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"An Interesting Bit of History:" An Examination of the Methodist Church Case at Maysville, Kentucky, 1845-1847

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This paper examines a dispute regarding church property that arose from the sectional split of the Methodist Episcopal Church (into Northern and Southern General Conferences) in 1844. Originating from the border community of Maysville, Kentucky, this case reflects the increasingly divisive influence of the politics of slavery on American social life. The church at Maysville split into Northern and Southern factions that sharply contested the congregation's future, mirroring broader divisions across the nation. The case also raised important questions about the proper role of courts in adjudicating religious conflicts, as both sides turned to the judicial process for resolution. The Maysville case challenged Kentucky courts to reconcile the vested and secular rights created through a legal trust with the autonomous power of a religious organization to determine its own affairs. This overlooked and understudied aspect of American legal and religious history echoes questions of church and state that resonate clearly in the present day."This Maysville Church Case is an interesting bit of history into which we have no inclination to enter here. Let the past bury its dead!"—William Arnold[1]

On September 30th, 1845, John Armstrong filed a bill in Mason County Circuit Court seeking an injunction granting him, and the faction he represented, control of the Methodist church in Maysville, Kentucky. That church had become caught up in the broader transformations around the issue of slavery that were remaking both the Methodist Episcopal Church and the United States more

[1] William Arnold, *A History of Methodism in Kentucky, Volume II* (Louisville: Herald Press, 1935), 291.

broadly. The M.E. Church had recently split into Northern and Southern divisions over slavery, and its Maysville church is emblematic of those divisions. Almost equally divided between those wishing to adhere to the North and those preferring the South, the church represents, on the very local level, the shift toward the hardened attitudes on sectional division that would characterize the last decade before the Civil War. Far from being merely "an interesting bit of history," the case offers a unique window into a fascinating and unstudied facet of American history.

It is important to situate the case in its historical context before proceeding to analyzing it. Maysville is located along the Ohio River in Northeast Kentucky and is the county seat of Mason County. Census data from 1820-1860 reveal that the county experienced sporadic growth, with double-digit gains in population in the 1820s and 1840s and small contractions in the 1830s and 1850s.[2] The slave population remained somewhat higher, in percentage terms, than the state average throughout the period, peaking at 27.41% of the county's population in 1840.[3] These numbers indicate the importance of slavery to the local and state economies. While slavery was never as ubiquitous a factor in Kentucky as it was in other parts of the South, the 1850 census shows that it still played a major role in the Commonwealth's economy.[4] Despite the lack of large-scale plantation agriculture characteristic of the Deep South, slaves still performed backbreaking labor under "harsh," "unhealthy," and "dangerous" conditions.[5]

[2] 1820, 1830, 1840, 1850, and 1860 US Census Data for Kentucky, accessed via Social Explorer, www.socialexplorer.com.
[3] *Ibid.*
[4] *Ibid.*
[5] James Ramage and Andrea Watkins, *Kentucky Rising: Democracy, Slavery, and Culture from the Early Republic to the Civil War* (Lexington: University Press of Kentucky, 2011), 5-6.

Slavery had been essential to Kentucky from "the earliest beginnings" and would continue to play a vital part in the Commonwealth's history through the Civil War.[6]

Yet the census data also reveal that Mason County was a substantial manufacturing center, particularly compared to surrounding counties. This emphasis on manufacturing, which accelerated in the 1840s and 1850s, helped tie Kentucky's Ohio River counties more closely to the Northern economy.[7] The Northeast region had further ties to the North as an important last stopping point on the Underground Railroad to freedom across the river.[8] Maysville in particular had several homes that served as safe houses for escaping slaves, including some just down Main Street from the Methodist church.[9]

Mason County thus emerges as a border community in a border state. It is perhaps unsurprising, then, that it was home to the most contentious case rising out of the Methodist Episcopal Church's 1844 decision to sanction its division into two jurisdictionally separate conferences. The major cause of this division was the issue of slavery, though there were also important sectional differences about the "nature of episcopacy itself," with the Southern conferences generally believing the bishops to be a "co-equal branch of church government within the General

[6] *Ibid.*, 236-240.
[7] Lowell Harrison and James Klotter, *A New History of Kentucky* (Lexington: University Press of Kentucky, 1997), 138-141.
[8] Ramage and Watkins, *Kentucky Rising*, 250.
[9] Ann Hagedorn, *Beyond the River: The Untold Story of the Heroes of the Underground Railroad* (New York: Simon and Schuster, 2002), 231-232; also, I walked past several of them that had historical markers when I visited Maysville on November 25, 2012, see http://www.cityofmaysville.com/tourism/museums%20libraries.html.

