THE DIALECTICS: JOURNAL OF LAW, LEADERSHIP, AND SOCIETY

VOLUME X

2018-2019

© The Pennsylvania State University
Abington College

CONTENTS

The Masking of a Medical Crisis: How U.S. Presidents Have Failed to Reduce the Organ Transplant Waiting List
By Michelle Howard
Stanford University
1

Like a Dog with a Bone: How U.S. v. Stevens Keeps the Door Open for Animal Law
By Sarah Catherine Montgomery
University of Southern California
12

On Integrity: Why Religion Fails to Deserve Special Treatment Regarding Legal Exemptions
By Blake Center
University of Virginia
20

Bearing Witness to Bearing Arms: Can We Solve Our Mass Shooting Epidemic?
By Sarah Vicol
Stanford University
26

Lobbying in the United States: A Closer Look at Loopholes
By Madison Stromswold
Pennsylvania State University
37

Disciplinary Power in an Age of Mass Surveillance
By Jared Kelly
The University of California at Berkeley
48

Tobacco Control in the United States: Why the U.S. Should Consider Creating a Generation of Non-smokers
By Nicholas Edward Griffin
Pennsylvania State University at Abington
56

Exploring Day Programs for Adults with Developmental Disabilities: A Provider’s Perspective
By Alice Felker
University of Notre Dame
65
Administrative Failure or Blatant Transphobia: The Adverse Relationship Between Transgender Folks and the Criminal Justice System that Must be Addressed
By William Connor
Pennsylvania State University at Abington 86

The New Wave of Race as Biological: Making Sense of One’s Identity within a Genetic Context
By Susanna Williams
Whitman College 92

A Brief Review of Research on Forms of Instruction
By Kevin Butler
Illinois Wesleyan University 101
The Dialectics: Journal of Law, Leadership, and Society is a refereed, multidisciplinary publication housed at the Pennsylvania State University, Abington College. The Journal’s aim is to promote undergraduate scholarship and to encourage students to pursue and engage in thoughtful discourses on topics of societal importance. The Journal’s publication is made possible by the Lord Chancellor’s Chair and the support of Albert and Suzanne Lord.

For more information about the Journal, please contact:

The Dialectics
dialectics@psu.edu

You may also visit the Journal’s website at:
www.abington.psu.edu/dialectics
A CALL FOR PAPERS

_The Dialectics: Journal of Law, Leadership, and Society_ will accept, on a rolling basis, high quality research papers on issues of public importance. We search for papers that have a single thesis, are focused, identify significant societal and global issues, and offer creative solutions or specific recommendations for addressing the challenges.

**Guidelines**

- **Length:** 2,000 to 5,000 words;
- **Cover page:** title, the author’s name, a short biographical sketch, and full contact details;
- **Writing style:** clear, concise, engaging and informal, written for the general public;
- **Citation style:** the American Psychological Association (APA) style;
- **Deadline:** Papers will be reviewed on a rolling basis.

Please submit essays to dialectics@psu.edu in Microsoft Word attachment format, with “Dialectics Submission” in the subject line.

**Review Process**

The editor and a panel of referees will conduct a rigorous review of the submissions to select the essays for publication. Authors are advised that by submitting their essays to the Journal, they agree to subject their work to substantial editing, should their submission be selected.

Articles in the journal do not necessarily represent the views of the editor, the editorial board, or the Pennsylvania State University. Authors are responsible for the content of their articles.

For additional information, please contact:

Salar Ghahramani  
Editor  
_The Dialectics_  
E-mail: salar@psu.edu
THE Masking of a Medical Crisis: How U.S. Presidents Have Failed to Reduce the Organ Transplant Waiting List

By Michelle Howard*
Stanford University

Of the over 120,000 patients in desperate need of an organ transplant each year, only about 17% have a realistic chance of receiving a kidney either from a deceased or living donor (National Kidney Foundation [NKF], 2016). The National Organ Transplant Act (NOTA) of 1984 first declared voluntary organ donation as U.S. patients’ only means for receiving organs through the Organ Procurement and Transplantation Network (OPTN), a long transplant waiting list that guarantees a higher chance of death than of receiving a kidney. Amendments to NOTA (1984) and related public laws passed to address this issue have failed at increasing altruistic organ donation—from 1989 to 1992 alone, the demand for organs increased 66% while donations increased only 33% (Territo & Matteson, 2011). Patients desperate for salvation have turned to the black market for organs, in which thousands of disadvantaged donors across the world are coerced or physically violated, most commonly for their kidneys (United Nations, 2000). The increased demand for organs continues to be unsatisfied by altruistic donation, the only legal means for increasing organ supply, yet the three presidential administrations since NOTA’s (1984) conception have done little to implement policies that effectively address the shortage. In the public limelight, however, our presidents rhetorically project progress, not stagnancy.

This study examines the rhetoric of National Donate Month proclamations written by George W. Bush, Barack Obama, and Donald Trump to understand how presidents present on the issue of organ scarcity. Obama’s “Key Actions to Reduce the Organ Waiting List” document also serves as a source of study, since it is one of the only publicly available presidential statements on organ scarcity and employs rhetoric similar to that of the proclamations. An investigation of these four sources reveals a trend in how the state of the organ scarcity crisis is presented to the American public by our country’s leadership. This trend is characterized by repetitive and recycled language, optimistic tone, and shifts of responsibility for addressing the organ demand from the government to other parties. This study further identifies an inconsistency between how the government presents its progress in increasing organ supply, and what its actual progress is. Finally, this study explores what forces may be encouraging a false presentation on the state of the organ scarcity crisis, and argues that an innocuous interest group, the NKF, is a primary promoter of stagnant organ donation policies because of its commitment to its own moral agenda.

Most of the scholarship criticizes current organ legislation for its ineffectiveness and advocates for alternative solutions, but much of it fails to explain why today’s policies are failing and who can be held accountable for this failure. There is especially little said regarding how presidents have spoken about the organ scarcity crisis. This study is necessary for exploring presidents’ roles in addressing the organ scarcity issue. As our country’s leaders, they have the

* Michelle is an undergraduate at Stanford University, studying bioengineering. She plans on attending law school and working on bioregulation and biosecurity policy.
power to not only influence what passes in Congress, but also to motivate the public to support more impactful policy alternatives to the donation system.

Research exists supporting altruistic donation policies; many scholars show that the current donation policies are in fact effective (Terbonssen, Settmacher, Wurst, Dirsh, & Dahmen, 2015). However, I argue that while some statistics show that current organ donation policies have resulted in increased donation rates, they are certainly not the most effective at increasing the organ supply to meet demand. If our country and its leaders are truly committed to saving lives, legislators and citizens alike must be prepared to consider a change that could potentially save thousands of American lives each year.

The repetitive nature of the National Donate Month proclamations and Obama’s “Key Actions List” suggest a lack of progress in reducing the transplant waiting list that optimistic language masks well. This, together with shifts of responsibility to organizations outside the government, such as NGOs and private companies, dismisses any sense of urgency or need for alternative propositions to the current organ donation system.

Recycled, Repetitive, and Optimistic: National Donate Month Proclamations

A side-by-side comparison of Bush’s and Obama’s National Donate Month proclamations reveals a clear similarity in organization and language. Both presidents applaud organ donation efforts, but admit that despite the altruism, many deaths occur each year from organ scarcity. They both, therefore, refer to National Donate Month as a time in which “we renew our efforts to foster this compassion” (Bush, as cited by Peters & Woolley, 2002) or “we recommit to supporting the researchers, innovators, advocates, and medical professionals” (Obama, 2016b). This similar structure parallels the shared goal between the two documents: advocacy for donation awareness.

Much like how Obama’s proclamation seems a mimicry of Bush’s, President Trump’s National Donate Month proclamation (2017) bears a striking resemblance to both Obama’s (2016b) and Bush’s (as cited by Peters & Woolley, 2002). The nearly identical phrases, statistics, and commands among the three proclamations support the possibility that presidential statements regarding organ scarcity are constructed by a copy-and-paste method. Both Obama’s and Trump’s proclamations “honor” donors and supporting medical professionals; state that a single organ donor can save up to eight lives (referred to in the first sentence of Obama’s piece and in the last paragraph of Trump’s); report the number of people on the organ donation waiting list (referred to in the penultimate paragraphs of each); stress that nearly anyone can qualify as an organ donor; and end by “encouraging” Americans to communicate their choice to become organ donors (Obama, 2016b) or by “encouraging” organ donation outright (Trump, 2017). The blatant similarity in structure among Bush’s, Obama’s, and Trump’s proclamations could indicate a lack of progress towards alleviating the organ scarcity issue that necessitates the recycling of statements from prior presidential administrations.

Optimistic tone is implemented to mask the stagnancy of U.S. organ donation policies. Optimistic tone is characterized by the frequent use of a phrase beginning with “we” and followed by a verb clause that connotes progress, such as in “we lift up,” “we have opened new doors,” “we are making great strides,” “we renew our efforts,” and “we have taken bold steps” (Obama, 2016b). The frequency of the word “we” subtly achieves optimism by reinforcing a sense of collaboration towards improvement, as in “We also continue our efforts” (Trump, 2017) and “We continue to increase donations” (Bush, as cited by Peters & Woolley, 2002).
Other phrase forms that contribute to optimistic tone include “Progress has been made and great promise exists” (Obama, 2016b), and “Every day, Americans sustain the miracle of life” (Trump, 2017). These three presidents are personally quite different; Bush was known as a “phrase-mangling Texan,” (Feller, 2009), Obama as a tranquil and elegant speaker, and Trump as a boisterous, say-it-how-it-is businessman. Given these contrasts in personality, one would expect large differences among the styles of their public announcements. Yet, all three proclamations employ similarly uplifting and optimistic tones. This subsequently calls the sincerity of the presidents’ statements into question. In order to substantiate potentially false optimism, each president refers to acts their administrations have taken to address this issue, such as large financial investments into research efforts under Obama, and the introduction of the “Gift of Life Donation Initiative” under Bush. However, none of the three presidents make any claims about the success their acts have had at lowering the number of people on the organ donation waiting list.

Also appearing in all three proclamations is a frequent reference to a “gift of life” in phrases such as “thousands of Americans have given the gift of life” (Bush, as cited by Peters & Woolley, 2002); “Together, we can improve and save lives . . . to provide the greatest gift there is to offer” (Obama, 2016b); and “we honor the living and deceased donors . . . [who] make the gift of life possible” (Trump, 2017). This emotionally charged euphemism for donation makes the act appear as a pure, honorable means of addressing the organ scarcity crisis. It, however, neither acknowledges donation ineffectiveness nor hints at new ways of addressing organ scarcity.

The ending points of the three proclamations serve as a final point of commonality: “I call upon health care professionals, volunteers, educators, government agencies, faith-based and community groups, and private organizations to join forces to boost the number of organ, eye, and tissue donors throughout our Nation” (Obama, 2016b). Bush first generated this statement in his 2002 proclamation, which also included a statement calling upon citizens “to help raise awareness” (as cited by Peters & Woolley, 2002). Trump calls upon the groups listed by Obama almost verbatim, but to instead “help raise awareness of the urgent need for organ and tissue donors throughout our Nation” (2017). All three pieces end on this uplifting note.

As a way of substantiating their optimistic claims, both Presidents Obama (2016b) and Trump (2017) refer to one point of true innovation: Obama mentions the first-ever transplant between an HIV-positive donor and recipient, while Trump alludes to an 8.5% increase in performed transplants between 2015 and 2016. It should be noted that this latter statistic does not mathematically align with Obama’s assertion that over 30,000 transplants were performed “last year” (i.e., in 2015) in the United States. Regardless, any change in transplant count has not amounted to significantly reducing the organ transplant waiting list. According to the OPTN (n.d.), “Despite advances in medicine and technology, and increased awareness of organ donation and transplantation”—the very efforts that Bush, Obama, and Trump advocate most for—“there continues to be a gap between supply and demand,” a gap that appears to widen year to year.

**Empty Promises and Responsibility Shifts: Obama’s “Key Actions List”**

Obama’s fact sheet announcing “Key Actions to Reduce the Organ Waiting List” (2016a) utilizes optimism to mask the reality of the organ scarcity issue, and shifts responsibility for addressing the crisis from the government to third parties. A quote by Obama—bolded,
italicized, and prominently displayed at the very top of a 16-page report—serves as the introduction to a document sewn with optimism; it states, “New breakthroughs in treating cancer and ending the wait for organ transplants. That’s some of what America can do” (2016a). Treating cancer only partially alleviates the organ scarcity issue. According to one National Center for Biotechnology Information source, risk of cancer is elevated in organ recipients (Chapman, Webster, & Wong, 2013), meaning that although transplants can help some patients, their effect on cancer rates is still quite unknown. President Obama’s reference to developments in cancer research, a buzzword of a noun, distracts from any regard to the true state of the organ scarcity crisis.

Claims of innovation and progress reduce organ scarcity to a complication that is actively being solved, not a crisis that multiple scholars believe is in fact worsening every year (Territo & Matteson, 2011). The “Reducing the Organ Waiting List” section in Obama’s “Key Actions List” perpetuates the image of progress by dedicating the entire first paragraph to describing how medical innovation has allowed for transplant success, boasting that 2015 featured the “most annual transplants ever” (2016a). Most of the section, however, makes no mention of organ scarcity. It furthermore lists zero bulleted specifics on how the Obama administration planned to tackle the goal of its “Key Actions List.” This allows for doubt in the administration’s reported commitment to solving the organ scarcity issue, especially since this list of “key actions” was released in June 2016, only six months before the end of Obama’s second term. Since it would have been nearly impossible to deliver the document’s promises during Obama’s remaining time in office, the passion behind the president’s recurrent, hopeful commitments is perhaps delegitimized.

In addition to optimistic language, Obama’s “Key Actions List” (2016a) relies on references to large investments in collaborators outside the government to paint an image of effective and successful progress in reducing the organ waiting list. This source notes seven government agencies that “have invested nearly $3 billion . . . in the future of bioengineering” (Obama, 2016a), and lists over 80 collaborators, including nonprofit organizations, medical associations, universities, and private companies. The names of these third parties are bolded or underlined, which stresses the importance of organizations outside of Obama’s circle in addressing the organ scarcity problem. The document, however, does not guarantee that these organizations will have any meaningful impact on a solution. Google is listed as one of more than 20 “private entities . . . that have committed to help reduce the agonizing wait for an organ transplant” (Obama, 2016a). The company vaguely promises to “develop ways people can easily locate information on organ donation and how to register online”; however, there is no mention of any concrete actions that it will take to effectively reduce the transplant waiting list. Google, therefore, seems to be mentioned more for brand recognition than for its contributions towards “Closing the Gap Between Americans Who Support Organ Donation and Who Are Registered Donors,” as the section title reads (Obama, 2016a). Like the “Key Actions List,” Obama’s National Donate Month proclamation also makes substantial references to outside organizations and large government spending amounts, claiming that thanks to the $3 billion investment plan, “we are making great strides in advancing treatment and improving technological capabilities” (2016b). Frequent references to large investments in the efforts of nongovernmental organizations transfer the responsibility for addressing organ scarcity away from the government while maintaining the illusion that the government is successfully addressing the crisis.

The descriptions of substantial third-party contributions distract from how little government action is mentioned in Obama’s “Key Actions List” (2016a). Of the document’s 16
Discussion

The goal of efforts to deal with the organ scarcity issue is to supply those in need of transplants with organs. The repetitive, optimistic nature of the three presidential National Donate Month proclamations and Obama’s “Key Actions List” (2016a) is underwhelming when it comes to addressing this goal, given that the total number of candidates on the waiting list has increased annually while transplants from living donors has decreased since 2004 (OPTN/SRTR, 2012). These declining results beg the question of why our presidents have decorated donation awareness proclamations to appear effective. Answers may be explored first in a discussion of the effectiveness of awareness campaigns in general, and next in a discussion of why proposed alternatives have failed to gain legislative momentum.

Awareness Campaigns: Do They Really Work?

Reported progress in reducing the transplant waiting list through awareness campaigns may not be accurate. Awareness month proclamations are “low-cost” ways for the president to acknowledge and appease powerful interest groups (Beam, 2009). There is little, however, proving that awareness campaigns do anything on their own to remedy the causes they promote. According to Christiano and Neimand, research shows that people who are simply given more information are in fact unlikely to change their beliefs or behavior (2017). Since NOTA’s (1984) introduction over 30 years ago, donation awareness has not achieved sufficient behavioral change to make a substantial impact on the transplant waiting list. In an attempt to deduce the consequences of health awareness campaigns, a study of the effectiveness of the National Breast Cancer Awareness Month (NBCAM) campaign found “little evidence that NBCAM led directly to increased diagnoses” (Jacobsen & Jacobsen, 2011). Christiano and Neimand (2017) instead argue that in order to achieve effective behavioral changes, campaigns must define “calls to action that will lead a specific group of people to do something they haven’t done before,” which the sources fail to do. Instead, the proclamations target “the Nation,” or the “we,” an ambiguous demographic that anyone can identify with, but no one has to feel especially loyal to. This lack of audience specificity, coupled with hopeful rhetoric and shifts of responsibilities to outside organizations, render the National Donate Month proclamations ineffective. Rather than spur the average American to act on the organ scarcity issue, he or she is instead lulled into complacency.
Proposed Alternatives and Accountability

Suggested alternatives to the current donation system may help us to understand why our government writes stagnant organ donation policies. One such policy switch with high potential for reducing organ scarcity is a regulated organ market. In 2008, Senator Arlen Specter of Pennsylvania proposed the Organ Donor Clarification Act, which “effectively allowed organs to become commodities of value” (Monti, 2009) while barring their explicit sale.1 Senator Matt Cartwright, also of Pennsylvania, later introduced a similar bill to Congress, the Organ Donation Clarification Act of 2016, which would have allowed for organ sale as part of a governmentally regulated pilot program. Despite receiving support from fellow House representatives as well as publicized support from both the American Society of Transplantation and the American Association of Kidney Patients (2008; Murphy, 2009), neither bill was even allowed a vote in Congress.

It is difficult to prove with certainty that organ availability would increase as a result of the success of a bill such as Cartwright’s or Specter’s, since the transplant community in the United States has been unable to conduct empirical research on the actual effects that financial incentives may have on deceased or living donation (Bolton, 2017). However, numerous professionals—from fields ranging from economics to medicine to law—agree that the failure of current policies, “legalizing payments for organs is in fact likely to result in an increased number of donors” (Territo & Matteson, 2011). Dr. Sally Satel, resident scholar at the American Enterprise Institute, argues that “an altruism-only system is sorely inadequate” (2016). She called Cartwright’s bill “the most realistic policy idea out there” (2016), and points to how “politicians are fairly receptive to the idea of incentives for organ donation unless some group is advising them against the idea” (GiveWell, 2013). It is quite possible that the NKF, one of the largest kidney advocacy groups in the world, is the body advising lawmakers against supporting innovative policies in order to preserve its own moral values. The NKF strongly lobbied against Specter’s bill in 2008 and 2009, and was the strongest protestor of Cartwright’s bill, claiming it “leaves too much open for misinterpretation and could have the unintended consequence of doing harm” (2016). The NKF called the idea of offering financial incentives for organs “inconsistent with our values,” claiming that it would have a negative effect on “the ethical, moral, and social fabric of this country” and that “Any attempt to pay families to say yes is wrong” (Satel, 2016). These statements indicate that the NKF is too devoted to morals to uproot the tradition of organ donation. The organization’s commitment, therefore, is first to remaining true to its own moral and ethical principles, and second to most effectively providing organ transplants to diseased patients.

The NKF’s reaction to proposed alternatives can be explained by the “yuck factor,” a strong sentiment against what is unseemly or wrong that is not necessarily founded upon facts or logic (Jefferson-Jones, 2013). The yuck factor is perpetuated by countries that have implemented legalized organ markets, such as Iran, in which the poorest demographics are exploited, or in China, in which prisons are “organ factories” where criminals are purposefully executed in order to provide organs to wealthy Chinese nationals (Carney, 2011). Opposition to proposals for a regulated organ market in the United States stems from the yuck factor, not a logical deduction.

1 Because the Organ Donation Clarification Act of 2008 was not formally introduced to Congress, it cannot be accessed on the Library of Congress website. However, information about Senator Specter’s bill can be found in Pitney, 2008.
of the positive effects a policy switch could have on reducing the transplant waiting list. In a previously mentioned survey on Americans’ attitudes regarding organ donation, 34% of participants responded that organ transfers “Should remain a donation or a gift of life; it should not be a profitable bargaining tool” when asked if there was any particular reason why a payment would make the participant less likely to donate organs.

Our presidents capitalize on the power of the yuck factor in their public releases. Appeals to personal philosophy through statements such as those on the “gift of life” in National Donate Month proclamations successfully sway citizens into accepting presidential claims. Since presidential proclamations are often written to appease interest groups, the statements released by our country’s leaders may not be sincere truths about the state of the organ crisis, but rather reflections of the interests of an influential association working at multiple levels to restrain progressive legislation. In alignment with the NKF’s desire to maintain the status quo, presidential statements regarding organ scarcity maintain that the only legal means of supplying organs to patients is on track to effectively meet organ demand.

The federal government’s involvement with organ donation initially stemmed from its role as payer for end-stage renal disease services. In recent years, the rationale for intervention has changed, and the mechanism for implementing regulatory oversight has shifted to a private network run for the government by United Network for Organ Sharing (UNOS). The government has delegated much policymaking authority to UNOS (Blumstein, 1989). The NKF works closely with UNOS to track and report kidney disease patient data on its website, as well as advance its agenda for increasing organ donation. The NKF wields power not only in the limelight of the American public by manipulating the statements of the president, but also at the legislative level; through UNOS, the NKF has nested into policymaking, allowing it to halt alternative laws such as those proposed by Senators Cartwright and Specter.

In addition to a regulated organ market, other policy alternatives for tackling organ scarcity have been proposed. These include a switch from an opt-in donation system, in which citizens must express consent to donating, to an opt-out donation system, in which consent is assumed, or to a system that calls for more individualized recognition of donors. Both practices have high potential for achieving progress—organ donation rates in countries that implement the opt-out system, such as Spain, Belgium, and Austria, “suggest that presumed consent might have a positive effect on rates of organ donation” (Gundle, 2004) and preferred status for organ donors would “fill a gap in the current organ donation scheme” (Kluge, 2000). In a national survey on attitudes associated with organ donation conducted by the U.S. Department of Health and Human Services, 72% of participants reported that they would not opt out of becoming a donor if the United States were to implement a presumed consent system like that of Spain’s (2013). Despite this, all attempts at policy changes have failed to garner enough support from any governmental sector to be approved.

Conclusion

Our country has supported organ donation-only policies for over 35 years. These policies, however, have not increased organ supply to meet demand—the number of people on the transplant waiting list today is six times the number in 1991 (U.S. Department of Health and Human Services, n.d.). Failure, however, is not what our presidents advertise to the American public. Year after year, presidents wield a similar sounding optimism that distracts from the gravity of a growing transplant waiting list. Public announcements on the issue released by
George W. Bush, Barack Obama, and Donald Trump soothe citizens, resulting in insufficient increase in organ donation and little incentive to protest change from lawmakers. Philosophical barriers to progressive policies perpetuated by groups such as the NKF may be ebbing—from 2005 to 2012, the percentage of respondents who indicated that a financial incentive would increase their willingness to donate organs increased by 18.3% (U.S. Department of Health and Human Services, 2013). Furthermore, our country has proven it is willing to commodify human organs; the sale of blood, plasma, hair, sperm, eggs, bone marrow, and surrogacy is legal despite its moral subjectivity. Regardless of what is necessary for change, be it a nationwide change in mindset or perhaps the expulsion of interest groups such as the NKF, those on all sides of the organ scarcity issue agree that too many American lives are lost each year to organ disease. Considering that the majority of all healthy citizens qualify as organ donors, these deaths are tragically unnecessary. Our government has a responsibility to both report the state of organ scarcity accurately and to minimize these deaths through legislation, neither of which it appears to be accomplishing.

References


Obama, B. (2016a). *Obama administration announces key actions to reduce the...*


Organ Donation Clarification Act of 2016, H.R. 5344, 114th Cong.


LIKE A DOG WITH A BONE:
HOW U.S. v. STEVENS KEEPS THE DOOR OPEN FOR ANIMAL LAW

By Sarah Catherine Montgomery*
University of Southern California

Though the law at the center of the U.S. v. Stevens (2010) controversy, 18 U.S.C. § 48, was flawed and worthy of repeal, the case’s legacy plays an important role in the necessary elevation of the status of animal law, described as “statutory and decisional law in which nature—legal, social, or biological—of nonhuman animals is an important factor” (Brief for Group of American Law Professors, 2010) in the United States legal system. 18 U.S.C. § 48, written by House Representative Elton Gallegly (R-CA), passed easily through Congress—facing little resistance in the House and passing unanimously in the Senate in 1999—following a spotlight on “crush videos” in the 1990s (Perdue & Lockwood, 2014). Crush videos are videos depicting the crushing of helpless animals, usually under a women’s high heel, often catering to a niche sexual fetish (U.S. v. Stevens, 2010). The law targeted crush videos by criminalizing any intentionally made auditory and/or visual paraphernalia that depicted the “maiming, mutilation, torture, wounding, or killing of an animal which conduct violated the law of the state where the creation, sale or possession of the depiction of the animal cruelty occurred,” with an exception clause that protected content “that has serious religious, political, scientific, educational, journalistic, historical, or artistic value” (U.S. v. Stevens, 2010). While swearing the legislation into law, President William Clinton declared that it would be used against depictions appealing to prurient interests (Cassuto, 2012). Nobody was prosecuted under the law until 2004, when Robert Stevens, a man who ran a business that made a profit from selling footage of aggressive pit bull behavior, was caught by law enforcement selling content online that was illegal under 18 U.S.C. § 48. Though dogfighting was not the content Congress was aiming to deter, Stevens’s actions fell under the jurisprudence of 18 U.S.C. § 48. The respondent, Stevens, contended that 18 U.S.C. § 48 was facially invalid, as it violated the First Amendment. The Supreme Court delivered an eight-to-one decision in favor of the respondent in April 2010; the majority decision featured a staunch defense of the First Amendment without touching on whether or not animal cruelty was a compelling State interest. The Supreme Court made a mistake by not setting a legal precedence of determining animal welfare as a compelling State interest because it failed to recognize the social, economic, and political consequences of animal abuse and instead focused solely on the First Amendment implications. The impact of the U.S. v. Stevens (2010) decision is an unanswered question in the American legal system as to which degree the protection of animal rights—and the results from the protection of those rights—are to be respected in times of controversy. This is an obscurity that must be answered urgently.

* Sarah Catherine Montgomery is an undergraduate student at the University of Southern California, majoring in philosophy, politics, and law.
Background

The arrival of Stevens’s case to the Supreme Court took years in the making. A Pennsylvania federal district court (United States v. Stevens, n.d.) denied Stevens’s motion to dismiss his indictment, citing the depictions subject to 18 U.S.C. § 48 as unprotected speech under the First Amendment (U.S. v. Stevens, 2010). In May 2005, Stevens appealed to the Third Circuit Court of Appeals. That court overturned his criminal conviction, declaring 18 U.S.C. § 48 unconstitutional on First Amendment grounds. Beyond declaring the law unconstitutional, the Third Circuit did not deem animal cruelty as worthy of recognition for a new category of unprotected speech. Furthermore, it decided that the analogy that lawyers presented between New York v. Ferber (1982)—the Supreme Court case that determined child pornography as unprotected speech—and 18 U.S.C. § 48 was invalid because children and animals are not of the same standard of importance. The Third Circuit cited Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993), the Supreme Court case that declared unconstitutional the prohibition of ritualistic animal sacrifices, as the Supreme Court’s determination of animal welfare as a non-State compelling interest (U.S. v. Stevens, 2010). In December 2008, the U.S. Solicitor General filed a petition to the Supreme Court to review the Third Circuit’s decision (B. Smernoff, personal communication, November 16, 2018).

Majority Opinion

Chief Justice John Roberts delivered the majority opinion that discussed the moral, political, and economic consequences of 18 U.S.C. § 48. Morally, the Court echoed the thoughts of the Third Circuit by also rejecting the analogous political thinking between New York v. Ferber (1982) and U.S. v. Stevens (2010): Child abuse and animal abuse do not share the same degree of urgency. Justice Ruth Bader Ginsburg said during the trial that “the very taking of the [child pornographic] picture is the offense—that’s the abuse of the child . . . the abuse of the dog and the promotion of the fight is separate from the filming of it” (Liptak, 2009). Economically, the judges determined the “lucrative” market for crush videos and other animal cruelty depictions as undoubtedly minute in comparison to the market for otherwise legal markets, such as hunting videos.

