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Letter from the Editor-In-Chief

Dear Students of the Claremont Colleges,

Welcome to the fifth print edition of the Claremont Journal of Law and Public Policy. Volume Four, Number One is our first Fall print edition. It includes three submissions we received from Claremont students, one article written by one of our staff writers, and three short pieces from our new blog. I encourage everyone to visit our website at www.5clpp.com to see the other articles we have published this semester.

I have never been more optimistic about the immediate future than I am now. After losing over half our board to graduation last year, we have filled the ranks quickly with a wonderful group of independent and ambitious students. Thanks to our returning staff writers, Anna Shepard, Emily Zheng, Eric Millman, Kyleigh Mann, and Ritika Rao, we start this year with a strong content-production base. Our new staff writers, Alice Stogiannou, Desiree Santos, Helen Guo, James McIntyre, Lucienne Altman-Newell, Neelesh Karody, Noah Melrod, and Shayok Chakraborty have all started researching their topics for this semester. I am excited to see their work!

Of course, thanks are also due to our senior editors, Greer Levin, Anna Balderston, and Andrew Marino, who have been working with their writers and editing this print edition simultaneously. Calla Cameron has also been helping as an editor. Celia Eyedeland, our new interview editor, has started planning her interview schedule for this semester, which will feature law & public policy experts from across the country. John Nikolaou, a staff writer last year and our new blog editor, has made a quick start to the year and a very productive addition to our board. He and the two blog writers, Lindsey Mattila and Justin Wenig, have stuck to their target of putting three blog articles online every week.

Last year I wrote in this space that I was optimistic about this year's business team. That optimism was not misplaced. April Xiaoyi Xu, our Chief Operations Officer, has been very active in managing the non-editorial side of the journal. She and our business director, Henry Head, have put together an ambitious events schedule for this year. To illustrate just two examples: I encourage anyone studying for the LSAT to check out our weekly group study sessions, and I encourage anyone interested in the 2016 election to attend our debate at the Athenaeum on October 13. Our opportunity to host that debate at the Athenaeum was won by our incredible marketing and recruiting director, Calla Cameron.

A big thanks is due to Jessica Azerad, not only for her work on this print edition but also for her general administrative help and for her advice. Our journal is also indebted to Jessica Tan, who helped us with our logo during the summer. Finally, our faculty advisor, Professor Amanda Hollis-Brusky, has been invaluable in the year that she has been with us. Her idea to reach out to other schools to solicit submissions turned out to be a great boon to the journal.

The CJLPP is looking ahead to a highly productive year. I invite all 5C students to be a part of our future. If you feel you could be a valuable addition to our staff, please email info.5clpp@gmail.com.

With Regards,
Martin J. Sicilian
Editor-in-Chief

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Federalism, Metaphor, and the Establishment Clause

By: Lane Miles, PO '17

In his 1802 letter to the Danbury Baptists, newly elected President Thomas Jefferson spoke of a "wall of separation between Church & State."[1] His metaphor has become an integral part of Establishment Clause jurisprudence. Cited consistently by the Supreme Court, Jefferson's figure of speech has aided in decisions striking down prayer in public schools and prohibiting certain ways of funding education in religious schools, to name.[2] It is warranted, then, to ask a basic question: is the metaphor a constitutionally justified and appropriate guide for interpreting the language and purpose of the First Amendment's Establishment Clause? This paper will answer that question by breaking it into two smaller questions, namely, has the metaphor been used in a justified and appropriate way and, if not, can it be used in such a way? Given that the Establishment Clause is fundamentally jurisdictional, I will argue that when Jefferson's metaphor was used to justify incorporating the Establishment Clause in *Everson v. Board of Education,* it used in ways that are not justified and appropriate. I will close by arguing that the metaphor can, with a small addition, become a justified and appropriate guide to understanding the clause.

To evaluate the relationship between Jefferson's metaphor and the Establishment Clause means we must determine what the latter means. Doing so, of course, requires interpreting the text of the First Amendment, which requires an interpretative framework. This paper will adopt an originalist framework based on the following guiding principle: when determining what a constitutional provision means, one hopes to understand what it would have meant to a reasonable person living at the time the provision was ratified—those from 1791 for the Establishment Clause. Unfortunately, little exists in the historical record to guide such an endeavor. Thus, I will focus on the available evidence: The Federalist and Antifederalist papers, the debates at the Constitutional Convention, and contemporary state laws and constitutions. While not completely dispositive, these documents will provide a mechanism to indirectly obtain what such a person might have thought the Establishment Clause meant.

Having identified an interpretative framework, we consider the ratification debates and the concerns of the antifederalists, to form an understanding of the Establishment Clause. Importantly, the ratification of the Constitution was not guaranteed from its inception. The final document was a product of compromise between the federalists, those supporting the new Constitution, and the antifederalists, those weary of its enhanced centralized power. To win the votes of the antifederalists, the federalists agreed to add the Bill of Rights to the Constitution. The Establishment Clause, as a part of the First Amendment, finds itself in the Constitution as a result of this compromise. Thus, to understand Clause's meaning, we look to see the concerns it was meant to address.

Before addressing their concerns directly, however, it is necessary to understand the state level disagreements over establishments of religion. At the time of the ratification of the Constitution, states had varying ideas about the best relationship between religion and state government. On the one hand, some states, like Virginia, had completely excised religion from government.[3] Jefferson, the author of the Virginia bill that separated the two entities, and Madison eloquently wrote about the harm, both to religion and to the state, that their intermingling entailed.[4] New York, like Virginia, had such an arrangement.[5] This view, howev-

1 "Jefferson's Final Letter," *American Constitutionalism Reader*, pp. 65.

2 *Engel v. Vitale*, 370 U.S. 421 (1962) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

3 "A Bill for Establishing Religious Freedom," *American Constitutionalism Reader,* pg. 55.

4 "Jefferson: Notes on the State of Virginia, Query XVII: Religion," *American Constitutionalism Reader*, pg. 56, and "Madison: A Memorial and Remonstrance on Freedom of Conscience," pg. 60.

5 Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 *Wm.*

er, was by no means a widespread one. Massachusetts, for contrast, ratified its state constitution three years after the Virginia split, and explicitly permitted local governments to tax their citizens for the benefit of the established church in the state, Congregationalism.[6] Maryland, among others, had a similar provision in its state constitution at the time of its ratification of the federal Constitution.[7] Vincent Munoz, a professor at Tufts University, summed the situation up thusly: "In revolutionary America, the relationship between church and state was anything but settled."[8]

Given these disagreements, the antifederalists were concerned that the newly formed national government would end the state level debate over the proper relationship between religion and state government by adopting a national establishment of religion. The antifederalist papers, written as a rebuttal to the federalist papers, which argued for the ratification of the Constitution, provide clear evidence of this concern. Antifederalist 44, "Deliberator," cautioned, "Congress may, if they shall think it for the 'general welfare,' establish a uniformity in religion throughout the United States."[9] Another antifederalist, "Old Whig," wrote "[I]f a majority of the continental legislature should at any time think fit to establish a form of religion...with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so?"[10] A Massachusetts antifederalist, "Agrippa," echoed the fear as well, writing "Attention to religion...is a distinguishing trait in our [Massachusetts] character. It is plain, therefore, that we require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us. Unhappiness would be the uniform product of such laws."[11] In all of the writings, there is explicit fear that the federal government would establish a national religion, for the sake of "uniformity," at the expense of the states' ability to decide for themselves. For states like New York and Virginia, this would cause certain pain, as they had deemed that religion and the state were best served when separated. The states with established religions, like Massachusetts and Connecticut, would have had to hope that Congress enshrined their chosen sect as the national one.

With an understanding of the antifederalists' concerns, that the national government would establish a national religion, the meaning and purpose of the Establishment Clause become clear. In exchange for supporting the ratification of the Constitution, the federalists compromised with the antifederalists and included the Bill of Rights, which contained a provision, the Establishment Clause, meant specifically to address the concerns over federal government intrusion into state establishment affairs through a national establishment of religion. The clause, therefore, is fundamentally about jurisdiction. While the immediate effects of the clause are to prevent actions of the federal government, the motivation behind those effects is federalism. To restate the point, while the clause may seem to be dictating the proper relationship between religious establishments and the federal government, it does so only to ensure the jurisdictional component of the clause is satisfied. The explicit Congressional limitations, in other words, would not exist without the demand for state freedom from federal entanglement in religious establishments.

With an understanding as to what the Establishment Clause means, we move to understand Jefferson's metaphor. After Jefferson's election in 1800, the Danbury Baptists, a small collection of Baptists living in Connecticut under an established Congregationalist church, wrote to him expressing their congratulations as well as their concerns over their minority status in a state with an established religion.[12] At the same time, Jefferson was being attacked by establishmentarian federalists in New England as being an atheist and an infidel, most recently at the time of the Danbury Baptist letter over his refusal to

& Mary L. Rev. 2105 (2003), http://scholarship.law.wm.edu/wmlr/vol44/iss5/4, pg. 2111.

6 "Fundamental Documents: Massachusetts Constitution," *Fundamental Documents: Massachusetts Constitution*, February 12, 2016. <http://press-pubs.uchicago.edu/founders/print_documents/v1ch1s6.html>.

7 "The Avalon Project: Constitution of Maryland - November 11, 1776," *The Avalon Project: Constitution of Maryland - November 11, 177, No Date.*

8 Munoz, Vincent Phillip. "The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation." University of Pennsylvania Journal of Constitutional Law 8 (2006). Pg. 605

9 "Antifederalist Paper 44," *The Federalist Papers*. 2011. <https://www.thefederalistpapers.org/antifederalist-paper-44>.