Conference."[10] Prior to the 1844 General Conference at which the issue came to the forefront, the church had already repulsed challenges from Northern abolitionists to its complicated position on slavery. Some of these abolitionists, led by Orange Scott, had already left the church in 1842 to form the "Wesleyan Methodist Connection," which explicitly disavowed slaveholding by any member, lay or clergy.[11] This departure had immediate consequences on the course of the M.E. Church. Prior to 1842, for example, ministers and members had been expelled from the church for being abolitionists. After 1842, no such expulsions would take place. Changes like this were not the result of some deep shift in doctrine; instead, "fear was the controlling factor."[12] Northern church leaders sought to retain as many of their increasingly pro-abolition congregants as possible, and doing so required taking a harder line against slavery in the church. At precisely the same time, some Southern church leaders were becoming more vocal in their support for slavery in the church. One went so far as to urge the General Conference to elect a slaveholding bishop "to place the South in her proper position and attitude as an integral part of the M.E. Church," a position with which church newspapers in Richmond and Nashville agreed.[13] While other prominent Southern Methodists disavowed such claims,[14] the issue of slavery in the church, just like the issue of slavery in the nation at large, was clearly becoming more

[10] James Kirby, "Methodist Episcopacy," in *The Oxford Handbook of Methodist Studies* ed. William Abraham and James Kirby (Oxford: Oxford University Press, 2009), 238.
[11] Charles Swaney, *Episcopal Methodism and Slavery: With Sidelights on Ecclesiastical Politics* (New York: Negro Universities Press, 1969), 106-107.
[12] *Ibid.*, 113.
[13] Donald Matthews, *Slavery and Methodism: A Chapter in American Morality* (Princeton: Princeton University Press, 1965), 242-243.
[14] *Ibid.*, 243.

sectionally divisive, with radicals on both sides beginning to dominate the conversation.

These simmering tensions erupted at the General Conference of 1844, first over an appeal by Rev. Harding of his expulsion from the Baltimore Conference for holding slaves and more importantly over the case of Bishop Andrew of Georgia. Unlike Harding, Andrew had come into slaveholding only indirectly and unwillingly, by marriage to his second wife.[15] He wished to free them, but Georgia law prohibited emancipation. Following the Methodist Discipline, Andrew purposely derived no benefit from the slaves, treated them humanely, and held them only in legal trust.[16] Everyone at the Conference recognized that, despite his adherence to the letter of the Discipline, Andrew would be subject to fierce attack and censure. Both sides (Northern and Southern) met in separate caucuses to discuss their strategies for the impending struggle.[17] During the Southern caucus, Andrew offered to resign to spare the church the division that would result from deciding his case. The caucus refused to entertain the thought, arguing that such a resignation would be a "fatal concession" to the abolitionists and would only encourage them.[18] Such further abolitionist agitation would "probably [have led] to the secession of the greater part of the Southern churches."[19]

Bishop Andrew decided not to resign, and the debate raged for days, eventually becoming something of a public spectacle, with "throngs of strangers pour[ing] into the visitors' gallery."[20] The

[15] John Nelson Norwood, *Schism in the Methodist Church, 1844: A Study of Slavery and Ecclesiastical Politics* (Alfred, NY: Alfred Press, 1923), 62-66.
[16] Arnold, *History of Methodism in Kentucky, Volume II*, 279-281.
[17] Matthews, *Slavery and Methodism*, 256.
[18] *Ibid.*, 258.
[19] Norwood, *Schism in the Methodist Church, 1844*, 68.
[20] Matthews, *Slavery and Methodism*, 260.