Politically and legally, 18 U.S.C. § 48 seriously unsettled the Justices. First and foremost, the requirement that the action in the depiction be illegal in the statute is irrelevant to animal cruelty because plenty of laws regarding animals are not necessarily applicable to animal cruelty, such as laws regarding hunting seasons and fishing quotas. Additionally, the statute’s condition of depicting illegal action is confusing because all 50 states have different laws regarding animal cruelty, and thus these videos could be illegal in one state and legal in another. As a result, it is impossible to apply a fair federal law when there is such conflict of jurisprudence among the state jurisprudence and thus the definition of the law itself.

All things considered, the true killer of this bill was the Court’s application of the overbreadth doctrine. Chief Justice Roberts acknowledges that maiming and killing, both parts of the statute, do not require necessarily cruelty but still may infringe on otherwise legal behavior that 18 U.S.C. § 48 did not intend to impact. The government’s promise that the law would only be applied as intended has already been broken, as this case is about dogfighting and not crush videos; a law cannot be upheld just because the government claims it will use it
This overbreadth of legal writing has led to a direct contradiction with the First Amendment, even considering the exceptions clause 18 U.S.C. § 48 contains. Beyond finding that most depictions, like hunting videos that are not necessarily instructional, will have a hard time falling under the exception clause because of the inclusion of the ambiguous word “serious,” the government cannot be sure that this language will answer to any and every free speech issue. The Court acknowledges that the exception clause’s language, integrated to protect valuable speech, is directly borrowed from Miller v. California (1973), the case that designated obscenity as unprotected speech. Roberts responds that, though depictions of dogfighting and crush videos may be “value-less,” the writing of 18 U.S.C. § 48 does not just pertain to these types of depictions and, more importantly, this kind of characterization does not set the test for what speech is and is not protected. The First Amendment was created to foreclose these kinds of attempts by the government to make a judgment that some speech is not worth it. Acknowledging that the Supreme Court has historically described certain categories of speech (U.S. v. Stevens, 2010) as unprotected due to low social value, Chief Justice Roberts affirms that they are just descriptions for those specific instances, not a means of setting a test for the speech of “an ad hoc calculus of costs and benefits.” The bottom line of the decision is that 18 U.S.C. § 48 was “substantially overbroad and therefore invalid under the First Amendment” (U.S. v. Stevens, 2010).

Dissenting opinion.

Justice Samuel Alito alone delivered the dissenting opinion. He cited crush videos as “a form of depraved entertainment that has no social value,” thus making them morally imperative to eradicate. He argued that the First Amendment protects freedom of speech, not freedom of conduct. He also feared the economic effect of overturning 18 U.S.C. § 48, worrying that the Court’s majority decision would create a resurgence in the market for crush videos. He agreed with the Humane Society’s amicus (2010) in that the only way to prevent the underlying criminality of these videos is to prohibit the commercial benefits. Indeed, a loss of economic incentive will deter crime.

In terms of political and legal impact, Justice Alito disagreed with his fellow Justices over the use of the overbreadth doctrine. He found that the law was not overbroad because the exception clause would let legal activities, like hunting, off the hook because they have “serious” value as a part of America’s heritage. The intention of 18 U.S.C. § 48 is to prevent animal cruelty, a goal all should aspire to, not to curb free speech. Justice Alito argued there are not a lot of depictions that the law would unconstitutionally impact. In concordance with the majority, Alito also acknowledges that the motivation to deter the torture of animals is less important than preventing child abuse, thus rejecting the relationship between New York v. Ferber (1982) and U.S. v. Stevens (2010). Though he sees the compelling State interest involved in the case, he does not reference animal welfare as a compelling State interest but rather “preventing the torture depicted in crush videos” (U.S. v. Stevens, 2010).
Impact

Political impact.

Immediately following the Supreme Court’s decision, Congress enacted H.R. 5566, the Animal Crush Video Prohibition Act, which President Barack Obama signed into law at the end of 2010. This time around, members of Congress focused specifically on crush videos and reframed the issue as a matter of obscenity, an already unprotected category of speech (Cassuto, 2012). However, this new law features much narrower language—applying only to visual (and not auditory, as previously written) depictions of burning, crushing, suffocation, drowning, impaling, and otherwise serious bodily injury of live nonhuman mammals. The justification for passing the new law was to prove that animal cruelty is a compelling State interest, among other reasons. The Crush Act (2010)—used sparsely since its enactment (Perdue & Lockwood, 2014)—can be summarized as a backdoor way to get to Congress’s original goal (N. Saharsky, personal communication, November 16, 2018).

Economic impact.

It is difficult to read U.S. v. Stevens’s (2010) economic impact. For starters, it is hard to decipher the status of the crush video market because it’s a black market. In 2009, journalist David Savage wrote that the Humane Society has seen a resurgence of horrific “crush videos” for sale on the internet in the past year, ever since a U.S. appeals court, on free-speech grounds, struck down a federal law that banned the selling of videos of animals being maimed and tortured. Crush videos were sold for about $300 per video; though not an extraordinary fee, that is not a cheap price by any means. Dogfighting, another lucrative industry in relationship with animal cruelty, creates a market for canines worth thousands of dollars and, because of dogfighting’s underground nature, makes footage necessary in order to showcase a dog’s abilities (Perdue & Lockwood, 2014).

The impact on the hunting industry is also hard to decipher because, though 18 U.S.C. § 48 never appeared to formally impact the hunting community, it is possible that public exposure of U.S. v. Stevens (2010) or the efforts of animal advocacy groups may have changed how Americans define the acceptable and ethical treatment of animals. Regardless, as of 2010, “hunting in the United States injects over $66 billion into the national economy through hunting-related expenditures, taxes, and licensing fees, and the creation of 593,000 jobs” (Brief for the National Shooting Sports Foundation, 2010). With numbers that large, it is likely that the preservation of the hunting industry at face value is economically beneficial.

With the enactment of the Crush Act (2010), these markets have been pushed deeper underground, making it harder to collect empirical data on them. As attorney Abigail Cromwell, responsible for the Northwest Animal Rights Network amicus brief submitted to the Supreme Court, points out: The Court’s hard-and-fast ruling on child pornography, while certainly not entirely eliminating the entire market for such content, has curbed its production thanks to such strict regulations and serious punishment (personal communication, November 16, 2018).
Even without the legitimacy of a favorable Supreme Court decision behind it, the fear of a felony conviction, thanks to the Crush Act (2010), is logically a deterrent to the creation of videos depicting blatant animal cruelty.

**Public impact.**

Though there was not much public outcry in the mainstream media, a positive impact of the case is that it raised public awareness of the general legal obstacles animal rights advocates face. This public attention encouraged the creation of stronger state laws in regard to animal protection—in particular, some acts of animal cruelty were subsequently designated as felonies. This increased public awareness now means that animal abuse cases often become “hot” cases, unleashing an onslaught of public opinion on local task forces and engendering the involvement of community-oriented policing (Perdue & Lockwood, 2014). Also, as raised by David Horowitz, the current executive director of the Media Coalition, the striking down of 18 U.S.C. § 48 is beneficial not only to free speech advocates but also to animal advocates. For instance, animal rights groups post videos of obscene content, like videos of dogfighting, to gauge sympathy. Under this law, the ability for both journalists and advocates to create an exposé utilizing depictions of such cruelty would be protected only on a basis of viewpoint-based discrimination (D. Horowitz, personal communication, November 15, 2018).

**Argument**

**Argument.**

In terms of political legacy, *U.S. v. Stevens* (2010) is an important case, as it, along with others, establishes the current Supreme Court as a very pro-First Amendment group (N. Saharsky, personal communication, November 16, 2018). Recently, the Court has been strongly in favor of free speech, regardless of each Justice’s ideology (D. Horowitz, personal communication, November 15, 2018). As Robert Barnes of *The Washington Post* puts it, the ruling “was a ringing endorsement of the First Amendment’s protection of even distasteful expression” (2010). On top of that, by making its decision in *U.S. v. Stevens* (2010), the Court “held that individuals cannot be held criminally liable for distributing speech depicting illegal acts, so long as the individuals did not perpetrate the underlying act.” This kind of judgment sets a precarious precedent not only for the possession of unprotected speech, but also for legally obtained, legally possessable speech to also not be criminalized, which affects growing issues of law, such as revenge porn (Goldberg, 2016).

But more significant than its pro-First Amendment stance, the Supreme Court made a statement by not sending a different message. By avoiding the question of whether or not animals are a State compelling interest—for the second time, the first being *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993)—the Court has put off addressing the dilemma for another case in the future (Cassuto, 2012). Considering the two missed opportunities, it does not seem like calls for consideration in reference to the moral stitchwork of America are working. One can ignore the fact that animals, like children, can neither speak nor defend themselves properly. One can ignore that they too are innocent victims in ways similar to how children are—sexually, physically, emotionally—and deserve the same
protections (A. Cromwell, personal communication, November 15, 2018). One can ignore the fact that the reasons and requirements set forth by *New York v. Ferber* (1982) for banning speech—i.e., that there is a compelling interest in regulating it (child pornography); that the speech must be intrinsically related to the crime depicting it; that there is an economic motive for production; that it is unlikely that serious value speech would be banned; and that appropriate circumstances are required for banning speech (Perdue & Lockwood, 2014)—apply well towards deterring animal abuse. But one cannot ignore how the manner in which humans relate with animals directly translates to how animals relate with people. As Pasch and Senatori, two lawyers who worked on *U.S. v. Stevens*, put it, “when animal and human interests come into conflict, human interests, quickly and unsurprisingly, trump the ethical and moral arguments favoring animal protection” (2010).

Compared to non-abusers, animal abusers are five times as likely to commit violent crimes, four times as likely to commit property crimes, and three times as likely to be arrested for drug-related arrests. If this isn’t terrifying enough, David “Son of Sam” Berkowitz, Jeffrey Dahmer, Edmund Emil Kemper III, and many other serial killers all share a history of animal abuse. The Supreme Court needs to address animal cruelty seriously because there is well-established scientific evidence showing that violence towards animals escalates to human-on-human violence (Brief for Group of American Law Professors, 2010).

**Possible rebuttal.**

As demonstrated by the majority opinion and dissent, many feel animal abuse is simply not as devastating as child abuse to the moral, political, and economic safety of America. And because the Constitution says nothing about animals (Silverstein, 1996), the issue of animal abuse is not a matter for the Supreme Court to rule on. The objector of making animals a compelling State interest could submit that there is, constitutionally, no explicit equal protection for humans as there is for nonhumans.

**Defense of argument.**

*Animal abuse escalates.*

The critics’ belief that animal cruelty is not a compelling State interest is erroneous because the violence that escalates from initial acts of animal abuse is a threat to the safety of the American people. In 1966, the *American Journal of Psychiatry* found that out of 84 prison inmates surveyed, 75% of those charged with violent crimes had prior records of cruelty to animals (Brief for Group of American Law Professors, 2010). In a different study, researchers studied 37 violent juveniles. Among them, “90% reported to having abused animals with 37% reporting *sexual* abuse of animals” (Perdue & Lockwood, 2014). Moreover, animal abuse is a tool which abusers of people can use to control, shame, and commit further acts of aggression. For instance, “a 1984 study by Lenore Walker found that 41% of the battered women she interviewed had been forced by their partners to engage in sex acts with their pets” (Brief for Group of American Law Professors, 2010). Not only does animal abuse damage the direct participants, but it also damages viewers. Not only is it potentially traumatic to witness acts of violence, but it runs the risk of desensitizing viewers to suffering, thus leading them to lose the
ability to empathize (Perdue & Lockwood, 2014). The welfare of animals in this country is a matter of high priority because more people will continue to be hurt if every corner of the legal system in the United States does not take animal cruelty seriously.

**The possibility to create a legal foundation for animal rights.**

The argument that animals are not named in the Constitution—and thus are not worthy of equal protection—is irrelevant, because it treats the Constitution like a document set in stone, a true legal positivist view. First, the Constitution is changeable, and there is always the potential for new categories of unprotected speech to be added to the First Amendment. Yes, the objector is right—there is a weak foundation in constitutional law as it relates to animal law. However, animal rights advocates can change that by engaging in litigation. Litigation is an important resource in advancing social causes because it directly influences the definitions of legal ideas (Silverstein, 1996). Consequently, this control over definitions—imagine if the definition of “animal cruelty” had been clearer before *U.S. v. Stevens* (2010)—will frame animal rights as a legitimate legal issue. Furthermore, litigation of animal law issues keeps the public aware of legal controversies such as animal cruelty (as seen with the result of the *Stevens* litigation), and directly galvanizes the public and pressures the legal system to reflect the values Americans hold.

**Conclusion**

18 U.S.C. § 48 was a terrible law regardless of good intentions. It was ambiguous and the overreach of the writing disastrously pitted the noble cause of animal advocacy against the incredibly important ideal that is the freedom of speech. The law deserved to be struck down. It is a good thing that 18 U.S.C. § 48 made it all the way to the Supreme Court, because beyond the scope of the law in question, it gave the opportunity for the Court to consider animal law in and of itself. The only way real progress in advancing the field of animal law can be made is if the restriction on crimes, like animal cruelty, is necessary to further a compelling State interest (Cassuto, 2012). Congress and the American people have decided that the welfare of animals is of State interest, but the Supreme Court is not yet on the same page. The best that Americans who care about the safety of this country can do is to continue to advocate for animals and shed light on the collective benefits that come from eradicating the violence inflicted on animals. By not deciding on whether or not animals are a compelling State interest in *U.S. v. Stevens* (2010), the door is open for animal advocates to get animals and the people of this country the justice they deserve.

**References**


Deeply held moral beliefs can compel an individual to perceive moral duties which may conflict with generally applicable laws. As such, liberal democracies regularly grant legal exemptions to individuals so that they may live in accordance with their perceived moral duties (Lenta, 2016). For example, the Quakers are a Christian sect which believes that a Christian life is opposed to violence—e.g., warfare. To accommodate the Quakers’ moral commitment to pacifism, liberal democracies like the United States have exempted them from conscripted military service (Gillette v. United States, 1971). However, while Quakers qualify for legal exemption from conscription, equal access to exemption is unavailable to nonreligious pacifists who cite secular, moral beliefs. Other than exemption from military service, religious beliefs earn greater access to exemptions across the board.

Assuming that liberal democracies should grant legal exemptions to accommodate perceived moral duties, should religion receive special treatment? In the interest of maintaining all citizens’ enjoyment of integrity, I argue that religious beliefs should not receive special treatment regarding legal exemptions. Given that there are many different ways to understand integrity, I will first provide a general account of integrity and clarify its importance within liberal democracy. Then, I will focus on one specific account of integrity which represents the most popular account in literature: the identity account. I will assess religious beliefs on the identity account of integrity to show that—at least on the most popular account of integrity—it cannot be reasonably accepted that religious beliefs involve greater integrity than secular beliefs, and as such, religious beliefs do not deserve special treatment.

The De Facto State of Legal Exemptions

Liberal political philosophers generally agree that religion should not be given special treatment regarding legal exemptions. However, religion’s special treatment is a legal reality—at least in the United States. Burwell v. Hobby Lobby Stores, Inc. (2014) presents an instance of obviously special treatment. In this case, Hobby Lobby’s shareholders cited their Christian aversion to birth control to object to the Affordable Care Act’s (2010) mandate requiring corporations to provide contraceptives for their employees’ healthcare plans. Granting Hobby Lobby exemption from the mandate on the basis of religious beliefs, a landmark decision, set a precedent for similar, for-profit corporations to earn exemption from generally applicable regulations by citing religious beliefs, whereas nonreligious corporations are still met with a fine for violating such a regulation.

Special treatment is also apparent in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton (2002) in which the plaintiff, a Jehovah’s Witness, sought exemption from a town ordinance which held it to be a misdemeanor to engage in door-to-door advocacy without a city permit. The plaintiff cited his religious belief that he had a religious duty to evangelize, and on this basis, he was exempted from the ordinance. That is, while the town’s
nonreligious citizens must acquire a permit to engage in door-to-door advocacy, religious citizens may do so whether or not they choose to obtain a permit.

Perhaps more controversially, the Supreme Court has also exempted religious followers from being punished for the use of illegal drugs. In Gonzales v. O Centro Espirita Beneficente União do Vegetal (2006), the Court ruled unanimously in favor of a small, Mexican-American church’s religious freedom to use ayahuasca, which—under the Controlled Substances Act (1971)—is an illegal drug. Not only is it generally illegal, it is categorized as a Schedule 1 drug, which puts it in the same legal category as heroin. Under the protection of the Religious Freedoms Restoration Act (1993), the Court justified the church’s appeal in light of the church’s religious conviction that the substance brought them closer to God. No such exemption is made for nonreligious citizens.

Lastly, states have passed laws which give special exemption for religious beliefs while explicitly denying the possibility of nonreligious exemptions. For example, Vermont recently passed a law concerning vaccinations (H.98, 2017). For state-mandatory vaccinations—including immunizations against hepatitis B and tetanus—the law bans nonreligious, moral exemptions, but it still allows religious exemptions. This law, like the aforementioned Supreme Court cases, makes it clear that religion does in fact receive special treatment regarding legal exemptions. However, once such a matter is subjected to philosophical analysis on the basis of integrity, it becomes unclear whether these practices can be justified.

**Terminology and Approach**

Religion is, of course, notoriously difficult to define—especially in finding a balance between inclusivity and exclusivity to minimize overlap with nonreligious beliefs. While I hope that my definition does not run afoul of either concern, I must define it nonetheless: I define *religion* as a system of belief which is sanctioned by a supernatural power and which may include beliefs about right and wrong, supernatural beings, distinctions between the sacred and the profane, and acts of ritualistic tradition as derived from religious doctrine. In contrast, I define *secular beliefs* as moral beliefs which are nonreligious in nature. By this, I mean that secular beliefs do not appeal to a supernatural power; rather, they appeal to a morality which is temporal—and often more evidential—in nature.

I limit both definitions to *moral beliefs*, which I define as sincere beliefs pertaining to what is right and wrong. Of course, I do not mean that all religious beliefs and secular beliefs are moral in nature; rather, I refer to the moral subset of each category. Religion is partly concerned with matters of right and wrong, but it also typically involves beliefs about the composition of the universe, dietary prescriptions, styles of dress, etc., which are not necessarily moral by nature (McConnell, 2013). The same can be said of secular beliefs. As such, I limit my argument to the consideration of moral beliefs—both religious and secular.

**A General Account of Integrity**

Before proceeding to the core of my argument, it is necessary to briefly provide a general understanding of *integrity*. As mentioned earlier, one’s moral beliefs can compel one to perceive certain moral duties. By *duty*, I mean a requirement or prohibition on action that applies regardless of whether one derives happiness from performing it. For example, duties may include caring for the elderly or remaining faithful to one’s spouse. With that said, integrity is generally
defined as what is preserved by living in accordance with one’s *perceived* moral duties—regardless of whether the perceived duties are actually one’s *true* duties, however they may be defined. As such, if one believes oneself to have a certain moral duty and one fulfills it, then one’s integrity is maintained, but if one fails to fulfill said duty, then one’s integrity is diminished. This means that integrity involves complying with what one believes one ought or ought not to do. In this sense, integrity is not a virtue that is to be strived for but rather a condition of moral agency. Integrity is important because having duties is something that is familiar to moral agents, and all else being equal, one would prefer a life in which one is able to fulfill a perceived moral duty to a life in which one is unable to do so.

Legal exemptions rely on integrity insofar as they are granted to allow one to live in accordance with one’s perceived moral duties so as to avoid the consequence for contravening said duties. If a generally applicable law uniquely threatens to contravene one’s ability to fulfill perceived moral duties—and thereby diminish one’s integrity—one has sufficient reason to object to the law. Liberal democracies most often make legal exemptions in the interest of preserving a substantively equal ability to live in accordance with perceived moral duties. In this sense, liberal democracy is committed to preserving an equal enjoyment of integrity for its citizens.

Having presented this general understanding of integrity and its place in liberal democracy, I will now determine whether integrity may be grounds for religion’s special treatment. To do this, I will assess religion on the most popular account of integrity: the identity account. I will show that—on this account—religion does not involve greater integrity than secular beliefs and, as such, does not deserve special treatment regarding legal exemptions.

The Identity Account of Integrity

The *identity account* defines integrity as fidelity to those projects and principles which are constitutive of one’s core identity (Calhoun, 1995). As such, integrity is based on the importance of personal attributes—principally, moral beliefs—which are central to the identity of their possessor. It follows that one maintains integrity when one is true to the attributes which are central to one’s identity, and one’s integrity is diminished when one fails to do so. The account also emphasizes that there is significant psychological harm done to one’s identity as a result of being forced to violate integrity (Lenta, 2016). Thus, exemption would be granted to protect the individual from the cost of legal compliance: psychological harm. With that, it is necessary to re-emphasize that a moral belief must be central to one’s identity in order for integrity to be at issue. If a given belief has only marginal influence on one’s identity, then it would not involve integrity and, thus, would not be considered for exemption. While the Quaker, whose identity is staked on a central commitment to nonviolence, may gain exemption from military service, the objector who claims only a distaste for physical exercise would not qualify.

Is Religion the *Only* Attribute Which Can Be Central to Identity?

On the identity account, religion may deserve special treatment if it is the *only* personal attribute which can be central to identity. Religious beliefs can undoubtedly be central to an individual’s identity, but they are by no means the only attribute which may be central to a person’s identity. Any number of secular attributes can give rise to beliefs of equal or greater centrality to one’s identity—even for religious people. For example, ethnicity is a fundamental
aspect of many people’s identities. In fact, it was the primary motivation for post-Soviet independence movements in Kosovo and Chechnya where volunteer soldiers were willing to die for ethno-territorial states. They found ethnicity to be so central to their identities that it fueled their fight for self-determination. Gender, culture, profession, class, etc. may also heavily contribute to one’s sense of self. With that, it’s clear that religious beliefs are not the only attribute which may be central to identity.

Is Religion More Central?

It is clear that both religious beliefs and secular beliefs can be central to one’s identity, but responsible argumentation prompts me to consider whether religious beliefs are more central. If religious beliefs are inherently more central to identity, then contravening them would incur greater psychological harm, and thus, they would be worthy of greater access to legal exemptions. In keeping with the identity account’s focus on the individual’s subjective valuation of personal attributes, one must consider the psychological consequences for the individual. To this effect, Choper (1982) presents the extra-temporal consequences argument, which holds that contravening religious beliefs can incur greater psychological harm than can be said of secular beliefs, for religious individuals face the threat of postmortem punishment for earthly conduct. At the extreme, this could mean eternal damnation of the soul. The argument recognizes that both religious and secular individuals suffer psychological harm for violating moral beliefs, but it maintains that severe punishment upon death is a more stressful concern than any nonreligious consequence.

I respond that the extra-temporal consequences argument cannot justify special treatment for religion. First, it does not categorically apply to religion, for there are many religions which do not involve belief in an afterlife—e.g., Taoism, Confucianism, etc. Further, not all religions that do believe in an afterlife also believe in postmortem punishment for earthly actions. For this reason, Ingber (1989) criticizes the argument as underinclusive. Ingber also contends that—for some religions—the extra-temporal consequences of State compulsion can be avoided by repentance and praying for forgiveness. Regarding legal exemptions, this would likely limit the number of religions eligible for exemption to such a considerable degree that clearly religious beliefs would be excluded from eligibility. While the extra-temporal consequences argument could possibly justify the special treatment of a controversially small subset of religion, it fails to justify special treatment for religion generally.

Additionally, it is intuitively strange for the argument to suggest that a secular individual is incapable of experiencing an equal level of psychological harm as a person threatened by postmortem consequences. As Cornelissen (2012) asserts, it’s reasonable to assume that “[a]n atheist, who believes she has one available life, may feel deeply distressed by the thought that in contravening her deeply and centrally important moral beliefs she has marred her one and only existence forever with a terrible wrong” (p. 97). Even if the psychological harm of two agents was disputed, a method for discerning the difference is undesirable for liberal democracies, for it would involve unequal treatment of not only religious people, but also certain people within certain religions in order to determine who would bear sufficient psychological cost. In sum, the extra-temporal consequences argument fails to establish that religious beliefs should be considered more central.
Is Religion Unchosen?

While the extra-temporal consequences argument is too limited to justify special treatment of religion, it does bring attention to what is perhaps a unique aspect of religion: Religion may not be a choice. While the State generally expects individuals to take responsibility for their free choices, one might argue that individuals should be accommodated for attributes which are unchosen. Even interpersonally, one is likely to give deference to the blind man who walks into someone, rather than the rude man who simply walks into someone as a consequence of staring at his cellphone. If religious beliefs can be found to be unchosen, then religion may deserve special treatment.

I can immediately respond that religion is not unique in being unchosen—if it is in fact unchosen—for ethnicity, gender, class, and a host of other attributes are also unchosen. Cornelissen (2012) responds to this conundrum by considering the nature of belief. To do so, she first presents an account of belief by Heal (2000). Heal analogizes the acquisition of beliefs to catching a cold. However, as Heal notes, one may subject oneself to circumstances which are conducive to acquiring beliefs—e.g., going to church—just as one may go camping on a brisk night and catch a cold. Bishop (2007) elaborates that there are two factors which contribute to an indirect control over beliefs. First, one may control one’s surroundings to be such that they are conducive to acquiring beliefs. Second, one can control the extent to which a given belief is applied. Cornelissen (2012) employs the example that one may wholeheartedly believe that war is wrong, yet, if conscripted, one may choose not to apply said belief. While beliefs may be selectively applied, Cornelissen also notes that beliefs can be subject to change. She presents a case study of how the Mormons lost their belief in polygamy. Given that the Mormons underwent significant psychological harm as a result, but that they now generally—and strongly—reject polygamy, Cornelissen notes that the identity account can include situations which involve matters of choice. This is important, because even if religion is unchosen and secular beliefs are chosen, it does not follow that secular beliefs would not qualify for legal exemptions, nor does it imply that religion would deserve special treatment.

Assuming that all beliefs are chosen, might religion still be special? Philosophers like Price (1965) distinguish religion from secular beliefs on the grounds that religious beliefs involve a belief in something, whereas nonreligious beliefs involve a belief that something. Price explains that a belief in something involves an additional feeling of goodness toward the object of the belief. But even if a belief in something can be said to be more valuable than a belief that something—however that may be determined—religion is not unique in its ability for believing in something. With this, it becomes incredibly difficult to distinguish between the integrity involved in a belief in God and a belief in one’s spouse who insists that war is wrong. It becomes even more difficult to differentiate the two when one considers that one can believe in oneself—thereby allowing conscience to stand on equal footing with religious belief. It’s possible that Price may respond by distinguishing religion on the fact that it is a belief in something external to the self. But even then, it becomes unclear how secular beliefs might lack an external source, for many secular beliefs can be said to be imposed by socialization. With that, I conclude that the State has no reason to assume that religion is unchosen whereas secular beliefs are chosen, and if both religion and secular beliefs are chosen, then neither can be said to involve greater integrity on the identity account.
Conclusion

The identity account fails to show that religion is the only personal attribute that is central to identity and that religion is more central to identity than other personal attributes. It also fails to show that religion deserves special treatment, even if religious beliefs could be considered to be unchosen while secular beliefs are chosen. Having assessed religion on the identity account of integrity, I conclude that religion cannot be said to involve greater integrity than secular beliefs and, as such, does not deserve special treatment regarding legal exemptions.

References


Bearing Witness to Bearing Arms:
Can We Solve Our Mass Shooting Epidemic?

By Sarah Vicol*
Stanford University

It is almost poignantly laughable to have to acknowledge that, yes, mass shootings are on
the rise in the United States. Merely turn on the television and chances are that somewhere in the
country four or more people have been shot to death, the standard definition of a mass shooting
(Federal Bureau of Investigation, 2005). In fact, while the annual number of homicides involving
firearms has decreased since the 1980s, as have all instances of homicides and of violent crime in
general, the number of yearly mass shootings has increased. Since the notorious shooting at
Sandy Hook Elementary School in December 2012, there have been almost 2,000 mass
shootings in the United States (Lopez, 2017). We have gotten to the point where “[o]n average,
there is more than one mass shooting for each day in America” (Lopez, 2017). Yet, despite guns
being responsible for the deaths of more than 31,000 Americans per year (American
Psychological Association, 2013), we still continue to purchase and own weapons—and many of
them, at that. Despite accounting for about 4.4% of the world’s population, private American
citizens own 42% of the global civilian firearms cache (Lopez, 2017). The result? Approximately
31% of all mass shootings worldwide occur in the United States (Lankford, 2015).

