, or his simplistic version of her femaleness, is her identity.

Anthony also imposes an identity onto Susan early in the novel, deciding first that she's a weird chick and then that she's a member of the counterculture club: "That's not true!" Susan protests (*Come and Join the Dance* 58). Although an identity within the "club" would put her in direct opposition to the mainstream she has worked so hard to rebel against, accepting an identity from Anthony is still accepting an identity rather than forming it herself. The face looking back at her in the glass would still not belong to her; it would merely belong to someone different. This serves as an excellent metaphor for the patriarchal structure of the Beat generation and how it creates a liminal space for Johnson who, as previously stated, must define herself within the context of both the mainstream and the counterculture, "a subversion from within" (R. Johnson 22).

Peter also attempts to categorize Susan, telling her she looks like his ex-wife, which implies he wants to associate her with the traditional domestic life that he fled (*Come and Join the Dance* 150). This is a moment of hypocrisy. Up to this point, Peter has tried to act as a catalyst for Susan's self-actualization, challenging the things she says and trying to get her to decide whether she means what she says or regurgitates a script handed to her by her upbringing: "Are you being polite when you say that, or don't you care?" he asks her (17). Later, he relates Susan to his ex-wife, Carol, mentioning that not only does Susan look like Carol, but she behaves like Carol, and he orders her a drink the way he would order one for Carol (152). In doing this, he places her in the domestic sphere he's tried so hard to escape. He cannot both

act as a catalyst for her individualization while also taking away her individuality by typifying her as his ex-wife.

Because this happens late in the novel, when Susan is much farther along the route to self-discovery, Peter's sudden categorization might be a reaction to her growth as an individual, a last-ditch attempt to put her in a box he recognizes. In the same section, Peter typifies her as a woman, insisting that she must expect him to take her away to celebrate because "women always expect that from a man" (*Come and Join the Dance* 152). Peter remains limited by the confines of the patriarchal society in which he exists, so that while he knows to prod Susan to question herself, he cannot realize a woman as being an individual as complex as himself. Susan can be Beat, but she is a woman, and to Peter, she is a woman first and foremost. The Beat generation's patriarchal core disrespects the art and intelligence of women within the group, even as it enables that art and intelligence to thrive (Johnson 15).

And it does enable that art and intelligence to thrive. One noteworthy difference, or perhaps the noteworthy difference between Jerry and Peter resides in that throw-away comment Peter gives Susan: "do whatever you want" (*Come and Join the Dance* 77). In the novel, this is something of a backhanded remark. Susan is a woman in the fifties and doing whatever she wants has terrifying implications. Kerouac says something similar—"you do what you wanna do"—to Johnson, and the effect is similar (*Minor Characters* 253). Johnson hears it as patronizing, an order to do something that she cannot do because of her gender. However, in *Come and Join the Dance*, Peter's suggestion that Susan do whatever she wants mirrors the conversation she has with Jerry earlier in the novel where she tells him, "Maybe I'll do whatever I want" (*Come and Join the Dance* 35). Here, she senses her own ability to become a stronger individual and break free from the narrative imposed upon her by her context. She threatens to individualize herself, to go against the norm, and her first step in going against that norm is to break up with middle-class Jerry. Peter's and Kerouac's statements can certainly be read as patronizing, easier-said-than-done suggestions,

as off-handed remarks to smirk at the women in their lives. But while their advice is simplistic—again, *Minor Characters* contains a catalogue of women who have died because they could not find a place in this liminal space—receiving no advice forces Susan and Johnson to come up with their own answers. And as Susan knows early on, she cannot simply take an identity from someone else.

Johnson's strong aversion to Kerouac's non-advice hints at a bitterness towards, maybe, how easy he makes it all sound. Johnson cannot go on the road, or at least she would rather not, and a reader can hardly blame her when considering the fatal or tragic cases of women who have tried. Again, it becomes apparent that Johnson did not want to go on the road, possibly because of the implicit danger or possibly because she wishes she did not have to go on the male-defined road to establish her own individuality. In looking at how Kerouac controlled Johnson's narrative in *Minor Characters* and using that insight to offer a context for *Come and Join the Dance*, we see the immense difficulty that Beat women had in defining themselves in an extremely liminal space. With that comes a sense of the complexities surrounding a time where concepts like gender, race, family, and home were all being challenged alongside mainstream society. Johnson certainly comes across as particularly timid when compared to someone like Bonnie Frazer, who does go on the road and suffers greatly at the hands of men who mistreat her during her time as a prostitute; or Hettie Jones, who fills in Johnson's racial blind spots with a heartbreaking recollection of an interracial marriage that broke under the strain of the charged political atmosphere of the Civil Rights movement. Regardless of how Johnson comes across, her struggle, as well as the struggle of her arguably braver peers, is aggravated by her liminality. And as dangerous as that liminality is, it also functions as a particularly productive place, so that Beat culture is "somehow hospitable to women in the artistic and cultural avant-garde, even if it [does] not promote women's agency in an intentional, protofeminist sense" (R. Johnson 16).

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Justice William J. Brennan Jr. and the 14th Amendment

By Britlin Richardson

The U.S. Supreme Court has long withstood different periods characterized as originalist and living constitutionalist majority rule, which has helped define America not only through law precedents but the ideas they contained. Former Supreme Court Associate Justice William J. Brennan Jr. heavily influenced the future of progressivism in America through his belief in living constitutionalism through the Fourteenth Amendment, which helped define liberalism and correct social injustices. This

research analyzes Brennan's opinions concerning important and lasting cases involving the Fourteenth Amendment such as the Regents of the University of California v. Bakke, Plyler v. Doe, Near v. Minnesota, and New York Times Company v. Sullivan and how they have defined living constitutionalism and the First Amendment. These influential cases explore how Brennan's influence helped define the Court and progressivism concerning historical wrongdoings.

Former Associate Justice William J. Brennan Jr.'s long legacy of progressive decisions was derived from his employment of living constitutionalism and motivation for social change in the Supreme Court. Brennan served a 34-year tenure on the Court and relied heavily on the evolving legal ideas of the times as justification behind some of the most influential court cases regarding Fourteenth Amendment rights in America. Utilizing the Fourteenth Amendment which states, "no state shall make or enforces any law which shall abridge the privileges or immunities of citizens of the United States... nor deny to any person within its jurisdiction the equal protection of the laws,"¹ Brennan pushed to expand and protect civil rights. According to US Legal, living constitutionalism is "the Constitution's ability to change to meet the needs of each generation without major changes."² Living constitutionalism allowed Justice Brennan the legal ideology to employ judicial activism on the Court.

About Brennan

Brennan was appointed to the Supreme Court by President Eisenhower in 1956 as an effort to diversify the spirituality of the Court as a Roman Catholic and son of an immigrant from Ireland.³ Brennan's ideology closely correlated with his childhood and his father, "a progressive in the mold of the Catholic theologian John A. Ryan, a forceful advocate for social justice who would come to be dubbed as the New Deal's priest."⁴ Brennan's philosophical belief of protecting individual rights of all despite race, religious affiliation, or sex built upon the ideas established by progressives and in Roosevelt's New Deal.⁵ When Justice Brennan cites "'diversity' as a justification for affirmative action,"⁶ he utilizes the social ideas developed through his childhood and applies them by evoking living constitutionalism and judicial activism. Brennan's experiences allowed him to apply the Constitution to modern and changing standards and ideas of inequality in his eyes.

New Deal Liberalism

Brennan became a justice during the Warren Court, an era defined as a majority liberal Court utilizing judicial activism in which Earl Warren served as the Chief Justice between 1953 and 1969.⁷ Largely, the classification of his thinking as liberal or that of a living constitutionalist was greatly associated with "New Deal liberalism [which] subscribed to classical liberalism's objective of self-preservation with the optimum of individual freedom intact, but accepted a broader range of governmental action than was common in nineteenth-century liberal thought."⁸ In the evolving beliefs on liberalism of the time, Brennan's tenure on the Supreme Court marked progressive reform of laws and interpretations of the Fourteenth Amendment. Brennan utilized the Supreme Court as a corrective entity to solve or fix social injustices and flaws he saw within the system, and "to advance individual rights and personal dignity by correcting what deficiencies remained in liberal thought during the post-New Deal period."⁹ From the establishment of the Supreme Court upon the Founding, the power of the Court has increased throughout time and can thus be seen through Brennan's use of the evolving power to establish social reform and correct flaws he saw within the system.

Brennan utilized the Supreme Court as a corrective entity to solve or fix social injustices and flaws he saw within the system.