debate broke down into three factions: the slaveholding South, solidly united behind Andrew; the Northern abolitionists, solidly against him though abstaining from speaking; and the more conservative element of Northerners, opposed to Andrew as "an honorable, Christian gentleman caught in unfortunate circumstances."[21] The Northern conservatives emerged as the numerically decisive bloc, and the abolitionists continually pressured them to support Andrew's immediate removal. An example of this pressure comes from the Northern conservative opposition to a proposal to postpone adjudication of the issue until the 1848 General Conference. The abolitionist faction made it clear to the Northern conservatives that "New England could not remain with the church" unless the resolution expressing "the sense" of the Conference that "Bishop Andrew should desist from the exercise of his office" were passed at the 1844 General Conference.[22]

By a 110-69 vote, this passage is precisely what eventually transpired. Although the resolution did not officially remove Bishop Andrew from the episcopacy, it signaled a shift in the dynamics of the General Conference. The South had witnessed the power the abolitionists held over the Conference and feared that subsequent conferences would continue to press the issue of slavery. It is important to note that most Southerners at the conference did not defend slavery as a "positive good."[23] Unlike their counterparts in political life, Southern Methodists generally accepted the immorality and fundamentally un-Christian nature of slavery. What they opposed, however, was the rising tide of abolition. Given the

[21] *Ibid.*, 261.
[22] *Ibid.*, 264.
[23] *Ibid.*, 261.

abolitionist faction's demonstrated control over the conference, it is not unreasonable that most Southern Methodists sought to organize a separate church.

The General Conference of 1844 established and approved the institutional framework for effecting such a division of the M.E. Church. A "Committee of Nine" appointed to study the issue returned to the Conference a document that would profoundly shape the future of American Methodism. This so-called "Plan of Separation" was the subject of contentious debate but eventually passed the General Conference by "an overwhelming majority."[24] All sides supported the plan, with Northern delegates providing 95 out of 146 total votes in favor of its first resolution.[25] The plan had several sections. The one most relevant to this inquiry stated that if the Southern annual conferences should "find it necessary" to form a "distinct ecclesiastical connection," that all churches and conferences adhering to it, by majority vote of their membership, would be under its "unmolested pastoral care."[26] This was an important consideration for the South, as it ensured that the abolitionist-controlled General Conference would have no jurisdiction over them. This rule, however, only applied to churches and conferences "bordering on the line of division." Those churches not on the border would have to follow the alignment decision of their respective annual conferences.[27] Another section that would later become important stated that "all property of the Methodist Episcopal Church…within the limits of the Southern organization"

[24] Norwood, *Schism in the Methodist Church*, 1844, 87.
[25] Swaney, *Episcopal Methodism and Slavery*, 138.
[26] Quoted in *The Methodist Church Case at Maysville, Kentucky* (Maysville: Maysville Eagle, 1848), 14. See Appendix for full text of the Plan.
[27] *Ibid.*

would be "forever free" from any claim by the remaining M.E. Church.[28] Based on this plan, the Southern conferences met in Louisville in 1845 and formally brought about the separation, organizing the Methodist Episcopal Church South.

Both the Kentucky Annual Conference and the Maysville church were thrust headlong into this ecclesiastical maelstrom and forced to make a decision about which side to adhere to. For the Kentucky Conference, the decision was obvious. Its leaders had been prominent in the 1844 General Conference, and perhaps its greatest figure, Henry Bascom, had been on the Committee of Nine charged with drafting the Plan of Separation.[29] The Kentucky Annual Conference was the first Southern conference to meet after the General Conference, convening at Bowling Green in the fall of 1844 to officially "take exception" to the General Conference's treatment of Bishop Andrew and to endorse the holding of a Southern conference.[30] When that conference convened at Louisville in 1845, the Kentucky Conference sent the largest delegation of any conference, and that delegation overwhelmingly supported the conference's decision to organize the M.E. Church South. The Kentucky Conference was again the first Southern conference to meet following the Louisville Conference, and again it voted (77-6) to support the Southern position.[31] The Annual Conference invited local churches to hold similar votes, and those votes were "almost unanimous." The one clear exception was the community at Augusta, another community along the Ohio River, which was home