Gun culture is undoubtedly an integral and seemingly inseparable element of the
American way of life. This is perhaps made most apparent through our collective reaction—or
lack thereof—as a nation to our mass shooting epidemic. Stephen Craig Paddock’s massacre in
Las Vegas, which occurred on October 1, 2017 and claimed the lives of 58 people, was the
deadliest mass shooting in U.S. history (Berkowitz, Gamio, Lu, Uhrmacher, & Lindeman, 2017).
It had taken this most appalling of titles away from the previous year’s Pulse nightclub shooting
in Orlando, in which Omar Mateen killed 49 individuals in June of 2016 (Berkowitz et al., 2017).
And yet a little more than a month after the Las Vegas massacre, 26 churchgoers, ranging in age
from five to 72 years old, were murdered in the deadliest mass shooting in Texas’s history and
the deadliest at any U.S. house of worship (Berkowitz et al., 2017). In the past decade alone,
there have been mass shootings at elementary schools, movie theaters, and other public places.
Children and the elderly have been killed. In spite of this, Congress sits around and does nothing,
and so does the greater American public.

Perhaps more strikingly, mass shootings tend to evoke substantially different responses
from liberals and conservatives. In the event of a mass shooting, left-leaning Americans usually
advocate for more as well as stronger gun control regulations (e.g., weapons bans, longer waiting
periods, background checks with fewer loopholes, etc.). To liberals, mass shootings justify the
idea that the underlying problems are the number of guns in the United States and the types of
people who have access to those firearms. In other words, in liberals’ minds, fewer guns would
amount to greater safety. On the other hand, right-leaning Americans typically use such
massacres to vindicate their beliefs that more guns and fewer regulations are the solutions to this
mass shooting scourge. The National Rifle Association (NRA) in particular has a tendency to
capitalize on mass shootings by pushing the narrative that background checks do not work and

* Sarah Vicol is an undergraduate at Stanford University, studying management science and
engineering.
that only so-called “good guys with guns” can prevent further mass violence. At its core, the whole left-right divide comprises liberals viewing most regulations as not infringing on the rights granted by the Second Amendment and conservatives concluding the exact opposite.

This begs the question, does this divergence in opinion by party line allow for any common ground to be found between liberals and conservatives? Specifically, is there anything that liberals and conservatives agree upon when it comes to preventing future mass shootings? Perhaps most importantly, would these compromises work in the long run? Using empirical data, I will review the validity of proposed liberal and conservative solutions to the wave of mass shootings. In particular, I seek to establish whether (1) more or fewer guns result in fewer deaths, (2) tougher gun regulations result in fewer deaths, and (3) improving America’s poor mental health system should actually be the focus of our efforts and legislation; the latter point is often alluded to by conservatives in the event of a mass shooting. In examining the effectiveness of proposed solutions, I hope to find intersections among functioning recommendations (i.e., overlap among liberal and conservative ideas that have been shown to work in practice). I will then attempt to surmise why these shared solutions, supposedly agreed upon by a majority of the American public, have yet to be implemented via legislation at the federal level. Cursory reviews of the Second Amendment and of Second Amendment doctrine, including a summary of the landmark Supreme Court case District of Columbia v. Heller (2008), will be provided prior to delving into the aforementioned questions regarding the establishment of a public consensus, if one exists.

A Brief History of the Second Amendment

It is imperative to understand just how divided academics, legal scholars, and judges are over the fundamental substance of the Second Amendment in order to fully appreciate any concurrence that exists between liberal and conservative laymen. To grasp the foundations of liberal and conservative legal arguments about the Second Amendment, we must first analyze the amendment itself. The basis of the Second Amendment to the United States Constitution comes from two articles from the Federalist, now more commonly referred to as the Federalist Papers. This collection of essays, written anonymously by Alexander Hamilton, James Madison, and John Jay, was published to promote the ratification of the U.S. Constitution. While the Constitution was eventually ratified by the required number of states, it was almost immediately amended; these first 10 amendments became known as the Bill of Rights. The second of these amendments deals with the right to bear arms, and reads in its original version as follows: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed” (U.S. National Archives and Records Administration, 2015).

It is generally agreed upon by constitutional scholars that the sentiment behind the inclusion—and, more importantly, behind the phrasing—of the Second Amendment originates from Federalist No. 29, authored by Alexander Hamilton, and from Federalist No. 46, written by James Madison. In his essay, Hamilton expounds upon the necessity of preserving state-regulated militias and promotes the use of such militias in the place of creating a national standing army (Hamilton, Madison, & Jay, 1788). Madison, in his turn, insists that the installation of local militias would prevent the nation’s federal government from ever attempting to exercise tyrannical rule (Hamilton et al., 1788).
The controversy surrounding the Second Amendment is centered on the interpretation of the phrase “well regulated militia.” This interpretation is markedly split along ideological lines. Conservatives contend that the Second Amendment protects an individual citizen’s right to purchase and own weapons for the purpose of self-defense. To this end, conservatives are in favor of “protecting gun rights,” or maintaining the United States’ permissive gun control legislation, if not lessening it. Liberals, on the other hand, argue that one of the major roles of the government, including both the federal and state apparatus, is to ensure public safety; thus, they are in favor of more restrictive policies with respect to the bearing of arms. This divergence in views of the Second Amendment is present in constitutional, scholarly, and popular settings.

The Development of Second Amendment Doctrine

Prior to District of Columbia v. Heller (2008), the Second Amendment was very much not what legal scholars and academics refer to as “ordinary constitutional law” (Reynolds, 2014, p. 413; Wolitz, 2014, p. 541). Law professor and occasional conservative pundit Glenn Harlan Reynolds, writing in his foreword to the 2014 spring edition of the Tennessee Law Review, quips that “the old question [was] . . . whether the Second Amendment protected any sort of right at all” (2014, p. 407). As Reynolds observes, “Second Amendment scholarship had been almost entirely nonexistent for decades” prior to District of Columbia v. Heller (2008) due to the fact that the Supreme Court had simply refused to take on such cases (2014, p. 407).

There were only two Second Amendment decisions of note made by the Court before the 21st century. In both decisions, the Supreme Court advanced strictly narrow interpretations of the right to bear arms, with great attention paid especially to the amendment’s inclusion of the phrase “a well regulated militia.” In United States v. Cruikshank (1875), the Court ruled that “[t]he right to bear arms is not granted by the Constitution” and that the Second Amendment “means no more than that it [the right to bear arms] shall not be infringed by Congress, and has no other effect than to restrict the powers of the National Government.” In United States v. Miller (1939), which Reynolds contends is “[t]he Supreme Court’s only significant opinion of the twentieth century on the subject” (2014, p. 408) of gun rights, the Court wrote that weapons had to have a “reasonable relationship to the preservation or efficiency of a well regulated militia” in order to be protected by the Second Amendment. There was an exception to the “reasonable relationship” condition, though; the Supreme Court held that arms could be protected by the Second Amendment if they were considered to be in “common use” by the American public (United States v. Miller, 1939).


The Supreme Court’s landmark decision in District of Columbia v. Heller held that the Second Amendment has a self-defense purpose (2008), overturning the precedent established both in United States v. Cruikshank (1875) and in United States v. Miller (1939). In other words, the Second Amendment was found to protect an individual right to keep and bear arms, negating the collective right position previously held by the Court. In light of this finding, conservative and liberal legal scholars had considerably disparate reactions. For conservatives, this decision was a cause for celebration, as technically all gun control regulations were now not only subject to court review, but could also just as easily be declared unconstitutional. Indeed, Reynolds rejoices about what he terms “the normalization of the Second Amendment” (2014, p. 415) that
was precipitated by *District of Columbia v. Heller* (2008). For liberals, however, these exact same repercussions were quite obviously worrisome, as they jointly represented an almost wholesale destruction of the State’s right to regulate firearms. Reynolds’s liberal colleague, fellow law professor and *Tennessee Law Review* writer David Wolitz, went further, warning that the “significant and irreducible doctrinal indeterminacy” (2014, p. 541) surrounding the Second Amendment following *District of Columbia v. Heller* (2008) would lead to, among other things, “increasing left-right socio-political polarization” (Wolitz, 2014, p. 542).

The Court’s ruling in this case, with a 5–4 majority, was likewise divided along ideological lines. The late Associate Justice Antonin Scalia, a bulwark of conservatism, wrote the majority opinion, while two liberal jurists, the former Associate Justice John Paul Stevens and current Associate Justice Stephen G. Breyer, authored the primary and secondary dissents, respectively. In the majority opinion, the Court ruled that in determining whether a certain type of firearm is protected by the Second Amendment, the prevalence of said firearm takes precedence over the actual usefulness and applicability of the firearm to a private citizen’s self-defense capabilities (*District of Columbia v. Heller*, 2008). Accordingly, Scalia suggests that the ownership of machine guns could technically be protected by the Second Amendment if their use reaches a level accepted as commonplace or mainstream (*District of Columbia v. Heller*, 2008).

Justices Stevens and Breyer take conventional liberal approaches in their dissenting opinions. Stevens argues in his dissent that the Second Amendment only protects the collective right to bear arms; if the framers of the Constitution had intended for the amendment to have a self-defense purpose, then they would have explicitly addressed this (*District of Columbia v. Heller*, 2008). Therefore, the Supreme Court did wrong in rejecting the importance of the founding fathers’ actual language when interpreting the Second Amendment, at least according to Stevens. Breyer contends that there is a limitation to challenging the constitutionality of gun control regulations, noting that a priority of the federal government is to ensure the general welfare of its citizens (*District of Columbia v. Heller*, 2008). Thus, in the name of public safety, not all gun control regulations can be found in violation of the Second Amendment. Specifically, Breyer proposes that the standard of review for potential violations of the Second Amendment should involve striking a balance between not infringing on the freedoms granted by the amendment and not curtailing general citizen safety (*District of Columbia v. Heller*, 2008).

**Do More or Fewer Guns Result in Fewer Deaths?**

The Supreme Court’s finding in *District of Columbia v. Heller* (2008) only served to intensify the already inflamed gun rights versus gun control debate. A central question in this debate is whether having more or fewer guns would result in a greater level of public safety; i.e., do more or fewer guns beget fewer deaths? Conservatives tend to argue for the former, maintaining that if more Americans had a personal firearm, then they could better deter crime and defend themselves from attackers. Liberals dispute this and instead embrace the latter assertion, claiming that for every “good guy with a gun,” there are plenty of “bad guys” with access to firearms. If this were the case, then it would make sense to limit the number of guns in circulation, thereby hindering the ability of criminals and would-be criminals to obtain such weapons.

And this notion that fewer guns result in fewer deaths is indeed the case, both worldwide and within the United States. “The U.S. has more than 300 million guns—roughly one for every citizen” (Kristof, 2017). This is the highest gun ownership rate of any country in the world.
(Kristof, 2017). Coincidently, the United States also has the highest rate of homicides involving firearms among developed nations, with approximately 30 homicides involving guns occurring per million Americans in 2012 (Lopez, 2017). Likewise, the developed country with the second highest rate of gun ownership, Switzerland (Kristof, 2017), had the second highest rate of homicides involving firearms in 2012 (Lopez, 2017).

Additionally, fewer guns lead to fewer suicides. In 1996, Australia instated a gun buyback program that cut the country’s firearms stock by 20% (Lopez, 2017). This halved firearm homicide rates as well as decreased gun suicide rates by almost 75% (Lopez, 2017). And while the decrease in homicides was not statistically significant, the decrease in suicides was so (Lopez, 2017). Similarly, a 40% decrease in suicides was observed among Israeli soldiers when they were prevented from taking their guns home over the weekend (Lopez, 2017).

These same trends continue to apply when examining American gun ownership rates on a state-by-state basis. There does exist a positive correlation between gun ownership and gun deaths at the state level. Out of the 29 U.S. states that “have gun death rates above the national average of 10.5 per 100,000 people,” all but one have a higher percentage of gun-owning households than the national average of 32% (Kristof, 2017). These same states also have the highest rates of suicides in the nation, and police officers in these states are more likely to be killed in the line of duty (Lopez, 2017). It has been estimated that for every one-point increase in a state’s firearm ownership rate, an additional law enforcement officer is murdered (Lopez, 2017). It thus seems that the “good guy with a gun” supposition turns out to not only be a myth, but also a horribly deceiving one at that.

Do Tougher Gun Regulations Result in Fewer Deaths?

Another fundamental question in the gun rights versus gun control debate is whether tougher gun regulations actually work in practice; specifically, does controlling—and limiting—access to firearms lead to fewer deaths? Conservatives typically contest the effectiveness of background checks and waiting periods, pointing out the string of mass shootings that such regulations were not able to prevent. In conservatives’ minds, if apparently strict restrictions could not prevent increasingly deadly episodes of mass violence, then why have these restrictions in the first place? Liberals disagree with this assessment, arguing that what matters at the end of the day is the number of deaths that were successfully prevented by various gun regulations.

As in the previous section of the paper concerning gun ownership rates, the data appear to support the liberal claim. There exists a negative correlation, shared internationally and among U.S. states, between the stringency of firearm regulations and the number of deaths in which a firearm was involved (Lopez, 2017). Worldwide, the implementation of “new legal restrictions on owning and purchasing guns tended to be followed by a drop in gun violence” (Lopez, 2017). The same trend applies to individual U.S. states; states with stronger gun regulations tend to have lower gun death rates (Lopez, 2017). A more apt American case study could not be found than in the examples of Connecticut and Missouri. In 1995, Connecticut passed a law that tightened the state’s gun licensing requirements; thereafter, gun homicides decreased by approximately 40% and gun suicides decreased by an estimated 15% (Kristof, 2017). Missouri, on the other hand, repealed some of its gun licensing requirements in 2007, after which homicides and suicides involving firearms rose by 25% and 16%, respectively (Kristof, 2017). Accordingly, we should work to reinstate strong gun regulations.
Should Mental Health Be the Focus?

A final point of contention in the gun rights versus gun control debate centers on the incidence of mental illness among individuals who commit crimes with firearms and, more specifically, among mass shooters. Conservatives customarily stress that a principal culprit in mass shootings is the United States’ poor mental health system for having failed to identify potential mass murderers. If we were to improve our nation’s mental health system so that it could better diagnose mental health problems and support those with mental illness, then we could prevent the majority of mass shootings. Liberals demur, insisting that the focus should not be on mental illness but rather on passing and implementing gun control legislation.

Once again, the evidence bolsters the liberal position. Despite 80% of Americans agreeing that the “[f]ailure of the mental health system to identify individuals who are a danger to others” is to be blamed a “great deal” or a “fair amount” for mass shootings (Gallup News, 2017), no correlation exists between a higher incidence rate of mental illness and an increased number of gun deaths with regards to individual U.S. states (Lopez, 2017). One researcher found that two-thirds of American mass murderers from the past century “exhibited no evidence of a severe mental disorder” (Carey, 2017). Multiple studies, including those commissioned by the federal government, have similarly found that approximately 20% of American mass shooters are “likely psychotic or delusional” (Carey, 2017). Granted, a mental illness incidence rate of 20% is substantially higher than the rate of 1% among members of the general public (Carey, 2017). However, mental illness cannot be claimed to be the leading shared characteristic among mass shooters. Current research suggests that it is very difficult to pinpoint any traits common to mass murderers other than that they are usually “disgruntled and aggrieved” men (Carey, 2017). Therefore, it does not make sense to focus our time, money, and efforts on improving the U.S. mental health system if mental illness is not the clear root of the problem.

Public Consensus on Gun Control

The preceding sections have perhaps made it seem as if it would be an utterly useless endeavor to make compromises between liberals and conservatives on the subject of firearms. On the surface, the liberal and conservative perspectives appear to be complete polar opposites. Indeed, reaching some sort of practical and functional general agreement would be impossible if the left-right divide were so great. But it is not—at least, not when it comes to the general American public.

Perhaps it comes as no surprise, though, that there are various specific proposals that most Americans—conservatives and liberals, gun owners and not—do support. When asked “[h]ow worried are you that you or someone in your family will become a victim of a mass shooting,” almost 40% of Americans replied that they were either “very worried” or “somewhat worried” (Gallup News, 2017). The fear is real, so it makes sense that the majority of Americans believe that there should be a ban on the purchase of firearms by individuals who are mentally ill, on no-fly lists, or on other watch lists (Kristof, 2017; Lopez, 2017). Approximately 60% of Americans think that “[e]asy access to guns” is to be blamed a “great deal” or a “fair amount” for mass shootings (Gallup News, 2017), so it follows that gun owners and conservatives also approve of legislation that is normally categorized as “liberal.” For example, 93% of gun-owning households support background checks for all gun buyers (Kristof, 2017), and more than three-
quarters of all conservatives even support background checks at gun shows and for private firearm sales (Kristof 2017; Lopez 2017).

Remarkably, almost 60% of gun owners believe that stronger gun regulations “will not interfere with the right to own guns” as delineated in the Second Amendment (Kristof, 2017). However, again, this is a logical extension of the fact that 54% of Americans are either “somewhat dissatisfied” or “very dissatisfied” with current federal gun legislation (Gallup News, 2017). This could explain why slight majorities of gun owners and of conservatives back “liberal” solutions like having a “[f]ederal mandatory waiting period on all gun purchases,” “[c]reating a federal database to track gun sales,” and banning modifications that result in near-automatic weapon functionality—think along the lines of the bump stocks utilized by Stephen Craig Paddock in the Las Vegas massacre to convert his semi-automatic firearms into almost fully automatic ones (Kristof, 2017). Fifty-four percent of conservatives also support “[b]anning assault-style weapons” (Lopez, 2017).

In essence, what these poll results illustrate is that there is a consensus among Americans with regards to commonsense legislation, such as improved background checks and longer waiting periods. The greater American public, by seeking to prevent individuals who should not own guns from gaining access to such weapons, does agree with many a researcher’s conclusion that “the best way the United States could reduce public mass shootings is to dramatically reduce its world-leading firearm ownership rate” (Lankford, 2015). It thus appears that the main issue at hand is not gun control itself but rather the framing of such regulations as “liberal” proposals or, more generally, as “gun control.” This framing effectively accomplishes nothing because it “scares off gun owners and leads to more gun sales” (Kristof, 2017). If we were to instead adopt a public safety framework that emphasized gun safety and the reduction of gun violence, then we would be more successful in garnering support for the implementation of such legislation (Kristof, 2017). And rather than focus on banning firearms, we should work to replicate what was done to the automobile industry in the latter half of the 20th century—that is, “make the products safer and . . . limit access by people who are most likely to misuse them [the products]” (Kristof, 2017). By approaching gun control in this fashion—i.e., by not referring to it as “gun control” in the first place—we would lessen the political discord inherent to the discussion of this matter, thereby increasing the chances of Americans realizing and acting upon their shared beliefs.

**Historical Opinions on Guns**

In spite of the previously shown consensus, Americans have become progressively more “pro-gun” since the mid-20th century (Gallup News, 2017). This has been particularly true since the 1990s, even in the wake of a growing number of high-profile mass shootings (Lopez, 2017). In July of 1959, 60% of Americans agreed that “there should . . . be a law that would ban the possession of handguns, except by the police and other authorized persons”; 36% were against such a hypothetical law (Gallup News, 2017). As of October 2017, the percentages have switched; only 20% of Americans would be in favor of such a law, with 71% against (Gallup News, 2017). As recently as December of 1993, a majority of Americans believed that “having a gun in the house makes it . . . a more dangerous place to be”; in October 2014, 63% of polled Americans thought that having a gun would lead to a safer home (Gallup News, 2017). American gun culture is still a very powerful phenomenon, and it is going to “take much more than semi-regular public mass shootings to dramatically change” it (Lankford, 2015).
The Ubiquity of the NRA

Why have these reversals in opinion taken place? The answer lies in the statistics themselves: Americans increasingly consider the disproven “good guy with a gun” myth to be valid. Perhaps that is why a slight majority of Americans currently believe that higher rates of concealed carry would heighten public safety levels (Gallup News, 2017). And what organizations promote such viewpoints in the first place? Gun lobbies like the NRA, no less. While “pro-gun control” lobbies do exist, they are far outmaneuvered by the activities and significant resources of just the NRA itself, never mind other gun lobbies (Soloperto, 2016, p. 236). Since becoming “the most powerful lobbying organization in the country” in the late 1990s (Soloperto, 2016, p. 237), the NRA has been able to “concentrate its influence so effectively . . . in the legislative battle over Second Amendment rights” (Soloperto, 2016, p. 236), as well as in the legal battle. In fact, it was the NRA that found the plaintiffs for and initiated the lawsuit that culminated in District of Columbia v. Heller (2008). It has been estimated that almost 90% of politicians in the Republican party will receive donations from the NRA “at some point during their political careers” (Soloperto, 2016, p. 237). Indeed, approximately half of all 2012 Congress members had financial support from the NRA during that year’s election (Soloperto, 2016, p. 237). For this reason, loyalty to the NRA is pervasive among Republican lawmakers, which is what allows the NRA to achieve such legislative success.

It is undeniable that the legislation trumpeted by the NRA has contributed to America’s gun violence epidemic. The over 200 state legislative acts for which the NRA has been responsible have expanded “hunting rights, emergency powers, and carry-conceal rights” (Soloperto, 2016, p. 239). The NRA’s involvement at the federal level has had worse consequences. “The Firearm Owner’s Protections Act of 1986 (FOPA) . . . which was drafted with significant NRA input” essentially “creat[ed] a black market in the northern United States for illegally trafficked firearms of southern origin” (Soloperto, 2016, p. 238). FOPA (1986) also “removed the record-keeping requirement for sales of non-armor-piercing ammunition,” thereby allowing individuals to purchase enormous quantities of such ammunition without the relevant federal authorities being alerted (Soloperto, 2016, p. 238).

Additionally, the NRA actively works to obstruct “federal funding efforts for epidemiological research of gun violence” (Soloperto, 2016, p. 237). Unsurprisingly, the organization is “extremely hostile to such research” (Kristof, 2017) because, as demonstrated in preceding sections, empirical data contradicts the rhetoric often promoted by the NRA (e.g., that more guns contribute to an increased level of public safety, that mental health should be the real focus of our efforts, etc.). And it appears as if Congress does the NRA’s bidding in this case, too. From 1973 to 2012, the National Institutes of Health (NIH) awarded 89 research grants to study rabies; there were 65 cases of the disease in the United States during this time period (Kristof, 2017). During the same four decades, despite there being over four million injuries resulting from firearms, the NIH awarded only three research grants for the purposes of studying gun violence (Kristof, 2017), an incomprehensibly vast difference.

The Changing Rhetoric of the NRA

Yet the NRA was not always like this; it neither used to lobby the federal government or state governments nor make ill-founded claims such as “guns don’t kill people” or “more guns would decrease gun deaths.” Actually, up until the late 1960s, “the NRA . . . supported sensible
gun regulation” (Soloperto, 2016, p. 236–237). Then-president of the NRA Karl Frederick even spoke of “the virtues of the National Firearms Act of 1934 prior to its passage” (Soloperto, 2016, p. 236). Back then, the NRA’s main purpose as an organization was to promote safe gun usage and highly skilled marksmanship; today, “the NRA is [still] peerless with respect to teaching such [gun safety] classes” (Brown, 2016). But the problem is that the NRA’s approach to such matters has significantly changed, and even training courses are subject to decidedly pro-gun rhetoric (Kristof, 2017). Audits of NRA training classes found that “trainers are more likely to advocate for the N.R.A. or for carrying guns than for, say, safe storage” (Kristof, 2017). More than three-quarters of instructors promoted “gun carrying” and gun ownership, almost 70% “[e]ncouraged gun use for self-defense,” and more than half of trainers “[e]ncouraged membership in [a] gun-rights group” like the NRA (Kristof, 2017).

The NRA’s bias is much more pronounced in the material that it disseminates to a public audience despite the fact that, perhaps contrary to popular belief, the NRA does not represent the views of the majority of Americans (Gallup News, 2017). As of December of 2012, 61% of Americans reported that the positions of the NRA either never reflected their own personal views about guns or only did so “some of the time” (Gallup News, 2017). Yet, the NRA advances an “us-versus-them” narrative, “us” being NRA members (or more broadly, law-abiding gun owners) and “them” being non-gun owners. The implied conflict, though, is between conservatives and liberals. The NRA, in various advertisements and other media campaigns, seeks to portray liberals as “violent” and “hateful” individuals who would like to take guns away from “real Americans”—i.e., from conservatives (NRA, 2017). Never mind the fact that not all law-abiding gun owners are conservatives—liberals own guns, too—or that not all liberals are insurrectionists in the vein of anarchists like Antifa members. No, these “subtleties” are not what the NRA wants its members to take away. Rather, the NRA prefers to perpetuate stereotypes through purposely divisive propaganda pieces, thereby inciting further animosity between liberal and conservative Americans. By connecting the gun rights versus gun control debate to the greater culture wars, the NRA prevails in building a fan—and more importantly, customer—base of staunch supporters.

**Conclusion**

There is actually a healthy amount of consensus among members of the American public with regards to methods of preventing further mass gun violence. This consensus is centered on realistic solutions—such as improving background checks—that have been proven to work in practice. However, the flowing money and pressure from gun lobbies such as the NRA taint the discussion at the top levels of our government. The extreme positions that some of these lobbying organizations take infiltrate the popular discourse as well, pitting conservatives against liberals by framing gun control as “liberal” policy rather than as an issue of public safety. This all culminates in the intense polarization over Second Amendment doctrine present in our judicial and legislative systems being foisted on the general public, worsening the possibility of achieving any sort of bipartisan unity.

But it does not have to be this way. I was raised in the state of New Jersey, where Democrats and Republicans alike share a commitment to strong gun regulations. New Jersey has some of the toughest laws in the nation with regards to gun ownership and usage, and so I grew up believing that this was the norm. While the news told of mass shootings all around the country—in Las Vegas, Orlando, San Bernardino, Charleston, Sandy Hook, and countless other
places—I did not bear witness to any such tragedies. To date, my hometown has not had one shooting in over a decade. This should be the norm. Why is the safe environment that I was raised in not the same environment that is afforded to everyone else in the United States? Why can we not solve our mass shooting epidemic once and for all?

But we can, and we shall. At the end of the day, we already know the answer to the United States’ mass shooting epidemic: Get money out of politics, and abolish lobbies. It will be a long and arduous process to root out the corrupting influence of lobbying organizations, but it must be done. Everyday Americans—not lobbies—understand how to solve this crisis, and the unity of the greater American public should transcend petty politics. It is high time that Congress finally answer to the wishes of the American people, and that time starts now.

References


For generations, Americans have allowed the lobbying industry to play a role in their government, while being conditioned to believe various connotations about lobbyists. Dating back to the 1939 film *Mr. Smith Goes to Washington* (Capra, 1939), a vilified lobbyist undermines an optimistic senator, Mr. Smith. Fast-forward seven decades, and *Miss Sloane* (Zeitoun, Browning, Thykier, & Madden, 2016), an intelligent lobbyist, is held in high esteem. However, what often goes unacknowledged is the denotative meaning of a lobbyist: anyone who (1) is employed by a client for compensation purposes; (2) serves over one lobbying contact; and (3) lobbies 20% or more of his or her time while employed by a client over a three-month period (United States House of Representatives, Office of the Clerk, 2017). Despite either discernment, lobbyists are often criticized for abusing registration and disclosure loopholes. With the help of academic, professional, and government sources, this research shines light on legislation aimed at regulating lobbying to prove that loopholes not only exist, but are used by lobbyists. To begin, who lobbies and why they lobby is exemplified to provide an elemental understanding of the industry. Next, an overview of critical legislation and executive orders pinpoints major loopholes and the consequences of regulating the lobbying industry. Additionally, a section dedicated to the exposure of a considerable loophole and the improperly regulated use of coalition lobbying encourages lobbying reform. Finally, policy solutions to close loopholes are provided based on the collective research presented.

**Lobbying: Who and Why?**

Regardless of its negative stigma, lobbying gives the marginalized, the wealthy, and the concerned American access to policy change. From churches to Fortune 500 companies, the research below concludes that a wide variety of interests are represented by lobbyists (Shiller, 2012; Bowie, Smith, Phillips, & Wamhoff, 2012).

**Who?**

In a 2009 study conducted by Baumgartner et al. (as cited in de Figueiredo & Richter, 2014, p. 165), “trade and business associations, business corporations, professional associations, and coalitions specific to an issue represented 54% of all lobbying groups. Citizen groups, unions, foundations, think tanks, governments, institutions, and other groups represented the remainder.” Churches, legislators, and charities also hire lobbyists to influence legislation or for their expertise in an area (Shiller, 2012; de Figueiredo & Richter, 2014). Corporate lobbying and special interests tend to be the focal point of lobbying research, including this research.