Affirmative Action: Regents of the University of California v. Bakke

Justice Brennan was well known to evoke the Fourteenth Amendment when it concerned the controversial legality of affirmative action as utilized by higher learning institutions to establish diversity on their campuses. Allen Bakke, a white man, was denied admission twice to the University of California Medical School at Davis. Bakke's test scores and GPA were higher than any of the minority students admitted the years he applied. He later found the program reserves 16 of the 100 yearly spots in the program for minority students and claimed the denial of his application was based on his race.¹⁰ In 1977, the Supreme Court heard the case of *Regents of the University of California v. Bakke* and nearly one-and-a-half years later relayed their 8-1 in favor of the Regents of the University of California decision. The singular message stated, "Universities were (relatively) free to take race and ethnic background into account in their admissions decisions but they were not free to maintain strict quotas absent a history of racial discrimination demanding a strong remedy."¹¹ Brennan relies heavily on wording in many of his arguments to uphold individual rights. In a 37-page narrative by Brennan concerning the case, Brennan and the other Justices were strongly divided on the issue and the message associated with the decision. In Brennan's narrative, he stated on the constitutionality claim for Bakke that the Court had already "settled the principle that not every remedial use of race is constitutionally forbidden," and "under any standard of Fourteenth Amendment review, other than one requiring absolute color-blindness, the Davis program passes muster."¹² In this instance, Brennan utilizes the Fourteenth Amendment's equal protection under the laws to justify Davis' quota of minorities in their program as remedial action.

Living constitutionalism ideology and judicial activism as seen by Justice Brennan in cases such as Bakke allowed him to be a defining voice on the Court throughout his tenure. Brennan's

personalized focus around social justice stemmed from his experiences and beliefs growing up, in which he believed the law could fix the societal shortcomings in history.

Right to Education: Plyler v. Doe

In 1981, the Court heard the case of *Plyler v. Doe* which called a 1975 Texas law into question allowing school districts to refuse funding the free education of the children of undocumented immigrants as well as deny enrollment altogether.¹³ Texas argued the law was necessary in order to preserve funding for children "residing legally in the State."¹⁴ In a close 5-4 decision with Justice Brennan authoring the majority opinion, he wrote that the actions of the state did violate the Equal Protection Clause of the Fourteenth Amendment, which states "that no State shall deny 'any person within its jurisdiction equal protection of the laws.'"¹⁵ Brennan stated, "whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of the term," and "the phrase 'within its jurisdiction' guaranteed 'equal protection to within a state's boundaries, and to all upon whom the State would impose the obligations of its laws.'"¹⁶ Brennan also cited within the opinion that despite being defined by the term of undocumented, the children had no bearing or any way to influence their parents' decisions and Texas could not also prove the regulation served a "compelling state interest."¹⁷

Within his majority decision, Brennan was able to achieve social justice for those he believed to be disenfranchised and overturn a state law based on a Fourteenth Amendment violation. Perhaps beyond the purely Constitutional reach, Brennan also cites justice as a reason for the children to have access to education by stating, "in determining the rationality of [the statute], we may appropriately take into account its costs to the nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it

further some substantial goal of the State.”¹⁸ He continually employed living constitutionalism in his decisions to apply the Constitution in different manners, which is directly seen in *Plyler v. Doe*, a historically controversial but standing case for all of America and within the Court.

As for his New Deal liberalism and social justice mindset, the Fourteenth Amendment allowed Justice Brennan to utilize the Constitution as a tool for advocacy. During a 1985 speech at Georgetown University, Justice Brennan spoke about the Constitution as a “sparkling vision of the supremacy of the human dignity in every individual... The vision of human dignity embodied there is timeless. If we are to be a shining city upon a hill, it will be because of our ceaseless pursuit of the ideal of human dignity.”¹⁹ Brennan’s belief that the Constitution should be used as a vessel for social change stems from the contested idea that the Founding Fathers intended it to be so. To preserve the society and moral government regime, the Founding Fathers were not ignorant to the eventual need for change and the evolution the Constitution must undergo to preserve the United States. This idea, furthered by living constitutionalism, allowed Justice Brennan to utilize the document and calculate his decisions according to the changing intentions of the Constitution and the Founding Fathers to maintain justice and liberty. Brennan utilized the Constitution as a vessel for change because “for William Brennan, at least, human dignity was the supreme and transcendent value of the

Brennan’s personalized focus around social justice stemmed from his experiences and beliefs growing up, in which he believed the law could fix the societal shortcomings in history.

Constitution, trumping even majoritarianism.”²⁰ Seen widely in *Plyler v. Doe* and *Regents of the University of California v. Bakke*, Brennan sought to maintain individual freedoms and correct the injustices he commonly saw. Utilizing his views on living constitutionalism and his

want to progress social change, he helped the Court affirm the right of education for children of undocumented immigrants and allow higher learning institutions to utilize affirmative action.

Hand In Hand: The Fourteenth and First

The Fourteenth Amendment was ratified in 1868, and the Supreme Court found the “Privileges and Immunities Clause, the portion of it that, at least on its face, appeared most likely to incorporate the Bill of Rights against the states, did no such thing.”²¹ The Privileges and Immunities Clause sought to ensure citizens had the same rights no matter which state they were in and could not be discriminated against for being citizens of another state.²² It wasn’t until much later when the Supreme Court, “... determine[d] that most of the rights guaranteed in the Constitution’s initial amendments were part and parcel of the ‘liberty’ that the Fourteenth Amendment established.”²³ Because of this, it was concluded that liberty, “could not be denied by the states without ‘due process of law.’”²⁴ It was decided by the Court in 1925 that the “freedom of speech or the press” applied as such and in 1931 it held that the Fourteenth Amendment incorporated the First Amendment for states in *Near v. Minnesota*. In this case, a Minnesota newspaper accused officials of “being implicated with gangsters,”²⁵ in which those officials sought

a permanent injunction against the newspaper because it was “malicious, scandalous, and defamatory.”²⁶ The permanent injunction would essentially act as a “gag law” upon the newspaper, but the Supreme Court ruled that the government could not prevent something from being printed with few exceptions.²⁷

This decision, made long before Brennan was appointed to the Court, laid the groundwork for the incorporation of the Bill of Rights within the Fourteenth Amendment and therefore the basis for many important decisions. During Justice Brennan’s tenure on the Court, he made numerous

decisions concerning the First Amendment which were incorporated by the Fourteenth Amendment and are therefore forever intertwined and related.

In *New York Times Company v. Sullivan*, Public Safety Commissioner L.B. Sullivan filed a libel action suit against the *New York Times* after they published an ad calling for donations to defend Martin Luther King Jr. on perjury charges. Despite not being mentioned in the ad, Sullivan believed it reflected poorly on him and asked the *Times* to retract the ad, which they refused to do.²⁸ In Justice Brennan's majority opinion, he states that Sullivan's claim is that, "... he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of 'ringing' the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission."²⁹ Originally, a state court jury awarded Sullivan \$500,000 in damages and the state Supreme Court concurred.³⁰ The U.S. Supreme Court decided in favor of the *Times* and was able to apply First Amendment

fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones."³¹ Although it is characterized as a First Amendment case, Brennan and many Justices who utilize the First Amendment must also utilize the Fourteenth which grants equal protection to all citizens, and in turn, protection from the states.

Conclusion

When speaking of Brennan's dedication to the Equal Protection Clause in the Fourteenth Amendment, scholars of the Supreme Court have said that "he looked to the impact on the person or group subjected to discrimination. For him, whether lawmakers intended to discriminate is secondary, almost irrelevant. Instead, the Court's greatest responsibility lies in scrutinizing practices that disproportionately affect a class of persons who have been traditionally oppressed, such as racial and ethnic minorities, women, and illegitimate children."³² During his confirmation hearing with the Senate Judiciary Committee, Brennan's ability was questioned as to "the fitness of a Catholic to hold judicial office," and if he would "be bound by papal decrees or doctrines or the laws and precedents of this nation."³³ With his first-hand experiences of discrimination, Brennan did not have to dig deep to understand the rooted unequal beliefs of America and he sought to change it through the Fourteenth Amendment.