10 "Amendment I (Religion): An Old Whig, No. 5," *Amendment I (Religion): An Old Whig*, No. 5. <http://press-pubs.uchicago.edu/founders/documents/amendI_religions47.html>.

11 "Agrippa XII." *Infoplease*. <http://www.infoplease.com/t/hist/antifederalist/agrippa12.html>.

12 Daniel Dreisbach, "Sowing useful truths and principles: The Danbury Baptists, Thomas Jefferson, and the wall of separation," *Journal of Church and State,* 1997.

issue religious proclamations like fast days and thanksgivings.[13] Jefferson was a staunch antifederalist and believed that religious law and establishments should lie only at the state level. However, he was also a disestablishmentarian, having disentangled the church from the state government in Virginia. In the Baptists' letter, then, Jefferson saw a chance to both support the Baptists, with whom he sympathized as a fellow disestablishmentarian, and to push back at those who were attacking him. In his response, Jefferson employed his famous line; saying that he was glad to see "a wall of separation between Church & State"[14] created by the people through the religion clauses of the First Amendment. By referring to the First Amendment as an "act of the whole American people" with respect to "their legislature," it is clear that the "State" in Jefferson's metaphor is meant to be exclusively the federal government. His metaphor, then, focuses on and colorfully describes the direct effects of the Establishment Clause, namely, the prohibitions on the federal government with respect to religious establishments. By emphasizing the barrier between the federal government and religious establishments, Jefferson was able to both assure the Baptists that he would, and could, do them no harm as President and was able to provide justification to those attacking him as to why he did not, and could not, issue religious proclamations.

With the Establishment Clause defined and Jefferson's metaphor understood, we move to determine if the Court has used the metaphor in a constitutionally justified and appropriate way. While the metaphor first appeared in a Court decision in 1878 (*Reynolds v. United States*)[15], its most pertinent use was in *Everson v. Board of Education*, a 1947 case in which the Court upheld a bus reimbursement program for a New Jersey township, which served to reimburse the bus fares for students of public or Catholic schools. Importantly, Everson was the first case in which the Court explicitly incorporated the Establishment Clause through the Fourteenth Amendment to apply to the states. The opinion of the Court, written by Justice Black, listed the consequences of the incorporation, which were a series of actions, such as "set[ing] up a church" or "tax[ing] in any amount...to support any religious activities or institutions"[16] that neither the federal government nor any state could engage in. Following his analysis of the prohibitions an incorporated Establishment Clause would produce, Black stated, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[17]

Thus, in Everson, Jefferson's metaphor was used to illuminate what an incorporated Establishment Clause would entail, including, ironically, the prevention of state establishments of religion. Attempting to incorporate the Establishment Clause, however, makes little sense. The process of incorporation looks to identify the individual liberties found in the Bill of Rights and then requires that state law respect them as well.[18] With freedom of speech or of the press, the inherent right is clear, and its incorporation is relatively straightforward. However, the Establishment Clause, when correctly understood as a clause about federalism, does not put forth any broadly applicable individual right or liberty. Potentially, one might argue that it articulates the right of freedom from a national religious establishment. However, the incorporation would then read to disallow the states from regulating a national religious establishment, which they never would have had the power to do. Perhaps, instead, the clause advocates the broader principle of freedom from all religious establishments. This interpretation cannot be the meaning either, as no delegate from a state with an established religion, like Massachusetts, would have ever supported such a clause. Fundamentally, the Establishment Clause, unlike the other clauses in the First Amendment, is not right granting. Instead, it is federalism preserving, much like the Tenth Amendment. Thus, just as we do not incorporate the Tenth Amendment, we cannot incorporate the Establishment Clause. Therefore, the use of the metaphor in *Everson*, to provide understanding of what an incorporated Establishment Clause would entail, cannot be constitutionally justified and appropriate. The Court's use of the metaphor, rather than informing an understanding of what the Establishment Clause means, entirely distorts it.

In *Lemon v. Kurtzman*, the Court argued that the wall must be understood as a "blurred" and "indistinct" "line of separation," which depends on the "circumstances of a

13 Ibid.

14 "Jefferson's Final Letter," *American Constitutionalism Reader*, pg. 65.

15 "Reynolds v. United States (1878)," *American Constitutionalism Reader*, pg. 116.

16 "Everson v. United States (1947," *American Constitutionalism Reader*, pg. 101.

17 Ibid.

18 Gitlow v. New York, 268 U.S. 652 (1925), Opinion of the Court by Justice Sanford.

particular relationship."[19] As a result of their analysis, the Court created the Lemon test, which states that a law must adhere to the following: be secular in purpose, neither advance nor inhibit religion, and does not produce "an excessive government entanglement with religion."[20] Importantly, The Supreme Court understood the test to apply at the state and federal level. At the federal level, the Lemon test seems to be an appropriate guide to understanding the Establishment Clause, as the three prongs create a regulatory environment that would prevent laws "respecting an establishment of religion," to quote the text of the clause. However, because of the error in *Everson*, the Court also made the test applicable to state law, in direct conflict with the meaning of the Establishment Clause. Although using Jefferson's metaphor to create the Lemon test was perhaps appropriate at the federal level, it cannot be entirely justified and appropriate.

While Jefferson's metaphor has been used in ways that are not constitutionally justified and appropriate, it has the potential to be a valuable interpretative guide for the Establishment Clause. As shown above, the Establishment Clause exists to leave issues of religious establishments exclusively to the states. If the metaphor is understood only to prevent a national establishment of religion, it is not incorrect, but it is insufficient, as it can be used like it was in *Everson* and subsequently in *Lemon*, to prevent all levels of government from passing religiously motivated laws. To be constitutionally justified and appropriate, the metaphor must also be understood to guarantee the right of states to decide on issues of religious establishments for themselves. It must, for example, prevent the Lemon test from applying to the states. Perhaps, then, augmenting the metaphor with a second wall can prove useful. Rather than just a wall between the federal government and religious establishments, Jefferson's metaphor should be understood to also include a wall between the federal government and the states' ability to regulate religion. This second wall would prevent misapplications, like *Everson*, and would fully capture the language and purpose of the clause. Two walls of separation, perhaps, are sturdier than one[21].

This paper set out to examine whether or not Thomas Jefferson's famous metaphor of a "wall of separation Church & State" was a constitutionally justified and appropriate guide to understanding the language and purpose of the Establishment Clause. By adopting an originalist interpretative framework, we came to understand the Establishment Clause as a fundamentally jurisdictional clause. It set apart the federal government and the state governments with respect to regulating establishments of religion. Through the context of Jefferson's letter to the Danbury Baptists, we then understood his metaphor as a satisfying part of what the Establishment Clause demands, namely, a separation between the federal government and religious establishments. Then, by analyzing Everson and Lemon, we showed that the metaphor had been used in ways that were not justified and appropriate. Finally, by suggesting an extension of his metaphor, namely a second wall between the federal government and the states, we argued that Jefferson's metaphor could, in fact, be a justified and appropriate tool for understanding the Establishment Clause.

19 "Lemon v. Kurtzman (1971)," *American Constitutionalism Reader,* pg. 110.

20 "Everson v. United States (1971)," *American Constitutionalism Reader*, pg. 109.

21 A sentiment, I'm sure, Donald Trump would approve of.

No Compromise in Sight:

The Supreme Court Nomination of 2016 and Party Polarization

By: Marissa Mirbach, CMC '16

On February 13, 2016, Justice Antonin Scalia was found dead in his hotel room in Marfa, Texas. His death, though tragic in its own right, also represented a political tragedy for Republicans across the country. Scalia was a bastion of conservative thinking in the Supreme Court: he consistently fought for strict interpretation of the Constitution, and, as a devout Catholic, upheld the rights of religious groups wherever possible. Without him on the bench, the Supreme Court is left with a 4-4 liberal-conservative split. The implications of his absence are so important to defining the fate of the Supreme Court's future decisions that his death immediately became politicized.

The aggression that has arisen between Democrats and Republicans during the nomination and confirmation process of President Obama's Supreme Court nominee reflects the rise of affective polarization in today's party politics. Affective polarization goes further than partisan polarization – it describes not only strong disagreement between groups, but strong hostility. Researchers Shanto Iyengar and Sean Westwood define the term as "the tendency of people identifying as Republicans or Democrats to view opposing partisans negatively and co-partisans positively."[1]

Whether or not the politicians grew antagonistic towards the opposing party, and that bled into the American electorate, or vice-versa, is a chicken-and-egg question. Regardless, we can see the paralyzing effect it has on important decision-making in observing the Supreme Court nomination saga that is playing out today.

Ten days after Scalia was found dead, before President Obama had announced a nominee, the Senate Republicans wrote an open letter to Majority Leader Mitch McConnell (R-KY) stating their insistence on delaying any hearings on a Supreme Court nominee until the next President is elected.[2]

Nevertheless, President Obama fulfilled his duties in searching for his next nominee to the Supreme Court. Reacting to the Senate Republicans' statement, he assured the public that it was his "intention to nominate somebody who has impeccable credentials, somebody who should be a consensus candidate…"[3] Some Democrats had hoped that the White House would take this opportunity to bring a woman or minority voice to the Supreme Court, or nominate a candidate who would excite supporters of Hillary Clinton or Bernie Sanders. But Obama chose instead to focus on selecting a centrist.[4]

He finally settled on Merrick Garland, who in a calmer political environment would be an extremely palatable choice for conservatives. He justified this choice in the nomination speech, saying, "At a time when our politics are so polarized, at a time when norms and customs of political rhetoric and courtesy and comity are so often treated like they're disposable, this is precisely the time when we should play it straight."[5] The White House calculated that by choosing a nominee who, based on values and politics, is uncontroversial to Republicans, conservative rejection of his nomination would be obviously purely political, and therefore less likely to happen.