[28] *Ibid.*, 15.
[29] Roy Short, *Methodism in Kentucky* (Rutland, VT: Academy Books, 1979), 10.
[30] *Ibid.*, 11.
[31] *Ibid.*, 13.

to a Methodist college operated in conjunction with the Ohio Annual Conference.[32]

The much more ambiguous case was at Maysville. Both Northern and Southern factions claimed the support of a majority of the membership. Pursuant to the "directions of the college of Bishops" and as provided for in the Plan of Separation, the Maysville church took a vote on the question of which faction to align with at an announced church meeting.[33] The result of that vote, as stipulated by both sides in the case, was 109 for the M.E. Church South and 97 for the M.E. Church. The meeting moved that these vote totals and a copy of the proceedings be sent to the Kentucky Annual Conference and the Ohio Annual Conference to inform them of the congregation's decision to adhere to the M.E. Church South.[34]

Complicating this result, however, the Northern faction claimed that there were 33 additional members "in good standing" who could not attend the meeting "from various causes" but who nonetheless supported the M.E. Church. Armstrong and the other Northern trustees appended a document to the transmission to the Ohio Annual Conference certifying a majority of 21 (130-109) in favor of continuing with the M.E. Church.[35] The Northern trustees did not inform those adhering to the M.E. Church South about this appendix, and it was only authorized by a meeting of "the committee appointed by adhering members [those adhering to the

[32] *Ibid.,* 14.
[33] "Answer of William Gibson et al.," in *The Methodist Church Case*, 29.
[34] "Proceedings of the Church," in *Ibid.,* 48.
[35] "Deposition of Jacob Outten," in *Ibid.,* 66-68.

M.E. Church] who voted in the church," not the congregation writ large.[36]

This appendix allowed both sides to later claim further support from members not attending the meeting. John Armstrong's initial complaint to the circuit court claimed that 141 members of the Maysville church adhered to the Church North, while the respondents argued that twenty of this number either actually supported the Church South or were not members of the congregation. Their answer instead asserted that either 147 or 148 members supported the South, giving them a majority of twenty-six or twenty-seven members.[37]

Under the Plan of Separation approved at the 1844 General Conference in New York, a church "on the line of division" between the M.E. Church South and the M.E. Church had the right to decide, "by a vote of a majority of the members of said [church]," whether to "remain under the unmolested pastoral care" of the M.E. Church South or to align with the M.E. Church.[38] While both sides claimed the majority, they also recognized that the courts would not simply defer to whichever side could conclusively establish majority support. Instead, both the Mason Circuit Court and the Kentucky Court of Appeals emphasized the importance of the original trust conveying the property to the church. This trust was just as contested an issue as the numbers supporting each church.[39] According to Armstrong, the M.E. Church South represented "a new and different organization" that had "seceded" from the "Methodist

[36] *Ibid.*, 67.
[37] "Answer" of William Gibson, Henry Davis, et al., in *The Methodist Church Case at Maysville, Kentucky* (Maysville: Maysville Eagle, 1848), 30-31.
[38] James Monroe Buckley, *Constitutional and Parliamentary History of the Methodist Episcopal Church* (New York: Eaton and Mains, 1912), 273.
[39] See appendix Document 1 for the full wording of the trust.

Episcopal Church of the United States" for whose benefit he was required to administer the property in trust.[40] Armstrong's initial petition to the circuit court for an injunction reiterated this claim that those in the Maysville church adhering to the M.E. Church South were "seceders" who had rejected the M.E. Church and therefore had no right to use the church property.[41]