The Supreme Court has gone through noted periods of originalism and living constitutionalism majority rule, which expand upon the ideas of the time and allow the Court to ebb and flow between ideas of liberalism and conservatism. Justice William Brennan's approach on the Supreme Court allowed him to pursue judicial activism through his beliefs of living constitutionalism. During his 34-year tenure on

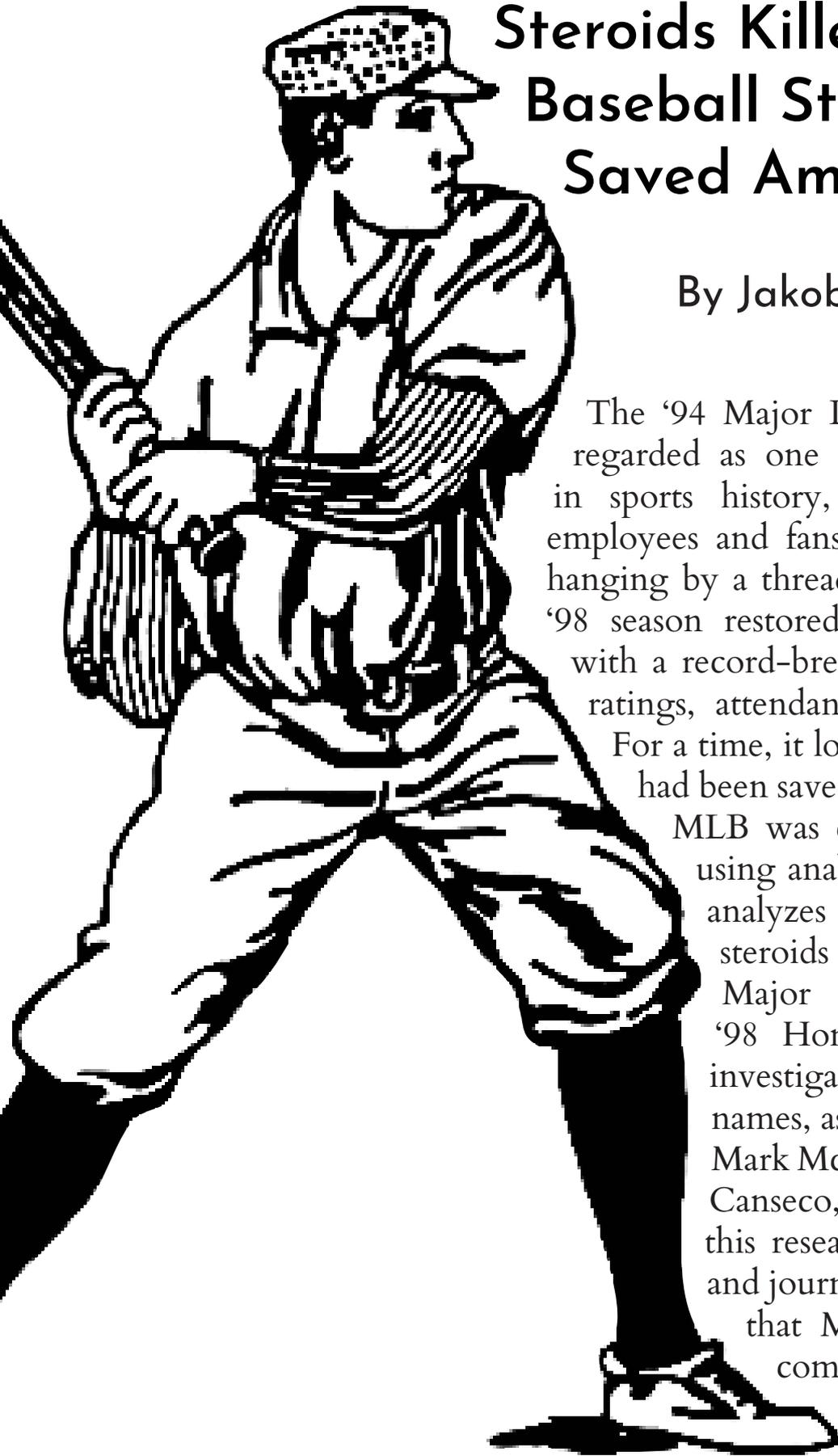
With his first-hand experiences of discrimination, Brennan did not have to dig deep to understand the rooted unequal beliefs of America and he sought to change it through the Fourteenth Amendment.

rights to the states, allowing Brennan and the other justices to give concrete Constitutional support behind the decision. In a unanimous decision in favor of the *Times*, Justice Brennan wrote the opinion which required libel to include the idea of "actual malice," meaning intentionally falsifying or recklessly publishing information which may be untrue. In his majority opinion, Brennan cited Mr. Justice Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357 as further justification stating, "...it is hazardous to discourage thought, hope and imagination; that

the Court, “Brennan did not come to the Court with his jurisprudence firmly fixed; rather, he grew into his beliefs.”³⁴ In his many decisions concerning the Fourteenth Amendment and through such, the First Amendment, Brennan was able to correct the perceived wrongs he saw within America. Many rights held important by millions of Americans today were heavily influenced by Brennan’s decision on the Supreme Court, such as the expansion of the First and Fourteenth Amendment protections for Americans and affirmative action.

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Steroids Killed the Baseball Stars but Saved America's Game

By Jakob R. Rodriguez

The '94 Major League Baseball Strike is regarded as one of the greatest betrayals in sports history, hurting MLB players, employees and fans. America's pastime was hanging by a thread. In a time of need, the '98 season restored the MLB to greatness with a record-breaking season in terms of ratings, attendance, and player statistics. For a time, it looked as though the MLB had been saved, but the greatness in the MLB was chemically manufactured using anabolic steroids. This paper analyzes the role of anabolic steroids in the resurgence of Major League Baseball, the '98 Home Run Race, and the investigation into '98's household names, as well as the steroid use of Mark McGwire, Barry Bonds, Jose Canseco, and Sammy Sosa. From this research consisting of studies and journalistic pieces, it is evident that Major League Baseball is complicit in baseball's greatest doping scandal.

“Take me out to the ballgame take me out with the crowd.”

When Jack Norworth wrote these words on a scrap of paper in 1908, accompanied by a doodle of a fictional New York girl named Katie Casey; he had no idea of the social and cultural impact his song would have on the game for decades to come. By the 1970s, the famous White Sox announcer Harry Caray began performing the song during the seventh inning stretch of each game. Across the United States, baseball fans sang Norworth’s words. “Buy me some peanuts and Cracker Jack,” went Norworth’s story a young woman, Casey, begging her boyfriend to take her to a baseball game rather than a show. “I don’t care if I never get back!” The song serves as not only the unofficial anthem for the sport. Today, the song also reminds us of the many decades when baseball emerged as America’s pastime. As the sport has declined in popularity, such reminders of its draw for the nation evoke a simpler time of spectacle and entertainment. To the extent that baseball has remained popular in recent decades, it has relied on the draw of the home run. Consequently, the resurgence of baseball has, ironically, depended on wrestling with what has been seen as one of the greatest threats to the game: steroid use by the would-be home run hitters.

The modern dilemma of baseball became especially apparent in the 1990s. Steroids would take the baseball world by storm, scarring the game forever and marring the triumphs and accolades of a generation’s greatest heroes. The late 1980s to the late 2000s became known as the “steroid era,” when a number of players, with both high and low popularity amongst fans, were accused and later proven guilty of doping their bodies or altering their physiques with the help of anabolic steroids.

Athletes take anabolic steroids, also known as anabolic-androgen steroids, to increase their muscle mass and strength, as well as gain an edge throughout competition and the training leading up to the contest. While some athletes take testosterone to boost performance, others typically use synthetic modifications of the hormone that