It is common practice for corporations and special interests to access representation through lobbying. However, some have come to believe that purchasing representation leads to corruption. Watchdog and advocacy groups are just a few manifestations of the backlash exerted on the lobbying industry. Despite this backlash, lobbyists are able to maneuver through loopholes and continue their influence on legislation. The following section will give an overview of critical legislation and executive orders regarding lobbying and their loopholes. These sections are divided into three main topics: legislation affecting the registration and disclosure of lobbyists, legislation affecting the registration and disclosure of lobbying firms, and legislation affecting the registration and disclosure of coalitions and other lobbying groups.

[Madison Stromswold](https://www.abington.psu.edu/dialectics) is a recent graduate of Pennsylvania State University, where she studied political science.
by corporate lobbying skeptics. Such skepticism is only furthered by research that reveals the enormous amount of money spent on lobbying each year by corporations or special interests. Research presented by Bowie et al. (2012) exhibits lobbying expenditures over the course of three years (2008–2010) for 30 companies which are notorious for “corporate tax dodging” and remain known as the “dirty thirty.” Within this group are recognizable companies like General Electric, Verizon Communications, Boeing, and FedEx, which each spent more than $50 million on lobbying between 2008 and 2010.

Why?

According to de Figueiredo and Richter (2014), lobbyists are most commonly hired to effect policy related to: trade and tariffs; financial regulation that affects markets; government budgets and contracts; taxation; judicial confirmations; and immigration. It also helps that several lobbyists, especially those that serve corporations and special interests, receive generous compensation for their work. In 2010, special interest groups spent a collective $3.51 billion on lobbying (Bowie et al., 2012). However, the unofficial number stands at approximately $9 billion a year due to the lack of official disclosure (Fang, 2014).

Not all lobbying serves the interests of wealthy corporations. President John F. Kennedy once wrote:

Lobbyists are, in many cases, expert technicians and capable of explaining complex and difficult subjects in a clear, understandable fashion . . . the lobbyists who speak for the various economic, commercial and other functional interests of this country serve a very useful purpose and have assumed an important role in the legislative process. (as cited in Ostas, 2007, p. 34)

Lobbyists have the potential to change public policy for the better, as explained by Shiller (2012): “financial lobbyists, if they are properly regulated, are essential, for only the financial community has the expertise to understand the financial marketplace and the ability to evaluate policy regarding it” (p. 92). Also important are the charities, churches, and advocacy groups which lobby to effect public policy that has the ability to alter social, economic, and political progression (de Figueiredo & Richter, 2014).

Lobbying Legislation and Executive Orders

Prominent regulations to counter negligent or corrupt lobbying activity exist in the status quo. The following legislation and executive orders demonstrate an overview of their purpose, regulatory intent, and loopholes or potential shortcomings.

Foreign Agents Registration Act

One of the first pieces to comprehensively address lobbying regulation was the Foreign Agents Registration Act (FARA) of 1938, which limited the access foreign propaganda had to public and political officials. Within the bill, an “agent of a foreign principal” is directed to register with the U.S. State Department by submitting the registrant’s contact information; personal and business addresses; agreements and contracts with foreign principals whom they
represent; and the compensation they receive for their work as a lobbyist (FARA, 1938). The original law denotes “agent of foreign principal” as anyone who:

- acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal or for any domestic organization subsidized directly or indirectly in whole or in part by a foreign principal. (FARA, 1938)

The bill also defines “foreign principal” as “the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization” (FARA, 1938). In addition to registering, however, foreign agents are required to periodically disclose finances and any communication with government employees or officials in the United States. Despite being an effective combat against foreign propaganda, the bill’s purpose changed with 1942 and 1966 amendments (United States Department of Justice [DOJ], 2015).

1942 amendments gave enforcement and oversight responsibilities to the DOJ, lending judicial weight to the bill. Since then, the FARA Registration Unit has developed a habit of contacting unregistered individuals and enforcing registration requirements (DOJ, 2015). Penalties for not registering include a prison sentence of up to five years, up to $10,000 in fines, or both. Additionally, penalties for improperly labeling propaganda that is promulgated in the United States is punishable for up to six months in prison, up to $5,000 in fines, or both (United States Government Accountability Office, 2010).

1966 amendments, which tightened registration requirements, changed the focus of the bill and aimed it at preventing foreign interests from receiving pecuniary or political favor by influencing U.S. policy. Although these amendments include several exemptions and new denotative action, the most noteworthy changes to the bill include three exemptions that have the potential to serve as loopholes for lobbyists (FARA, 1966; Paul, 1967).

**FARA loopholes.**

First, the “private” or “commercial trade” exemption states that private activities—those that do not sponsor public or political interests tied to foreign governments—do not have to be reported. Examples of private activities could include those that serve foreign corporate interests, even if the corporation is owned by a foreign government (United States Government Accountability Office [GAO], 2010). Another significant exemption includes the “attorneys’ exemption,” which does not require registration of attorneys who represent foreign clients in court; administrative agencies; and both informal and formal proceedings within the United States. The obscure phrasing within the attorney’s exemption leaves room for lawyers to submit “comments on proposed rule changes by government agencies and ordinary negotiations over government contracts” (Paul, 1967, p. 606). Furthermore, agents of foreign principals who are registered lobbyists under the Lobbying Disclosure Act (LDA) of 1995 do not have to register under FARA (1938). Between LDA (1995) and the commercial trade exemption, legislation has deemed it unnecessary for lobbyists serving foreign corporations to register at full capacity, since LDA (1995) expects less registration information than FARA (1938) (Albaugh, 2014; GAO, 2010). Additionally, requirements to notify the FARA Registration Unit of any exemptions do not exist, which results in a lack of proper tracking.
Over the course of 30 years, prominent U.S. senators have taken initiative to address foreign lobbying loopholes. In 1988, Senator John Heinz recommended amendments to FARA (1938). Some of these included removing the attorneys’ exemption, a bright line test to define “whether a domestic entity was under control of a foreign principal,” and to increase supervisory power of the DOJ (Albaugh, 2014, p. 5). Heinz’s recommendation to increase the supervisory power of the DOJ was also confirmed by the GAO in the 1980, 1990, and 2008 reports. In fact, the FARA Registration Unit has mentioned that agents are usually not specific enough in their disclosure reports and that the proper resources needed to acquire additional information are nonexistent. This is partly due to staff downsizing (Albaugh, 2014; Fang, 2014). In the summer of 2008, Senator McCaskill and Senator Schumer introduced the Closing the Foreign Lobbying Loophole Act, which called for removal of the LDA (1995) exemption and required that all registered agents report lobbying actions taken outside of the United States (Albaugh, 2014, p. 6).

**Lobbying Disclosure Act**

The birth of the LDA (1995) not only set forth new criteria for lobbying practices in the United States, but marked a new era for the lobbying industry. Although the Federal Regulation of Lobbying Act (FRLA) in 1946 had implemented disclosure and registration requirements, its language was often too vague and inconsistent (“The Federal Regulation of Lobbying Act of 1946,” 1947). Eventually, it served as the skeletal framework for LDA (1995) and was ultimately repealed. The goal of LDA, as stated in the bill, is to “provide for the disclosure of lobbying activities to influence the Federal Government, and for other purposes” (1995). The downfall of past legislation, like FARA (1938) and FRLA (1946), was mostly due to cryptic language that left room for loopholes. Due to its coherent rhetoric and clear terminology, LDA (1995) and its amendments more effectively addressed lobbying disclosure and registration requirements. Additionally, LDA requires lobbyists to register within 45 days after being hired for lobbying activities, and to file with “the Secretary of the Senate and the clerk of the House of Representatives” (1995). A lobbyist is required to detail information about him or her as well as any clients and organizations that contribute to lobbying activities. The name, address, telephone number, and an explanation of said lobbying activities are recorded. Also, the registrant—who is a lobbyist, lobbying firm, or organization employing outside lobbyists—must report the total income they received or paid for lobbying endeavors that exceed $3,000. Amendments to the bill require quarterly reports, submitted by both lobbyists and their respective clients, which asks for detailed lobbying activities and updates to registration information. Knowingly disobeying LDA (1995) may result in a $200,000 fine and/or a maximum five-year jail sentence (Honest Leadership and Open Government Act [HLOGA], 2007). Regardless of its intent, carefully crafted provisions, and amendments seen in HLOGA (2007), LDA (1995) remains vulnerable to a sizable loophole.

**LDA loopholes.**

As a critical phrase within the definition of “lobbyist,” any individual’s time that “constitute[s] less than 20% of the time engaged in the services” for a client, while also not meeting the monetary threshold, is not considered a lobbyist (LDA, 1995). If a lobbyist argues that they spend less than 20% of their time pursuing policymakers and make less than $3,000,
then no registration is required. However, many lobbyists and businesses often make an excuse for not registering by claiming that their activities do not meet the 20% threshold. This is exemplified by the notorious public relations firm, Edelman. While being unregistered, Edelman has acquired numerous high-paying contracts with companies like the American Petroleum Institute, “an oil and gas industry lobby (for $51,917,692)” (Fang, 2014, p. 22). Entities like Edelman are not unique in the way that they approach the 20% threshold. According to Fang, a distinguished investigative journalist and former writer at The Nation, lobbying groups often avoid announcing whether or not they meet the monetary threshold and, instead, claim that their lobbying activities remain below 20%.

**Honest Leadership and Open Government Act**

Signed by President George W. Bush, HLOGA (2007) amended the LDA (1995) and implemented other important provisions. HLOGA mandates public accessibility to registered lobbyists’ disclosure statements through a government database, and places numerous restrictions on congressional members and their staff who interact with lobbyists (2007).

This was the first time that a piece of legislation had significantly improved “cooling off” periods for both senators and members of the House of Representatives. This cooling off period, as jargonized by experts, is the amount of time a public official must wait before participating in lobbying efforts (Blanes i Vidal, Draca, & Fons-Rosen, 2012). Senators face a two-year ban on lobbying after losing or leaving their positions, while senatorial staff and officers face a one-year ban. Members of the House of Representatives, officers, and staff are also subject to a single-year ban. As for “very senior executive personnel,” a standard cooling off period is two years (HLOGA, 2007).

Other regulation accomplishments found in HLOGA (2007) include steeper fines and penalties for congressional employees and lobbyists who knowingly falsify information or refuse to comply with the law. Amended House and Senate ethics rules place new restrictions on members, staff, or officers. Additionally, the bill bans members of Congress and employees from receiving special treatment from lobbyists. Unlike past legislation, HLOGA (2007) states that Congress and their employees are not allowed to receive gifts or travel accommodations paid by “registered lobbyists and entities that hire registered lobbyists.”

**HLOGA compliance.**

Another important facet of HLOGA (2007) includes a requirement for audits and annual reports presented by the director of the GAO. In the 2015 GAO report titled “2014 Lobbying Disclosure: Observations on Lobbyists’ Compliance with Disclosure Requirements,” the agency details important registration and disclosure findings. To begin, the GAO points out that firms and organizations required to disclose lobbying incomes or expenses often round incorrectly. LDA (1995) guidelines dictate that all financial reports be rounded to the nearest $10,000, but it seems that 21% of the randomly selected reports had rounding errors. The GAO investigated this issue and discovered that some lobbyists find that the guidelines are unclear. In fact, between the years 2010 and 2014, the percentage of lobbying firms who found lobbying disclosure requirements “very easy” to comply with shrank from 69% to 16% (GAO, 2015). Other than testing the effectiveness of disclosure and registration practices, the GAO consults the United States Attorney’s Office (USAO) on past or potential complications concerning lobbying.
activity. The USAO has received 2,308 noncompliance referrals from the secretary of the Senate and the clerk of the House of Representatives between 2009 and 2014 filing years. These noncompliance cases either misreported disclosure requirements or failed to register. However, the USAO reports that noncompliance issues are resolved by having the entity file amendments or voluntarily dissolving their registrations. As for chronic offenders, settlements are not common, but they do happen. For example, shortly before this GAO report, the USAO states they “finalized a settlement in the amount of $30,000 for Alan Muak & Alan Muak Associates, Ltd” after not filing for many years (GAO, 2015, p. 30).

Executive Orders

The implementation of lobbying regulation through executive orders appears historically consistent and almost traditional since the Clinton administration. Relevant literature reflects on the beginnings of the Clinton, George W. Bush, Obama, and Trump administrations and their efforts to thwart imperfect lobbying practices within the executive branch.

At the start of his presidency, Bill Clinton issued a five-year ban on lobbying executive branch officials. However, he had to “rescind [the restrictions] shortly before leaving office when aides complained they posed problems in securing new positions” (Burke, 2009, p. 590). Nonetheless, the attempt at regulating lobbying was a success for President Clinton, who signed the LDA in 1995. Later, President George W. Bush passed an “ethics directive” aimed at holding appropriate and honest standards of conduct within the executive branch (Keith, 2017). The absence of literature discussing Bush’s executive orders aimed at regulating lobbying suggests that he found the ethics directive a sufficient regulatory guideline. Eventually, President Bush would sign the HLOGA in 2007, which, as recently examined, had many effects on the lobbying industry.

On his first day in office, President Barack Obama signed an executive order aimed at preventing appointees in “every executive agency” from lobbying the executive branch for the duration of Obama’s presidency (Burke, 2009, p. 590). However, as the transition from the Bush to Obama administrations occurred, speculation about Obama’s choices for department and agency officials caught the attention of many. “Dozens of former lobbyists and some who were registered as recently as last year” had cropped up in Obama’s selection of transition officials, among them the notoriously unregistered lobbyist: Senator Tom Daschle (Kirkpatrick, 2008; Mosk, 2008). Waivers were granted to executive officials, who otherwise would not have been permitted to join the West Wing due to Obama’s newly signed executive orders combatting lobbyist influence (Burke, 2009). Ultimately, as years passed, power slowly turned back to lobbyists as the administration issued numerous exemptions to the executive order. Such exemptions could have been forged for someone like Anita Dunn, the former White House communications director and advisor to the Obama administration. In 2009, she left the administration and took employment with SKDKnickerbocker, a consulting firm “taking on corporate accounts to influence Obama initiatives” (Fang, 2014, p. 22). “The New York Times reported that despite SKD’s claims that it engages only in public relations, the firm has contacted Obama administration officials on behalf of its clients” (Fang, 2014, p. 22). Despite harsh scrutiny, it is worth noting that academic and professional literature on Obama’s executive lobbying initiatives is more plentiful than that of former presidents.

Just as the three presidents before him, President Donald Trump took to regulating lobbying in the executive branch within the first month of his presidency. After signing a lifetime
“foreign-lobbying ban for members of his administration,” Trump implemented the same five-year ban as Clinton (Miller, 2017). Yet, some are skeptical about Trump’s ability to prevent lobbyists from joining his administration. Trump hired many “industry lobbyists for both his transition and administration staff” (Miller, 2017). Nevertheless, the amount of regulation and accountability is ultimately exciting for those who believe the lobbying industry still requires more disclosure and registration. According to Fang (2014), however, over-regulation of disclosure and registration may just be one reason why the problem has not been solved. When Obama signed his executive order preventing registered lobbyists from entering his administration, he “only made the problem worse” (Fang, 2014). Many lobbyists deregistered, removing themselves from the lobbying disclosure and registration database (Fang, 2014, p. 18). Though research on Trump’s lobbying decisions does not exist, Trump’s executive order may have the potential to affect the lobbying industry in ways comparable to the Obama administration.

Additional Loopholes and Tactics

Exercised loopholes can often exist—regardless of plentiful legislation—due to improper enforcement, as is the case with the “Daschle loophole” (Fang, 2014). Additionally, a look into coalition lobbying tactics exemplifies the industry’s effectiveness at influencing policy.

Daschle Loophole

Former Democratic senator for South Dakota, Tom Daschle, is infamous for more than just his entertaining campaign advertisements. The senator has refused to register as a lobbyist since 2004 after losing his seat and joining a law firm as a “policy advisor” (Fang, 2014). As of 2014, Daschle was working for the firm DLA Piper, and claiming he did not need to register because he did not spend at least 20% of his time during a three-month period working for a lobbying contact. This is not the first, nor will it likely be the last, time that a lobbyist uses the 20% threshold as a reason to not register. Despite the fact that it is illegal and punishable by up to five years in prison, other senators and public officials have used the Daschle loophole to escape disclosure requirements. Some of these individuals and firms include Senator George Mitchell, former Senate aide Charlie Scheeler, the McChrystal Group, and the Law Media Group (Fang, 2014). Few remedies for this loophole exist outside of a 20% threshold replacement.

Coalition Lobbying

A frequently exercised lobbying tactic used by businesses, known as coalition lobbying, is “any coordinated effort by interests to lobby government with the aim of advancing a shared advocacy agenda” (Nelson & Yackee, 2012, p. 339). This routine strategy is often exhausted to influence public policy, but especially policy aimed at rulemaking. Therefore, the businesses that participate in coalition efforts are those that could benefit from deregulation and potential reforms. For example, businesses mostly lobby “against environmental regulations . . . healthcare reform legislation, and unions” (Nelson & Yackee, 2012, p. 351). Coalition lobbying is not always effective, but under the right conditions, it has the ability to be incredibly persuasive. Kevin Hula (1999), associate professor at the Loyola University of Maryland, found that 80% of interest groups believe that coalition lobbying influences public policy. Research conducted by
David Nelson and Susan Webb Yackee at the University of Wisconsin at Madison also found that consensus among “coalition participants” does affect government policy (2012). Their research also leads them to note that more dated literature on the topic insinuates that coalition lobbying is not particularly effective. Perhaps this dated literature is one reason why legislation has yet to properly regulate this lobbying tactic. In the status quo, HLOGA (2007) requires disclosure of organizations that supply more than $5,000 for lobbying endeavors coordinated by coalitions. However, all remaining registration and disclosure provisions are not applied any differently to coalitions, nor are organizations required to disclose coalition attempts and practices.

The Daschle loophole and coalition lobbying are inevitable methods used to dissuade legislative lobbying reform. Proposing more regulation may only push these lobbyists underground, resulting in a collapsed system where lobbyists could potentially form together and deregister by the masses (Fang, 2014). In fact, lobbyists are already deregistering at a significant rate. “In 2013, the number of registered lobbyists dipped to 12,281, the lowest number on file since 2002” (Fang, 2014, p. 14).

Conclusions and Recommendations

Despite registration and disclosure policies, the lobbying industry has proven resilient and symbolic of corporate representation for decades. Through means of legislative and executive regulation, lobbying activity is monitored in ways that were unseen before the 1938 implementation of FARA. However, much needs to be done in order to properly account for the gaping loopholes found within FARA (1938) and LDA (1995). A 2015 GAO report detailing registration and disclosure compliance demonstrates issues that arise with the registration and disclosure processes, regardless of a comprehensive HLOGA (2007). Furthermore, research conducted on executive orders that regulate lobbyists within the executive branch show the impact that the Clinton, Bush, Obama, and Trump administrations have had on the lobbying industry thus far. Recommendations to close the Daschle loophole cannot extend beyond a need to enforce current laws, but calling for more disclosure for coalition efforts can be remedied with amendments to HLOGA (2007).

Numerous solutions to close FARA (1938) loopholes exist. First, by removing the “private” or “commercial trade” exemption, corporations owned by foreign governments would be required to register as lobbyists. Second, technical amendments to the “attorneys’ exemption” would clean up the ambiguous phrasing that leaves room for lawyers to negotiate government contracts. Third, FARA (1938) should be amended to include a provision requiring that anyone who falls under its exemptions should notify the FARA Registration Unit. Additionally, applying Senator Heinz’s recommendation to increase the supervisory power of the DOJ at the FARA Registration Unit may improve disciplinary actions for those who repeatedly fail to register. Lastly, recovering Senator McCaskill and Senator Schumer’s Closing the Foreign Lobbying Loophole Act would remove the LDA (1995) exemption and order registered lobbyists to disclose any lobbying conducted outside of the United States.

The LDA’s (1995) 20% lobbying registration threshold has been abused by lobbyists since its birth. Based on the findings of this research, it is imperative to lower the 20% threshold. Plenty of research suggests that lowering this threshold would curb registration excuses and prevent offenders like Edelman and Senator Tom Daschle from not registering. More research is required to conclude a more appropriate percent threshold.
According to the 2015 GAO report “2014 Lobbying Disclosure: Observations on Lobbyists’ Compliance with Disclosure Requirements,” lobbyists have found it more difficult to comply with disclosure and registration requirements, as was analyzed between 2010 and 2014. The reason for this is still not conclusive, and therefore no solution can be provided at this time. Noncompliance with HLOGA (2007) and LDA (1995) provisions is usually due to misreported disclosures or registration refusals. However, as demonstrated by the Alan Muak & Alan Muak Associates case, the USAO uses appropriate means to fine or punish chronic offenders. No recommendations exist at this time to alter HLOGA (2007) or the compliance processes overseen by the USAO.

After issuing hefty lobbying bans for members of the executive branch, both President Clinton and President Obama invalidated parts of their executive orders to fit the needs of government employees. This exemplifies the way in which regulations placed on lobbying may not always suit the needs of the general public or the efficiency of an administration, despite the call for more regulation by many. The Bush administration’s lack of issuance does not make it easier to provide policy solutions, but President Trump’s recent regulations will demonstrate the impact of strict governance within the executive branch when it comes to curbing lobbying influence.

Many sources unveil Senator Daschle’s refusal to register as a lobbyist, but little evidence exists for his issued punishments. It has yet to be confirmed if Daschle paid fines or served time behind bars for his noncompliance. Regardless, those who purposely use the Daschle loophole to escape registration and disclosure of lobbying activity should seek settlements with the USAO and further their lobbying according to the law. Recommendations to discourage the frequency of coalition lobbying include decreasing the monetary threshold that dictates the need to disclose the use of coalition lobbying, which currently stands at $5,000. Additionally, educating policymakers on the influencing tactics they may face is one viable option for combatting maneuvers like coalition lobbying.

Finding the right balance between autonomy and regulation may always be problematic for the lobbying industry. However, collective research proves that this balance is more easily constructed with the application of the recommendations above, a little faith in the United States Congress and executive branch, and the same idealistic spirit as Mr. Smith.

References


Foreign Agents Registration Act, 75 Cong., G.P.O. (1938) (enacted).


Zeitoun, A., Browning, B., & Thykier, K. (Producers), and Madden, J. (Director). (2016). *Miss Sloane* [Motion picture]. United States: EuropaCorp.
DISCIPLINARY POWER IN AN AGE OF MASS SURVEILLANCE

By Jared Kelly*

*Jared Kelly is an undergraduate student majoring in political science and geography at the University of California–Berkeley.

In June 2013, thousands of classified documents regarding government surveillance were exposed to the general public. These surveillance programs were more far-reaching and widespread than the public had expected. Government agencies such as the Central Intelligence Agency (CIA), National Security Agency (NSA), and Federal Bureau of Investigation (FBI) had extensive public surveillance networks, where information was collected and shared to the member countries of an international body known as the Five Eyes (Walsh & Miller, 2016). Although these operations were designed to be covert, their details were leaked by former government contractor Edward Snowden through The Guardian. More information has come to the surface after the initial leaks, including the disclosure that companies such as Apple, Facebook, Google, Verizon, AT&T, and other major corporations willfully give up information to spy agencies or have intentionally created areas of vulnerability in their software or hardware for government agencies to exploit (DeVos, 2010; Angwin et al., 2015). It is now common knowledge that the government is monitoring you in the United States no matter who you are. Government agencies are finding more intimate ways to spy on us. This includes recent revelations about the CIA’s Operation Weeping Angel. In Weeping Angel, the CIA has developed tactics to hack and infect smart televisions in order to reprogram their microphones to record conversations. These conversations are then sent to remote CIA servers to evaluate the data; the microphones continue to collect data even when it appears the units are off (Mazzetti & Rosenberg, 2017; Weeping Angel, 2014). The CIA is not the only agency with the ability to spy on us within the home. In 2014, WikiLeaks cables revealed that the NSA has two plugins—GUMFISH and CAPTIVATEDAUDIENCE—that control cameras and microphones on computers (Richelson, 2015). The intrusion of what we once believed was private by the government may lead to fears of a future with telescreens—such as those from George Orwell’s 1984—and the State’s expansion of classical power. I will analyze the effects of the State’s expansion of mass surveillance into the home and the resulting effects of disciplinary power on the public under the scope of Wendy Brown’s work. I will also explore the further consequences that the disciplinary State has for women, using Brown’s juridical/legislative modality. To avoid confusion regarding the public/private divide, two uses of the word will be employed. In the usage of juridical public and juridical private, what is meant is the distinction between where the government can legislate (juridical public), and where it cannot (juridical private). By the social public and social private, what is meant are the areas that have been historically visible (social public) and invisible (social private), to the government and the public at large. The term mass surveillance is to mean actions taken by facets of the State to surveil the social private, with or without the subject’s knowledge. The term ideal is to mean actions and behaviors that agents determine to be good or noteworthy. The expansion in the State’s disciplinary power from mass surveillance will harm democracy and disproportionately affect women.
The Expansion of Government Range

The government’s ability to spy on us collectively comes from a masculine type of classical State power and has led to the fear of the State expanding its reach of classical power. According to sociologist Max Weber, the authority of the adult male springs from his capacity to physically dominate and defend his household from competing warrior leagues and patriarchs (Brown, 1992). This idea of masculine authority has been reproduced within the modern State, which derives its authority from protecting the domestic domain. In order to defend the domain, State agencies such as the NSA, CIA, FBI, and later the Department of Homeland Security have instituted widespread surveillance of the American public, largely beginning with Executive Order 12333. This order significantly broadened the surveillance capabilities and reach of the U.S. intelligence community (Eggert, 1983). As advances in technology have progressed, the collection of information has become easier for these agencies. State surveillance agencies have progressed to more intrusive means, such as gaining access to phone calls, internet history, smart phone activity, computers, cars, and more recently smart televisions (Greenwald & MacAskill, 2013). Mass surveillance is commonly done without the proper procedures and warrants, such as going through the Foreign Intelligence Surveillance Court (Eggert, 1983). The State engages in mass surveillance programs such as Weeping Angel because it believes these programs will make the United States a safer place, protecting the State from threats both domestic and international. Although there is no way to evaluate a counterfactual to this approach, it is likely the State has had success in guaranteeing a safer environment for the United States. This is because being monitored 24/7 would force us to alter our behavior out of fear of repercussions, such as formal sanctions. The fear of punishment by the State leads to less crime and dissent. However, in exchange for the public’s added security, a tradeoff occurs with freedoms, as it is the nature of doing business with the masculine State (Brown, 1992). This leads to the fear that the government will create statues based on what they see in the home and enforce them using the force, coercion, and intimidation of classical power to achieve their means. Despite the fact that the State claims a legitimate monopoly on force, this expansion of classical power is not likely to manifest itself because of prior protections that have been established.

Protections Against Classical Power Expansion

Protections currently in place on the juridical private prevent the government from exercising power in this realm. Individuals may fear that the State’s growing observance of the social private makes it is easier for the government to justify and pass invasive legislation broadening classical power. Yet, this fear is not likely to materialize into a legitimate threat. This is because of a precedent that has been established by multiple Supreme Court cases which upholds an implied right to privacy under the Fourth Amendment. This can be seen in the case of Lawrence v. Texas (2003). In this case, Houston police arrested John Geddes Lawrence and Tyron Garner for violating the Texas anti-sodomy statue while responding to a weapons disturbance call. The courts had determined that the law under which Lawrence and Garner were arrested violated the privacy and liberty of consenting adults engaging in private intimate conduct under the 14th Amendment. The Court agreed with the defendants’ claims of privacy violation under the Fourth Amendment. It doesn’t matter what you can see; privacy is not about visibility, rather, privacy is about autonomy. Ultimately, the Court ruling held that privacy in the home was important; this has been held in other cases, including Griswold v. Connecticut (1965).
and *Mapp v. Ohio* (1961). Because sets of protections are in place that prevent the juridical public from infringing on the juridical private, the government won't be able to regulate the population using classical power the way it does in Orwell’s *1984*, even if they can see everything. The government can have perfect visibility into the social private sphere and still respect an individual’s autonomy despite the fact that they do not agree with the individual’s actions. The government has the capability to watch us most of the time (if not all the time), but it still does not have the ability to pass preemptive legislation and outlaw certain practices in the home based on its surveillance. Though it is unlikely the government will be able to extend the juridical public into the juridical private, the knowledge that you’re being watched by the government in the social private leads a more insidious mechanism to take place.

**Modern Panopticism**

The government’s asymmetrical spying causes the public to willfully give up freedoms and self-policing. Some information concerning Weeping Angel and other covert government programs that spy on the public has been disseminated through major news networks and is now widely accessible to the general public. The information on State surveillance programs is largely asymmetrical, as the public does not know what methods the State is using to spy on its citizens unless the information is leaked by news networks or WikiLeaks. While the State's surveillance programs were intended to be covert, the exposing of the programs has created benefits for the State. These benefits include a population that does not know when it’s being watched by the State, what device the State may be using to spy on them at a specified time, or what agency is spying on them. The knowledge that the government is potentially spying on the social private at any given moment is conceptually similar to Jeremey Bentham’s “panopticon.”