Merrick Garland is currently the chief judge of the U.S.

1 Shanto Iyengar, and Sean J. Westwood, "Fear and Loathing across Party Lines: New Evidence on Group Polarization," pp. 690-707, *American Journal of Political Science 59, no. 3*, 2014.

2 Charles E. Grassley, Orrin G. Hatch, Lindsay O. Graham, Jeff Sessions, John Cornyn, Ted Cruz, Jeff Flake, David Vitter, David A. Perdue, and Thom Tillis to Majority Leader Mitch McConnell, "Judiciary Committee Letter Opposing Supreme Court Hearings," *United States Senate Commission on the Judiciary*, February 23, 2016.

3 Kevin Liptak and Evan Perez, "Obama Looking for 'consensus' Pick to Supreme Court," *CNN*, March 16, 2016. Accessed April 08, 2016. http://www.cnn.com/2016/03/14/politics/obama-supreme-court-interview-consensus/index.html.

4 Ariane De Vogue, "Some Liberals Disappointed with Merrick Garland Pick," *CNN*, March 16, 2016. Accessed April 08, 2016. http://www.cnn.com/2016/03/16/politics/liberals-disappointment-merrick-garland-supreme-court/index.html.

5 Stephen Collinson, "In Age of Trump, Obama Embraces the Conventional," *CNN*, March 16, 2016. Accessed April 08, 2016. http://www.cnn.com/2016/03/16/politics/merrick-garland-barack-obama-supreme-court-politics/.

Court of Appeals for the District of Columbia, where he has served for 19 years, and has been the chief justice since 2013. He has an extremely uncontroversial record, which is partly a product of the nature of the Court of Appeals. Tom Goldstein, publisher of the SCOTUSblog, writes, "We think of it as the second most important court in the land, but in fact it is the single most boring. It is a court that only lawyers could love, with so many administrative issues like how phone companies should be organized and how power plants should sell electricity and so on."[6]

There are not many cases that Garland has been involved in to indicate his thinking on abortion, gay marriage, or other hot-button issues for conservatives. His decisions have been categorized as moderately liberal: he leans right in criminal law cases, and is more liberal on environmental law and civil rights.[7] His identity as a white, heterosexual male was expected to reduce the risk of outright rejection from the far right, and as the eighth oldest Supreme Court justice nomination in history at 62, he was meant to be a fairly attractive candidate to the Republican party.[8]

Most Republicans, though, would not budge. On March 20, McConnell reiterated on national television that he is 100 percent opposed to the prospect of a confirmation hearing for a nomination by a lame duck president.[9] A majority of the GOP has followed suit: Kansas Senator Jerry Moran, who had originally said that not holding a hearing for Garland would mean he would "not [be] doing his job", has reversed his opinion. According to an aide, "He has examined Judge Garland's record and didn't need hearing to conclude that the nominee's judicial philosophy, disregard for Second Amendment Rights and sympathy for federal government bureaucracy make Garland unacceptable to serve on the Supreme Court."[10]

6 Nina Totenberg, "Why Merrick Garland's Judicial Record Slips Through Critics' Fingers," *NPR*, March 27, 2016. Accessed April 08, 2016. http://www.npr.org/2016/03/27/472051889/a-look-at-garlands-judicial-record-reveals-few-hot-buttons.

7 Eric Posner, "Forget the Moderate Talk. Merrick Garland Would Shift the Supreme Court Decisively Leftward," *Slate*, March 17, 2016. Accessed April 08, 2016. http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/merrick_garland_would_shift_the_supreme_court_left_a_lot.html.

8 Oliver Roeder, "Merrick Garland Is The Oldest Supreme Court Nominee Since Nixon Was President," *FiveThirtyEight*, March 16, 2016. Accessed April 08, 2016. http://fivethirtyeight.com/features/merrick-garland-age-supreme-court/.

9 Marisa Schultz, "Mitch McConnell Is '100 Percent Against' Merrick Garland," *New York Post*, March 20, 2016. Accessed April 08, 2016. http://nypost.com/2016/03/20/mitch-mcconnell-is-100-percent-against-merrick-garland/.

10 Jessie Hellman, "GOP Senator Reverses Stance: No Hearings for Garland," *The Hill*, March 2, 2016. Accessed April 08, 2016. http://thehill.com/blogs/blog-briefing-room/news/274983-gop-senator-reverses-stance-no-hearings-for-garland.

The justification that Republicans who oppose allowing Garland the Senate hearing use is several layers deep. First, they say that the nomination of the next Supreme Court justice is in the hands of the people, and as a lame duck president, Obama's will no longer represents the will of the people. In their letter to Majority Leader Mitch McConnell, Senate Republicans wrote, "As we mourn the tragic loss of Justice Antonin Scalia, and celebrate his life's work, the American people are presented with an exceedingly rare opportunity to decide, in a very real and concrete way, the direction the Court will take over the next generation. We believe The People should have this opportunity."[11]

They also state in the letter that it is part of their Constitutional right, through Article II, Section 2: "[The President] by and with the advice and consent of the Senate, shall appoint...judges of the Supreme Court…" Another aspect of their argument is historical precedent, namely that over the past eighty years no president has filled a Supreme Court vacancy in an election year.[12]

Robin Bradley Kar and Jason Mazzone of University of Illinois College of Law take down the Senate Republicans' argument for opposing a hearing point by point. They contradict the notion that the American people have the opportunity to directly influence the future of the Court, writing, "...the people speak through actions by the full Senate…" which wisely preserves the separation of powers.[13] Regarding the question of the Senate's constitutional right to withhold a hearing, they maintain that, by saving the power of nomination for a future, unnamed president, the Senate is unconstitutionally delegating power. They say that historically, the only times that presidents have failed to fill Supreme Court vacancies during an election year have been anomalies, because "the nominating president either assumed office by succession (rather than election) or began the nomination process after the popular election of a new president (but before inauguration)." Neither of those cases is equivalent to Obama's position today. It is not Obama's decision to nominate a Supreme Court Justice candidate that is historically unprecedented,

11 Charles E. Grassley, Orrin G. Hatch, Lindsay O. Graham, Jeff Sessions, John Cornyn, Ted Cruz, Jeff Flake, David Vitter, David A. Perdue, and Thom Tillis to Majority Leader Mitch McConnell, 2016.

12 Ibid.

13 Robin Bradley Kar and Jason Mazzone, "Why President Obama Has the Constitutional Power to Appoint - and Not Just Nominate - a Replacement for Justice Scalia," March 21, 2016. SSRN: http://ssrn.com/abstract=2752287

but rather, the Senate's refusal to hold a hearing.

The Senate has rejected Supreme Court nominations on the basis of political reasons before. A 1987 article in Congressional Quarterly Weekly, treating the contemporary issue of Ronald Reagan's contested nomination of Judge Robert Bork, described cases of rejected nominations dating all the way back to George Washington. The author writes that 26 Supreme Court nominees had failed to be confirmed by the Senate, either through outright rejection, or indefinite postponement due to lack of support. The majority of these rejections, according to the article, were justified by "raw politics."[14] He says, "the primary factor in the rejection of 12 nominees was the "lame duck" status of the president nominating them or the hopes of the party in control of the Senate that its presidential candidate would emerge victorious in the next election."[15] It is not surprising that in the increasingly polarized environment that exists today, the issue is an extremely contentious one.

What is surprising, though, is the hostility that has arisen between the two parties over the nomination. Norm Ornstein, scholar at the American Enterprise Institute observed the departure from precedent in an interview, saying, "In every previous instance, including ones where they had played hardball.... You had hearings held in the Senate Judiciary Committee. You had an up or down vote...The idea that…. the majority leader of the Senate would basically say, with a year to go, that there shouldn't even be a nomination breaks all norms."[16]

It is unlikely that the Senate Republicans' refusal to grant a hearing to Merrick Garland will work in their favor. Garland is one of the least offensive candidates President Obama could have chosen. As it becomes more likely that a Democrat will win the presidency in 2016, the odds that the next Supreme Court nominee will be more palatable to the right diminishes. So what are they trying to achieve? Former strategist for John McCain, Steve Schmidt, suggests that the stance was not thoroughly calculated: "Mitch McConnell's knee-jerk response after Justice Scalia's death is a public relations debacle for the Republican Party." He would have done better to "derail [the nomination] slowly over time."[17] The Republican's aggressive stance represents a deeper trend in American politics: the rise of affective polarization.

While the ideology of the two parties has been drifting farther apart, their members have grown more aggressive towards each other. Researchers Jonathan Haidt and Marc Hetherington write that over the past decade, both Republicans and Democrats rated their "warmth of feeling" towards the opposing party as dramatically lower, dropping about 50% since the Clinton administration.[18] And, while all Americans' trust in government has dropped since the 60's, the Republicans were at a 40-year-high during George W. Bush's administration, and dropped 5% after President Obama was elected. Iyengar and Westwood observe, "Americans increasingly dislike people and groups on the other side of the political divide and face no social repercussions for the open expression of these attitudes."[19] The surprisingly personal reactions of the Senate Republicans, then, is best explained as a reflection of the nature of the party's electorate-base who have come to see Democrats as inimical both in political and social spheres.