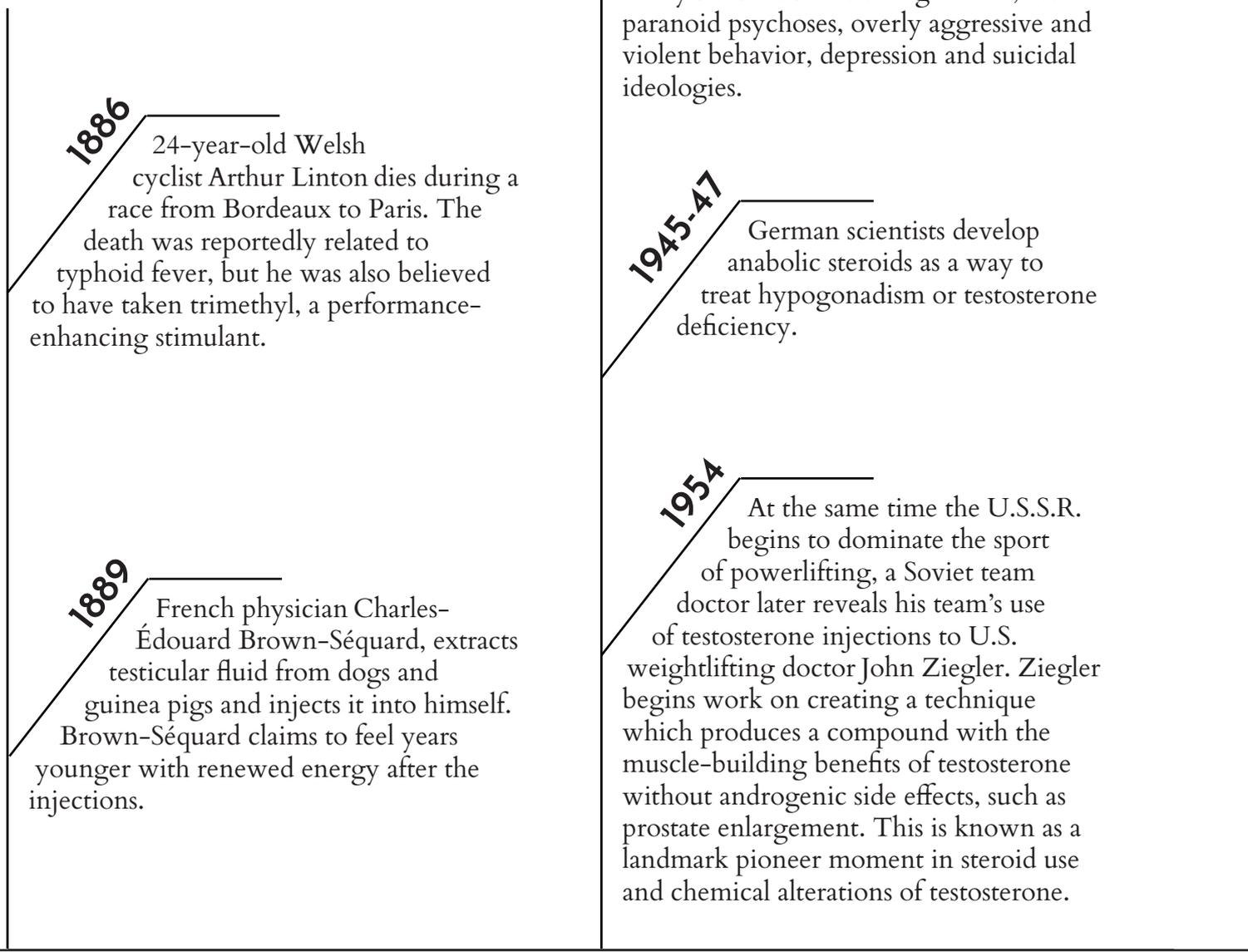
are approved for medical uses. They can be taken or administered in the form of pills, injections and topical creams.

The steroid era would serve as a permanent smear on the game of baseball and the players involved in the scandal. Over three-decades, observers of the baseball world came to see clearly how the commercialization of the game, combined with the greed of players and the League, could undermine the reputation of an entire professional sport, while essentially erasing the achievements of the players and coaches. The rise of steroid use cast a pall on the most famous players of the era, including Mark McGwire, Sammy Sosa, and Barry Bonds. Others, like Jose Canseco, admitted their use of the illegal or banned substances, preserving their personal reputation, but not saving themselves from association with “cheating.”

Ironically, the steroid era also saw the resurgence of baseball, a sport that was declining in popularity as the National Football League and the National Basketball Association, among others, gained fan followings. With this in mind, it is possible to argue that steroids were a necessary evil that helped catapult the sport to the top of ratings during the home run races of Bonds, McGwire, and Sosa. The drama of those home run record races in 1998, and the regular moon shots smashed by players like Canseco, all helped usher in a new generation of fans to the parks. Following the Major League Baseball Players Association organized the strike in 1994, which ended the season early and canceled the year’s World Series. Baseball needed a spark and it found it in the artificially inflated muscles of its new heroes. However, for a game as entrenched as baseball is in tradition, when some of these generational “heroes” flirted too closely with records, previously or without the aid of steroids, thought of as being unbreakable. The Major League Players Association, the MLB itself, and even the United States Congress would eventually intervene to preserve a sense of purity in “the old ball game.” But the deed was done, the crime already committed, and the wounds from this ordeal have been very slow to heal.

The Timeline and Context of Anabolic Steroids

Doping was not and is not some new-fangled idea. It dates back to ancient Greece, where athletes who would compete in the Olympics would gorge themselves on meat, an abnormal dietary supplement, and would go as far as experimenting with herbal solutions to find an edge in competition.^{vi} Drawing upon a Sports Illustrated timeline^{vii} developed in 2008, we can identify key benchmarks for developments in anabolic steroid use and practice. From 1886 to 2005, the doping was clearly central to the development of modern athletes.



1886

24-year-old Welsh cyclist Arthur Linton dies during a race from Bordeaux to Paris. The death was reportedly related to typhoid fever, but he was also believed to have taken trimethyl, a performance-enhancing stimulant.

1889

French physician Charles-Édouard Brown-Séquard, extracts testicular fluid from dogs and guinea pigs and injects it into himself. Brown-Séquard claims to feel years younger with renewed energy after the injections.

1935

German scientists develop anabolic steroids as a way to treat hypogonadism or testosterone deficiency.

1940-45

Nazis test anabolic steroids on prisoners, Gestapos and Hitler: testosterone is used by German soldiers to promote aggressiveness and physical strength throughout the war effort. Hitler's mental state toward the end of his life also exhibits characteristics that scientists normally associate with heavy steroid use including: mania, acute paranoid psychoses, overly aggressive and violent behavior, depression and suicidal ideologies.

1945-47

German scientists develop anabolic steroids as a way to treat hypogonadism or testosterone deficiency.

1954

At the same time the U.S.S.R. begins to dominate the sport of powerlifting, a Soviet team doctor later reveals his team's use of testosterone injections to U.S. weightlifting doctor John Ziegler. Ziegler begins work on creating a technique which produces a compound with the muscle-building benefits of testosterone without androgenic side effects, such as prostate enlargement. This is known as a landmark pioneer moment in steroid use and chemical alterations of testosterone.

1975

The International Olympic Committee institutes a drug-testing policy for participating athletes and adds anabolic steroids to its list of illicit or banned substances, barring users and future competitors from participating in the games.

1984-96

The Bay Area Laboratory Co-operative was a San Francisco Bay Area business which supplied anabolic steroids to athletes. The BALCO scandal involved the use of banned substances that would otherwise benefit performance amongst professional athletes. The scandal itself stems from a 2002 US Federal Government Investigation of the laboratory. Starting in 1984 by Victor Conte and his wife, BALCO began as a vitamin shop in California, an initial business venture by the couple to provide for their family, after a year of clean operation, Conte closed the shop and started BALCO as a sport supplement company in neighboring the neighboring town of Burlingame. Conte had no formal training, but devised a system of testing athletes for mineral deficiencies in order to maintain a perfect balance of minerals in the body. Through regular urine and blood testing, Conte would monitor and treat mineral shortages in athletes, elevating their level of physical wellness dramatically. By the summer of 1996 NFL linebacker Bill Romanowski was added to BALCO's client list. Following Romanowski's addition to the client list, Conte begins to acquire additional high-profile athletes with his untraceable substance cocktail and doping program.

1988

Ben Johnson's, American sprinter, gold medal is stripped after the anabolic steroid Stanozolol is detected in a urine sample.

1990

The Anabolic Steroids Control Act is introduced by Congress. The Act classified steroids as a schedule III-controlled substance, making trafficking those illicit substances a felony, not a misdemeanor.

1991

German scientists develop anabolic steroids as a way to treat hypogonadism or testosterone deficiency.

2002

Ken Caminiti, retired third baseman, admitted to using steroids in 1996, the same year he would win the National League MVP title. "I've made a ton of mistakes. I don't think using steroids is one of them," Caminiti said. "He estimates that at least half of his fellow big leaguers are regular juicers," the June 3 issue of Sports

2005

Jose Canseco's, The Oakland A's 1986 rookie of the year, writes and publishes a tell-all book, Juiced: Wild Times, Rampant 'Roids, Smash Hits, & How Baseball Got Big. Canseco catalogued his own drug abuse by and alleged of those same drugs by home run kings Mark McGwire and Sammy Sosa.