The panopticon, as originally envisioned, is a circular prison where inmates can be observed by a single watchman in a central tower; however, none of the inmates have the ability to see the watchman. The watchman is unable to observe all the inmates at once; however, the fact that the inmates do not know if they are being watched forces them to act as if they were being watched all the time. In this scenario, disciplinary power is an effective tool used to compel the inmates to monitor and control their behavior (Bentham, 1791). A similar phenomenon occurs when individuals within the private sphere do not know if the government is watching them at a given moment. The fact that the government may be watching the public causes individuals to alter their behavior and willfully surrender their freedoms.

Not knowing if you are being watched expands the State’s disciplinary power, causing us to standardize ourselves and succumb to Foucault’s panopticism. In the case of mass surveillance, it does not matter that the government does not have the ability to break through the juridical public and impose laws on the juridical private. This is because the public’s knowledge that the government can be watching us at any time will cause us to outlaw practices ourselves that the government may otherwise restrict. The juridical relationship between the public and private dictates that what happens in an individual’s home should not be subject to the law because of the standards set forth by the social sense of what is private; in turn, the home remains invisible to the law. However, despite the fact that the home remains private in the legal sense, it is no longer private in the social sense, as your actions are now under the State's microscope. The law becomes irrelevant, but the State’s examination of the socially private sphere causes us to alter our behavior, resulting in the State not needing to exercise any classical power. Disciplinary power is a formidable force in altering behavior, given the lack of formal
repercussions such as punishment. With disciplinary power, the public alters its behavior for reasons such as avoiding shame that would result from the government seeing us participating in a certain action, or preventing future discomfort if information is accidentally released (Norris & McCahill, 2005). Being watched leads us to alter our behavior to align with what we believe the observers think is “ideal,” resulting in such behaviors becoming prevalent and eventually becoming the default normative modes of behavior. The standardization of the populace's behavior is based on our own shame, social mores, normative values, volition, and our idealizations of what people should be. This standardization means that individuals won’t undertake actions they may typically engage in within the confines of the social private. This includes forgoing nudity, pornography, casual sex, consumption of illicit narcotics, possession of illegal firearms, abstaining from arguments, and ultimately refraining from most things that make us human in the social private because of the belief that the government may be watching us. According to Brown (1992), the State is multifaceted, where different institutions represent different forms of power and oppression. Surveillance is asymmetrical, as we do not know who is spying on us, when they are spying on us, and from what device they are spying on us. Multiple institutions are spying on the American public at a given time, and there is the potential for the number of institutions who spy on the public to expand. This results in a greater degree of conduct standardization on the part of the public, as it not only has to conform to what one organization believes is ideal, but also conform to what multiple organizations believe are ideal. So, the public will attempt to consistently alter its behavior in the private sphere to conform to what it believes each of these agencies find to be ideal, even if the ideals are contradictory. Once this occurs, we begin to fall further into the trap of Foucault’s panopticism, where he states that

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection. (1977, pp. 202–203)

As stated by Foucault, the knowledge that we are being watched forces us to standardize our behavior and subjugate ourselves. Because of the multidimensionality of the State’s surveillance apparatuses, we standardize ourselves into further monolithic agents who uphold what the State believes is ideal. Once we are reduced to this form, we live up to what the masculine surveillance apparatuses of the State wants, rather than living up to our own values and the values of a liberal free society. The State’s expanded disciplinary power means the police or the legislature does not have to do anything, as we will perform all the work of our own subordination. In our willful subordination, we will standardize ourselves by surrendering our unique ways of life.

The exchange of our unique way of living for greater State disciplinary power harms democratic engagement. With the State surveilling us, we are reduced from humans with rich lives into data to be quantified so that government agencies can create standards of what the ideal life should look like in the private sphere. The State indexes our actions and determines what qualities and characteristics are good and ideal. Any way that deviates from this ideal is bad. Individuals who do not meet the ideal—due to a lack of knowledge, an intentional choice to dissent from the ideal, or an inability to live up to the ideal—are all symptomatic in different ways of being bad and therefore deviant and inferior (Lyon & Morris, 2016). This is problematic, as individuals limit their agency and as a result are less likely and able to choose an alternative lifestyle; this runs contrary to the tenets of a free society. We therefore conform to the standards
the government has set for us in order to avoid shame or embarrassment, and to appear as the ideal private person so that we are not considered deviant or inferior by the State. Being reduced to the monolithic private person removes agency from us and the uniqueness of what makes us human. As Brown (1995) explains, "the autonomous subject of liberalism requires a large population of non-autonomous subjects, a population that generates, tends, and avows the bonds, relations, dependencies, and connections that sustain and nourish human life” (p. 157). The State achieves its goal of attaining a smoothly running liberal system when we are reduced to monolithic agents. This occurs as the public is less likely to have conflicting opinions with the State, less likely to protest, and are less likely to dissent. This lack of confrontation results in a smoother democratic process which furthers the aims of the State. However, being enticed to act in predictable ways to further our standardization leads the public sphere to eventually forgo principles 2a-3 of the ideal speech situation as proposed by Jürgen Habermas (1990). Because of this, the public is unwittingly coerced and less able to engage in rational discourse, as they are unable to express their desires, question assertions, and introduce new assertions. This is because it impedes the smooth functioning of the democratic process and is not considered ideal by the State. This harms discourse that is fundamental to the principles of a free State. Brown (1992) does not want a society of equally unfree individuals; instead, she wants the converse, where we can collectively exercise control over our lives in accordance with the rich principles of freedom. A democracy ceases to be truly democratic when individuals become standardized and lose the ability to engage in rational discourse.

Mass surveillance and the corresponding disciplinary power exercised by the State are crafted to be gender neutral, as the nature of discipline harms all individuals regardless of their gender identity. The negative externalities of the State’s disciplinary expansion are felt by all genders. This means the likelihood to commit crimes or dissent against the State’s ideals is reduced for everyone. This occurs because of a fear of what the State will think about the individual’s person and character if they were to commit such acts. Despite the crafting of mass surveillance to be gender neutral, it is in fact gendered and disproportionately affects women more than men.

**The Disproportionate Impacts of Disciplinary Power on a Gender-Neutral State**

Disciplinary power’s effects extend beyond gender neutrality, having a greater effect on the oppression of women. The State appears to have gender-neutral principles in place; however, its roots are in liberalism, which has historically been a gendered system that oppresses women’s attempts to engage with the State (Brown, 1992). Many disciplinary measures will inhibit women more than they will inhibit men. The government’s nonconsensual intrusion in the social private disproportionately affects women. This occurs because the household has historically been the domain of social, home, and work life for women (Brown, 1992). Because the household and the social private have historically been the primary area of engagement for women, it follows that the social intrusion would primarily affect women despite the gender-neutral connotations of mass surveillance. Women are increasingly oppressed because they are locked in a cycle of nonengagement with the State. Since women are primarily affected by mass surveillance, it follows that women are more likely to be compelled to act in ways the government finds to be ideal. The State is likely to find the historic tenets of liberalism to be ideal, where women are not present in the public sphere. For women to combat the presence of mass surveillance, they must engage in the public sphere. However, when women do engage,
they face unique challenges as outlined by Brown’s juridical/legislative modality. In the liberal system, women are unable to transcend their gender label and become citizens who engage with the State to an equal extent as their male counterparts. Women must participate in the sphere according to standards of masculinity because, historically, citizens who have participated in the polity have been male. Men have historically had the luxury and ability to leave the home freely and collectively govern with other men without the burden of home life. Only men can transcend gender confines to engage as citizens, while women have been unable to do so (Brown, 1992). In the liberal system, the law is not supposed to distinguish gender, because gender is a prima facie issue that belongs in the social public/private sphere (Held, 1991). When women attempt to engage, they are disciplined and conditioned to act like males. During their engagement as males, they are often judged to be ineffective or inefficient, making them bad political actors. When women participate as males in the public sphere, they are judged to be bad women. This goes against the concept of gender neutrality, as this burden is not extended to men (Connell, 1990; Okin, 1998). The burden on women causes many women to forgo engagement with the public sphere. This is because the disciplinary consequences of engagement make you a bad woman. When you fear you may be labeled a bad woman, you do not challenge your oppression, which allows for mass surveillance to continue to further the cycle of the liberal State’s oppression of women. Women are punished twice, by both the gender-neutral State and gendered aspects of the gender-neutral State.

The subordination of women in the liberal State is bolstered by the strengthening of the juridical public/private divide and the institution of mass surveillance. The government’s inability to exercise classical power in the juridical private despite mass surveillance strengthens the divide between the juridical public and private. This occurs as egalitarian laws designed to help women are unable to be enacted within the juridical private because of the divide (Lyon & Morris, 2016). The reach of the State into the social private reinforces behavior that the citizenry believes the State considers ideal. The behavior serves as the historical foundations of liberalism, where women do not engage with the public sphere and do not dissent against surveillance. If a woman wants to challenge the intrusion of mass surveillance into the private sphere, she faces a quandary of poor choices. She can either choose to allow mass surveillance to continue uninterrupted and be an ideal woman, or choose to challenge the authority and be a bad/inferior woman because she is leaving the family sphere and engaging in politics. The liberal State’s version of the “ideal” woman does not choose to involve herself in politics or challenge mass surveillance. Women are stuck in a perpetual, self-defeating cycle of political nonengagement. They are conditioned to stay in the social private by the social public, as well as by the State’s expectations of what is ideal for women. The expansion of disciplinary power further entrenches the juridical public/private divide and strengthens the cycle of women’s nonengagement. Women’s self-policing from disciplinary power reinforces masculine social norms which oppress them. The masculine norms reinforce the belief among the juridical and social public that women are a group with a diminished capacity for acting like liberal subjects in the public sphere. This system means that women are separate from the polity, and their natural sphere resides with the family, according to the juridical/legislative modality (Brown, 1992). This reinforces the public/private divide and allows the expansion of the disciplinary power of the State to continue unchecked. The increase in the State’s disciplinary power solidifies the divide between the juridical public and private, harming women by condemning them to a cycle of oppression. Any way they choose to engage or disengage through formal or informal means to challenge mass surveillance is always a losing proposition for women.
Conclusion

Mass surveillance will not likely result in the increase of the State’s classical power; however, an increase in disciplinary power will impact society by subduing socially private behavior. Mass surveillance in the social private will compel individuals to police themselves, standardize themselves, and reduce their existence to what the State considers to be ideal. Since the State is multifaceted with contradictory opinions, and surveillance is asymmetrical, the public has a hard time determining what is ideal, and attempts to be ideal in every way possible to the State. When the citizenry is reduced to this level, they are less likely to engage in meaningful discourse, and the diversity of ideas and ideals in the liberal democracy is diminished. When the citizenry voluntarily chooses to disengage from lawful activities which the State may find unfavorable, the public sphere is muted, and in turn democracy suffers. This oppression further harms women by strengthening the juridical public/private divide and locking them into a cycle of oppression. Ultimately, mass surveillance is a losing proposition for women and the general public in maintaining a thriving democracy.

References


Bentham, J. (1791). Panopticon: Or the inspection-house. Containing the idea of a new principle of construction applicable to any sort of establishment, in which persons of any description are to be kept under inspection, etc. Dublin, Ireland: Thomas Byrne, M.DCC.XCI.


It is well known that smoking cigarettes and using other tobacco products is not good for your health. In fact, the Centers for Disease Control reports that smoking kills over 480,000 people a year and is the biggest preventable cause of death in the United States (2017). The dangers of smoking are well documented, and most people are taught from a young age that smoking cigarettes is harmful. Most people are aware that tobacco companies try to lure them into buying their products as well. However, most people, regardless of age, might not know about tobacco lobbyists and their efforts to preserve the tobacco companies which create products that are bad for public health and a danger to children.

Tobacco lobbyists are one of the biggest problems facing American health, and they remain relatively unknown. Tobacco lobbyists do not make that much documented money from the lobbying itself, even though the tobacco companies benefit heavily from them. Lobbyists are able to make their case for limited restrictions on tobacco companies by emphasizing the personal freedoms of smokers. The idea that smokers understand the dangers of—and are the only ones hurt by—their own tobacco use is used by tobacco lobbyists in order to help tobacco companies. Tobacco companies also use third-party sources to receive important information about tobacco usage.

The selling, distribution, and use of tobacco products are far bigger problems than they are made out to be. While there has been a lot of progress with the restrictions and regulations of tobacco over the past 10 years, more still needs to be done. Ultimately, the United States should push forward towards a smoke-free generation like other countries have done already. Even though kids are smoking cigarettes less and less as time goes on, they are still finding different ways to consume tobacco, such as by using vapes and smoking cigars. Therefore, tobacco use among young people is still prevalent, and the best way to keep our kids safe and to keep our country healthy is to create a generation of non-smokers.

**Background on Lobbying**

For years, both economists and tobacco lobbyists have helped to keep tobacco companies on their feet. In a 2015 article written by Anna Song and Stanton Glantz, they note that “US Presidents since Ronald Reagan have required regulatory agencies to conduct cost-benefit analyses of proposed regulations.” Economists, however, have been providing too many costs and not enough benefits when it comes to regulating tobacco products. The argument for the costs of regulating tobacco is that the consumer is missing out on the “utility” of smoking, from which they derive pleasure and enjoyment. However, most smokers start smoking before the age of 18, which is well before their brain fully develops. Therefore, the utility they receive from smoking the cigarette no longer exists as time goes on; smoking just becomes habitual, and the pleasure from smoking decreases.

* Nicholas Edward Griffin is an undergraduate student at Pennsylvania State University, where he studies political science.
These cost-benefit analyses can be harmful towards the movement to enact more tobacco regulations. Over the years, the cost-benefit analyses regarding warning label packaging has been flawed, favoring limited regulation. Song and Glantz note that “the FDA should not be discounting the benefits of reduced smoking by the cost of lost pleasure (consumer surplus)” (2015). When the idea of “consumer surplus” of using tobacco products comes into play, it immediately undermines the benefits of tobacco regulation and overshadows the health benefits associated with not using tobacco products. These analyses provided by economists are used by tobacco companies and lobbyists to show why there should be little to no regulation of their products.

Tobacco lobbyists are the biggest problem facing tobacco regulation, with tobacco lobbying groups located all around the world working with tobacco companies. Ingrid Torjesen writes that “Forest, the pro-smoking group supported by the tobacco industry is launching a consumer rights campaign called Action on Consumer Choice” (2014). This group, located in the United Kingdom, stresses the importance of the consumer and his or her decision making. This group even reached out to the fast food industry and companies that distribute alcohol to join their movement. This is because of the increased regulation on both fast food and alcohol, which Forest’s director, Simon Clark, feels are under the same scrutiny as tobacco companies.

The Action on Consumer Choice was started after similar actions were taken in the United States. Torjesen writes again that Action on Consumer Choice “has been modelled on the Center for Consumer Freedom, a powerful US Organization funded by tobacco firms” (2014). The director of the Center for Consumer Freedom is a man by the name of Richard Berman, a well-known tobacco lobbyist. Berman’s campaign slogan, “Promoting individual responsibility and defending the freedom to choose” (Torjesen, 2014), encapsulates two key ideas that tobacco lobbyists stand behind. Tobacco lobbyists push the idea that it is the consumer’s personal choice to use tobacco products, and that the health risks associated with smoking should not be the tobacco companies’ fault. This, of course, assumes that the consumer knows the dangers of smoking and is consciously making the decision themselves.

Richard Berman is a tobacco lobbyist known for his strong lobbying tactics, and has even gone on to be called “Dr. Evil.” One former tobacco lobbyist who also worked for the Maryland legislature, Mr. Victor L. Crawford, spoke about his regrets regarding his time as a tobacco lobbyist. Mr. Crawford once said that “We could never win at the local level. The reason is, all the health advocates . . . they’re all local activists who run the little political organizations” (Skolnick, 1995). This is why tobacco lobbyists attack problems at the state level, because politicians can be more easily persuaded at the state level. Local politicians and activists feel very passionately about tobacco regulation, therefore making it more difficult for tobacco lobbyists to make their voices heard at the local level. Interestingly enough, Victor L. Crawford only made $20,000 in documented income from his tobacco lobbying after six years of work. He was a chronic smoker until he was diagnosed with cancer, which motivated him to speak up about tobacco lobbying.

In the 1990s, tobacco lobbyists used a multitude of different strategies to propagate their ideas. The most notable strategy was to donate money to a politician’s campaign. It has been shown that “contributions to legislators’ re-election campaigns from the tobacco industry are statistically related to more pro-tobacco behaviour” (Givel & Glantz, 2001). This is why big tobacco companies like Philip Morris spend a lot of money on the political campaigns of politicians who support them. Tobacco lobbyists would even take politicians out to sporting events or hunting trips in the hopes of persuading them to continue to back tobacco. While
tobacco companies and lobbyists still go out of their way to do these things for politicians today, these donations and outings were especially prominent in the 1990s and are now illegal under the Honest Leadership and Open Government Act of 2007.

**Complicated Tobacco-Related Issues**

One of the biggest problems regarding tobacco legislation and facing tobacco companies is that there are a lot of large, impactful issues (tobacco marketing, the effects of secondhand smoke, etc.) mixed with smaller, more complex issues. For example, cigarette butts and other tobacco product waste are a bigger problem than most would expect. Cigarette butts are the “most common waste elements picked up worldwide each year during environmental cleanups” (Curtis, Novotny, Lee, Freiberg, & McLaughlin, 2017). This same journal article noted that in 2012, “almost 6.3 trillion cigarettes were consumed globally” (Curtis et al., 2017). While there are public ashtrays, a lot of cigarette butts are just thrown on the ground, which explains why cigarettes are a common form of litter. Surely, enforcing stronger littering laws, as well as instituting hefty fines for throwing cigarette butts on the ground, would address this issue. Other environmental effects of the use of tobacco products include harmful greenhouse gases that are released during tobacco manufacturing, as well as the toxins that are released into the air from secondhand smoke (Curtis et al., 2017).

One issue that makes further tobacco regulation more difficult is how the Food and Drug Administration (FDA) should deal with those who distribute cigars. Those in the cigar industry note that those who smoke premium cigars are usually older men who are not addicted to the cigars, but rather smoke them on special occasions. While this is true, there are also less expensive cigars that are not regulated by the FDA that would be more accessible to young smokers. These less expensive cigars are appealing to young people because of their fruity flavors and colorful packaging. Interestingly enough, these types of cigars are popular amongst Black and Hispanic men (Printz, 2015). This could possibly show that tobacco companies do not only market their products towards children, but also to minorities. These types of cigars influence and increase youth smoking, yet premium cigar industries still fight back. “The premium cigar industry has been concerned that the FDA’s regulation of these inexpensive cigars used by youth could affect premium cigars” (Smith, 2014). While this is a concern for premium cigar companies, their reasoning is flawed because premium cigar smokers typically only smoke on special occasions, and there are fewer regular cigar smokers than regular cigarette smokers. Furthermore, most would agree that the general health of young people in the United States is more important than the premium cigar industry benefitting only slightly from the increased use of flavored, inexpensive cigars.

Another issue with tobacco legislation is that tobacco companies are still businesses, and feel that they should be treated like any other business. Most tobacco companies feel that they are being treated unfairly due to all of the restrictions and regulations forced upon them and their products, whereas other businesses do not face the same scrutiny. It is true that the “public has a justifiably low opinion of the tobacco industry in the light of its history of fraud, concealing the harmful effects of its products and deceptive marketing” (Flanigan, 2016). Still, tobacco companies feel that it is unfair to be treated differently from other companies just because of the public’s negative view of them. While it is true that the public generally views tobacco companies negatively, tobacco companies should be held to a different standard from other companies. This is because the products they are selling are known to contain toxins and
poisons, and the very use of tobacco products affects the general health of everyone, not just the tobacco user. When it comes down to it, tobacco companies should be held to a different standard not just because of the public’s negative view of them, but rather because of the danger of their products and their ineptness in regards to letting the public know the potential dangers of tobacco products.

**Legislation in the United States**

Enacting tobacco regulation measures has been a long and arduous process within the United States for the past couple of decades. Although tobacco regulation is a heavily political issue, it is not necessarily an issue between political parties. Even though it is very political, tobacco regulation is also a personal issue for a lot of people, regardless of their political affiliation. Generally, however, most pro-tobacco politicians are conservative (Morley, 2015). Before the 21st century, there was a stronger positive correlation between pro-tobacco views and conservatism, but the times have changed as the general public’s knowledge of the negative effects of smoking has grown.

Pro-tobacco legislation generally appeals to conservatives because of their views on “freedom from personal restrictions and excessive taxation” (Morley, 2015). The argument is that no one should be told what to do with their health by the government, and that tobacco legislation infringes on the personal freedoms of smokers. Some people feel that when any kind of regulation is placed on tobacco products, it restricts them from making a conscious choice. This is, of course, not always the case, because if legislation were to be passed on warning labels on tobacco products, that would not stop anyone from making the decision to smoke or not. A warning label only educates and warns potential consumers of the negative effects of smoking. With this information, consumers can then make a conscious decision of their own as to whether they want to use that product or not. Their personal freedoms remain intact even with this kind of legislation.

Anti-tobacco legislation in the United States took a big blow in the 1990s after legislation was not passed because of restrictions from the Federal Food, Drug, and Cosmetic Act (FFDCA) of 1938. The FDA was trying to enact rules that would reduce the number of underage smokers in the United States. These laws aimed to accomplish three major provisions: limiting tobacco sales to minors, making warning labels more prominent on the packaging of tobacco products, and reducing the amount of advertising of tobacco products by essentially banning tobacco products (Redhead & Burrows, 2009). The idea was that after these provisions were made, the number of minors who used tobacco products would sharply decrease while adult tobacco use would also decrease in the near future. These provisions were struck down by the FFDCA (1938) for a number of reasons. The FFDCA (1938) “concluded that banning tobacco products was not a realistic option because the health care system would be overwhelmed by more than 40 million nicotine addicts seeking assistance for withdrawal symptoms” (Redhead & Burrows, 2009). In addition, the FFDCA (1938) believed that there would soon be a large black market for tobacco products, which would be incredibly dangerous.

Afterwards, the FDA lost in the Supreme Court case *FDA v. Brown & Williamson Tobacco Corporation* (2000), when the Supreme Court ruled that the FDA could not control and regulate tobacco products, given the fact that they were not “drug-delivery devices.” After this Supreme Court decision, it was “clear that Congress would have to enact legislation giving FDA explicit statutory authority over tobacco products in order for the agency to assert jurisdiction.”
At this point it also became clear that a total smoking ban in general was not the right way to go about regulating tobacco (Redhead & Burrows, 2009). This would soon influence the Family Smoking Prevention and Tobacco Control Act of 2009. However, the 1990s ended on a high note for those who favored tobacco regulation with the 1997 Proposed National Tobacco Settlement. This settlement had the tobacco industry agree to “pay $368.5 billion over the first 25 years, and $15 billion a year afterwards” (Redhead & Burrows, 2009) to individual states as a way to repay them for medical costs associated with smoking. While this was obviously a positive settlement, the ultimate goal of regulating tobacco products had not yet been fulfilled.

It was not until 2009, under President Barack Obama, an ex-smoker himself, that transformative tobacco legislation was passed in the United States. The Family Prevention and Smoking Act of 2009 was passed under the 111th Congress of the United States after first being introduced in the 108th Congress of the United States. The most important provisions of the Family Prevention and Smoking Act of 2009 were that it would “place new restrictions on youth access to tobacco products, end all remaining brand-name sponsorship of sporting and other entertainment events, and limit tobacco advertising in publications with a significant youth readership to black-and-white text only” (Redhead & Burrows, 2009). These, of course, were all great steps forward in tobacco legislation, specifically the ones having to do with advertising.

Limiting the advertising of tobacco products is one of the best measures that could have been taken for those who approve of tobacco legislation. While some may argue that tobacco companies are still selling a product just like other companies and should be allowed to advertise as freely as they would like, there are restrictions that need to be put in place. Smoking is still illegal for anyone under the age of 18, and advertising towards children is exactly what tobacco companies do. Tobacco companies know that most people start smoking when they are young, before the age of 18, and they used to advertise to children by using colorful marketing which included the use of different popular cartoon characters. The bright colors and appealing advertising that tobacco companies used were obviously directed towards children, whose brains are not fully developed and who are the most susceptible to peer pressure. Therefore, putting these kinds of advertising restrictions on tobacco products will prevent underage kids from smoking. This will, in turn, prevent people from smoking as they grow older.

The FDA at this point had “the authority to develop regulations restricting the sale, distribution, advertising, and promotion of tobacco products” (Redhead & Burrows, 2009). This, of course, gave the FDA incredible power, which some tobacco companies did not appreciate. However, Philip Morris, the largest tobacco company in the world, offered their support for the FDA during the time the Family Prevention and Smoking Act of 2009 was passed, and even before then. In fact, in the year 2001, only five years after Philip Morris had denounced the idea of the FDA regulating cigarettes, the company “issued a white paper in support of legislation giving FDA the authority to regulate cigarettes” (Redhead & Burrows, 2009). This came as a shock to other tobacco companies, which did not support FDA regulations.

Now that the FDA had support from the largest tobacco company in the world, it became easier for the FDA to regulate tobacco products, tobacco distribution, and the marketing surrounding tobacco products. Other tobacco companies were not pleased with the legislation that had been passed concerning tobacco regulation, mainly because it would hurt their business. Philip Morris made their brand more appealing by complying with public concerns and the FDA, even though their business would obviously not benefit from increased tobacco regulation. Philip Morris could get away with doing this because of their size, power, and outreach. Other tobacco companies like R.J. Reynolds and Lorillard, however, did not support the legislation, citing that
they wanted the FDA to advocate for more “research” on the effects of tobacco products before making any decisions (Redhead & Burrows, 2009).

These companies mainly did not support the new legislation because it would establish Philip Morris as the powerhouse of the tobacco industry (partly because their image had grown more favorable after complying with the FDA), while other companies would be crushed. Philip Morris would supposedly lose their reputation as “bad guys” by supporting further tobacco regulation from the FDA (McDaniel & Malone, 2005). Some may feel that those who run Philip Morris are “bad guys” because of their history of marketing towards young children and their deceitful ways. Philip Morris is deceitful, in part, because of its use of third-party sources that it works with to gain access to important information, as noted previously. Tobacco companies like Philip Morris are in league with lobbyists and other third-party sources to gain access to confidential information (Connor, 2011).

Other Countries’ Progress

Tobacco use is not purely an American staple; rather, it is very popular worldwide. Smoking cigarettes is very popular within most European countries and China. Recently, many European countries have taken measures to prohibit tobacco use in public, and some other countries have even gone further with their tobacco regulation. In fact, in 2005, “Italy became the first large European country implementing a strict and comprehensive smoke-free legislation” (Gallus et al., 2007). After the implementation of this ban of smoking at bars or restaurants, more Italians claimed that they went out to eat at restaurants or cafes more frequently (Gallus et al., 2007). Additionally, in a 2008 survey conducted in Portugal, “Seventy seven percent of regular smokers smoked in restaurants” (Neves, Marques, Bessa-Monteiro, Barros, & Lopes, 2008).

While legislation was being passed in Italy in 2005, similar legislation was being passed in Spain, looking out for the best interests of non-smokers who felt the effects of secondhand smoke. Legislators in Spain were specifically trying to reduce the number of people who had acute coronary syndrome (ACS). Legislators were soon pleased to find out that “In Barcelona, in the year after the 2005 Law came into force, hospital admissions for ACS fell by 11% in men and 9% in women” (Fernández de Bobadilla, Dalmau, & Galvé, 2014). This statistic in particular is far more important than a certain restaurant’s patronage. Most would agree that the general health and well-being of the population of a country is more important than the business that a restaurant may lose, and that is why so many countries have started to ban smoking in restaurants and public places.

More recently, other countries have taken strides in tobacco regulation when it comes to packaging. According to an article about standardized packaging, “The first country to introduce standardised packaging was Australia in December, 2012” (Laverty, Watt, Arnott, & Hopkinson, 2014). This rise in standardized packaging is crucial for young kids who might take up smoking. The larger the warning label, the less likely a young person will smoke for the first time. This transformation is not immediate, however, and legislators in Australia know that very well. They understand that “as with other tobacco control interventions [it will] have a long-term effect on youth uptake” (Laverty et al., 2014). Australia was the first country to be patient enough to implement the idea of standardized packaging that could potentially halt thousands of new teenage smokers from emerging, and hopefully result in the elimination of smoking completely.
Almost unbelievably, the most progressive of tobacco regulation reforms within the past couple of years have been in Russia. Owen Dyer wrote in the medical journal *BMJ* that “The Russian health ministry’s newly announced long term plan for tobacco control includes a measure to ban the purchase of tobacco for the entire generation now being born, even after they reach adulthood” (2017). Russia can do this without upsetting adults who currently smoke. This ban does not affect current smokers, and will not affect anyone born before 2014. This avoids a potential problem commonly facing smoking bans, and while the results will be slow, eventually there will be a generation of people in 2033 who will not legally be allowed to smoke cigarettes or buy tobacco products. Even further down the road in the 21st century, once there are no more Russians who were born before 2014, there will no longer be any tobacco sales. While this process is very long, it is easily the best way to go about regulating tobacco because ultimately the final result is a total halt to all tobacco sales, therefore influencing the overall health of any nation that wishes to foster a generation of non-smokers.