The perception of increased negativity in today's polarized political sphere is real, and it slows decision-making and compromise in government. Republicans and Democrats clashing over Merrick Garland's nomination is only one symptom of affective polarization. There are no indications that politicians will move away from this trend in the near future. As members of the electorate, our only hope is to consciously move away from animosity towards members of the opposing party in the social realm, and hope that our politicians begin to reflect our actions.

14 "When Senate Rejects Court Nominees...Root Cause Is Most Often Raw Politics," pp. 2162-63, *CQ Weekly*, September 12, 1987. http://library.cqpress.com/cqweekly/WR100401713.

15 Ibid.

16 Isaac Chotiner, "The Fight Over the Future of the Supreme Court Could Get Really Nasty," *Slate*, February 17, 2016. Accessed April 08, 2016. http://www.slate.com/articles/news_and_politics/interrogation/2016/02/norm_ornstein_on_the_fight_over_scalia_s_scotus_replacement.1.html.

17 Steve Schmidt, "Steve Schmidt: McConnell's 'Knee-Jerk Response' After Scalia's Death Was a 'Public Relations Debacle' for GOP," *Morning Joe on MSNBC*, March 17, 2016.

18 Marc J Hetherington and Jonathan Haidt, "Look How Far We've Come Apart," *Campaign Stops*, September 17, 2016. Accessed April 08, 2016. http://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart/?_r=0.

19 Iyengar and Westwood, 2014.

The Effects of Mass Incarceration on Communities:

A Study of Race and Poverty

By: Madeline Honingford, Pitzer '17

Over the past 50 years, the threat to public health from drug use and drug-related crime has become tantamount to a threat to public safety and to national security. Yet, from its outset, America's "War on Drugs" has been less about drug crime and more about racial politics and the advancement of a coercive political rhetoric. Although drug use is acknowledged as a public health issue, it is remedied primarily with criminal justice-based responses, often militarized and uniformly aimed at users, dealers and producers. The result of this prescription is the current imprisonment of a demographically disproportionate number of young, uneducated, African-American men. One study estimates that one in nine African-American men between ages twenty and thirty-four resides in prison on any given day. Among these, approximately one in three has less than a high school degree.[1] As a result, poor urban communities have become subject to the disruptive effects of population turnover created by the cycling of offenders between prison and the community. This paper examines the way in which prison cycling caused by mass incarceration affects the social and economic structures of American communities.

Four decades ago, on July 17th, 1971, President Richard Nixon declared that drug addiction had "assumed the dimensions of a national emergency." Drug abuse, he claimed, was "public enemy number one." Since then, every US president has asserted the importance of cracking down on drug use. The Reagan administration promptly followed Nixon's lead and launched a public relations campaign designed to change the public perception of drug use and the threat posed by illegal drugs. The centerpiece of this public relations campaign was a new rhetorical strategy that sought to demonize drugs and ostracize drug users. Throughout the 1980s, the Reagan administration pushed drug enforcement laws that penalized crack cocaine users with significantly harsher sentences than for powder cocaine users. At the time, crack cocaine was more commonly used within African American communities than within white ones. Consequently, these laws ensured that African Americans were more frequently sentenced to much longer terms.[2] Although rates of drug use and sales were comparable across racial lines, people of color have become far more likely to be stopped, searched, arrested, prosecuted, convicted, and incarcerated for drug law violations than are whites. Dan Baum, a freelance reporter who has been published in the New York Times and the Wall Street Journal, conducted an interview in 1994 with John Ehrlichman, who served as President Richard Nixon's domestic policy chief. Ehrlichman reportedly said, "You want to know what this was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying. We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."[3] Regardless of whether Ehrlichman was being facetious, his republican political era created lasting inequality in the US prison system and within American communities.

Since the mid-1970s, the United States has experienced an enormous rise in incarceration rates as well as a corresponding increase in prisoners returning to their commu-

1 "One in 100: Behind Bars in America 2008," *Pew Charitable Trusts*, February 28, 2008.

2 "Race and the Drug War," *Drug Policy Alliance,* May 15, 2000.

3 Hillary Hanson, "Nixon Aide Reportedly Admitted Drug War Was Meant to Target Black People," *Huffington Post*, March 22, 2016.

nities. In 1975, only about 400,000 people resided in jails and prisons on any given day. By 2003, this number had increased more than fivefold to 2.1 million.[4] Today, African Americans make up 13.2 percent of the total US population but comprise 40 percent of its prison population. Non-experts commonly assume that this massive growth of prison population can be explained by an increase in crime, and that the disproportionate imprisonment of black and brown men is due to their disproportionately common criminal behavior. In truth, however, crime rates have fluctuated over the last few decades – they are currently at historical lows – but incarceration rates have consistently soared. Crime rates do not explain the sudden and dramatic mass incarceration of African Americans over the past thirty years. The causes and consequences of mass incarceration and prison overcrowding have been widely studied. There has been less research conducted on the consequences of imprisoning such a large portion of African Americans in the US.

Understanding the relationship between incarcerated people and the communities to which they return requires an appreciation of three central aspects of the rise in prison populations. Firstly, as previously cited statistics indicate, racial minorities – particularly young black men with little education – experience the prison boom most severely.[5] Secondly, poor urban communities are forced to bear the burdens of mass incarceration – specifically, the removal and reentry of prisoners from their labor force and from their social networks. Because poor blacks tend to live in racially and economically segregated neighborhoods, these neighborhoods feel the brunt of mass incarceration. Research in several cities reveals that the removal and reentry of inmates is geographically concentrated in the poorest neighborhoods of mostly racial minorities. As many as one in eight of adult male residents from these urban areas are sent to prison each year and one in four is behind bars on any given day.[6] A 1992 study, for example, showed that 72 percent of all of New York State's prisoners came from only 7 of New York City's 55 community board districts. Similarly, 53 percent of Illinois prisoners released in 2001 returned to Chicago, and 34 percent of those releases were concentrated in 6 of 77 Chicago communities.[7] The removal of people from their communities not only uproots them from families and workplaces but, when they return, also forces them to compete for scarce resources, potentially engage in further criminal activity, and disrupt the community's social networks. Thirdly, incarceration that disproportionately targets minorities exacerbates existing racial and socioeconomic inequalities by making those who are already disadvantaged even more so.[8]

To illuminate racial and social inequalities in the context of poverty, it is first necessary to qualify and define poverty. Poverty's most basic definition is a lack of necessities: food, shelter, medical care, and safety are all considered the most basic resources necessary to survive. However, necessity is subjective: "necessity may be relative to what is possible and is based on social definition and past experience."[9] Valentine (1968) says that "the essence of poverty is inequality[10]. In slightly different words, the basic meaning of poverty is relative deprivation." Inequality is relative, but the most common "objective" definition of poverty – the "poverty line" – does not account for relativity and therefore is an unreliable measure of poverty in real scenarios, in which families' needs vary. A relative definition would refer to poverty not as an absolute amount but in terms of the minimum acceptable standard of living applicable to a certain person or household. Additionally, the "poverty line" is regularly criticized as an inaccurate and arbitrary measure. Among other concerns, specialists emphasize that it does not consider some resources, such as tax credits and food stamps, and some key family expenses that determine a family's available income.[11] The official measure of poverty should be updated and improved.

Osimani's definition of poverty as "severe restrictions to opportunities to pursue well-being" appropriately accounts for the relative nature of poverty and specifically highlights the significance of inequality. Restrictions to opportunities within communities predominantly inhabited by African Americans are reflected in disparities in

4 Bruce Western, "Punishment and Inequality in America," *Russell Sage Foundation*, June, 2006.

5 Jeffery D. Morenoff and David J. Harding, "Incarceration, Prisoner Reentry, and Communities." *Annual Review of Sociology. U.S. National Library of Medicine*, July 16, 2014.

6 Todd Clear and Dina Rose, "Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization," *Justice Quarterly* 20.1 (2003), March 2003.

7 Dorothy Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," *Stanford Law Review* 56 (2004), November 5, 2004.

8 Sara Wakefield, and Christopher Uggen, "Incarceration and Stratification," *Annual Review of Sociology* 36.1 (2010): 387-406, April 20, 2010.

9 Amartya Sen, "Development as Freedom," *New York: Knopf*, 1999.

10 Charles Valentine, "Culture and Poverty," *University of Chicago*, 1968.

11 Mark Greenberg, "It's Time for a Better Poverty Measure," *Center for American Progress*, August 25, 2009.

income and wealth, access to healthcare and education, crime, housing, and employment opportunities. But "social capital" especially indicates both poverty and unequal access to opportunities. Rose defines social capital as a by-product of social relationships that provides the capacity for collective understanding and action.[12] Levien says that not only resources, but also social networks, play a role in determining class structures.[13] Social networks perform a function in individual and group interactions within broader structural contexts such as political institutions, labor markets, the healthcare system and the education system.[14] Rose discusses the importance of a community's social capital, and the influence it can have on individuals living within the community:

> "One can imagine an individual living in a neighborhood rich in social capital who, because of relative social isolation, has comparatively low levels of social capital personally. Alternatively, an individual with abundant social capital might reside in an area with few such reserves. In the former case, the individual benefits from the community's potential for collective action even if he does not contribute anything; in the latter he is less capable of making a significant change in the community even though he has the personal resources, because the collective supplies of capital are missing. Thus, regardless of their individual level of social capital, individuals are influenced by the community-level social capital in which they live."