When McGwire released his book, he inspired an investigation by the United States Congress into doping and steroid use throughout Major League Baseball. The MLB reached an agreement to change its drug testing policy in January of that same year, but Canseco's tell-all book reopened the conversation as Canseco had accused players across the major leagues. Congress subpoenaed Canseco, Jason Giambi and Mark McGwire, who all testified before a Congressional committee investigating steroid use. Curt Schilling, Sammy Sosa, Rafael Palmeiro, and Frank Thomas were also subpoenaed to appear at the March 17 hearing of the House Government Reform Committee along with Players' Association Head Donald Fehr, Baseball Executive Vice Presidents Rob Manfred and Sandy Alderson and San Diego General Manager Kevin Towers.

The '94 Strike and Why It Happened

On August 12, 1994, the eighth work stoppage in baseball history would hit the MLB and would result in the remainder of the season being canceled, including the post-season and World Series. For 232 days both work and play stopped. What started as a response to an alarming financial situation in the baseball industry turned into a disagreement over collective bargaining rights, negotiation of wages or conditions of employment by the MLB players union, with a deal adamantly rejected by the Players Association. In continued negotiations, team owners chose to withhold the \$7.8 million they were required to pay into player's pension and benefit plans from the previous agreement. The cancellation of the season meant a net loss of approximately \$810 million in both players' salaries and ownership revenue. Prior to October 2, the final scheduled day of the season, players had been losing salary pay collectively at a rate of \$4.4 million a day.

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Further, out of the 28 teams in the MLB in 1993, 19 failed to match the previous season's attendance. Following the strike, in 1995, only 13 of the 28 teams matched the previous season's attendance numbers. The strike enraged many fans who perceived players who held out during the strike to be greedy, but proved that the strike itself was, in some capacity, beneficial to the league once play did continue. Once the 1995 season did get underway, team members and team management were both called out by upset fans, both on and off the diamond

for being "greedy" and "selfish."

During the 1995 season, certain fans took to demonstrations against teams, the league, and the players. In one such event, fans wearing T-shirts that had "Greed" written on them rushed the field at Shea Stadium and tossed \$160 in one-dollar bills at players' feet before they were eventually escorted out of the facility. Other fan-bases took to throwing things onto the field and causing delays for games. Some strew messages on billboards, banners, and signs at games. Others even went as far as flying banners over the stadiums with messages: "Owners & Players: To hell with all of you!"

Baseball in America was walking on thin ice, and the league needed to turn things around in terms of attendance or else it would once again fall into the trap.

The '98 Home Run Race

The event that would ultimately silence many critics of the game was the 1998 home run race between the first baseman of the St. Louis Cardinals Mark McGwire and the right fielder of the Chicago Cubs Sammy Sosa. The '98 season ended with both players breaking Roger Maris's historic 1961 single-season home run record of 61 home runs. Maris beat Babe Ruth's previous 1927 record of 59 home runs. Maris's record was

held for nearly four decades until Sammy Sosa reached Maris's milestone on September 25, 1998, breaking McGwire's standing record of 65-home runs. McGwire broke the record less than an hour later and would also hit two home runs in each of his next two games to achieve his home run record of 70.

For baseball, the '98 home run race meant a resurgence to the sport. It injected new blood into the veins of the MLB and gave the league, owners and players something to look forward to and cherish. Throughout the steroid era, power hitters would dominate the league, putting up astronomical numbers and flirting dangerously to all-time leaders. The '98 home run race also gave owners a way to throttle profits with more fans lining up to see sluggers go after one more at-bat. In St. Louis alone, the Cardinals was able to get 541,083 more people in the ballpark than the year prior. The Washington Post reported in July of that same year that the home run race put baseball back in a financially positive place: "Attendance so far is 36.3 million and could surpass the mark of 70 million established in 1993 and restore the game to fiscal health after the four-year hangover left by the 1994-95 players strike that canceled the '94 World Series." The Washington Post also reported in September 1998 that "McGwire's and Sosa's home runs have helped revive a sport that seemed in decline four years ago when a labor dispute forced the cancellation of the 1994 World Series. Until this season, attendance remained below 1994 levels. Fans seemed to be coming back a bit at a time, but because of Sosa and McGwire, they started to come back in a rush." Fans and owners alike latched onto the home run race drama. Those that could make the games would drive for hours and pay hundreds of dollars to watch batting practice and every at-bat, the rest watched on television.

Clearly baseball needed a boost. Significantly, however, the majority of the players involved in this "baseball mania" were either doping or linked to steroids in some way. Over the years, they would be added to the infamous list of players who would have tested positive for steroid use.

How 'Roids Re-invented Player Physiques and Stat lines

Science tells us that steroid use and home run numbers are directly correlated. According to the Journal of Sports Medicine & Doping Studies 2015, "Approximately the same time steroids use was suspected to have increased in MLB, there was an increase in the number of home runs (HR) per season, as well as the highest HR totals per player per season." The study goes on to explain that at the time of the steroid era were also increasing in size of the average hitter. Researchers theorized that there would be an overall increase in home runs hit, batting average and isolated power throughout the steroid era.

The research team failed to prove its hypothesis of more home runs being hit in the steroid era: "there was no statistically significant difference between the steroid era and the other 10-year time frames (the steroid era, 1993-2002; post-steroid era, 2003-2012; pre-steroid era, 1973-1982.) However, the team concluded through statistical analysis that "there was a significant increase in players who hit more than 40 HR in a single season during the steroid era compared to before and after this time period."

The steroid era serves as a permanent smear on the game of baseball and the players involved in the scandal.

Allegations Against Bonds, McGwire, and Sosa

The Game of Shadow: Barry Bonds, BALCO and the Steroids Scandal That Rocked Professional Sports is a best-selling book that chronicled the alleged extensive use of substances that helped players achieve success in the game: steroids or performance-enhancing drugs and Human Growth hormone. It was written by Mark Fainaru-Wada and Lance Williams, reporters for the San Francisco Chronicle, and provided the

basis for the greatest collection of evidence of steroid use by Barry Bonds. Bonds' record still stands through controversy over the possible use of performance-enhancing drugs among the trio of hitters (Sosa, McGwire and Bonds) that picked up speed and mass speculation when Bonds hit 73-home runs despite having never hit as many as 50 in any other season.

In a headline that read "Sosa Is Said to Have Tested Positive in 2003," The New York Times reported that Sosa joined the group of ballplayers like McGwire, Roger Clemens, Barry Bonds, Alex Rodriguez, Manny Ramirez and Rafael Palmeiro, who all tested positive for performance-enhancing drugs, even when Sosa was quoted saying he had "never taken illegal performance-enhancing drugs."

Former Democratic United States Senator George J. Mitchell of Maine launched a 20-month-long investigation into players' illegal doping. Mitchell sent a letter to Sosa asking for an interview or clarification of the allegations presented in a list of specific questions on ever using steroids or other performance-enhancing substances without a prescription during his major league career. However, neither Sosa nor Bonds responded to the letter.

Mitchell Report

The report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball, the 409-page report released on Dec. 13, 2007 covers the historical use of illegal performance-enhancing substances by players and the effectiveness of the MLB Joint Drug Prevention and Treatment Program to combat the issue. The report also analyzes and advances certain recommendations of the handling of past illegal drug uses and future prevention of the practice amongst players. In addition to the recommendations listed in the report, the report also names 89 MLB players who are alleged to have used steroids or performance-enhancing drugs in their time in the league.

Throughout the Congressional hearing on

steroid use in the major league, McGwire stated that any answer he gave regarding alleged steroid use would not be believed by the public-at-large anyway, regardless of the context added. Bonds later admitted to taking steroids but claimed to not know he was taking a steroid.

Essentially, every athlete named in the Mitchell report had some sort of an investigation into illegal substance, illegal drug or non-prescription use. All 89 players named in the report had their reputation and career forever shadowed by its remarks. In essence, the higher you were in the baseball upper echelon of individuals destined for the hall of fame glory, the harder you fell after the report came out. Following its release, MLB increased testing and increased punishments for those who tested positive for the human growth hormone and performance-enhancing drugs.

McGwire was never named by an official investigation, but on January 11, 2010, McGwire admitted to broadcaster Bob Costas of the MLB network that he did, in fact, take steroids throughout this career, including the 1968 record-setting season. Both Bonds and Sosa have been linked to illegal use of steroids in the Mitchell report. Jose Canseco admitted that he "would never have been a Major League-caliber player without steroids."