**Why the United States Should Start a Smoke-Free Generation**

It is certain that there have been measures taken in the United States so far to prevent young people from smoking. Some of these measures have worked already, including increasing excise taxes on cigarettes. Increasing taxes on cigarettes have been shown to discourage young smokers from paying for cigarettes at a rate three times that of older smokers, perhaps halting younger smokers from starting to smoke or continuing to smoke (Givel, 2006). These taxes are good for now, but they are not a long-term solution to the end of tobacco production. While these excise taxes are a good start, the ultimate goal should still be to create a generation of non-smokers.

What makes the issue of tobacco regulation even more bothersome to those who wish to see further legislation passed is that almost everyone feels that smoking is a problem. In a Portuguese study conducted in 2008, 98% of people thought that passive smoking was harmful (Neves et al., 2008). Nevertheless, in an American study conducted in 2015, only 41% of people surveyed knew that the FDA regulated tobacco products (Kaufman et al., 2015). The disparity between these numbers is alarming, and more people should know that the FDA regulates tobacco. From this, one of the biggest challenges regarding tobacco is clear: Many people know that the use of tobacco products is harmful, yet are uneducated concerning the topic or are uninterested in doing anything to stop it.

With increased funding going towards education in schools concerning the dangers of tobacco products, youth smoking will surely continue to drop. Because legislation has already been passed in the United States with heavier restrictions on tobacco products, we can use this as a stepping stone for more regulation. The process of completely eliminating tobacco from the daily lives of Americans will surely be long, but these first few steps are crucial to the success of later regulations. Once the United States implements tobacco legislation similar to Russia’s (which can realistically happen very soon) and fully halts the sale of tobacco products to people born past a certain year, the dangers of smoking and the numbers of smokers will reduce significantly. Eventually, after the implementation of this legislation, the general health of people in the United States will improve and we will no longer have to live with the dangers of smoking in our everyday lives.
References


Day habilitation programs have functioned as an alternative option to employment for adults with intellectual and developmental disabilities (IDD) who may not be able to be adequately supported in an employment setting, or who do not wish to work. Generally, the aim of these programs is “to build the community living skills of people with IDD by increasing their capacity to perform activities of daily living” (Friedman, 2016, p. 245). As a society, we dedicate a substantial and increasing amount of funding to day programs. In 2013, day habilitation programs were “the largest form of day service provided by HCBS (Home and Community-Based Service) waivers, comprising more than 80% of projected funding for day services” (Friedman, 2016, p. 245). Funding day habilitation programs comprised 18% of total HCBS IDD funding allocated in 2013 (Friedman, 2016, p. 245).

The literature on day habilitation programs indicates a variety of positive outcomes for adults with IDD. Studies in 2007, 2011, and 2013 indicated that participating in these programs “reduces boredom, under stimulation, and problem behaviors” and “increase[s] physical and psychological well-being” (Friedman, 2016, p. 244). Past research indicates that day programming is preferred by participants over home and institutional settings. Participants reported “increased choice and control over their daily activities” and “increased opportunities for community inclusion” when day programs were in community-based settings (Blick, Litz, Thornhill, & Goreczny, 2016, p. 362).

A relatively new subtype of day habilitation programs is community-based nonwork programs (CBNW). CBNW is a type of day programing for adults with IDD that “includes non-job-related supports focused on community involvement” (Sulewski, Butterworth, & Gilmore, 2008, p. 456). CBNW programs aim to connect people with disabilities to their communities and broaden their social horizons. While this program type is relatively new, it is steadily increasing. The number of people participating in CBNW programs grew from 44,000 to 114,000 between 1996 and 2004 (Sulewski et al., 2008, p. 459).

CBNW programs allow individuals who may not be able to participant in inclusive, supportive work environments to participate in community-based activities. Inclusive experiences, where individuals with IDD can interact with people without disabilities, increases their “sense of belonging” and, according to some studies, their “objective quality of life” (Blick et al., 2016, p. 359). Additionally, people in adult day programs with field trips into the community report “having more friends” and additionally have “more advanced language skills” than peers who spend less time in the community (Blick et al, 2016, p. 359).

While these programs have been “growing rapidly” (Friedman, 2016, p. 252), some argue that they are problematic because of the limited potential for community involvement and their relatively undefined requirements. Sulewski et al. (2006) report that “primary social interaction [in these programs] is likely to be with other individuals with disabilities and with staff” and that “opportunities to meet and interact with community members not involved in disability services

* Alice Felker is an undergraduate student at the University of Notre Dame, where she studies psychology and computational math and statistics.
are limited.” Programs themselves have reported difficulty “finding meaningful activities that foster community integration and relationships” (Sulewski et al., 2006, p. 457). The definition and regulation of CBNW programs are often vague. As per a 2008 survey, “when asked what requirements (minimum staff-to-individual ratio, maximum group size, minimum number of hours in the community or other) were in place for CBNW, over one-third of respondents to this question did not identify any specific requirements” (Sulewski et al., 2008, p. 459).

Finding meaningful and engaging activities is a challenge in day programming for adults with disabilities. In a 2001 study, 100-day programs were observed to determine the level of engagement of the participants. Researchers reported that “adults with severe disabilities were involved in purposeful activities during an average of 48% of the observation intervals” (Reid, Parsons, & Green, 2001, p. 464). In the purposeful activities observed in this study, 75% were determined to be age appropriate (Reid et al., 2001, p. 464).

Additionally, staffing seems to be a consistent issue for day habilitation programs of all types. Direct support professionals (DSPs) staff day habilitation programs, and their commitment and competence to participants is critical for successful programming. In the United States, DSPs have an estimated 52% turnover rate, leading to frequent vacancies and a lack of consistency in the quality of care. Higher vacancy rates have been shown to negatively impact participant and family satisfaction ratings (Hewitt & Larson, 2007, p. 182). While day habilitation programs, including the newest subtype of CBNW programs, have clear positive effects for adults with IDD who cannot participate in supported employment, the literature makes it clear that they struggle with challenges in staffing, providing meaningful activity, and creating opportunities for inclusive community building.

In this study, day program service providers in the Washington DC area were asked about the perceived strengths and weaknesses of their programs in order to identify how day programs are faring in this area. Additionally, scheduling, mission, and program design information was collected from each program. This study aims to provide a brief outline of the current attitudes of providers in order to give policymakers and government officials an insight into how programs can be supported best.

**Method**

**Participants**

Directors of day habilitation programs or community-based day programs in the Virginia, Maryland, and Washington DC programs participated in this study. The survey respondents are directors or staff members at 15 different day programs. Although this sample size is small, a recent national survey reported 30–40 consistent respondents (Sulewski et al., 2008), so 15 respondents for a regionally focused study is appropriate.

**Survey Design**

**Platform.**

The survey was designed using Qualtrics. It was anonymous, and no individuals or particular programs were tied to the responses given. The University of Notre Dame provided the Qualtrics subscription.
Questions.

The questions in the survey were designed to identify the key ideas, values, and daily schedules of day programs in the Washington DC, Maryland, and Virginia area. The survey consisted of 21 questions. The first 12 questions were Likert-type questions in which the participants responded to statements using the following response options: Strongly Agree, Agree, Disagree, or Strongly Disagree. The remaining questions consisted of write-in responses and multiple choice questions. Write-in questions were used to gain information about the greatest strengths and challenges the providers faced, the types of activities routinely scheduled at the program, the number of program participants, number of staff members, and average shift length. The multiple choice questions asked about the number of reportable incidents in the last four months and the challenges day programs face.

Procedure

The survey was distributed via an email to the DC and VA Provider Coalition for service providers for people with disabilities. Not all of the providers in the coalition provide day service support programs, but instructions in the email specifically asked for day program providers to fill out the survey. The survey took about 20 minutes to complete, depending on the length of responses provided for the open-response questions.

Results

Likert Responses

Interestingly, the most significant finding in the Likert response section of the survey related to government intervention. The following charts present the provider responses to the various questions.

Provider responses to the statement, “Our organization would benefit from more guidelines and established standards from the state and/or federal government,” were as follows:
Provider responses to the statement, “Our organization struggles to fill open positions,” were as follows:

Our organization struggles to fill open positions.

<table>
<thead>
<tr>
<th></th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>4</td>
<td>3</td>
<td>7</td>
<td>1</td>
</tr>
</tbody>
</table>

In response to the statement, “The activities we offer are age-appropriate,” providers responded as follows:

The activities we offer are age-appropriate.

<table>
<thead>
<tr>
<th></th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>9</td>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>
In response to the statement, “Input and evaluation by our participants are always sought after,” responses were as follows:

![Input and evaluation by our participants are always sought after.](image1)

Similarly, in response to the statement “We evaluate and, where appropriate, implement the input from our participants,” responses were as follows:

![We evaluate and, where appropriate, implement the input from our participants.](image2)
Day programs also indicated that they would be interested in some level of collaboration with other area providers. In response to the statements, “We would be interested in hearing activity and scheduling ideas from other programs,” and “We believe that other day programs could benefit from learning our practices, mission, and offered activities,” responses were as follows:

**We would be interested in hearing activity and scheduling ideas from other programs.**

![Bar chart](chart1.png)

**We believe that other day programs could benefit from learning our practices, mission, and offered activities.**

![Bar chart](chart2.png)
In response to the statement, “Our participants find the activities we offer to be engaging,” responses were as follows:

![Bar chart showing responses to the statement about engaging activities.]

In response to the statement, “Staff members can identify each individual by name,” responses were as follows:

![Bar chart showing responses to the statement about staff identification.]

---

The Dialectics ▲ Vol. X  
www.abington.psu.edu/dialectics
Finally, in response to the statement, “We take pride in tailoring activities to meet our participants’ needs and match their interests,” responses were as follows:

Demographic Questions

Demographic questions in the survey collected information regarding staffing, incident reporting, activities offered, and number of participants.

The average shift length for employees of these day programs was eight hours. Three programs reported shift lengths under eight hours, and one reported a shift length over eight hours.

The programs in this study also differ in the number of participants they cater to. Five programs had less than 20 participants, six programs had between 20 and 40 participants, and two programs had between 40 and 60 participants. One program had between 160 and 180 participants, one had between 420 and 440 participants, and one had between 440 and 460 participants. In terms of employees, eight programs employed less than 20 staff members. Two programs employed between 40 and 80 staff members, one employed between 160 and 180 staff members, and one employed between 200 and 220 staff members.

Programs also identified the number of reportable incidents their organization has had in the last four months. Two programs identified having no reportable incidents, eight reported having between one and five reportable incidents, two had between five and 10 reportable incidents, and one had 10 or more reportable incidents. Both of the programs that reported no incidents had 20 staff members or less, and five of the eight programs that reported between one and five incidents had 20 staff members or less.

Day programs reported a variety of different activities that are routinely offered to participants. Six programs offered art and volunteering respectively. Four programs offered music. Three programs each offered group exercise activities and visits to museums. Additionally, activity offerings were analyzed based on the extent to which they engaged participants in their current communities. Of the seven programs that listed the specific community-based activities routinely offered, the average number of community-based activities...
offered per program was 2.2 (s.d. 0.7). Additionally, six respondents reported offering "community integration activities" or "community outings," but did not specify what particular opportunities were offered.

**Greatest Strengths**

When providers were asked to identify the greatest strength of their respective programs, seven referenced their commitment to a "person-centered" approach. Four programs responded with themes relating to activities offered and community-based focus of their programs. Three programs cited their greatest strengths as either their qualified staff, the choices presented to participants, or the low turnover rate for employees. Two programs referenced their small size; qualified management; clinical and therapeutic offerings; and commitment to individuals. Single programs each named strengths in facilities; focus and specialization of activity; vocational opportunities; consumer satisfaction; consistency; and high ratio of staff to participants.

**Greatest Challenges**

When asked to check off the challenges that they consistently face, 33% of providers indicated they struggled with hiring enough staff members. Sixty percent of providers reported difficulty in retaining staff members for more than two years. Fifty-three percent reported challenges with funding. Thirty-three percent reported challenges with government compliance. Twenty-seven percent reported challenges in finding age-appropriate activities. No programs indicated that none of the listed challenges applied to their programs. When asked to identify the greatest challenge faced, eight providers responded with a concern related to staffing. Of these responses, five were related to attracting enough employees, two were related to offering a competitive and livable salary to staff, and one mentioned retaining employees for longer than two years. Additionally, five programs identified funding issues as the greatest challenge for their program. Of this number, two programs specifically mentioned difficulties with accessing the technology necessary for the daily operation of the programs. Two programs identified finding appropriate activities and finding participants respectively as their greatest challenge. Additionally, two programs referenced a lack of support from management and government compliance respectively.

**Discussion**

Fifteen adult day service programs in the Washington DC, Maryland, and Virginia area responded to an online survey discussing strengths, challenges, and program design. Their responses explore important policy areas relating to government regulation, staffing, funding, and the types of activities offered. In addition, the shift toward person-centered programming is evident from providers in this survey.

A particularly interesting finding was the significant response of programs that disagreed with the statement that their organization would benefit from more guidelines and established standards from the state and/or federal government. Based on previous literature, day programs, particularly CBNW programs, are often criticized for not having specific enough standards. In the 2008 national survey, “one third of respondents . . . did not identify any specific requirements” relating to ratio, group size, and minimum hours in the community (Sulewski et
Current findings indicate that most providers would not like more requirements for their programs. This finding could potentially be explained simply by the passage of six years between these two surveys, during which more regulations and monitoring processes may have been established. It may be that in trying to regulate and define CBNW programs, states have swung too far in the opposite direction, leading to excessive requirements and over-regulation. In identifying the greatest challenges for their programs, one provider cited “over-regulation,” and another wrote, “keeping up with the daily requirements set forth by governing bodies.” However, it could also be that there still is a lack of regulation, but programs do not desire more government intervention. More research is needed to determine exactly what type of government regulation is optimal for both providers and participants. State resources should be directed toward finding a balance between ensuring the safety of people with disabilities while also creating a system of guidelines that is amenable to providers.

Another finding with policy implications relates to staffing, which was the most frequently cited “greatest challenge” for providers. When programs were asked to choose which challenges applied to their program, nine programs indicated issues with retaining employees for more than two years. This challenge received the highest response rate. Additionally, five programs, or one-third of respondents, indicated difficulties in hiring enough staff members. For the write-in responses, while two programs just generally identified “staffing” as the greatest challenge, other respondents provided insight into the specific elements of staffing that are challenging. Two programs reported overburdened staff; one provider wrote that “each staff person wears many hats/shoulders a lot of varied and essential tasks,” while another observed that “frequently things aren’t done to a perfect standard or get lost somewhere along the way due to the heavy [staff] responsibilities.”

Two programs also directly referenced the salary of the staff. One program noted that “the high performing employees want higher pay.” Additionally, one program referenced “retaining employees” as its greatest challenge. Another program identified difficulty in filling positions not only simply in terms of finding applicants, but more specifically that finding qualified applicants was very difficult. Overall, eight programs identified their greatest challenge as related to staffing. This mirrors previous research on the current staffing challenges facing providers of disability services. High vacancy and turnover rates have been reported for DSPs, who staff residential as well as day service programs.

Challenges with staffing have been found to lead to a decrease in quality of services for people with IDD, and staffing problems are often cyclical and self-reinforcing. High DSP turnover leads to increased DSP vacancies. When there are vacancies, staff members are often needed to work large amounts of overtime, which has been shown to make DSPs more susceptible to “exhaustion, increased mistakes, increased abuse and neglect, and decreased performance” (Hewitt & Larson, 2007, p. 182). In addition, exhaustion leads to the phenomenon of burnout experienced by many DSPs, and burnout further leads to high turnover rates, beginning the cycle again. From the current survey responses, there is evidence that programs are in fact stuck in different phases of this cycle. In the “greatest challenge” section of the survey, one program reported issues with turnover rate, another reported issues with vacancy, and two reported overburdened staff leading to “things slipping through the cracks.” In addition, two-thirds of respondents reported that their organizations struggled to retain employees for more than two years. With such a high proportion of programs struggling with staffing issues, it is reasonable to conclude that solutions to stop this cycle of vacancy and high turnover are
paramount for the well-being of day programs in the Washington DC, Maryland, and Virginia area.

Interestingly, however, a few programs reported not having problems attracting staff members and retaining employees. Two programs identified their employees as their greatest success: One specifically focused on their low turnover rate, and one indicated the high quality of their employees. This, along with findings that most providers would be willing to share activity information and would like to receive more information from other providers, may indicate that collaboration between programs in terms of employee incentives and training could be beneficial.

The second biggest challenge facing day programs was funding. Three programs listed funding generally as an issue, while two programs specifically referenced a lack of technology. One program reported having “not enough computers” for participants. Another observed that “[their program] could do a lot more Community Engagement with lower ratios (less than 1:3), if the funding covered more such as more vehicles/insurance/fuel.” Since it is often questioned how truly inclusive CBNW programs are, it may be that, as a society, we are not providing programs with the resources they need to actually get participants into the community consistently enough to be meaningfully integrated.

When programs were asked to identify their greatest strength, the ideological shift toward person-centered planning was evident. Seven programs referenced a “person-centered” program philosophy as their greatest strength as an organization. This was the most frequently mentioned strength. Additionally, four programs identified the level of community engagement they provide for participants as their greatest strength. Furthermore, elements of program design also reflect person-centered philosophy. The choice that participants are offered in picking activities was evident from survey responses. Some programs noted that they did not have a daily schedule of activities, because daily planning is done by individuals upon arrival. Day programs seem to be dedicated to a person-centered mission.

Dedication to person-centered planning can also be identified in the survey questions that assessed the level of agreement of providers with given statements. All programs either strongly agreed or agreed that the activities offered in their programs were age appropriate. All programs also agreed or strongly agreed that they sought input and evaluation from participants. Similarly, all programs either strongly agreed or agreed that staff members can identify each individual by name. These responses also indicate a commitment to person-centered service delivery.

Participant engagement and activity planning are self-reported strengths for some programs, and a definite challenge area for others. Four programs identified challenges in “finding age-appropriate activities” for participants. However, three programs identified the variety of activities and the choice in activities as particular strengths of their respective programs. Another interesting finding is that in responses relating to listening to participants and providing age-appropriate activities, all respondents either agreed or strongly agreed. Three-fifths of respondents strongly agreed with statements regarding age appropriateness and seeking input from participants; two-thirds strongly agreed that they implemented feedback from participants in their programming; and over three-fourths of programs reported “taking pride” in tailoring activities to match the interests and needs of participants. While the majority of respondents strongly agreed with statements related to the quality of activity offerings, providers seemed slightly less confident when answering questions about participant engagement. Sixty percent of providers agreed that their participants found the activity offerings to be engaging, but only 40% of providers strongly agreed with this statement, which is surprising, given the high
confidence level about overall quality of activity offerings demonstrated in previous responses. This indicates that future research needs to be devoted to how to measure participant engagement. Training on how to observe and evaluate participants’ engagement with activities may be an area of growth for programs. Additionally, more collaboration between providers regarding accessible, effective activities would likely be beneficial.

Day program providers have made significant gains in adopting a person-centered mission; however, future policy needs to address the vacancy-burnout-turnover cycle in staffing and allocation of funds. If more than half of programs are struggling with staffing, it seems paramount to assess policies for loan forgiveness, higher salaries, or better benefits packages for DSPs. Additionally, future research needs to address how participant engagement can be adequately measured and what programmatic design elements improve participant engagement in day service programs. Regulatory bodies need to devote time to listening and documenting the experience of providers in order to improve the quality of life for adults with IDD.

Limitations

This study has a limited sample size and did not utilize random sampling procedures. Participants in an existing coalition of day programs volunteered to participate. The findings in this study also cannot be generalized to a national level. Additionally, information on the locations, based on state, of each program was not collected. This may impact findings based on state-specific guidelines for day programming. All information collected was self-reported by program providers, which inherently increases potential bias in responses.

References


### Additional Tables and Figures

#### Greatest Strength: Original Responses and Coded Categories

<table>
<thead>
<tr>
<th>Original Response</th>
<th>Coded Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Management is constantly coming up with new ideas to help provide services that are person centered</td>
<td>• Management</td>
</tr>
<tr>
<td>• Person centered</td>
<td>• Person centered</td>
</tr>
<tr>
<td>• We offer a wide variety of onsite and community activities, including volunteering and offer access to onsite nursing, therapies, and behavioral supports</td>
<td>• Variety of activities</td>
</tr>
<tr>
<td>• We have a large cadre of volunteers and activities</td>
<td>• Clinical/therapeutic services</td>
</tr>
<tr>
<td>• Volunteers</td>
<td>• Volunteers</td>
</tr>
<tr>
<td>• Focus on specific skill set</td>
<td>• Community based</td>
</tr>
<tr>
<td>• Vocational opportunities</td>
<td>• Focus on specific skill set</td>
</tr>
<tr>
<td>• Passionate and skilled work force</td>
<td>• Vocational opportunities</td>
</tr>
<tr>
<td>• Beautiful and program-owned building/gallery/studio space</td>
<td>• Workforce</td>
</tr>
<tr>
<td>• Community-based programming</td>
<td>• Facilities/resources</td>
</tr>
<tr>
<td>• Our greatest strength is ensuring choice and freedom of movement.</td>
<td>• Choice and freedom of movement</td>
</tr>
<tr>
<td>• We value our dedication to being person centered</td>
<td>• Person centered</td>
</tr>
<tr>
<td>• Person centered</td>
<td>• Person centered</td>
</tr>
<tr>
<td>• Our individuals/families state they are satisfied with the services provided, mission and values of the organization</td>
<td>• Consumer satisfaction</td>
</tr>
<tr>
<td>• Clinical therapeutic services offered on site</td>
<td>• Therapeutic/clinical services</td>
</tr>
<tr>
<td>• Expressive therapies offered on- and offsite</td>
<td>• Variety</td>
</tr>
<tr>
<td>• Staff compassion towards individuals served</td>
<td>• Longevity of staff</td>
</tr>
<tr>
<td>• Families seek our program for their individual due to the variety of activities and services provided</td>
<td></td>
</tr>
<tr>
<td>• Longevity of many staff</td>
<td></td>
</tr>
<tr>
<td>• Person-centered philosophy</td>
<td>• Person centered</td>
</tr>
<tr>
<td>• Self-guided schedules</td>
<td>• Choice</td>
</tr>
<tr>
<td>• New opportunities</td>
<td>• High ratios</td>
</tr>
<tr>
<td>Features</td>
<td>Benefits</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Higher than typical staffing ratios</td>
<td>New opportunities</td>
</tr>
<tr>
<td>Behavioral focus to support individuals with significant behavioral challenges</td>
<td>Behavioral focus</td>
</tr>
<tr>
<td>Our day program is small and intimate, allowing for close and person active engagement</td>
<td>Intimate</td>
</tr>
<tr>
<td>In addition, we love to celebrate the gifts and talents of our participants</td>
<td>Recognizing gifts and talents</td>
</tr>
<tr>
<td>The tone of our program is very festive and jovial</td>
<td></td>
</tr>
<tr>
<td>Person-centered service delivery</td>
<td>Person centered</td>
</tr>
<tr>
<td>Dedicated staff</td>
<td>Dedicated staff</td>
</tr>
<tr>
<td>Very low staff turnover</td>
<td>Low turnover</td>
</tr>
<tr>
<td>Excellent management for the program</td>
<td>Management</td>
</tr>
<tr>
<td>Small numbers and community based</td>
<td>Intimate</td>
</tr>
<tr>
<td></td>
<td>Community based</td>
</tr>
<tr>
<td>We offer services that help our individuals to reach their goals socially, academically, and physically</td>
<td>Choice</td>
</tr>
<tr>
<td>We stand on the premise of choice and community integration</td>
<td>Activities</td>
</tr>
<tr>
<td>Our activities are meaningful</td>
<td>Workforce</td>
</tr>
<tr>
<td>We have an amazing team</td>
<td>Community partnerships</td>
</tr>
<tr>
<td>We are great with developing and maintaining relationships/partnerships in the community</td>
<td></td>
</tr>
<tr>
<td>Several staff members are degree holders</td>
<td></td>
</tr>
<tr>
<td>Community engagement activities are stimulating, interesting, and truly teach individuals to independently engage with others</td>
<td>Activities</td>
</tr>
<tr>
<td>Volunteerism with others from the community</td>
<td>Volunteerism</td>
</tr>
<tr>
<td>Person centered</td>
<td>Person centered</td>
</tr>
<tr>
<td>Age appropriate</td>
<td>Age appropriate</td>
</tr>
<tr>
<td>Respect all individuals and treat them as adults</td>
<td>Staff longevity</td>
</tr>
<tr>
<td>Staff longevity lends to consistency in service delivery with more effective outcomes</td>
<td>Consistency</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Our commitment to our individuals</td>
<td>Commitment to individuals</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>Community engagement activities</td>
<td>Person centered</td>
</tr>
<tr>
<td>Onsite programming</td>
<td>Community engagement</td>
</tr>
<tr>
<td>Person-centered plans</td>
<td></td>
</tr>
</tbody>
</table>
Self-Identified Greatest Strengths
### Greatest Challenge: Original Responses and Coded Categories

<table>
<thead>
<tr>
<th>Original Response</th>
<th>Coded Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Not enough management to meet the needs of the individuals/staff</td>
<td>• Management</td>
</tr>
<tr>
<td>• Due to this it can become quite difficult to juggle so many balls and frequently things aren't done to a perfect standard or get lost somewhere along the way due to the heavy responsibilities</td>
<td>• Overburdened staff</td>
</tr>
<tr>
<td>• Funding</td>
<td>• Funding</td>
</tr>
<tr>
<td>• Overburdened staff</td>
<td>• Staffing</td>
</tr>
<tr>
<td>• Finding participants</td>
<td>• Funding</td>
</tr>
<tr>
<td>• Overburdened staff</td>
<td>• Finding participants</td>
</tr>
<tr>
<td>• Our greatest challenge is identifying local cost-effective, age-appropriate community activities in our area</td>
<td>• Activities</td>
</tr>
<tr>
<td>• Over-regulation</td>
<td>• Over-regulation</td>
</tr>
<tr>
<td>• Underfunding</td>
<td>• Funding</td>
</tr>
<tr>
<td>• Receiving applicants as well as qualified applicants for the vacant direct care positions</td>
<td>• Staffing</td>
</tr>
<tr>
<td>• Keeping up with the daily requirements set forth by governing bodies</td>
<td>• Government regulation</td>
</tr>
<tr>
<td>• Staffing</td>
<td>• Staffing</td>
</tr>
<tr>
<td>• The high performing employees want higher pay</td>
<td>• Staff salary</td>
</tr>
<tr>
<td>• Lack of support from upper management in listening to our needs (technology, logistics, how the program actually operates)</td>
<td>• Lack of support from management</td>
</tr>
<tr>
<td>• Lack of field-based technology for a program that is a community-based program and we are in the community 6 hours per</td>
<td>• Lacking technology</td>
</tr>
<tr>
<td>day</td>
<td></td>
</tr>
<tr>
<td>-----</td>
<td>-----</td>
</tr>
<tr>
<td>• Replacing participants as they retire (or age out)</td>
<td>• Finding participants</td>
</tr>
<tr>
<td>• No funding available</td>
<td>• Funding</td>
</tr>
<tr>
<td>• Rate of pay has always been the program's challenge</td>
<td>• Staff salary</td>
</tr>
<tr>
<td>• Not enough computers</td>
<td></td>
</tr>
<tr>
<td>• We could do a lot more community engagement with lower ratios (less than 1:3), if the funding covered more such as more vehicles/insurance/fuel</td>
<td>• More technology</td>
</tr>
<tr>
<td></td>
<td>• High ratios</td>
</tr>
<tr>
<td>• Funding by far is the biggest challenge to our programs</td>
<td>• Funding</td>
</tr>
<tr>
<td>• Retaining employees</td>
<td>• Retaining employees</td>
</tr>
</tbody>
</table>
Self-Identified Greatest Challenges

- Appropriate Activities
- Lack of support from Management
- Funding (technology)
- Funding (general)
- Staffing (salary)
- Staffing (general)
- Staffing (Retaining employees)
- Government compliance
- Finding Participants

0 1 2 3 4 5 6
Greatest Challenge: Broad Categories

- Appropriate Activities
- Lack of Support from Management
- Funding
- Staffing
- Government Compliance
- Finding Participants
### “Select all Challenges that Apply” Results

<table>
<thead>
<tr>
<th>Challenge</th>
<th>Number of Programs that Identified this Challenge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hiring enough staff members</td>
<td>5 (33%)</td>
</tr>
<tr>
<td>Retaining staff members for more than two years</td>
<td>9 (60%)</td>
</tr>
<tr>
<td>Funding</td>
<td>8 (53%)</td>
</tr>
<tr>
<td>Government compliance</td>
<td>5 (33%)</td>
</tr>
<tr>
<td>Finding age-appropriate activities</td>
<td>4 (27%)</td>
</tr>
<tr>
<td>None of the above</td>
<td>0</td>
</tr>
</tbody>
</table>
ADMINISTRATIVE FAILURE OR BLATANT TRANSPHOBIA: THE ADVERSE RELATIONSHIP BETWEEN TRANSGENDER FOLKS AND THE CRIMINAL JUSTICE SYSTEM THAT MUST BE ADDRESSED

By William Connor*

Pennsylvania State University–Abington

This past summer, I spent my short break between my undergraduate and graduate career at an internship for the Philadelphia’s Mayor’s Office of LGBTQ+ Affairs. One incident brought to light a disturbing reality facing the transgender community. This incident, without pointing fingers or naming names, stole the dignity of a member of the Philadelphia community. A one-line summary that may not cause any cisgender individual, or someone unaware of the states of gender, any dismay would read: A transgender woman was sent to an all-male, maximum-security prison. Simply put, an individual who self-identified as female was sent to an all-male, maximum-security prison.