Networks within communities are the foundation of social capital, which is inherently linked to community development. Low or non-existent social capital within a community can result in lack of effective leadership, weak civil society organizations, political problems, and a general lack of consensus and action that affect community development outcomes.[15] Collective action is weakened when a community is unable to form networks or when a community is destabilized. Mass incarceration disrupts social networks and destabilizes communities, some much more than others. This occurs simply due to the massive removal of people from those communities as well as the massive re-entry of released offenders. Social networks cannot form in the midst of the constant social turbulence caused by removal and re-entry of community members.

A community's social capital and social controls work together. Social controls have more to do with the social climate within a community than the community's formal or institutional networks. They are linked to community functionality and progressiveness. There are two kinds of social control: formal and informal. Law and bureaucracy exemplify formal social control because they clearly define what is appropriate, and they decree the extent to which an act should be punished. Informal social controls – the ones that are important in a community's response to mass incarceration – are people's reactions to behaviors that violate laws, morals or social norms. Citizens create and enforce informal social controls and can be found in many places within a community (schools, homes, workplaces, public places, etc). They are essentially the social norms that govern the proletariat and are therefore crucial to a community's structure and functionality. Morenoff and Harding assert that an absence of informal social control "diminishes the amount of collective supervision and surveillance and creates a climate in which it is difficult to foster norms of mutual obligation among neighbors. Former prisoners who return to neighborhoods with lower levels of informal social control may face fewer sanctions for deviant behavior and more opportunities to return to crime." Disorganized communities cannot enforce social norms because reaching consensus on common values and on methods for solving common problems is too difficult. Roberts notes that because informal social controls play a greater role in public safety than formal state controls do, a breakdown of social networks can seriously jeopardize community safety.[16]

Clear and his colleagues propose that high population turnover can impede community safety in three ways: first, the disruption of ties within families can weaken private social controls exercised within families or primary networks; second, population turnover can also weaken parochial social controls by disrupting secondary networks connecting residents to local institutions (for example, schools, churches, businesses), thereby reducing their shared sense of obligation to the community and collective supervision of youth; and third, prison cycling can disrupt public social controls by weakening

12 Dina Rose, "Incarceration, Reentry, and Social Capital: Social Networks in the Balance," *US Department of Health and Human Services*, June 13, 2015.

13 Michael Levien, "Social Capital as Obstacle to Development: Brokering Land, Norms, and Trust in Rural India," World Development 74 (2015): 77-92, *Institute of Economic Growth*, *India*, 2015.

14 Grace Galabuzi,"Social Cohesion, Social Exclusion, Social Capital," *Region of Peel, Department of Citizenship and Immigration*, February 2010.

15 Tirmizi Otto, "Role of Social Capital in Economics and Community Development," *Iowa State University*, 2005.

16 Dorothy Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," *Stanford Law Review* 56, November 5, 2004.

a community's political base and diminishing its ability to obtain goods and services from outside agencies and governmental systems that could improve public safety. Rose and Clear also suggest that population turnover increases cultural/normative heterogeneity by exposing entire communities to prison norms and subcultures. Additionally, people returning to communities from prison bring in different norms and values. Both of these factors reduce a community's capacity to regulate itself.

Based on the hypothesis that extensive incarceration disrupts a neighborhood's informal mechanisms of social control, DeFina and Hannon conducted a study that aimed to quantify the effect mass incarceration has had on poverty. They note that although economic growth in the United States has remained relatively high over the past thirty years, poverty has remained high as well. At the same time, incarceration rates have increased by 300 percent. Although DeFina and Hannon recognize that the typical procedure to determine who is poor (comparing individuals' families' incomes to predefined thresholds) has shortcomings, they conclude that there is no preferable approach. However, they incorporate both the poverty gap and the distribution of income among the poor into the typical procedure to create a more comprehensive method by which to measure poverty. Their research, using this calculation, indicates that mass incarceration is responsible for 20 percent of the poverty that exists today.[17] On the national scale, this translates to several million more people living in poverty as a result of mass incarceration.

This research explicitly incorporates measures of poverty that reflect inequality. Inequality and poverty are the great marginalizers, isolating minorities within peripheral communities that lack the resources for economic growth. Mass incarceration contributes to the economic stagnation of certain communities by eliminating tools of economic progress: civic and political engagement, a permanent and skilled labor force, and secure, safe families with healthy, educated children. The spatial concentration of mass incarceration in predominantly poor and African American communities disproportionately ensures unequal access to opportunities available in upper and middle class neighborhoods.

Mass incarceration severely damages civic engagement by stripping offenders of host citizenship rights, privileges, and benefits:[18]

> "Unbeknownst to this offender, and perhaps to any other actor in the sentencing process, as a result of his conviction he may be ineligible for many federally funded health and welfare benefits, food stamps, public housing, and federal educational assistance. His driver's license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses .... He will not be permitted to enlist in the military, or possess a firearm, or obtain a federal security clearance. If a citizen, he may lose the right to vote; if not, he becomes immediately deportable."

These barriers are a burden to inmates after they leave prison, diminishing civic involvement in the communities to which they return. Incarceration concretely denies citizenship rights through felon disenfranchisement laws. In most states, a felony conviction results in the loss of the right to vote either temporarily during incarceration or permanently, and fourteen states deny voting privileges for life. The Sentencing Project and Human Rights Watch conducted a study in 1998 that documented the impact of high incarceration rates on black communities' participation in civic life.[19] The authors estimated that 3.9 million Americans, or one in fifty adults, had either currently or permanently lost their right to vote as a result of a felony conviction. More than a third of these disenfranchised citizens – 1.4 million – were black men. From a community perspective, nearly one in seven black males of voting age have been disenfranchised as a result of incarceration. In reaction to the impact of mass incarceration on voting rights, the Stanford Law Review asserts that "the geographic concentration of mass incarceration translates the denial of individual felons' voting rights into disenfranchisement of entire communities. Excluding such huge numbers of citizens from the electoral process substantially dilutes African American communities' voting power"[20]. Therefore, black communities lose their political ability to address policies that contribute to the disproportionate incarceration rate of African Americans. Neighborhoods with large percentages of current and former inmates lack the political clout to influence policies and demand services. Denying felons the rights to vote, to participate in jury service, and to hold public office reinforces social norms and perceptions within these communities. Specifically, members of these communities come to regard civic activities as illegitimate as they are systematically excluded from the national polity. Diminished civic and political involvement means that entire communities are less likely, and less able,

17 Robert DeFina and Lance Hannon, "The Impact of Mass Incarceration on Poverty," *Crime & Delinquency*, June, 2013.

18 Marc Mauer and Meda Chesney-Lind, "Invisible Punishment: The Collateral Consequences of Mass Imprisonment," *The New Press*, December 13, 2003.

19 Ibid.

20 Roberts, 2004.

to engage in the wider political economy.

Prison cycling significantly constrains African American participation within the labor force as well. In the most basic sense, incarceration depletes communities of their workforce and income, impairing their economic stability. Incarceration does not only temporarily disrupt employment in communities, it persistently "aggravates the already severe labor-market problems of their mostly low-income, poorly educated inmates."[21] Even though most inmates are employed at low-paying or low-quality jobs at the time of their arrest, incarceration further reduces employment prospects. Time in prison creates gaps in inmate employment histories, which can hardly be amended because vocational and educational training is largely unavailable in prison.[22] Additionally, incarceration removes inmates from the important social networks that might assist them in finding work, while simultaneously strengthening their ties to other prisoners with similarly low levels of social capital.[23] Upon re-entry into society, prison time is a powerful barrier to finding legal employment; the stigma of criminality makes employers reluctant to hire anyone with a criminal record. Sabol and Lynch examined the relationship between incarceration and labor force participation at the county level. They used the National Corrections Reporting Program data collected by the Bureau of Justice to estimate prison admission rates and return rates for communities in 1983 and 1990.[24] They found that release rates were positively related to unemployment and statistically significant for blacks, but negatively related to unemployment and not statistically significant for whites. These results reveal that mass incarceration affects economic institutions in black communities – but not in white ones – and that incarceration is detrimental to social organization within communities.

Imprisonment also severely disrupts organization within families which thereby contributes to a loss of social control. This disruption occurs when a family member is removed either temporarily or for a long period of time. For example, even a short period of incarceration affects a father's relationship with his children.[25] For young incarcerated people, the stigma of criminality decreases their chances of finding a partner and having a family at all. For families who are left behind when a parent is incarcerated, the implications are much more critical; the loss of income from a parent imposes economic and emotional costs on children. Fishman studied the effects of incarceration on partners and families of male prisoners. Most of the women she spoke with had experienced severe financial problems as a result of their partners' incarceration. For those with children, "having full responsibility of raising their children was a severe hardship."[26] Maintaining a relationship with the incarcerated family member can be taxing as well.[27] The possibility of receiving any amount of child support is practically eliminated as the extremely low rates of pay for prison work leave inmates with little opportunity to contribute financially to families left behind.[28] The hourly minimum wages averaged $0.89 across state prisons and $0.23 in federal prisons, with the hourly maximum averaging $2.93 and $1.15 in state and federal prisons, respectively.[29]

The consequences of incarceration are particularly severe for children who have incarcerated parents. Rutgers reports that one in nine African American children (11.4 percent), one in twenty-eight Hispanic children (3.5 percent), and one in fifty-seven white children (1.8 percent) in the United States have incarcerated parents.[30] Although many of the risks associated with incarcerated parents may be related to drug problems or mental health issues, parental incarceration increases the risk of children living in poverty or experiencing household instability independent of such problems. It may contribute to the loss of an involved parent,[31] push a child into the foster care

21 Elliott Currie, "Crime and Punishment in America," *Picador*, October 15, 1998.

22 Jeremy Travis and Christy Visher, "On Your Own Without a Net: The Transition to Adulthood for Vulnerable Populations," *Chicago UP*, 2005.