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Conclusion

The reaction by MLB and the Players Association to combat the steroid problem in professional baseball suggests that owners, players and even fans have a skewed perspective. The truth is that juicing found its way into not only the veins of potential hall-of-famers, which have forever tainted what would have been stellar careers, but the baseball industry itself. The industry only cared to attempt to rehabilitate itself based on the traditions of the past and the condition of the sport it had thrown away in favor of historic records, large accolades and big checks. Only when historical records were challenged or broken did the MLB or media truly question how players were able to achieve that sort of prestige. Even then, the home run race of Bonds and McGwire created a sort of sports telenovela for the nation and the game saw a resurgence of popularity when records like the all-time home run record were being challenged. Anabolic steroids or non-prescription drug use offered a clean means of publicity. Even when players and league leaders were subpoenaed to testify before Congress, the hearings only elevated the game that much higher into the American media digest and also popular culture.

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THE UNITED STATES' INVOLVEMENT IN THE HUMAN RIGHTS SITUATION OF MODERN CHECHNYA

By Evan Olszewski

This summarizes the history of modern Chechnya's human rights situation. It deals specifically with the persecution of minorities on ideological grounds, exploring the cultural background and the motivations of the Chechen ruler, Ramzan Kadyrov. The involvement of the United States in the region in the time surrounding the Cold War exacerbated the ideological opposition to Chechnya's long-time occupier, Russia. This paper suggests that the ideological opposition to Russia, which is associated with western values in Chechen thought, has led to an increased focus on the modern state's Islamic roots. It proposes Kadyrov's attacks on and purges of homosexual men in 2017 and 2018, as well as the country's broader return to brutal tribal politics, are a result of this increased focus, which was kickstarted by the anti-Russian ideological fighters armed and trained by the United States in Afghanistan in the 1980s.

Chechnya, part of the contested North Caucasus region, has a long history of violence and turmoil in its interactions with Russia and its own people. Its troubling human rights record has come to international attention since the 1980s as the United States' involvement in some of the key factors of conflict has become apparent. Chechnya's current situation, whereby a renaissance of tribal and traditional Islamic values is curtailing the rights of its citizens, is tied to American and Russian rivalries across the globe.

This paper contextualizes the current state of human rights within Chechnya by briefly tracing the country's history since it came to its current form and state of conflict in 1864. The main focus will be on the United States' effect on the state since 1980, demonstrating how international input has affected Chechnya's own political forces and its constant struggle for independence. The paper also examines some of the relevant cultural influences in Chechnya, in order to clarify the goals and purposes of its domestic political forces.

Organized chronologically into four topics, this paper follows the historical direction the discussion takes: historical background, the effects of war, human rights, and United States' involvement, are all addressed in each section. The first section, which covers the history of Chechnya prior to the First Chechen War in 1994, is critical, as it serves not only to explain Chechnya's geographical situation, but also to relate some of the cultural facts which are important for the following discussion. The second section builds on the background established in section one and discusses the First Chechen War, its neglect of human rights, and its relevance to the following twenty years of history. Section three covers the Second Chechen War in 1999, the rise to power of the current Chechen President, Ramzan Kadyrov, and the political background of his rule. The fourth and final section details the disquieting human rights violations inherent in Kadyrov's rule today, and the United States' response to these abuses.

Chechnya 1864 to the First Chechen War (1994-1996)

The conflict in Chechnya began in 1864, when the state was annexed along with several other states in the North Caucasus region by the Russian Empire (Tappe, 7). The annexation was met with severe resistance by native Chechens, who have struggled with the dominant Russian force ever since, provoking nearly "100 years of resistance" (Tappe, 7). Though still occupied or controlled in some form today, Chechnya has never accepted their place or participated in the Russian body politic (Tappe, 9). Dr. Svante Cornell wrote in 1999 that abuses of the Chechen people began in response to the rejection of Russian rule and have become integral to the relations between the Russian state and its territory ever since (Cornell, 85).

The Chechen state, which is traditionally tribal and centered around bloodline politics, has been in constant conflict since the fifteenth century. However, Islam's arrival in the region in the seventeenth century provided a uniting cause for the Chechen people resisting Tsarist Russia, and the religion became ubiquitous in the region as a symbol of Chechen independence from outside rule. The theological doctrine of "ribat," meaning guard duty at a frontier outpost, has become important in Chechen thought as their resistance was galvanized increasingly on religious terms (Long, 32). Foundational to the Chechen synthesis of Islamic values and tribal customs, the larger doctrine of ribat holds that the concept of states itself is a western invention, further motivating the rejection of Russian rule (Long, 44). The Chechen identification with Islamic peoples and struggles has emphasized Chechnya's physical position as a geographic fence separating Russia and the Islamic world (Long, 33).

As the Chechen struggle became synonymous with the Islamic world's struggle with the western world, the spiritual divide between Muslims and nonbelievers also began to entail a physical divide, and Chechen independence gradually became understood as a holy war—a reclamation of Islamic territory (Long, 33–5). Hannah Notte notes that Chechen nationalism

is fundamentally different from Chechen-Islamic extremism; however, after the state's annexation by the Russian Empire, the two forces became increasingly conflated in light of their identical goals of Chechen independence (Notte, 61). The religiously- and politically-unified Chechens engaged in a drawn-out rebellion, beginning in 1918, which took Vladimir Lenin and Joseph Stalin six years to stop (Tappe, 7). Additionally, strict measures imposed by Soviet Russia heavily restricted the rights and crippled the civil wellbeing of the Chechens, to the point that today it is difficult to find older people who did not grow up in some sort of military camp (Tappe, 7).

In the 1980s, American efforts to stop Soviet influence in the Middle East involved the sponsorship and training of Afghani insurgent groups, some of whom migrated to Chechnya to continue the fight against Russia (Powelson, 298). Michael Powelson writes that Mujihadeen fighters in Afghanistan were originally supported by the United States, as they served to disrupt and unseat Soviet influences (297). He clarifies that while U.S. support was not rooted ideologically, the fighters were motivated to repel Soviet ideologies and ways of life (Powelson, 299). Consequently, the people armed and trained under U.S. supervision continued to develop their skills in combination with their radical ideologies and have been linked to many instances of international terrorism (Powelson, 298).

Coinciding with the failed coup against Mikhail Gorbachev in 1991 and the disintegration of the USSR, the Chechen struggle for independence resumed, as did both the prevalence of widespread abuses of civilians and fighters and the strong, unforgiving hand of Islamic extremism. In 1989, Chechnya's neighboring country, Dagestan, was the first of the North Caucasus states to see modern Islamic radicalism (Ware, 164). Its 1991 secession attempt was aided by radical fighters who ultimately made their way into Chechnya, eager to serve as borderland guards in the fight to reclaim Islamic lands from Russia (Tappe, 1).

The First Chechen War, Human Rights Abuses, and Modern Issues (1994-1996)

The First Chechen War began in 1994 when Russia deployed troops into Chechnya in response to a new Chechen declaration of sovereignty. Russian interest in the region is driven primarily by Chechen oilfields which they are ever-reluctant to lose (DiPaola, 3). The Russian troops, which had been in and out of the region since the failed coup and attempted secession in 1991, had been combatting radical fighters as the Chechen state began to expel everyone who was not Chechen or Muslim in order to purify society (Tappe, 1). Though Russian troops killed over 80,000 people during the course of the first Chechen War (Cornell, 86), the problems of the region were greatly exacerbated by both the Muslim fighters' unwillingness to surrender and the coinciding independence declaration of Azerbaijan, which went largely uncontested by Russia at the time (Tappe, 10).

Shamil Basayev and Ibn al-Khattab, two Islamic fighters who trained by the U.S.-supported groups, were actively involved in the Chechen armed struggle (Powelson, 302). Basayev, who was a tribal warlord in the traditional Chechen style, commanded a group of fighters who were composed chiefly of men from Afghanistan (Powelson, 301). Al-Khattab was later linked in a leaked FBI memo in 2001 to Osama bin Laden's operations in Afghanistan (WashingtonsBlog 2013). One year later, the Russian Prosecutor General, Vladimir Ustinov, released a video showing al-Khattab with Osama bin Laden in Afghanistan, further reinforcing the links between the Chechen insurgents and the Americans in Afghanistan (Powelson, 302).

The first war in Chechnya was one of the most destructive conflicts in the region's history for the civilians involved. The Russian army, facing a force composed mainly of nonmilitary insurgents, had to engage many civilian targets (Cornell, 86). Chechen cities, especially the capital, Grozny, suffered what has been called "the worst shelling since World War II," the

violations of war codes and human rights far exceeding any humane standard during the Russian involvement (Cornell, 86-87). Although scholars place the blame mainly on the Russian military, which at that point lacked any legislative limits or guidelines on the use of deadly force (Solvang, 215), it is worth noting that Chechen fighters regularly held their own citizens hostage as a way to tempt Russian forces into committing atrocities (Cornell, 87).