Despite informing the authorities of her gender identification, the police evaluated her genitalia, which revealed a penis. The authorities ignored the self-identifying woman and sent her to an all-male, maximum-security prison. For the transgender community, this aesthetic justification can mean the difference between rehabilitation and a sentence of sadistic sexual abuse for the term of the individual’s incarceration.

According to the most recent Transgender National Survey (2015), completed by the National Center for Transgender Equality (NCTE),

Of respondents who interacted with police or law enforcement officers who thought or knew they were transgender in the past year, 57% said they were never, or only sometimes, treated respectfully. Further, 58% reported some form of mistreatment, such as being repeatedly referred by the wrong gender, verbally harassed, or physically or sexually assaulted. (James et al., p. 185)

This denial of basic human dignity on the part of law enforcement officials transforms a transgender individual’s incarceration into an unjust, traumatizing experience. For any non-White inmate, the percentage reporting an incident of mistreatment supersedes the 58% overall, ranging from 60% for Asian, and peaking at 74% for American Indians (James et al., 2015, p. 187).

As a consequence of this perceived mistreatment towards the transgender community on behalf of law enforcement officials, “More than half (57%) of respondents said they were either somewhat or very uncomfortable asking the police for help” (James et al., 2015, p. 184). This means that if a crime is committed against a member of the transgender community, over half of its members are not comfortable and are not inclined to seek police assistance in resolving the matter. The consequences of this breakdown of trust and cooperation could allow: criminals to go unpunished; further discrimination of the transgender community to continue; acts of

* William Connor is a recent graduate of Pennsylvania State University–Abington, where he studied history and American studies.
retribution to be sought extra-legally (perpetuating the cycle of violence); and yet even more consequences to society ranging from verbal altercations to physical altercations.

As an intern for the Office of LGTBQ+ Affairs, and a citizen of the United States, it frightens me that over half of the transgender population is uncomfortable interacting with the police. My main concern is, how can we, as a society, govern and create a free society if members don’t feel welcome and safe accessing its resources? Upon further research, one discovers the federal government’s attempt to help quell that question in the form of a law aiming to reduce sexual crimes in the criminal justice system.

The Correctional System Needs Correction

After Human Rights Watch completed the first national study researching prisoner on prisoner rape titled “No Escape: Male Rape In U.S. Prisons,” the public was informed that sexual crimes in the correctional system were omnipresent and brutal. In response, Congress unanimously passed with bipartisan support the Prison Rape Elimination Act (PREA) in 2003. Following a near decade of research on how to reduce the rate of sexual violence, guidelines—reinforced by the law—were made available to federal, state, and local officials to reduce the rate of sexual violence in the corrections system. With its main purpose being to create remedies to reduce the rate of sexual abuse in the criminal justice system, PREA (2003) focused on creating policy that would protect at risk populations from abusers. In relation to my internship with Philadelphia’s Mayor’s Office of LGBTQ+ Affairs, and the unfortunate placement of a transgender woman into an all-male, maximum-security prison, the most important sections of PREA (2003), in this instance, deal with the housing of transgender folks.

Significant Reforms That Need Enforcement

According to the NCTE, PREA (2003) established significant reforms to create a safer environment in the criminal justice system. First, prison officials must perform an intake risk assessment evaluating an individual’s risk for experiencing or perpetrating abuse (this includes identifying transgender status among other gender statuses and sexual orientation that are known to be at higher risk). Officials must also obtain the individual’s own thoughts on their vulnerability. Individuals may not be retaliated against for not disclosing relevant information, and facilities must take into consideration this intake report when delegating housing and security assignments.

Second, housing must be made on a case-by-case basis with housing not being solely determined by genital anatomy or sex assigned at birth. This allows transgender folk to be placed in environments where they will be safe and not abused or exploited because of their gender status. Transgender and intersex individuals also will be given the opportunity to shower separately, away from other inmates. In the case of the transgender woman in Philadelphia, this part of PREA (2003) was willfully ignored.

Third, in terms of protective custody after an incident of abuse,

all available alternatives be assessed before placing an inmate involuntarily in segregated housing. Alternatives might include relocating a perpetrator of abuse, providing heightened supervision, changing housing placement or cellmates, placement in a single-
occupancy cell within the general population, or transfer from a men’s to a women’s facility, or vice versa. (NCTE, 2012, p. 2)

This recommendation takes into consideration the victim, environmental factors, other inmates, and law enforcement officials when accounting for responding to incidents of abuse. Segregation of the victim may only last up to 30 days and the victim must have access to programs, education, and activities as much as possible.

Fourth, in terms of segregated housing,

In some facilities, gay, lesbian, bisexual, or transgender individuals are housed in separate units. Some people may prefer to be housed in this way because they may feel they are safer from being abused by other inmates. However, these units can also pose some risk of further stigmatizing individuals and making them more vulnerable to harassment and abuse by staff. Individuals in such segregated units may also be restricted in their access to education, jobs, and other programs and opportunities. The standards place some limits on separate housing for LGBT people. LGBT people may be housed in separated, dedicated housing units only if such placement is voluntary or is based on a case-by-case assessment that includes other factors; if the unit also houses other groups of vulnerable individuals; or if the unit was established as part of the resolution of a lawsuit to protect LGBT people. (NCTE, 2012, p. 2)

Segregation carries with it detrimental effects on the transgender community, so to make it a last resort, segregation may only be used in the rarest of situations when no other alternatives can guarantee the transgender community’s safety (NCTE, 2012, p. 2).

The Trump Administration’s Failure

PREA (2003) continues to lay out procedures for bodily searches, minors in adult facilities, staff training, reporting abuse, support for survivors of abuse, how to differentiate between consensual sex and sexual abuse, how to file grievances and gain access to courts, and the compliance and enforcement of PREA (2003). These procedures serve as huge steps forward for the nation’s consideration of the transgender community (among others) while incarcerated. Recently, however, President Trump’s administration rolled back some of the policies created to protect transgender individuals, raising concerns from human rights groups.

According to Megan McLemore, in an article published on the Human Rights Watch organization’s webpage, President Trump’s administration has announced a policy change for the Bureau of Prisons, which announced

that while it will continue to make these determinations on a case by case basis as is required, “biological sex” will be used as the basis for the initial determination, and transgender prisoners will be assigned to facilities conforming to their gender identity only “in rare cases.” (2018)

This policy change is detrimental to the well-being of the transgender community during incarceration; it further erodes trust between law enforcement and transgender folk, and is, in a sense, an attempt to induce more personal attacks on transgender individuals, setting back prison
reform to an all-too-familiar state of sadistic “rehabilitation.” This step is viewed as another attack by Trump’s administration and right-wing radicals on transgender people, along with Trump’s transgender military ban and Trump’s support of individuals who discriminate against the LGBTQ community in the name of religious liberty.

In the words of Vanita Gupta, the chief executive of the Leadership Conference on Civil and Human Rights and the head of the Department of Justice Civil Rights Division under President Barack Obama, “[The Trump] administration seems to be using every opportunity to roll back progress for L.G.B.T.Q. and transgender people, even against the grain of where the American public is, and is headed, on these issues” (Benner, 2018).

The Human Rights Campaign Government Affairs Director David Stacy offered,

The Obama Administration put this guidance into place after an extensive review to develop workable and reasonable procedures that would protect some of the most vulnerable people in our prison system. The decision to disregard a transgender person’s gender identity is harmful and disrespectful. This unconscionable decision ignores medical expertise and defies common sense. Transgender people, under the control of the Bureau of Prisons, will face greater risk of violence and discrimination. (Clymer, 2018)

While interning at the Philadelphia Mayor’s Office For LGBTQ+ Affairs, we were informed that housing was determined based on genital status, a revelation that, as a resident of the fifth largest city in the United States, is morally repugnant, willfully ignorant, and a terrible indicator of our values regarding the treatment of marginalized communities. PREA (2003), a law passed with unanimous bipartisan support to reform a prison system with unconscionable levels of sexual crimes, has effectively been undermined by the Trump administration, and the consequences of these actions create and promote an environment in which individuals are susceptible to sexual harassment and abuse—consequences that are real for the transgender community and other vulnerable communities.

**Ensuring Human Dignity**

As reported by individuals who took the 2015 Transgender National Survey:

When I was booked, the officers asked very intrusive questions about my genitalia in a very nonprofessional manner and laughed about it. They ended up booking me into an all-female solitary confinement cell, kept calling me “miss,” and gave me female colors even though I pass full time as male. (NCTE, 2012, p. 188)

I was in [jail] for 12 days housed with male detainees. Upon being booked, I was escorted to the shower area where I was forced to strip down and shower with male inmates who made sexual advances towards me while mocking me for being different. I feared for my life and the guards were of no help because they mocked me for being transgender. (NCTE, 2012, p. 188)

While I was in solitary, a cop asked me about my gender. I told him I was male, and he told me I sounded female. Next thing I knew, I was being taken to the jail doctor to
spread my legs and have him confirm my gender. It was humiliating. (NCTE, 2012, p. 188)

These traumatizing moments, when transgender individuals’ basic human dignity is violated by willful ignorance, harassment, mockery, and physical abuse at the hands of fellow inmates and/or law enforcement officials, can be prevented if communities hold their officials accountable and demand that our officials enforce PREA (2003). If local, state, and federal officials do not enforce PREA (2003), despicable actions will continue to make transgender individuals’ lives, while incarcerated, a torturous experience that only further exacerbates the anguish of an already marginalized community.

As my internship with the Mayor’s Office of LGBTQ+ Affairs is now over, I am aware that Philadelphia is one site on the battleground for the establishment and preservation of universal human rights. I hope that in a city with a civil rights history as rich as Philadelphia’s, members of the community and citizens of the great state of Pennsylvania will join this discussion and secure transgender folks their rights and respect their basic human dignity.

Overall, PREA (2003) must be enforced so that incarcerated individuals can be rehabilitated and not sexually abused and exploited. In 2003, Congress took appropriate measures to reduce rates of coerced sexual abuse, continued sexual abuse, sexual slavery, prostitution, and other sadistic practices of prisoner-on-prisoner and correction officer-on-prisoner crimes. The Trump administration, along with state and local correctional officials, must take steps to end the sadistic incarceration that vulnerable populations, such as transgender folk, face by reimposing PREA (2003) at its full strength. Furthermore, it must fund further research aimed at providing more preventative measures so that incarcerated individuals are able to be rehabilitated and not brutally traumatized, which further discourages them from being active contributing members of society.

References


THE NEW WAVE OF RACE AS BIOLOGICAL: MAKING SENSE OF ONE’S IDENTITY
WITHIN A GENETIC CONTEXT

By Susanna Williams*
Whitman College

On December 26th, 2017, I arrived home from visiting family in eastern Washington for the holidays. Little to my knowledge, there was just one more gift waiting for me at home. That gift was an AncestryDNA kit, chock full of information about “finding my roots,” “learning where I come from,” and everything else you hear on AncestryDNA’s television commercials. Having taken an introduction to race and ethnic studies course in my first year of college, I had a feeling that there was more to this gift than my all-White family could ever have anticipated. But of course, I smiled, said thank you, and went to spit in a vial to send off to strangers in a laboratory.

Several weeks later, I received an email saying that my tests results were in. I logged into my Ancestry.com account and opened my newly determined “ethnicity estimate.” Through the analysis of this ethnicity estimate, I found out that I am genetically mostly European, with only 9% of my genetic makeup deriving from any region in Africa.

I asked myself a lot of questions the night I got my ethnicity estimate. Does the fact that I’m only listed as less than 10% “African” mean I’m White; or even if I’m not really White, am I not really Black either? Does this information validate all the times I was told by my peers I wasn’t either? Does this discredit my identity as a Black woman? And lastly, what does this all really mean, if anything?

In learning more about the correlation between race and genetics through the sources which have contributed to this article, I argue the following: While genetic testing companies make compelling arguments based on information provided by scientific authority, race and ethnicity—in addition to the identities associated with them—are not determined by one’s genome. In addition, I argue that the consideration of one’s genome as inherent to an understanding of one’s race perpetuates the false notion of race as a biologically verified concept.

Genetics, Ancestry, and Race: Misconceptions

The biggest myth of race is that we humans have biological races and that on a biological or, more precisely, on a genetic level our race determines a good deal about how we differ from each other and our potentialities. The science of human variation, however, tells us otherwise. Race-as-genetic-variation is a myth. Race neither explains variation nor is a useful genetic construct. (Goodman, Moses, & Jones, 2012, p. 3–4)

In a talk facilitated by Professor Helen Kim and Professor Britney Moss during the Whitman College Power and Privilege Symposium (2018), four misconceptions were identified surrounding dialogues on genetics, ancestry, and race (Beckwith et al., 2017). I now will take the time to address each of them individually.

* Susanna Williams is an undergraduate student at Whitman College, where she studies sociology, rhetoric, writing, and public discourse.
1. Individual traits (e.g., skin color or hair color) can be reliably used to distinguish people by race: As of today’s scientific development, there are no genetic markers which can define race. This is because there are no characteristics that can be found in all members of one race, and simultaneously in no members of another.

2. Trait combos (e.g., skin color and hair color) can be reliably used to distinguish people by race: As previously mentioned, as of today there are no genetic markers which can be defined to a particular race. This idea pertains both to trait combos and individual physical traits.

3. There are more genetic differences between people of different races than between people of the same race: Contrary to popular belief, the average human’s genetic makeup is 99% similar to that of their peers, regardless of race, biological sex, etc. Thus, the measured amount of genetic variation in the human population is very small (approx. 0.5%). This is due to the fact that, in evolutionary terms, humans have not been around long enough to have developed substantial genetic variation between them; therefore, as of today, there have yet to develop any subspecies (different races) within the human population. An example of this lies in the continent of Africa, its people being of the “African race.” Because humanity started in Africa, there is greater genetic variation in Africa than anywhere else in the world; this means that if genetic differences really were really able to determine a member of one race from another, Africans would not belong to one race deemed African, but belong to hundreds if not thousands of different race groups.

4. Racial differences are best explained by biology, not culture or society: I must begin first by explaining the difference between the study of biology and the study of genetics. Genetics, the study of heredity and the variation of inherited characteristics, is a subset of biology. Biology as a whole encompasses the study of living things, not just humans and their genetic makeup and system of inheritance of such makeup. In a similar way, in order to properly consider biological factors which are said to contribute to things such as race, one cannot only consider genetics. Biological factors can include, in addition to genetics, environmental factors, as well as factors that impact one’s mental health such as stress, systematic discrimination, etc. Therefore, genes alone are not solely determinant of differences between people, whether these differences are racialized or not.

   It is important to note at this point that just because race is not best explained by biology, doesn’t mean it’s not real. As stated by the authors of Race: Are We So Different?,

   Most people think race is real, and they are obviously right. Race is real. But race is not real in the way we think of it: as deep, primordial, and biological. Rather, race is a foundational idea with devastating consequences because we, through our history and culture, made it so. (Goodman et al., 2012, p. 2)

   This tells us that race over time has been given a false biological meaning as a result of its social meaning, and thus is more accurately explained within a social context.

1 I placed “African race” in quotation marks here to highlight that the notion of an “African race” is one that has been constructed.
Genetics, Ancestry, and Race: A Brief History

Race as a Tool of the Powerful

Previously I outlined that the notion of race as inherent and unchanging is generally, if not completely, false, but how did these notions develop over time?

The United States specifically has created a story of race across four centuries; it is one that has been utilized “to further certain economic and political goals” (Strain, 2003). However, it did not begin when the first colonizers of America touched its soil. Rather, it began when the colonizers developed a need for labor. It is important to acknowledge that slavery had existed for thousands of years prior to the colonization of America; however, the establishment of slave labor in the United States represented the first time a notion of race was used to justify the idea that certain individuals, as opposed to others, should work as slaves. In *Race: Are We So Different?*, the authors outline that,

For a time, enslaved Africans and Native Americans labored side by side (with indentured European servants) to produce rice, cotton, indigo, and other cash crops, but eventually slavery was limited to blacks. It was only with their increased reliance upon slavery and ambitions for Native American lands that English colonists began to develop a racial hierarchy. Slavery and Native American land dispossession did not begin, but became, racial or race-based projects. (Goodman et al., 2012, p. 15)

This tells us that initially, both Native Americans and Blacks brought to the United States to work were exploited for labor. However, once the colonizers realized they could utilize Native people for a greater purpose, the landscape of the racial hierarchy changed; no longer were Natives and Blacks equal, and yet, at the same time Native Americans would never be able to recover a level of equality with Europeans.

All of this had to be justified in some way. An example of the justification of slavery in literature is the *Notes on the State of Virginia*, written by Thomas Jefferson in the late 1700s. While it can be seen as a sort of sales pitch for America and its values, it also expresses Jefferson’s views on the people of the land. It quickly became a document which justified slavery with the following passage: “I advance it as a suspicion only, but blacks whether originally a distinct race or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind” (Strain, 2003).

When slavery was abolished and no longer operated as the primary justification of racial difference, science emerged to fill its place. This was during the 19th century, a time when science was just becoming popular and was expected to explain all things, including physical differences between people. Race was “the issue of the age,” as many scientists began conducting research on the matter. As Goodman et al. (2012) state, 19th century race theory was characterized by two distinct schools of thought regarding racial origins. First, there were polygenists, who proposed that human races were in fact separate species from each other. Opposing polygenists were monogenists, like Charles Darwin, who proposed that races are merely representations of variation within a single human species (Goodman et al., 2012, p. 26). Various scientists sought to justify their viewpoint on the matter via the measurement of physical differences, such as skull size, and attributing those differences to racial differences; from there,
different races were also attributed differences in character and health, such as intelligence and susceptibility to disease.

Following 19th-century race theory was the eugenics movement of the 20th century. This movement is often considered the basis for the extermination of millions of Jewish people in Nazi Germany during the Holocaust. Eugenics presented so-called scientific ideas from the field of genetics and converted them into social policy. Based upon the belief that all human qualities were inherited, eugenicists developed controlled breeding and sterilization programs aimed at “improving” a gene pool that they believed to be deteriorating because of racial mixing. (Beckwith et al., 2017)

Certain qualities, such as criminality, poverty, intelligence, etc., were attributed to certain racial groups as justification for acts against them (Beckwith et al., 2017, p. 525). The early 20th century was also the time in which physical anthropology emerged as a field of study, rooting the notion of race as inherent and unchanging within the world of academia, more so than scientific authority ever had.

The Secondary Development of “Whiteness”

“The history of race in America is grossly incomplete without the stories of how white folks came to be” (Goodman et al., 2012, p. 44–47).

Up until this point, I have focused most of my description of the history of race in America on how racial categories attributed to minority groups came to be; this is primarily because Whites have reaped the benefits of such occurrences. But a true account of race in America is lacking if it does not mention how whiteness came to be the default or the normal race. In Race: Are We So Different? (Goodman et al., 2012), the authors state that the first legal use of the term “White” appeared in 1691. However, whiteness was vastly different during this time. Rather than referring purely to skin color, whiteness was based largely on national affiliation and religion; this meant that “White people” of this time were any Protestant Anglo-Americans, regardless of their physical appearance.

From this initial boundary, however, American whiteness was enlarged three more times to meet the demands of the country. First, whiteness was extended to most European males for the purpose of suffrage. Second, during the late 19th and early 20th centuries, the Irish, Germans, and other “Nordics” gained greater acceptance as “true” Americans, in order to reinforce a boundary of whiteness with the coming influx of immigration into the United States. The immigrants entering the United States at the time were largely Jews, Poles, Russians, and Italians; these groups initially were victims of discrimination. However, by the middle of the 20th century, all southern and eastern European immigrants and their children saw themselves and were largely recognized politically and culturally as White people. This rapid transition from culturally non-White to White is proof that even whiteness, in its apparent superiority, has been molded and altered to meet the current demands of the elites.

Today’s racial climate in America is characterized by a notion of the post-racial era. Since the election of Barack Obama in 2008, Americans, especially those who are White, have come to believe that, as Eduardo Bonilla-Silva states in his book Racism Without Racists, that color is no longer a central factor:
Nowadays, except for members of white supremacist organizations, few whites in the United States claim to be “racist.” Most whites assert they “don’t see any color, just people” . . . More poignantly, most whites insist that minorities (especially blacks) are the ones responsible for whatever “race problem” we have in this country. They publicly denounce blacks for “playing the race card,” for demanding the maintenance of unnecessary and divisive race-based programs, such as affirmative action, and for crying “racism” whenever they are criticized by whites. Most whites believe that if blacks and other minorities would just stop thinking about the past, work hard, and complain less (particularly about racial discrimination), then Americans of all hues could “all get along.” But regardless of whites’ “sincere fictions,” racial considerations shade almost everything in America. (2013, p. 13)

Albert Memmi makes this same argument in his book *Racism*, stating that, “There is a strange kind of tragic enigma associated with the problem of racism. No one, or almost no one, wishes to see themselves as racist; still, racism persists, real and tenacious” (2000, p. 3). As both authors outline, not acknowledging race ignores the fact that the United States remains highly racialized. In addition, it fails to recognize that while the landscape of race in America has changed, race has only been altered, not eliminated. These alterations include a newly emerged, more nuanced form of racism.

In regards to contemporary science on the matter, scientific authority has followed in the footsteps of the social norms of racism by nuancing itself. It has done so through the study of genetics, after the collection of the first complete DNA sequence of human genomes in the early 21st century. While race was discovered to have almost no biological significance (with approximately 99.5% of DNA the same across the human species), the remaining 0.5% of genetic difference was focused on to justify the idea that distinct differences still exist between races (Beckwith et al., 2017, p. 525).

**The Data: What Does It Really Mean?**

Existing mechanisms for exposure to ideas about race, genetics, and society often perpetuate common myths about how informative DNA ancestry tests are and the relevance of DNA to the concept of race. We see this in popular television programming like the *Faces of America* series, in which the host and celebrity participants frequently ascribe racial meaning to DNA ancestry testing results. Thus, our dialogues are developed out of an awareness that there are general public misconceptions about genetics, ancestry, and race, and are positioned to potentially dispel the erroneous ideas that (1) DNA-based ancestry testing can describe one’s ancestry with precision, and that (2) ancestry information from these tests can be informative about one’s race. (Beckwith et al., 2017, p. 526)

The main issue surrounding ancestry DNA testing is the meaning consumers ascribe to the data it provides. These meanings are first derived from a lack of knowledge of what is being examined/sought out in these tests, and second, an overall assumption that racial identity, amongst other identities, can be ascribed meaning through scientific data. One must remind oneself that race is a social construct, and not a biological determinant. Therefore, factors outside of the data presented must also be considered to make sense of racial or ethnic identity within a social context.
In addition, some of the issues that surround ancestry DNA testing derive from an individualistic approach to the matter. In general, ancestry tests like AncestryDNA’s ethnicity estimate are hyperfocused on individual genetics; what they fail to note to customers is that when the human population is examined collectively, any member of the human population is around 99% similar genetically to another member of the human population. Thus, the data provided is inherently paying attention to a miniscule piece of the human genome.

Finally, one must also consider the margin of error in AncestryDNA’s ethnicity estimates, or really with any set of data. Often, people make the mistake of considering science to be accurate simply because of the reputation science itself has. Science was not always truth, but rather came to be known as truth. People place their faith in percentages and large data groups, because to consumers, a percentage or a large sample size appears to be extremely precise; in reality, they are not necessarily more accurate.

Using data to determine race also fails to consider what one has built up as their racial/ethnic identity over the course of their life. This is important, because this is the part of race that feels “real” to us, as it has been made socially meaningful. The process of developing a self-identified racial identity occurs once the “crisis of adolescence” (Psychology Department Labs, n.d.) prompts an individual to embark on a search for self. However, one’s identity is being influenced from the moment they begin to interact with others. In the early stages of life, parents are the most influential in the socialization process; this occurs in some ways intentionally, such as in teaching children traditions, or unintentionally, such as inexplicitly expressing attitudes towards members of other racial groups. Once an individual reaches the age of adolescence, this process becomes more introspective, and individuals seek to answer the question, “Who am I?” for themselves. There are four main factors that influence how strongly one develops their own racial or ethnic identity; these factors are size, power, discrimination, and appearance. Generally, members of dominant racial/ethnicity groups have a lower sense of ethnicity. This explains why members of the White America are able to function within society without thinking much about the color of their skin. Conversely, members of minority racial/ethnicity groups are more likely to experience a greater sense of race/ethnicity. This is why members of Black America tend to identify much more with blackness than Whites identify with their whiteness. This also explains why in post-racial America, Whites have the tendency to place blame on people of color in order to focus on race rather than the fact that America is highly racialized; race affects White people less, and thus White people think about it less.

So what is this information really saying? AncestryDNA is a type of ancestry DNA test that is genomic. This means that:

This DNA ancestry test relies on nuclear DNA loci. Nuclear DNA is genetically transmitted from both father and mother in roughly equal contributions to sons and daughters . . . Genomic ancestry tests . . . utilize biparental inheritance of autosomal markers. Autosomal sequences acquire tree-like descent just as unilineal DNA sequences do. However, because each person contains two different copies of each and autosomal sequences undergo recombination that scrambles the various haplotypes, genomic

---

2 A “dominant” racial/ethnic group is defined in this context as one that has a numerical advantage, greater power, and experiences little to no discrimination.

3 A “minority” racial/ethnic group is defined in this context as one which does not have numerical advantage, has less power, and experiences more discrimination.
ancestry tests are based on comparing frequencies of alleles at large numbers of different variable sites along the genome. These sites are known as ancestry informative markers (AIMs), chosen because they vary substantially among some set of putative “parental” populations of which individuals may be the admixed descendant. The assumed parental populations often represent up to four continental populations (European, East Asian, African, and Indigenous American). The consumer’s genotypes at these markers are used with maximum likelihood analysis to determine the statistically most likely distribution of ancestry from the parental populations. (Wagner, 2010, p. 235)

This complex process is difficult for the average consumer to fully comprehend; thus, the average consumer does not know what they really are getting out of their purchase. This likely explains why there is a misconception that these tests are providing you with information about your race (in addition to the way in which these products are advertised). Overall, the reality is that these tests are not telling you that you are from one region or another, nor that people from that region are most like you. Because we as a species have been mixing, moving, and intermingling on a genetic level for hundreds of thousands of years, they are simply telling you that it is likely that there are people in that region (who have had the opportunity to take the same test) who have similar nuclear DNA to your own (Herbes-Sommers, 2003).