23 John Hagan and H. Foster, "Incarceration and Intergenerational Social Exclusion," *Social Problems*, 2007.

24 James Lynch, and William Sabol, "Assessing The Effects Of Mass Incarceration On Informal Social Control In Communities," *Criminology Public Policy* 3.2 (2004): 267-94. March, 2004.

25 Nelson Edin, and R. Paranal, "Fatherhood and Incarceration as Potential Turning Points in the Criminal Careers of Unskilled Men," *Institute for Policy Research Northwestern University*, May 5, 2001.

26 Lynch and Sabol, 2004.

27 Megan Comfort, "Doing Time Together," *University of Chicago Press*, 2008.

28 M Cancian, D. Meyer, and E. Han, "Child Support: Responsible Fatherhood and the Quid Pro Quo," *The Annals of the American Academy of Political and Social Science*, May, 2011.

29 F. Pryor, "Industries behind Bars: An Economic Perspective on the Production of Goods and Services by U.S. Prison Industries," *Review of Industrial Organization*, 2005.

30 Pew Center on the States, "Collateral Costs: Incarceration's Effect on Economic Mobility," *The Pew Charitable Trusts*, 2010.

31 John Hagan and Juleigh Coleman, "Returning Captives of the American War on Drugs: Issues of Community and Family Reentry," *Crime & Delinquency*, July, 2001.

system,[32] increase aggression and delinquency,[33] inhibit educational attainment,[34] and subject children to social stigma and isolation.[35] Wakefield reported that over 50 percent of the children of incarcerated parents exhibited problems in school, such as poor grades or behavioral aggression, albeit many of these problems were temporary. In all, mass incarceration impacts everyone connected to offenders uniquely, but children who are left behind often experience altered mental health, social behavior, and educational prospects.

Family organization, labor force participation, and social citizenship are all aspects of a community that require social networks in order to function successfully. The extent to which these aspects are affected similarly impacts the prevalence and interdependence of social networks. Without these social networks, a community cannot realize common values and therefore cannot enforce informal social controls. The structure of a community's social organization and the strength of its informal social controls are directly related to urban poverty. This is because the systemic base of a community's social organization is largely determined by various forms of structural disadvantage, such as poverty and racial discrimination. It is valuable to note that this systemic base is built upon expectations and ideologies as well as social and economic structures. Communities that are vulnerable to mass incarceration over a sustained period develop the expectation that youth, especially young men, will inevitably spend some time in jail or prison. This type of norm fosters contempt for and distrust of law enforcement personnel, whom the community comes to view as oppressive and illegitimate, rather than helpful and caring in maintaining a high quality of life.[36] Ultimately, mass incarceration exacerbates poverty because the removal of people from their communities raises unemployment levels and destroys social networks.

Legislative bodies in America have forged a deeply problematic relationship between race and the criminal justice system. Frequent arrests and incarceration have become a normal way of life in many American communities. The damage that mass incarceration inflicts, particularly in African American communities, exemplifies moral corruption within our criminal justice system; mass incarceration now serves as a racially oppressive tool for the powerful and prejudiced. Hopefully, illuminating this cyclical, oppressive phenomenon will spark an urgency to address and change mass incarceration and its horrific consequences.

32 Elizabeth Johnson and Jane Waldfogel, "Parental Incarceration: Recent Trends and Implications for Child Welfare," *Social Service Review*, September, 2002.

33 Sara Wakefield, "The Consequences of Incarceration for Parents and Children," *University of Minnesota*, 2007.

34 John Hagan and Juleigh Coleman, "Returning Captives of the American War on Drugs: Issues of Community and Family Reentry," *Crime & Delinquency*, July, 2001.

35 Sara Wakefield, "The Consequences of Incarceration for Parents and Children," *University of Minnesota*, 2007.

36 Lawrence D. Bobo and Victor Thompson, "Racialized Mass Incarceration Poverty, Prejudice, and Punishment," *Doing Race: 21 Essays for the 21st Century*, 2010.

Corruption and the Shadow Economy in Greece

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Introduction

It is hard to imagine the level of impact a country nearly two times smaller than the state of Michigan can have on the global economy. Yet, a combination of reckless spending, excessive borrowing, large-scale corruption and a historically prevalent underground economy left Greece (and a majority of the Eurozone) under the rubble of a massive economic collapse.

This paper focuses on the latter two factors in an attempt to understand how Greece's shadow economy has exacerbated its present-day crisis. With this, we must ask and critically analyze two questions: (1) How has the economic and cultural history of Greece encouraged the size and growth of corruption and the present-day underground economy? (2) What are the structural challenges that need to be addressed in order for it to gradually integrate into the legitimate Greek economy?

This paper incorporates historic and cultural frameworks. It commences with an overview of the evolution of the Greek economy since 1973. It proceeds to discuss cultural values, stereotypes, and the role of family networks in Greece, and the next section addresses the size, creation, and effects of the underground economy. The final segment focuses on the possibility of future stability and the challenges to be tackled before concluding with policy recommendations and learning outcomes.

The Evolution of the Greek Economy

In all its 186 years of independent statehood, Greece has had a negligible number of economic growth spurts. The key years in the nineteenth century were the 1850s and 1880s, while twentieth century growth was highest in the 1920s and 1960s. Greece was faced with an endless set of obstacles in the 20th century. In addition to the two world wars that consumed all of Europe, it suffered through the Balkan Wars in the 1910s, the Asia Minor War in the 1920s, and a civil war in the 1940s. Greece's small population and low-income levels resulted in its small internal market, thus rendering it unable to overcome the restrictions of a competitive and increasingly globalized world.[1]

Both episodes of growth in the twentieth century were curtailed because of international crises: The Great Depression of the late twenties and the oil crisis of the mid-seventies. The Greek "Economic Miracle" of the 1960s was defined by an influx of foreign direct investment and US aid and loans.[2] Despite this rapid growth, Greece still failed to catch up to the advanced core due to its internationally uncompetitive labor produce, overdependence on foreign aid, and an aversion to any type of Keynesian policy-making, such deficit spending, high wages and social welfare[3].

1973 presented a turning point in Greek social, economic and political history. The roots of the debt crisis today can be found in the 1970s and 1980s which are marked by the social/class struggle within the country, the aim to join the European Economic Community (EEC) by 1981, the rise of a new and large middle class, and the transition to and consolidation of democracy.

After the ending of the Bretton Woods system and the first global oil crisis, the Greek economy was completely altered. The crisis led to a retardation of growth and a jump in inflation which was particularly extreme in Greece, due to ongoing political transitions.[4] In mid-1974, Greece's military dictatorship collapsed. Although society's transition to democracy was smooth and eventually secured constitutional order, the economy did not catch on as quickly as the political culture had. In the years after 1974, Greece's economic status was defined by low growth and high inflation. Greece applied to join the EEC in 1975 and, after a lot of disagreement and deliberating, was eventually accepted for the purpose of "ensuring democracy and stability in Southern Europe at the height of the Cold War."[5]

The end of the dictatorship sent Greece into an inflation-

1 Allison, G. T., & Nicolaïdis, K, "The Greek paradox: Promise vs. Performance," *The MIT Press*, 1997.

2 Fouskas, V., & Dimoulas, C, "Greece, financialization and the EU: The political economy of debt and destruction," *Palgrave MacMillan,* No date.

3 Ibid.

4 Allison, G. T., & Nicolaïdis, K, 1997.

5 Rankin, J, "Greece in Europe: A short history," July 3, 2015. Retrieved April 30, 2016, from http://www.theguardian.com/world/2015/jul/03/greece-in-europe-a-short-history

ary spiral, most notably between 1973 and 1993. The state fueled inflation without stimulating growth by attempting to protect its farmers, wage earners, and pensioners with mandated income increases, not to mention regulating banks. Inflation averaged around 18% annually.[6] Greece had to maintain an overvalued drachma relative to the growing domestic inflation, thus resulting in slow export growth. In terms of growth in aggregate investment and growth of industrial productivity, Greece's performance lagged behind its Mediterranean neighbors (Spain and Portugal) and the average of the EU-15.