The first war in Chechnya was one of the most destructive conflicts in the region's history for the civilians involved.

The international responses to the First Chechen War showed a cautious attitude toward the issue, largely passing it off as an internal Russian problem (DiPaola, 1). However, in response to the Russian military's disregard for Chechens' lives, the International Court of Justice ruled on January 6, 1995 that Russia violated human rights on a major scale (Cornell, 89). Concurrently, the United States unofficially sympathized with the Russian struggle despite voicing criticism of the state early on, and U.S. aid to Russia did not lessen during this period (Cornell, 91). Two reasons that international help was not freely available were the image of Chechnya as a "gangster republic" and the belief that independence of a Muslim territory surrounded by Russian territories was impossible (Tappe; 9, 11).

Since 1991, no other country has recognized Chechnya's independence, but DiPaola suggests that the many international implications from United States' participation in Afghanistan to the International Court of Justice's 1995 ruling have made the Chechen problem an international issue (DiPaola; 6, 2). In 1994, the U.S. Commission on Security and Cooperation in Europe opened an office in Chechnya and began monitoring human rights violations there, according to a report they made before Congress in 2003 (U.S. CSCE; 1, 8). Though the United

States took no definite stance on the Chechen conflict and routed all aid through Russia to treat its dissident state, this monitoring suggests that the U.S. was actively aware of the predicament of the Chechen people.

As the Russians withdrew from Chechnya in 1996, ending the First Chechen War, a semblance of independence was reached and the dominant Islamic forces in Chechen society rose to the forefront. In the dubiously victorious country, Islamic rule became the norm as the ideologically-motivated independence fighters held most of the political power and nearly all military force (Solvang, 159). Socially, Chechnya began to develop an image of itself more completely in line with the performance of ribat and the idealistic defense of the Islamic world.

The importance of ribat was emphasized heavily by the fighters in Afghanistan, who carried the ideology to Chechnya in the early 1990s (Long, 35). This ideology grew until 1999, when Chechnya effectively became a fully Islamic society, and the dominant political forces began to agitate to spread the ideology over the North Caucasus (Ware, 157).

The Second Chechen War and Ramzan Kadyrov's Rise to Power (1999-2009)

In 1999, Russia tired of the Chechen independence and moved to re-involve itself in the region. Russia's decision to engage in the region once again was spurred by Chechen fighters' intrusion into neighboring Dagestan, claiming that it too was independent and attempting to establish it as an Islamic territory. The Second Chechen War began as a war on terrorism and Islamic extremism which Russia feared would overtake the region, and Putin's exclusively counter-terrorist intentions resounded with American goals, especially after the attacks of September 11, 2001 (Notte, 60). The international community reacted more favorably to this commitment, and in 1999 President Clinton endorsed Russia's goals

in Chechnya while condemning their methods, still wary of the atrocities of the First Chechen War (Notte, 63).

Russia created and pursued a plan of Chechenization, which basically entailed the destruction of rebel forces and the establishment of leadership loyal to Moscow. The increased Russian concern with the region also led it to attempt to isolate Chechnya from the rest of the world and treat it entirely as its own internal problem. One of the first casualties of the involvement was the U.S. Commission on Security and Cooperation in Europe (CSCE) office, which was shuttered and prevented from monitoring the rights and violence after late 1999 (U.S. CSCE, 8). Simultaneously, a Russian human rights organization, Human Rights Watch, began to operate in Chechnya, fielding reports of abductions and extrajudicial executions; however, their investigations were seriously hampered by Russian attitudes toward Chechens, who were perceived only as terrorists (Solvang, 209-10; Notte, 62).

In the Second Chechen War, three main groups were involved in the conflict. In 2000, as part of Russia's Chechenization strategy, Putin installed former rebel Akhmad Kadyrov as Chechnya's head of state in exchange for his loyalty, the conversion of former rebels, and military support against the extremist elements of Chechen society (Campana & Ratelle, 123). Effectively, Russia and the newly-instated Chechen forces faced the insurgent warlords whose militias, again, were composed of many Afghani fighters (Campana & Ratelle, 121). According to a collection of 2006 cables from American Ambassador William J. Burns in Moscow, Russia was fully confident in the abilities and loyalty of Kadyrov and his converted soldiers (Burns, 28). However, installing Kadyrov legitimized the religious and extremist ideologies of many Chechens and gave their cause a strong foothold in the region.

As the fighting in Chechnya continued, the international community reacted with unprecedented force. The United States, especially after its own unfortunate experience with terrorism in 2001 and the subsequent declaration of the Global War on Terror, grew closer to Russia, and

American national security advisor Condoleezza Rice even advised the Chechen rebels to submit to Russia's regional plans to avoid further conflict (Notte, 66-7). At a 2001 summit in Slovenia, President George W. Bush partnered with Putin to fight Chechen terrorism, which they agreed threatened the wellbeing and freedom of the rest of the world, as the religious extremism which motivated their agitation had global implications (Notte, 64). This necessarily entailed a lessening of scrutiny on Russia's rights violations, as discretion in that area was viewed as expedient to the goal of clearing out terrorists (Notte, 64). However, after 2002, when the United States began to focus on its own War on Terror, Russia's terrorist narrative apparently became less immediate to the U.S.. Subsequently, the relationship between the countries deteriorated as Russia felt as if its terrorism concerns were not being treated with urgency (Notte, 69). One of the last interactions between the two countries was a September 2002 letter to Putin volunteering aid to Russia and Chechnya, and tactfully recognizing Putin's claim to Chechnya's territory (U.S. CSCE, 21).

The physical conflict of the Second Chechen War was as rife with abuses as the first. Once again Russian forces found themselves engaging mainly in populated areas with enemy combatants indistinguishable from civilians. The warlords, and especially the predominant leader, Shamil Basayev, knew this and intentionally operated in ways that drew Russian troops into bad circumstances. Certainly, Akhmad Kadyrov's native knowledge of the land and politics of Chechnya helped Russian forces in the fight against the insurgents, however Kadyrov himself still held the ideal of Chechen independence, and especially resented the continued Russian control of Chechnya's oil. In 2004 he was killed by a bomb prior to a meeting with Russian authorities where he intended to demand control of Chechnya's natural resources (Campana & Ratelle, 123). Though his death was officially attributed to Basayev, many Chechens blamed Russia. In 2005, Kadyrov's successor, Aslan Maskhadov, was killed as well, presumably for his rebellious activity and refusal to aid the Russians (Campana & Ratelle, 122). In 2006, Maskhadov's successor,

Abdul-Khalim Sadulaev, was killed. Soon after, Sadulaev's own successor, the insurgent leader Shamil Basayev, was also assassinated (Campana & Ratelle, 122). Kadyrov's son, Ramzan, who had served in the Russian army during the First Chechen War and thereafter worked as his father's personal bodyguard, quickly advanced through Chechnya's political hierarchy. In 2007, Ramzan superseded his nominal political roles and assumed active power in the family name.

Modern Chechnya's Human Rights Abuses

After the Second Chechen War ended in 2009 and the counter-terrorism operation was officially concluded, Ramzan Kadyrov was left to more freely conduct his business in Chechnya in exchange for his broad loyalty to Putin, in a deal similar to what his father enjoyed. Kadyrov's accession in 2007 was less a function of official Russian policy and more akin to a private arrangement between Putin and himself. After his accession, Kadyrov hunted down and killed Basayev's soldiers, who were reportedly responsible for the bombing that resulted in his father's death, making first use of the broad leeway Putin granted him (Russel, 514). He began to act as if he were not beholden to any leader, aware that Moscow needed him in order to maintain some semblance of Chechen peace.

The blind eye Russia turned to his actions became one of his most powerful tools, and his Islamic reformation of Chechen society has continued in the style of a medieval dictator (Walker, 2; Šmid, 82). Kadyrov appeared live on television in 2009 personally interrogating prisoners in scenes designed to inspire fear and display his power (Russel, 524).