**Conclusion: Where Do We Go from Here?**

We have known for some time now that race is a social construct, something that was developed by humanity for the benefit of a select portion of the population. We know that the false notion of “science as fact” has been utilized in order to validate the notion of race. We know that once basic science failed in doing this, it became up to genetics to take its place. But now that genetics is being proven to have failed to explain such a notion as valid, where do we go from here? In addition, how do we begin to stop this progression of one failed explanation to the next? And even before that, how do we begin to convince everyone that these explanations are really failures? Goodman et al. argue that “Once we understand what race is and is not, race ceases to become a ready excuse for the intolerable differences in our wealth, health, and other core indicators of equality and experiences of life” (2012, p. 4). But while it is becoming clearer and clearer each day that race is a biological myth and that racism is not an innate part of human interaction, it is going to take more than the existence of this fact to convince people otherwise; it is going to take a complete paradigm shift. Memmi outlines what this means in his book *Racism*:

> It occurred to me to write that racism is natural and anti-racism is acquired. That would have been half-wrong; they both have their roots in us. The obsessiveness of racism exists, but there also exist inclinations that carry us toward others, both to seek or to offer solace. We know, by intuition and by experience, that these inclinations are innate, from our first breath to our last, by virtue of our real reciprocal dependence. Indeed, these two contradictory manifestations of our being have a more profound unity whose source lies in that prior spirit that drives all life to persevere and to survive, by whatever means, whether antagonistic or not. They are two solutions to the same problem of survival. (2000, p. 145)
What Memmi (2000) is saying is that both racism and the abolishment of racism are completely possible realities. One is the current reality, and one is the ideal we strive for. This gives us hope that although the reality of today seems bleak, there is hope for a better tomorrow. This is crucial to the possibility for a paradigm shift, for without hope it would not be possible. But where to begin? A suggestion for the start to a process of shifting the race paradigm lies in uncomfortability: “We have to be uncomfortable with the present racial arrangement. In a sense we have to be willing to be uncomfortable, willing to demand more of ourselves and more of our country, and willing to make the invisible visible” (Strain, 2003).

Shifting the race paradigm is not something that will be easy or pleasant. If it was, we would have already done it; however, I see no way in which we can avoid it, and I find hope in the possibility of a more inclusive and equal world.

References


A Brief Review of Research on Forms of Instruction

By Kevin Butler*
Illinois Wesleyan University

Teaching well helps students learn effectively; in fact, the behaviors of a student’s teachers can be one of the most important factors influencing a student’s success (Brophy, 1986; Brophy & Good, 1986; Hanushek, 2002; Hattie, 2009; Muijs et al., 2014). However, effective teaching methods do not always coincide with popular or ideologically based teaching methods; in fact, it is quite common for teacher education programs and the education establishment in general to reject teaching strategies that have been strongly supported by research. The goal of this text is to summarize the empirical research that has been done regarding two general approaches to teaching: minimally guided instruction and direct instruction.

Current educational practice tends to advocate being a “guide on the side” rather than a “sage on the stage” (phrases coined by Alison King in her 1993 article published in College Education). Essentially, pedagogical practices based around minimally guided instruction—such as “discovery-based learning,” “inquiry-based learning,” and “constructivist learning”—are pushed in colleges of education as being the gold standard of teaching (Carnine, 2000; Farkas & Duffett, 2010; Farkas, Johnson, & Duffett, 1997; Finn & Ravitch, 1996; Hirsch, 1996; Krahenbuhl, 2016; Matthews, 2003; Mayer, 2004; Stone, 1996; Stone, 2002). More traditional teaching methods, such as lecture, are generally considered to be outdated and ineffective. The issue with this trend is that these newer methods of teaching have little or no pedagogical research to back up their effectiveness. While traditional lecture may not be the most useful method of instruction, the “guide-on-the-side” based methods are likely even less useful, whereas direct instruction, “explicit teaching,” or highly interactive lecture is most effective.

“Guide on the Side”: More Harmful than Helpful

An idea known as “best practice teaching” currently dominates colleges of education and the school system of the United States (Hirsch, 1996; Stone, 2002). According to Best Practice: Today’s Standards for Teaching and Learning in American Schools, these “best practices” involve “schools that are more student-centered, active, experiential, authentic, democratic, [and] collaborative” (Daniels, Hyde, & Zemelman, 2005, p. vii). The authors specifically advocate utilizing more “experiential, inductive, hands-on learning”; placing “emphasis on higher-order thinking”; and paying “attention to affective needs and varying cognitive styles of individual students” (Daniels et al., 2005, pp. 8–9). Additionally, they specifically advocate less use of “whole-class, teacher-directed instruction”; “presentational, one-way transmission of information from teacher to student”; and “rote memorization of facts and details” (Daniels et al., 2005, pp. 8–9). Many of these ideas seem intuitively appealing, and generally speaking, most of these “best practice” strategies make up a broad approach to teaching that is called “minimally-guided instruction” (Clark, Kirschner, & Sweller, 2006). Minimally guided instruction has manifested itself under the names “discovery-based learning,” “inquiry-based learning,” “constructivist

* Kevin Butler is an undergraduate student at Illinois Wesleyan University, where he majors in Hispanic studies and education.
learning,” “developmentally appropriate practices,” and a plethora of other titles (Clark et al., 2006; Finn & Ravitch, 1996; Mayer, 2004), and it consists of a very “hands-off” form of teaching. Rather than having the teacher directly present material to students, classes based on this style consist of very little “teacher-talk” and instead involve highly extensive group work, students teaching each other, and independent investigation. As mentioned, this form of education is ineffective, despite the fact that it is incredibly popular in the United States, specifically in colleges of education (Carnine, 2000; Farkas & Duffett, 2010; Farkas et al., 1997; Finn & Ravitch, 1996; Hirsch, 1996; Krahenbuhl, 2016; Matthews, 2003; Mayer, 2004; Stone, 1996; Stone, 2002). In his book The Schools We Need and Why We Don’t Have Them, Professor E.D. Hirsch comments on an earlier version of Best Practice, stating the following about the authors’ teaching recommendations:

The authors praise the current consensus on these “child-centered” principles for being “progressive, developmentally appropriate, research based, and eminently teachable.” These claims are not, however, “research based” in the way the authors imply. Quite the contrary. No studies of children’s learning in mainstream science support these generalizations. With respect to effective learning, the consensus in research is that their recommendations are worst practice, not “best practice.” (1996, p. 173)

There is an incredible amount of scientific literature analyzing minimally guided instruction and showing that it does not help students learn nearly as much as more direct methods of instruction. According to an article from Educational Psychologist, “evidence from empirical studies over the past half-century . . . consistently indicate that minimally guided instruction is less effective and less efficient than instructional approaches that place a strong emphasis on guidance of the student learning process” (Clark et al., 2006, p. 75). An article from the Elementary School Journal in which various studies were analyzed notes that “students taught with structured curricula do better than those taught with more individualized or discovery learning approaches. Furthermore, students who receive their instruction directly from the teacher achieve more than those expected to learn new material or skills on their own or from each other” (Rosenshine, 1983, p. 336). A report from Durham University entitled “What makes great teaching?” that analyzed several hundred empirical studies on teaching describes “discovery-based learning” as an ineffective practice (Coe, Aloisi, Higgins, & Major, 2014); a meta-analysis of nearly 8,000 studies summarized in Phi Delta Kappan found that using considerable guidance during instruction is much more effective than minimal guidance (Walberg, 1990); and Professor John Hattie’s book Visible Learning—a massive analysis of about 50,000 empirical studies addressing various aspects of education—concluded that teaching methods based around minimally guided instruction tend to be quite ineffective, especially when compared with direct instruction (2009).

**Reasons for the Lack of Effectiveness of Minimally Guided Instruction**

Why is it that minimally guided instruction is so ineffective? Put succinctly, in order to learn, one must develop a broad base of knowledge and practice basic skills to a level of automaticity; when one has a considerable amount of information stored in long-term memory and has simple skills well practiced, it is possible to focus one’s working memory on critical thinking because one no longer has to focus on trivialities, such as calling to mind basic
information. This allows for true engagement in higher-order thinking; research in cognitive psychology strongly supports this conclusion (Pinker, 1997; Sweller, van Merrienboer, & Paas, 1998; van Merrienboer & Sweller, 2005; Willingham, 2009). As explained by Hirsch:

First, expertness in [a] skill depends upon the automation, through a great deal of practice, of the repeated, formal elements of the skill, thus freeing the conscious mind for critical thought. Secondly, expertness depends upon the acquisition of the relevant vocabulary, conventions and schemas that form the relevant knowledge base for the skill. (1996, p. 151)

Minimally guided instruction consists of intentionally withholding information from students; the idea is that, by so doing, students will have to “think critically” in order to learn rather than just “memorize facts.” Given that knowing basic information and mastering basic skills are necessary prerequisites to higher-order thinking, this is not logical. Some educators may argue that critical thinking skills could somehow be developed and then applied to information found in outside sources, thus preventing students from having to memorize that information. However, it is essentially impossible to apply critical thinking skills to external knowledge—it is absolutely necessary to have knowledge stored in long-term memory in order to think critically, according to cognitive psychologist Daniel Willingham:

Data from the last thirty years lead to a conclusion that is not scientifically challengeable: thinking well requires knowing facts, and that’s true not simply because you need something to think about. The very processes that teachers care about most—critical thinking processes such as reasoning and problem solving—are intimately intertwined with factual knowledge that is in long-term memory (not just found in the environment). (2009, pp. 21–22)

This issue of focusing on higher-order thinking without first establishing foundational knowledge and skills is also addressed in the Handbook of Research on Teaching, in which a meta-analysis by Jere Brophy and Thomas Good provides this information:

There are no shortcuts to successful attainment of higher-level learning objectives. Such success will not be achieved with relative ease through discovery learning by the student. Instead, it will require considerable instruction from the teacher, as well as thorough mastery of basic knowledge and skills which must be integrated and applied in the process of “higher-level” performance. Development of basic knowledge and skills to the level of automatic and errorless performance will require a great deal of drill and practice. Thus drill and practice activities should not be slighted as “low level.” They appear to be just as essential to complex and creative intellectual performance as they are to the performance of a virtuoso violinist. (1986, p. 338)

Despite this, schools tend to push “critical thinking” before teaching basic skills. Perhaps the most egregious example of this is the tendency of some elementary schools to discourage or forbid students from counting with their fingers while doing simple addition and subtraction (Hirsch, 1996); using one’s fingers to count is seen as a lower-level thinking skill that should be abandoned in order to require students to use “expert” strategies to solve basic math problems—
as one would expect, this interferes with students’ math skills (Hirsch, 1996). E.D. Hirsch offers a phrase that may summarize many of these points: “To stress critical thinking while de-emphasizing knowledge reduces a student’s capacity to think critically” (1996, p. 66).

The best way to help students build a foundation of knowledge is to teach it to them directly; with minimally guided instruction, one actively keeps knowledge away from students. This leads simply to incoherency, because it is impossible to ensure that students will end up figuring out what they need to know. In other words, to teach effectively, one must have a clear plan of what material will be covered and how the elements of that material will integrate in order to achieve particular goals. In a minimally guided situation, it is impossible to establish a plan of what material will be covered, because students will be able to wander in any direction. If, for example, there was a class called “British literature,” one would expect to be learning about British literature in that particular class; however, if—as is common with minimally guided instruction—the teacher rarely presents information to the class, and the only assignments are essays and projects that allow students to explore any topic they choose as long as it vaguely pertains to British literature, then one may as well throw out any sort of curriculum, because none of the students will have to learn the set of information that the class is intended to cover. While such assignments are indeed valuable for honing students’ research, writing, and presentation skills, it would be detrimental for a class to include only assignments of this type, and it would be detrimental for the teacher to avoid directly presenting material. The lack of focus and excessive dependence on students’ self-guidance—expecting them, essentially, to learn the curriculum on their own or from each other—results simply in an incoherent mess in which students learn very little. In fact, allowing students to wander aimlessly through the process of learning can lead them to arrive at false conclusions and incorrect or inefficient ways of solving problems; these errors are then quite difficult to remedy (Clark et al., 2006; Hirsch, 1996; Kozloff, LaNunziata, Cowardin, & Bessellieu, 2001). As explained by Hirsch, “[discovery learning] takes more time and is sometimes insecure in its results . . . Students ‘discover’ all sorts of things, some of them irrelevant to the purposes at hand and some of them wrong” (1996, p. 134).

Ultimately, a broad base of knowledge and automation of basic skills are nearly impossible to achieve via minimally guided instruction due to its incoherence. Put simply in an article from American Educator, “[w]ithholding information from students does not facilitate the construction of knowledge” (Clark, Kirschner, & Sweller, 2012, p. 8). Additionally, in the words of John Amos Comenius, the father of modern education,

It is therefore cruelty on the part of a teacher if he set his pupils to work to do without first explaining it to them thoroughly, or showing them how it should be done, and if he do not assist them in their first attempts; or if he allow them to toil hard, and then loses his temper if they do not succeed in their endeavours. (1657/1898, pp. 138–139)

The Value of Interactive Direct Instruction

Highly interactive direct instruction is the teaching strategy that is most strongly supported by empirical research. In a previously mentioned article from the journal Phi Delta Kappan, Herbert Walberg (1990) discusses a meta-analysis of nearly 8,000 studies of teaching strategies; he finds that several psychological elements within teaching strategies are consistently
shown to be effective for helping students learn. Specifically, he mentions cues, engagement, and corrective feedback:

[C]ues show students what is to be learned and explain how to learn it. Their quality depends on the clarity, salience, and meaningfulness of explanations and directions provided by the teacher . . . The extent to which students actively and persistently participate in learning until appropriate responses are firmly entrenched in their repertoires is known as engagement . . . A high degree of engagement is indicated by an absence of irrelevant behavior and by concentration on tasks, enthusiastic contributions to group discussion, and lengthy study . . . Corrective feedback remedies errors in oral or written responses. Ideally, students should waste little time on incorrect responses, and teachers should detect difficulties rapidly and then remedy them. (1990, p. 471)

Walberg states that these psychological elements, when incorporated into teaching, result in effective methods, which include giving students advance organizers, setting clear goals, expressing high expectations for one’s students, and asking frequent questions in class. These methods, along with other aspects, come together to form a “pattern of teaching” known as “explicit teaching” (Walberg, 1990). According to Walberg, “[e]xplicit teaching can be viewed as traditional or conventional whole-group teaching done well . . . [Explicit teaching is referred to] by different names, such as process-product, direct, active, and effective teaching” (1990, p. 472).

Various other sources have discussed the effective elements of direct teaching in more detail. Jere Brophy and Thomas Good (1986), in an article published in the third edition of the Handbook of Research on Teaching, analyzed and summarized an extensive amount of pedagogical research done in the previous few decades. Some of their key findings include that student achievement, engagement, and motivation are maximized when teachers dedicate most class time to curriculum-related activities, actively present information and give demonstrations, ask many questions, and do not expect students to learn mostly on their own or from each other (Brophy & Good, 1986). In an article from American Psychologist, Brophy (1986) states the following:

Students achieve more in classes where they spend most of their time being taught or supervised by their teachers rather than working on their own (or not working at all). These classes include frequent lessons . . . in which the teacher presents information and develops concepts through lecture and demonstration, elaborates this information in the feedback given following responses to recitation or discussion questions, prepares the students for follow up seatwork activities by giving instructions and going through practice examples, monitors progress on assignments after releasing the students to work independently, and follows up with appropriate feedback and reteaching when necessary. The teacher carries the content to the students personally rather than depending on the curriculum materials alone to do so, but conveys information mostly in brief presentations followed by recitation or application opportunities. There is a great deal of teacher talk, but most of it is academic rather than procedural or managerial, and much of it involves asking questions and giving feedback rather than extended lecturing. (p. 1070)
More recent analyses of pedagogical research have found similar results. In the report “What makes great teaching?” from Durham University, the work of Barak Rosenshine is highlighted:

Rosenshine . . . has summarised at least 40 years of research on effective instruction with a key set of principles that maximise its impact. The starting point for this evidence base is a set of correlational studies linking particular observed classroom teacher behaviours with higher student outcomes. For each of these principles, there is also experimental evidence showing that attempts to train teachers in adopting these behaviours can result in changes in teacher behaviours and improvements in student outcomes. (Coe et al., 2014, p. 14)

In a report published in 2010 by the International Bureau of Education, Rosenshine wrote about various principles that his decades of research have found to be the most effective; these include reviewing key material at the beginning of class; asking students many questions during class; providing direct models of necessary skills; covering material in small steps; guiding student practice; checking the responses of all students; and taking ample time to present necessary information. It is important to note as well that Rosenshine’s research comes from three fields of study: research on how one’s brain acquires and understands information, research on the practices of effective teachers, and research in which cognitive learning strategies are taught to students. Rosenshine notes that

[an] interesting finding is that there is no conflict at all between the instructional suggestions that come from each of these three sources. In other words, these three sources supplement and complement each other. And the fact that the instructional ideas from three different sources supplement and complement each other gives us faith in the validity of these findings. (2010, p. 6)

Jeanne Chall’s book The Academic Achievement Challenge reviews extensive literature regarding direct, teacher-centered instruction and minimally guided, “student-centered” instruction; Chall concludes, “the findings [of the research literature on teaching] are quite consistent” (2000). Chall’s review finds that direct instruction—characterized by direct presentation of material and strong guidance for students—is much more effective for students’ learning than minimally guided instruction. Additionally, John Hattie’s book Visible Learning, in which roughly 50,000 educational studies are analyzed, indicates that direct instruction is a very effective teaching method; actions such as presenting necessary information, modeling processes, asking frequent questions to check students’ understanding, and guiding students’ practice are emphasized as key (2009).

Put simply, the clear, straightforward teaching that characterizes direct instruction, explicit teaching, or highly interactive lecture is the best way to instruct one’s students; this has been confirmed repeatedly by the research done over the past several decades (Adams & Engelmann, 1996; Brophy & Good, 1986; Chall, 2000; Clark et al., 2006; Coe et al., 2014; Ellis & Worthington, 1994; Kameenui & Simmons, 1990; Kozloff et al., 2001; Muijs et al., 2014; Rosenshine, 1983; Rosenshine, 1997; Rosenshine, 2010; Rosenshine & Stevens, 1986; Walberg, 1990; Westwood, 1996; Yates, 1988). Nevertheless, many people still object to direct instruction by saying that it only builds students’ ability to memorize and practice rote drills, and that it
makes students less interested in learning. However, these criticisms are not accurate; as explained by Professor John Hattie in his comprehensive book *Visible Learning*, “[o]ne of the common criticisms is that Direct Instruction works [only] with very low-level or specific skills, and with lower ability and the youngest students. These are not the findings from the meta-analyses” (2009, p. 206). In fact, there is considerable evidence that teaching in a more direct manner is actually *more* effective than minimally guided instruction for developing students’ critical thinking skills (Adams & Engelmann, 1996; Brophy & Good, 1986; Hirsch, 1996; Watkins, 1988). As previously mentioned, research in cognitive psychology clearly indicates that a base of knowledge and skills is an absolute prerequisite to critical thinking (Pinker, 1997; Sweller et al., 1998; van Merrienboer & Sweller, 2005; Willingham, 2009). Considering that direct instruction is much more focused than minimally guided instruction on building students’ base of knowledge, it makes sense that direct instruction would lead to improvement in students’ critical thinking skills. It is important to emphasize as well that using direct instruction tends to promote critical thinking skills not simply because it builds students’ background knowledge and basic skills, but also because direct instruction can—and in many situations, should—include in-depth class discussion. This depends on the type of subject matter and content being covered, but often, after key information has been presented and explained modeled by the teacher, the students can engage in discussion in order to practice or apply the knowledge that they have acquired. The teacher should, of course, ask many questions and guide the discussion in order to ensure that students are applying the necessary material; if students are thrown into a discussion without guidance and necessary background knowledge, they may learn little or nothing (Laurillard, 2002).

Additionally, in classes where students are mostly taught directly by the teacher rather than attempting to learn via minimal guidance, students tend to be more engaged in the material and more motivated (Brophy & Good, 1986; Chall, 2000; Hirsch, 1996; Rosenshine & Stevens, 1986). In fact, using minimally guided instruction can hurt students’ self-esteem by leading to students’ feeling “lost and frustrated” due to the number of “false-starts” that can occur before correct information is learned (Clark et al., 2012). Furthermore, direct instruction can be quite helpful for students’ creativity. Creativity, perhaps contrary to common belief, flourishes best under structured conditions (Sagiv, Arieli, Goldenberg, & Goldschmidt, 2009). Additionally, having thorough, detailed knowledge of a subject is necessary for one to demonstrate creativity in tasks related to that subject (Chall, 2000; Sweller, 2004). Therefore, using direct instruction—which builds students’ base of knowledge and basic skills much more than minimally guided instruction—is potentially conducive to creativity.

**Why Are Ineffective Methods Popular?**

Considering all of the research discussed so far, it would appear logical for methods based on direct instruction to be adopted in schools. However, as mentioned, there is great resistance in schools and teacher education programs in the United States to direct instruction, along with huge support for minimally guided instruction. Why is this the case? According to a comprehensive article published in *Education Policy Analysis Archives*, it has to do with an ideology called “developmentalism” that rules the education system of the United States (Stone, 1996). Developmentalism is described as such: “developmentalism . . . presumes ‘natural’ ontogenesis to be optimal and it requires experimentally demonstrated teaching practices to overcome a presumption that they interfere with an optimal developmental trajectory” (Stone,
Essentially, educational practices that appear to go against “natural,” unimpeded development of a student’s capacities are rejected regardless of empirical evidence. The result of this is that students are not pushed or held to any sort of standards:

Given that developmentally appropriate teaching and parenting must be fitted to the child's current developmental status, and given that efforts to exhort or otherwise induce advancement beyond the child's developmentally governed potentialities are considered risky at best, teachers and parents are given to understand that expecting too little is a much better choice than expecting too much. From a developmentalist perspective, if opportunity and conditions conducive to developmental advancement have been maximized, the developmentally guided teacher or parent has done all that can safely be done. In effect, developmentalism discourages teachers and parents from asserting expectations or otherwise acting to induce more mature behavior. Even in the face of noticeable deficiencies or problematic conduct, the developmentally appropriate course of action is that which is congenial to the child's apparent developmental status, i.e., his or her present behavior and inclinations. Continuing lack of advancement in spite of suitable facilitating conditions is taken to reflect delayed emergence of developmentally governed potentialities, not ineffective teaching. (Stone, 1996, p. 15)

Accordingly, many empirically supported teaching strategies are routinely ignored or dismissed. Where did this ideology of developmentalism originate, and why did it take hold of the education system of the United States? In brief, a public outcry against typical educational practices occurred in the late 1800s. In the 1890s, Joseph Mayer Rice—an author for the magazine The Forum—traveled around the United States and assessed the practices of many public schools. In general, he concluded that the setup of schools was overly authoritarian, focusing extensively on teacher control, senseless drills, and meaningless rote memorization (Cremin, 1964). In response to these criticisms, there was a call for a different approach to schooling. Two philosophers of education—G. S. Hall and John Dewey—had already, at this time, started writing about a form of developmentalist education that eventually took on the name of “progressive education.” This was a “student-centered” form of education that, being a developmentalist concept, advocated allowing students to flourish “naturally” with as little outside interference as possible (Cremin, 1964). According to the aforementioned article from Education Policy Analysis Archives, Dewey expressed the following ideas:

Dewey believed that evolution had equipped man with characteristics fitted to certain types of naturally occurring experiences and that the learning that emerges as the individual encounters these experiences is optimal. Quality teaching was, therefore, the practice of fitting educational experiences to the emerging characteristics and proclivities of the child for the purpose of optimizing “growth” . . . Because he believed that true understanding was personalized, Dewey held that educational aims could not be dictated by any agent external to the student. For this reason, Dewey’s concepts severely limited the ability of teachers to insure that students acquire any preconceived understanding or knowledge. (Stone, 1996, pp. 8–9)

Due to the popularity of G. S. Hall and John Dewey (along with other philosophers who espoused similar ideas) and Dewey’s eventual role in defining the curriculum of many teacher
education programs in universities across the country, this idea of “progressive education” became thoroughly ingrained in the concept of teaching:

By the late nineteen forties and early fifties, the language and concepts of progressive education were no longer thought of as representing a particular educational view. Rather they were simply considered good and sensible educational practice . . . Even though progressive education per se eventually fell into disrepute, its concepts and jargon were so thoroughly established as ‘conventional wisdom’ that the reasonableness and intuitive appeal of all subsequent educational theorizing was largely governed by its compatibility with progressive concepts—concepts that for the most part embodied one or another version of developmentalism. (Stone, 1996, p. 10)

Accordingly, developmentalism (and educational practices based around it) took hold of American education, and so far, it still has a strong grip.

**The Consequences of Developmentalist Ideology**

What are the consequences of this ideology of developmentalism? Education professors overwhelmingly advocate for minimally guided instruction despite its lack of empirical support. As Professor J. E. Stone explains, “[i]n the world of teacher education, learner-centered [minimally guided] instruction is the standard against which all other forms of teaching are judged” (2002, p. 39). A report from *Public Agenda* also explains that “professors of education have a distinctive, perhaps even singular, prescription for what good teachers should do . . . To a surprising extent, the professors’ views . . . differ from those of most classroom teachers” (Farkas & Johnson, 1997). This pattern amongst education professors of ignoring the educational concerns of the public and strongly supporting minimally guided instruction has endured up to the present (Farkas & Duffett, 2010; Krahenbuhl, 2016). Education professors, unfortunately, impose their views on their own students, who are future teachers, thus perpetuating a cycle of ineffective educational practices. This has had (and will continue to have, if not addressed) devastating effects on society. For example, there is a considerable achievement gap in the United States between students of color and White students, and between low-income students and high-income students; this gap has persisted for decades (Coleman et al., 1966; Kim & Axelrod, 2005; U.S. Department of Education, 2015), and the scientific literature shows quite clearly that implementing minimally guided instruction tends to *widen* the achievement gap in addition to hurting the achievement of all students in general (Chall, 2000; Clark et al., 2012; Hirsch, 1996; Kim & Axelrod, 2005; Kozloff et al., 2001). Accordingly, minimally guided instruction is a threat to equality and social justice, despite its popularity. In the words of E. D. Hirsch,

> the educational community has succeeded . . . in persuading the world that its antiknowledge views coincide with ethical and social right-thinking. The old guard has brilliantly succeeded in portraying its failed ideas as new, research-based, and conducive to social justice, although they are none of these. (1996, pp. 64–65)

Additionally, it is worth noting the general danger of allowing completely “natural,” developmentalist approaches to education. In *Best Practice: Today’s Standards for Teaching and
Learning in America’s Schools, Daniels, Hyde, and Zemelman state that although their minimal-instruction “best practices” are supposedly not identical to the ideas of “progressive education” advocated in the early 1900s by Dewey and his cohorts, they are “still rooted in the view of children as fundamentally good, self-regulating, and trustworthy” (2005, p. 26). This developmentalist idea is illogical due to the fact that many of humans’ natural tendencies are quite negative; aggression and violence are intrinsically ingrained in one’s psyche (Peterson & Flanders, 2005). In his book The Blank Slate, cognitive psychologist Steven Pinker explains that toddlerhood is the most violent age (2002). As psychologist Jordan Peterson states, “[t]wo-year-olds, statistically speaking, are the most violent of people. They kick, hit and bite, and they steal the property of others. They do so to explore, to express outrage and frustration, and to gratify their impulsive desires” (2018, p. 126). Additionally, an article from the academic journal Science states that “violence comes naturally to babies,” and that

[b]abies do not kill each other, because we do not give them access to knives and guns. . . The question . . . we’ve been trying to answer for the past 30 years is how do children learn to aggress . . . [T]hat’s the wrong question. The right question is how do they learn not to aggress. (Holden, 2000, p. 581)

Accordingly, allowing any and all “natural” actions to flourish can lead to quite disastrous outcomes. However, there are, thankfully, also natural tendencies of empathy within people (Peterson & Flanders, 2005). Ideally, then, education should aim to foster the positive natural tendencies of children while also teaching children to control their negative instincts—in sum, not everything natural is good.

Summary of Findings and Recommendations for Teaching

The vast majority of pedagogical research that has been done indicates that highly dynamic, interactive lectures lead to the highest level of student achievement and engagement. In order to build instruction that is in accordance with the literature, it is advisable to keep in mind certain principles.

First, knowledge necessarily precedes critical thinking (Brophy & Good, 1986; Clark et al., 2006; Hirsch, 1996; Pinker, 1997; Sweller, 2004; Sweller et al., 1998; Willingham, 2009). Before expecting one’s students to engage in higher-order thinking and creative pursuits, it is absolutely required to ensure that one’s students have acquired basic knowledge and skills.

Second, extensive literature indicates that explicit instruction, direct instruction, active teaching, and other similar effective approaches consist primarily of modeling the application of knowledge to students, then guiding students through application of knowledge in an interactive manner, then giving students time for independent practice. For example, if a teacher would like to teach his or her students how to solve a specific type of math problem, she should first explain and model the steps for solving such problems; then, she should go through example problems with her students in a highly interactive way that involves asking the class many questions; finally, she should give her students time for supervised, independent practice.

References


Farkas, S., & Duffett, A. (2010). *Cracks in the ivory tower? The views of education professors*