On the other hand, unemployment was sky high, even by recent standards.[7] The lack of industrialization put Greece at a major disadvantage since it couldn't absorb technology and generate advances in productivity as much.[8] Moreover, the government tried to jumpstart the economy with deficit spending policies, thus government debts were rising and practically exploded in the early 1990s.[9]

Nevertheless, the 1990s was prioritized to prepare Greece for its entry into the Eurozone. Policy reversals took charge particularly in areas of fiscal adjustment, monetary and exchange rate stabilization, and economic liberalization.[10] The government began reducing inflation and deficits in order to satisfy the Maastricht treaty but reduced overall competitiveness in doing so. Deficits shrunk to a seemingly reasonable extent until it was announced later in 2004 that numbers were tweaked to ensure deficits were under the 3% of GDP quota set by the Eurozone.[11]

In the years between 1996 and 2006 living standards improved (GDP per capita rose by 47%), quarterly economic growth shot up an average of 3.9% annually (while the Eurozone as a whole grew only at about 2.2% during that period), and the adoption of the Euro improved investor confidence. Eventually, government finances grew insufficient while budget deficits began to grow again and were as high as 12.6% in 2009.[12]

As its credit ratings dropped, Greece was no longer permitted to borrow from the financial markets. By the Spring of 2010, it was inching towards bankruptcy which had the potential to trigger an entirely new financial crisis.[13] By the end of 2015, Greece had received three bailouts in the span of five years. Although these bailouts implied an influx of billions of Euros into Greece, the money has been constantly averted to paying off international loans rather than into the economy itself. In addition, Greece has to endure painful austerity measures in order to secure the bailouts. Today, unemployment remains above 25% and the economy has shrunk by nearly a quarter in only five years (2010-15). While these external influences played a significant role, Greece's implosion had its roots in some of its internal challenges as well.

Cultural Values, Stereotypes and Family Networks

The role of corruption in the history of Greece and the Euro is considered a crucial "part of a lawless, kleptocratic culture that largely wasted the early benefits of EU membership, looted the wealth of the nation for the benefit of an undeserving cadre, and imperiled the single currency."[14] Some dimensions of Greece's corruption make an observer question whether it is really a democracy at all. Article 62 of the Greek Constitution, for instance, states that members of the government may not be prosecuted, arrested, or imprisoned without the approval of Parliament. Granting immunity to politicians is essentially put them above the law.[15]

A typical oligarchic system would involve a conglomerate which sometimes owns its own bank, newspaper, TV station and industrial firms. This system is far more concentrated in Greece, where power is placed in only a few hands and is focused on building special relationships with the government. Logically, this has stemmed from Greek history. The systemic misuse of taxpayers' money by politicians (as if it were their own) infects the wider attitudes towards respect for the law and public funds. Thus, the politicians and government officials have no justifiable grounds to call upon the sacrifice of ordinary citizens, or requiring that taxes be paid since their fiscal irresponsibil-

6 Phillips, M, "The complete history of the Greek debt drama in charts," June 30, 2015. Retrieved April 20, 2016, from http://qz.com/440058/the-complete-history-of-the-greek-debt-drama-in-charts/

7 Ibid.

8 Allison, G. T., & Nicolaïdis, K, 1997.

9 Phillips, M, 2015.

10 Alogoskoufis, G, "Greece's Sovereign Debt Crisis: Retrospect and Prospect. Hellenic Observatory European Institute," 2012. Retrieved April 15, 2016, from http://eprints.lse.ac.uk/42848/1/GreeSE No54.pdf

11 Phillips, M, 2015.

12 Ibid.

13 "Greece's Debt Crisis Explained," November 9, 2015. Retrieved April 13, 2016, from http://www.nytimes.com/interactive/2015/business/international/greece-debt-crisis-euro.html?_r=0

14 Manolopoulos, J, "Greece's 'odious' debt: The looting of the Hellenic republic by the Euro, the political elite and the investment community," *London: Anthem Press*, 2011.

15 Ibid.

ity creates injustice.[16]

In his book Exploring the Greek Mosaic, Benjamin Broome states:

> "Almost no politician is elected without alliances formed through rousfeti [personal influence] ... As one senior member of the government said: 'In Greece, public employment has always been done by patronage. Government grants and public works projects have been given to friends.'" Hence, cronyism is on a different level in Greece.

Nepotism is a far more outright phenomenon. At one point before the 2010 general elections, 269 individuals were hired over a single weekend to the Ministry of Rural Development.[17] Posts included gymnasts, a shipwright, nutritional technologist, and anthropologists. A more recent example involved the secretary of Syrzia's youth movement appointing his mother, brother, and girlfriend to positions in the public sector.[18]

The history of tax collection problems dates back to the Ottoman empire. The system encourages widespread evasion and persecutes the innocent while leaving the rich to subtly wire millions of Euros into Swiss bank accounts and put on paper meagre, fabricated salaries. The tax system in itself is inherently flawed, taxing people more than they earn above a certain annual income. The level of corruption in the tax system is so high that it actually has an economy of its own in the black market. A change in this age-old system of tax evasion is more inherent and cultural than strict and structural – nevertheless, it is a step in the right direction.

In terms of the overall relationship between the tax system and the state, it is imperative to, once again, dig back over 500 years to look into deeply rooted Balkan culture under the Ottoman rule. During this time, the state was considered "alien, hostile, an institution not to trust, but to cheat in any way possible."[19] This socio-political culture was still prevalent during the 1980s when Greece finally became a member of the 'West' and new consumerism practices were merged with old habits. It was almost like the people and the government alike forgot that Greece was still in its developing stages and began to "spend and consume non-earned, non-existent income, thus spending from credits i.e., future income."[20] Thus, the combination of an over-spending government and a population not paying taxes can be marked as one of the roots to Greece's present day debt crisis.

Family networks in Greece play a crucial role because they compensate for the absence of an extended social state.[21] This is why services such as kindergartens, old-age homes with pension systems, and unemployment coverage have been crucial components of the Greek agenda. Numerous studies have indicated that Greece has a short-term view of objectives and a decreased use of programming and long-term planning.[22]

Yet another contributor to Greece's failure has been its stifling parallel economy.

The Underground Economy and the Problem with Persistence

Every country has at least some percentage of its economy pushed below the surface. The US and China, for instance, are rumored to have the two largest black markets in the world, valued over $900 billion collectively.[23] As mentioned earlier, the Greeks have historically functioned on an incredibly corrupt public sector in addition to lacking tax discipline and facing a high unemployment rate. In 2013, it was estimated that 24% of all economic activity in Greece went unreported to evade tax and regulations, thus proving that a large shadow economy persists, affecting government tax revenues.[24]

In Greece, the official term for the shadow economy is "paraoikonomia", implying a parallel phenomenon func-

16 Ibid.

17 Ibid.

18 Polychroniou, C, "EU Officials Express Concerns over Nepotism in Greek Government Under Syriza," September 11, 2016. Retrieved April 05, 2016, from http://greece.greekreporter.com/2016/01/18/eu-officials-express-concerns-over-nepotism-in-greek-government-under-syriza/

19 Berend, T. I, "Europe in crisis: Bolt from the blue?" *New York: Routledge,* 2013.

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21 Petrakes, P, "The Greek economy and the crisis: Challenges and responses. Heidelberg: Springer," 2012.

22 Ibid.

23 Keller, J, "The Countries With the Biggest Black Markets in the World, in One Fascinating Interactive," September 12, 2014. Retrieved April 5, 2016, from http://mic.com/articles/98776/the-countries-with-the-biggest-black-markets-in-the-world-in-one-fascinating-interactive#.LsEMYff5j

24 "The treasures of darkness," October 12, 2014. Retrieved April 20, 2016, from http://www.economist.com/news/finance-and-economics/21623742-getting-greeks-pay-more-tax-not-just-hard-risky-treasures

tioning independently with a semi-organized structure.[25] In understanding the causes of this underground economy, economic theory points to taxation, excessive regulations, efficiency of the bureaucracy and corruption.

The complexity of Greece's tax system creates a series of problems; it is difficult to interpret tax laws, keep all sorts of records, and the generally off-putting notion of paying millions to an unproductive "tax industry."[26] These eventually result in bribes – an expensive, yet somewhat more efficient method of getting perplexing taxes out of the way. Greece is a country that has moderate statutory tax rates but a corrupt system of tax administration which, thus, places a heavy burden on firms and individuals – many who end up choosing to go underground.[27]

A combination of the aforementioned levels of corruption and the prevalent underground economy implies scaring away foreign direct investments, slowing down development rates, harming competition and generating more economic underground activities.[28] The key solutions in shrinking the size of the underground economy lie in the problems: controlling corruption, improving government effectiveness, and deregulating the labor market.[29]

The consistent relationship between corruption and the shadow economy in Greece is further complicated by people who are either unwilling to, cannot afford to, bribe the central or local government bureaucrats, hence resolving to the parallel economy as a substitute for corruption and bribery.[30]

Conclusion

Wide-scale corruption wreaks havoc in Greece. Two centuries after the Empire's fall, the Ottoman legacy still thrives as Greek elites follow the predatory habits of the sultanate while the citizens behave as if evading taxes is a heroic act of rebellion against an imagined occupier.[31] It is easy to type up grand solutions of overcoming corruption, but after learning just how deep-rooted it is I have concluded that eliminating corruption must be broken down into a stage-by-stage process. People engage in bribery every day and their lack of faith (or even fear) in the authority poses more of a cultural problem than any vacuous rule of law can possibly hope to change.

There are significant structural challenges that must be addressed in order to initiate the gradual integration of the underground economy into the legitimate one. Although far-fetched, rebuilding a new tax system model based on the general EU model is an essential start to something vastly new. Tax laws and rules must be coherent; individuals must be able to reach out to trustworthy authorities to help interpret any potential miscommunication. The next focus must be on the public sector. Wide-scale corruption in the public sector is a particularly hard obstacle to overcome since pretty much everyone is either involved or wants be involved to reap the benefits of a high paying job. Though cracking down on the elites through investigations and long-term consequences would mean re-vamping the judicial system in order to ensure that they are actually convicted, Greece must at least begin this process. Unfortunately, every major economic problem in Greece is connected to a larger institution – whether cultural or political.