The Southern faction's answer took issue with Armstrong's characterization of them as illegitimate "seceders." They argued that the Armstrong, as a trustee, was required to respect the decision of the majority to align with the M.E. Church South. That church could not have seceded, they claimed, because the "supreme power" of the M.E. Church had "authorized and directed us to do precisely what we did." Their response instead argued that Armstrong was the true seceder, as he was ignoring the "law of the General Conference."[42] This contested discussion of secession and legitimacy represented a vital legal point. For Armstrong and the Northern faction, it was important that the court construe the M.E. Church South as a new entity distinct from the "Methodist Episcopal Church in the United States" described in the trust. If the two were distinct organizations, and the trust explicitly required the building to be used for the benefit of one and not the other, then the North would prevail. The Southern faction advanced the opposite interpretation. The court should not interpret the phrase "Methodist Episcopal Church in the United States" to mean the M.E. Church (North) because "that church [Methodist Episcopal Church in the United States] in point of general jurisdiction, exists no longer as a

[40] "Record," in *The Methodist Church Case*, 18.
[41] *Ibid.*, 18-20.
[42] "Answer," in *Ibid*., 26-27.

whole, though one in doctrine, faith, and discipline."[43] The schism had created two separate churches, and the court should follow the Plan of Separation the General Conference had detailed, which "has given [the property] to the South."[44]

The issues raised in interpreting the requirements of the trust led to larger questions about how much deference courts should grant ecclesiastical bodies and their decisions in adjudicating the requirements of a legal document such as a trust. Armstrong offers one position:

> The General Conference is an ecclesiastical tribunal; and the rights created by the deed, are civil and vested rights. Vested rights can never be infringed by any power, legislative or judicial, civil or ecclesiastical; and *civil* rights can only be reached and adjudicated in *civil* tribunals [emphasis original]. No ecclesiastical tribunal can control them.[45]

In this interpretation, neither the Plan of Separation nor the decisions of the General Conference were binding on the court, as they represented ecclesiastical judgments. Instead, the court was bound to respect the obligations of the trust as a civil document creating civil, vested rights with whose execution an ecclesiastical body cannot interfere. The Southern response took the opposite approach, arguing that:

> the acts and decrees [of the General Conference] are law to the court, when within the scope of its authority. The only question should be, has the General Conference acted in the

[43] *Ibid.*, 31.
[44] *Ibid.*, 32.
[45] "The Replication," in *Ibid.*, 41.

> premises, and directed the use of the property? If it has, their mandate should be obeyed, and the court cannot inquire into the reasons of the act, if it was not fraudulent.[46]

Since the General Conference had authorized the Plan of Separation and the Maysville church had voted to adhere to the M.E. Church South, the court was incompetent to interfere. This interpretation posited that the decisions of the General Conference and the Kentucky Annual Conference, both ecclesiastical bodies, should guide the court's interpretation of the vested rights the trust created.

Mason County Circuit Judge Walker Reid heard the case and issued a confusing verdict with which neither side was content. Instead of addressing the major issues of the case directly, Judge Reid turned to an 1814 Kentucky statute "for the benefit of Religious Societies in this Commonwealth."[47] This statute had five major components. The first was a provision authorizing "any society or sect of Christians…in congregational form" to hold and convey property using a trust. This section also provided a mechanism for appointing new trustees, whose names were to be reported to the county court and recorded in its records.[48] The Maysville church had done precisely this in December 1844. Mason County court records show that "John Armstrong, John C. Reed, Henry L. Davis, Thomas K. Ricketts, and William Gibson, were duly and regularly appointed trustees of the Methodist Episcopal

[46] "Mr. Hord's Argument," in *Ibid.*, 88.
[47] See Appendix Document Two for the full text of this statute.
[48] *The Statute Law of Kentucky, with notes, praelections, and observations on the public acts* (Frankfort, KY: Butler and Wood, 1819), 131, http://digital.library.louisville.edu/cdm/compoundobject/collection/law/id/2525/rec/8.