Kadyrov's human rights record after the Second Chechen War is perhaps the worst in the country's recent history. Though no longer subject to the strains of war,

the country is now ruled by a nominally loyal Russian-appointed ruler who actively champions separatist causes and a radical Islamic reform of society (De Bruyn, 7). When Russian counter-terrorism operations ceased, radical fighters appeared only a month later, swearing tentative loyalty to Kadyrov and beginning to train under his supervision with Russian resources (Russel, 510; Smith, 3). The arrangement Putin and Kadyrov reached essentially allowed Chechnya to operate as an independent state with a private military arm available at Putin's leisure. The former rebels now under Kadyrov's control use threats of force to create compliance with theological reforms, and Putin is free to command Kadyrov's troops where his own cannot go—most notably into Ukraine in 2014 (Shuster, 36).

The United States has responded to the military discretions and violent transformation of Chechen society as information became available. In contrast, Russia has largely turned a blind eye to the problems, resistant to acknowledge their very existence. Aurélie Campana and Jean-François Ratelle Campana, write that the violence in Chechnya has increased since 2003, and the rapid changes in leadership have further destabilized the region (115). The lax initial response of the U.S. was quickly subsumed by a more active response in reaction to Chechen fighters' attempts to spread ideological conflict across the North Caucasus

and disrupt the convenient relationship between the United States and Russia (Campana & Ratelle, 117; Cornell, 97). In contrast, Russia actively obstructed the opening of offices to investigate Chechen affairs, presumably because of the undeniable evidence of wrongdoing by Russian forces in the region (U.S. CSCE, 5). In 2003, a mass grave was found outside the Chechen village

Pervomayskaya, containing the bodies of hundreds of civilians abducted by Russian Federation forces during the Second

The American commitment to fight terrorism with Russia coincided with many international exchanges exhorting Moscow to investigate and be more transparent about the region's wars.

Chechen War (U.S. CSCE, 3). The American commitment to fight terrorism with Russia coincided with many international exchanges exhorting Moscow to investigate and be more transparent about the region's wars (U.S. CSCE, 9-10).

Some of the most powerful actions by the U.S. are enabled by the Magnitsky Accords, which allow the leveraging of sanctions by the American government in response to human rights abuses or corruption in other countries. The first Magnitsky Accord, officially known as the Magnitsky Accountability Act of 2012, was designed to lessen the economic freedoms of countries under corrupt governments. The act was forwarded in reaction to Russian abuses of a corruption investigator (Magnitsky 2012, sec. 402). The second Magnitsky Accord was passed in 2016 as the Global Magnitsky Human Rights Act and expanded on the President's sanction-leveling power in response to abuses of human rights in other countries (Magnitsky 2016, sec. 1263). Cornell writes that governments today are emphasizing the importance of human rights much more than in the past and are more willing to become involved in related issues than before, which could explain the recent invocations of the Magnitsky Accords' powers (95).

Most recently, Kadyrov has targeted specific groups in Chechnya in attempts to create a society in line with Islamic tradition (De Bruyn, 7). Human rights watchmen such as Oyub Titiev and journalists like Anna Politkovskaya have been abducted and killed for reporting on Chechnya's reformation, and minorities, most recently homosexual men, have been specifically selected as targets of violence and execution (De Bruyn, 7; Russel, 514). In fact, the event which inspired the second Magnitsky Accord was Ms. Politkovskaya's murder, following her October 7, 2016 article detailing the abduction and torture of homosexual men in Chechnya (Russel, 514). Campana and Ratelle note that many of the insurgent movement's actions are aimed at creating goodwill toward Islamic rule in Chechnya in the rest of the radical Islamic world, so publicity about the persecution of the men is not altogether to be avoided (126).

In fact, since 2016 Ramzan Kadyrov has become more open in his defiance of both standards of human rights and Russian oversight. Tomáš Šmíd writes in his account of Kadyrov's economic position that the ruler may have been pushed into overt criminal activity because the security of his oil-related relationship with Russia and his military domination mean that legality is only a barrier to his profit and there are no consequences for not obeying moral or legal restrictions any longer (Šmíd, 74-5). In February 2017, Kadyrov made a public statement in which he promised that all homosexuals in Chechnya would be gone by Ramadan (May) of the same year (De Bruyn, 10). On April 1, the *Novaya Gazeta*, a Russian newspaper, published an article detailing the kidnapping, torture, and execution of gay people in a government-sponsored purge in Chechnya (De Bruyn, 1).

The United States responded quickly to the news in several waves of activity. On April 7, 2017, the U.S. State Department released a statement condemning the Chechen state's actions, and on April 17, the U.S.'s Ambassador to the United Nations, Nikki Haley, bore a report requesting Russian and Chechen authorities investigate the issue (Toner 2017; Haley 2017). On May 5, Putin responded, ordering an investigation in Chechnya, but his officials reported nothing, even denying the existence of homosexuals in Chechnya (De Bruyn, 3-5). After receiving the negative Russian report alongside news of continued persecution from international news sources, June 28-29, 2017 saw similar resolutions introduced in the U.S. House and Senate, urging the imposition of sanctions in accordance with the Magnitsky Accords in response to Kadyrov's continued violence (U.S. Congress, H5127).

Before any sanctions could be imposed, however, Kadyrov issued a new statement. On July 14, 2017, Kadyrov stated that not only were there no homosexuals in Chechnya, but that there never had been, and even if there were, he would depend upon Chechen citizens to perform honor killings and maintain the traditional propriety of the country (De Bruyn, 10). In response, on October 30, 2017 the Senate passed a bill recognizing the atrocities and officially

condemned the violence in Chechnya, requesting the activation of economic sanctions (U.S. Congress, S Res 211). On December 10, 2017, the U.S. Treasury Department leveraged sanctions against Kadyrov and four Russian officials also involved in the extrajudicial killings of prisoners (Schectman, 2017). These sanctions prohibited aid to Chechnya, with the understanding that postwar reconstruction money was being used illegally to support Kadyrov's violent reformation of Chechen society (U.S. CSCE, 5). Kadyrov responded to the announcement of sanctions, which included bans on his travel to any U.S. territory or participation in U.S. economic activity, saying that he is proud to be at odds with America, to whom he attributes the ongoing terrorist problem in his country (Schectman 2017).

People continue to suffer in Chechnya and the story is still developing today. According to a Council of Europe report, in January of 2018, Kadyrov began attacking human rights defenders, calling them "foreign agents" who make false accusations for money. Russia, eager to keep good relations with Chechnya, remains silent (De Bruyn, 11). By mid-2018, at least 100 men were imprisoned during the purge of homosexuals. They are known to still be alive in prison, though researchers maintain that imprisonment within Chechen prisons is itself a violation of human right to life (Artunyan 2018; Solvang, 213). The most recent development in the United States' involvement in Chechnya was on June 28, 2018. The U.S. State Department sent a request to Moscow requesting the release of rights activists who had been agitating against Kadyrov's actions, but that request was ignored.

Conclusion

The human rights situation in Chechnya is an unfortunate but unavoidable result of the ideological turmoil historically inherent in the region. That turmoil has been exacerbated in recent history by the United States' conflict with Russia in Afghanistan in the 1980s, which involved the arming and training of radical fighters who later dispersed over the Middle East and North Caucasus regions. The increased religious

fervency which drove early Chechen conflicts set the stage for militant groups and ideologues to seize power and control the tribal society. Consequently, a renaissance of traditional Islamic values, combined with the radical need to be free from centuries of Russian rule, foments violence which continues to upset Chechen society, as it resists western values and involvements.

The human rights situation in Chechnya has remained the same, whether by Russian force in the First Chechen War, terrorist and Russian forces in the Second Chechen War, or by its own hand in contemporary times. Abuses of human rights are systemic in Chechnya, and its ruler has the convenient excuse of American involvement to blame as the root of the issue, despite even the United States' outright and repeated rejection of the violence. The current Chechen administration enjoys the privilege of a nearly commitment-free relationship with Russia's Putin, which it freely exploits. Consequently, expectations for civil rights in Chechnya are constantly disappointed as the number of not-yet-persecuted groups grows ever smaller.

Current tensions between the United States and Russia present a serious set of obstacles to any U.S. involvement in the issue beyond the reactive and punitive sanctions currently in effect. Despite Chechnya's resistance to the concept, their country's close connection with Russia places the ability to act on rights abuses almost entirely within Putin's grasp. The ideological nature of Kadyrov's reforms may be largely immune to the U.S.' economic measures, especially with the political support of Russia for their regime. However, the history of the conflict at hand cautions against further involvement, demonstrating the inevitable dangers of manipulating ideologically charged groups. Clearly demonstrated, too, are the significant risks of a western power acting at all within a system predisposed to reject western influence.

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