Internally, there must be an authority that has gained the trust of the people. Credibility is not enough in Greek politics. In a society that has been historically indoctrinated to go against the authority, one must go out of their way (long-term) to prove they are a trustworthy leader capable of creating change. Going back two and a half millennia, Greece needs to find a leader like Pericles who could claim to be "not only a patriot, but an honest one."[32]

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28 Ibid.

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30 Katsios, S, 2006.

31 Cambanis, T, "Why can't Greece shake its corruption problem?" August 22, 2014. Retrieved April 20, 2016, from http://ase.tufts.edu/economics/documents/newsIoannidesGreece.pdf

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The following pieces are taken from our new CJLPP blog.

A Model for Clean Energy Policy? Look to Texas

By John Nikolaou, CMC '19

Yes, you read that correctly: Texas, well known for being the top crude oil producer in the country, has also emerged as a leader in clean energy. As the only state with its own electric grid, Texas' electrical transmissions and new energy developments are free from federal regulation. The result? Texas ranks first in the nation in total electricity generation, installed wind capacity, and solar energy potential. Notably, the state has achieved these rankings while preserving exceptionally low electricity costs for consumers, offering one of the ten lowest rates in the country, according to the Energy Information Administration.

Here are the facts. Since 2000, renewable energy development in Texas has grown rapidly. The state has a nation-leading 17,713 MW of installed wind capacity, and 534 MW of installed solar capacity as of April 2016. The Electric Reliability Council of Texas (ERCOT), which manages about 90 percent of the state's electric load, reports that in 2015, 11.7 percent of its electricity came from wind, 11.3 percent from nuclear, and 0.6 percent from solar and hydro. While these percentages may seem small, 11.7 percent of ERCOT's wind production alone is equivalent to close to 41,000,000 MW of electricity, or enough to meet the energy demand of close to one million Texan households in 2015.

Texas' unparalleled $32.7 billion in private capital investment in wind has been beneficial in many ways. Economically, wind projects have produced annual lease payments for landowners totaling $50 million and have increased the tax base of communities in general. In 2015, the wind industry in Texas supported close to 25,000 jobs, according to the American Wind Energy Association.

The state's rise to the top is greatly attributed to its free market policies. The deregulation of the electric market in 2002 left the state's generating capacity largely up to the private companies that can provide it at the cheapest rate. While Texas does have Renewable Portfolio Standards (RPS) that often distort prices in the electricity market, the state RPS goals are some of the least aggressive in the nation as well as the cheapest for producers to comply with (National Renewable Energy Laboratory). Texas maintains these comparatively low RPS standards while remaining the nation's top producer of renewable energy, demonstrating the potential benefits that repealing RPS completely can do for markets and consumers.

Environmentally, contrary to the narrative from pro-regulation environmentalists, the Texan free-market approach to energy production has not resulted in the industry doing more harm to the environment. In fact, while energy production has expanded, with renewables making up a good share of that growth, Texas's air quality has improved. According to the Texas Commission on Environmental Quality, of the 20 states with the highest sulfur dioxide (SO2) emissions, Texas ranks 6th lowest in emissions per capita, and 4th lowest in NOX emissions. SO2 emissions have been cut by more than half since 1997, and CO has decreased by about 74 percent over the last 15 years. Wind energy also helped the state avoid 25.1 million metric tons of carbon dioxide (CO2) emissions in 2014.

It is clear that Texas is a national leader in reducing emissions and known pollutants, and advancing renewable energy sources all while remaining a leader in the nation's energy production. The state has successfully balanced the need for improving the environment while also fostering economic growth, investment, and job creation. Texas' advancement of renewable energy through market incentives and stable regulation should serve as a model for other states.

The FDA Should Take Action to Make Generic Drugs More Affordable

By Justin Wenig, PO '19

Drug manufacturer Mylan made headlines last week when it was revealed that the price of its lifesaving generic medical device called the EpiPen rose more than 500% since 2007. The EpiPen is the latest in a series of widely publicized generic drug price hikes including a 2800% increase to the popular heart-rhythm drug isoproterenol and a 5000% increase to the life-saving AIDS drug Daraprim. Despite the negative publicity generic pharmaceutical companies have received for raising prices of essential generic drugs, many of these companies continue to engage in price hikes. With no end in sight to the wave of generic drug price increases, the Federal Drug Administration (FDA) has several options it can take to ensure that essential off-patent pharmaceuticals are affordable.

One way that the FDA can make generic drugs more affordable is by prioritizing review of pharmaceuticals that may increase market competition and reduce costs for consumers. Researchers at Johns Hopkins have suggested that under the 1992 Prescription Drug User Fee Act (PDUFA) the FDA can prioritize review of life-saving off-patent drugs as long as the drug "could help mitigate or resolve a drug shortage and prevent future shortages." By moving generic drugs that may enhance competition to the top of the review queue, the FDA may shorten the lifespan of markets with little or no competition that permit companies to engage in price gouging.

Another way the FDA can take action is to permit non-FDA approved drugs to be sold when uncompetitive markets emerge. The FDA can permit a practice called compounding, defined as when an outsourced facility or licensed pharmacist makes a medication that has not undergone the FDA's drug approval process, according to the Compounding Quality Act of 2013. While the act only permits certain listed medications to be compounded, it also retains the right for the FDA to add other compounded medications to the list under exceptional circumstances. Exceptional circumstances could include an uncompetitive generic drug market that endangers public health. Therefore, the FDA can legally permit compounding of generic drugs when they become unaffordable and public health is threatened. Permitting prohibited compounded medications is not without precedent; in 2012 the FDA waived enforcement action against compounded versions of a lifesaving injectable, hydroxyprogesterone caproate, after the FDA-approved form became too expensive.

A riskier way the FDA can promote affordability of off-patent medical products is to loosen standards for its drug review process. Pharmaceutical companies and its allies have long argued that uncompetitive medical product markets are a result of the FDA's competition-stifling review process. Mylan's EpiPen monopoly, for example, was aided by the FDA's rejection of three separate competitors since 2011, according to Bloomberg.

This solution is risky, however, because it could allow deficient or even dangerous pharmaceuticals to reach the market. Still, the FDA could consider the potential benefit of creating competition in the generic drug market and its potential impact on affordability and thus public health. The increased affordability caused by competition could be considered the tiebreaker when a generic drug is on the fence for approval.

Pharmaceutical companies will not stop taking advantage of uncompetitive markets anytime soon. There are clear-cut steps the FDA can take to stimulate competition and reduce costs for consumers. With cost prohibiting some consumers from accessing lifesaving generic drugs, it is clear that the FDA must look to take action to make generic drugs more affordable.

Burqas and Burkinis: Is there a legal limit to religious expression?

By Lindsey Mattila, CMC '17

Burqa bans are back in the media with fresh scrutiny as French officials fine women who wear "burkinis" on the beaches of France, calling the burkinis "the uniform of Islamic extremism" and a threat to public safety.[1] On August 26th, the French Council of State, which is France's highest administrative court, ruled that the burkini ban was illegal, saying that the officials were not able to produce evidence that the burkini was a threat to public safety.[2] Still, many mayors have yet to respond to the court's ruling. The debate brings up underlying issues within French culture of how to define secularism. Should secular mean the absence of religion in public spaces, free expression of religion in any spaces, or the dominance of French culture over religion in public spaces? Furthermore, the discussion brings to light certain contradictions since French culture has always been a strong proponent of women's rights and diversity.

France's controversial debate over burqas started in 2004 when the country banned burqas, nijabs, and other "conspicuous" religious symbols from being worn in school in efforts to promote secularism.[3] The controversy continued in 2011 with a law banning women from wearing full-body mesh coverings that hide the face in public and fining them 150 euro (roughly $205) if they were caught wearing one.[4] This law was justified by the French Constitutional Court that argued the ban was aimed at alleviating national security concerns and threats to the French secular culture.[5]

Many French Muslims, however, are concerned that they are being specifically targeted by the enactment of this law and are being burdened with a disproportionate amount of punishments compared to other French religious groups. In 2014, the debate over wearing burqas in public reached the European Court of Human Rights (ECHR) when a French Muslim woman appealed to the Court to defend her rights based on the Court's convention.[6] Her argument cited Article 8 of the convention which grants all European citizens "the right to respect for his private and family life," but includes that it may be interfered when "necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country… and for the protection of the rights and freedoms of others." Additionally, Article 9 grants all citizens the right to freedom of thought, conscience and religion either in private or public, but again includes that this freedom may be limited by law and when necessary to maintain a democratic society in the interest of public safety, protection of public order, health and morals, or for the protection of others' rights. Lastly, her argument used Article 10, which grants freedom of expression, and Article 14 which prohibits discrimination.

The ECHR ruled in favor of the ban saying that it increased public safety and also maintained the conditions that are necessary for a functioning democratic society.[7] The Court outlined three values necessary to a democratic society: respect for gender equality, respect for human dignity, and respect for the minimum requirements of life in society (or of "living together"). The opinion of the Court expanded on this by explaining that eye contact and the ability to see facial expressions are a key component of social interaction and community life; thus, a lack of it undermines the minimum requirement for "living together." In contrast, the Court was also concerned that the law targeted a small population of France and that it likely was not necessary. Regardless, the Court still ruled that the ban was legal and that the benefits outweighed the drawbacks.

The recent ruling made by the French Council of State is a start in repealing past court decisions regarding burqas, freedom of expression, freedom of religion, women's rights, and assimilation. There is, however, still a long road ahead for the legal status of the burqas as courts have long ruled that public security outweighs personal privacy.

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