Church, Maysville station."[49] The statute's second major component loosely defined the powers of the trustees, who were "vested with the legal title of said land, for the use and benefit of said congregation."[50] A third section provided that, in case of schism or division "in said congregation or church," the statute was not to be construed "to authorize said trustees to prevent either of the parties so divided, from using the house or houses of worship, for the purposes of devotion, a part of the time, proportioned to the numbers of each party."[51] A fourth section limited the quantity of land held under such trusts to four acres or fewer to prevent mortmain. The fifth section prohibited "the minority of any church having seceded from…the church or congregation, from interfering in any manner, in [the majority's] appointments for preaching or worship, [or] with any appointment for similar purposes, which may have been made by the body or the major part of such church or congregation."[52]

Judge Reid found the statute applicable in the case and used it to issue an injunction splitting the use of the property equally between the two factions. In interpreting the requirements of the trust, he adopted the position advocated by Armstrong and the Northern faction, that "with all proper respect for the Church, and the Minsters and Bishops, the law treats them as the rest of mankind, when they differ about property or the use of it."[53] Judge Reid acknowledged that a majority of the Maysville church wished

[49] "Answer" of William Gibson, Henry Davis, et al., in *The Methodist Church Case at Maysville, Kentucky* (Maysville: Maysville Eagle, 1848), 26.
[50] *The Statute Law of Kentucky* (Frankfort, KY: Butler and Wood, 1819), 132, http://digital.library.louisville.edu/cdm/compoundobject/collection/law/id/2525/rec/8.
[51] *Ibid.*
[52] *Ibid.*
[53] "Opinion of the Hon. Walker Reid, Judge of the Mason Circuit Court," in *The Methodist Church Case*, 76.

to adhere to the South. He also recognized that, given this fact, the Plan of Separation approved at both the General Conference of 1844 and the Louisville Conference of 1845 required that the church property be attached to the Church South. Despite these concessions, he found that Armstrong and the Northern faction had "rights, under the laws of Kentucky, which no Church or Ecclesiastical Court can take away."[54] He did not explicitly spell out what these rights were, only that they existed and compelled him to divide the use of the property between the two factions. In this aspect, the opinion is unsatisfying, as it does not clearly establish any specific grounds for the ruling other than the third section of the 1814 statute. Judge Reid then ignored the distinctions the statute made among churches, congregations, and societies, arguing that the statute embraced all religious societies, regardless of structure.[55] This would be an important point of disagreement in the subsequent appeal. Finally, he concluded by recommending "*union* according to the advice of the Conference…. Adhere to the Methodist Episcopal Church South—it is the wish of the Conference, it is the *law* of the Church—and whether you adhere South or North, peace with you [emphasis original]."[56] This section of the opinion reads more like a sermon than a legal document, and it probably reflects just how divisive the issue had become in Maysville.

Neither party believed the statute of 1814 was applicable, and both sides appealed Judge Reid's ruling to the Kentucky Court of Appeals. The Southern appeal was based on nine claimed errors, eight of which can be distilled into one large category. Judge Reid

[54] *Ibid.*, 78.
[55] *Ibid.*, 80.
[56] *Ibid.*, 81.

had erred in not looking to the specific language of the deed of trust, which established that the property was to be "held, controlled, and used" according to the decisions of the General Conference.[57] As the General Conference had clearly laid out a procedure by which border stations, like Maysville, could decide to which conference to adhere, and given that Judge Reid had acknowledged a majority for the South, the court was obliged to award control of the property to the Southern faction.[58] This claim was rooted in the assertion that the statute of 1814 did not override the terms of the trust. If the Court of Appeals found that the statute did apply, the Southern faction found error in the circuit court's decision to split the usage of the property equally. As the court recognized that a majority of the congregation desired to adhere South, the time should be split to reflect this majority.[59]

The Southern faction also believed the statute did not apply because the deed was not made to a church in the "congregational" form but to a church in the "Episcopal" form.[60] This was an important distinction, not only because of the language of the statute, but also because of the differences in ecclesiastical structure between the two. In a congregational church, the local church is the sole actor, and its property "belongs to the church in its aggregate form."[61] In case of a division in such a church, the Commonwealth would need to intervene (in the form of the 1814 statute), as there would be no higher ecclesiastical authority to adjudicate the dispute. The very meaning of the word "Episcopal," however, implies that

[57] Refer to the full-text of the Trust in the Appendix.
[58] "Mr. Hord's Argument," in *The Methodist Church Case*, 84-85.
[59] *Ibid.*, 85.
[60] *Ibid.*, 86.
[61] *Ibid.*, 87.

higher authority's existence and therefore defeats the need for such an intervention. In such a church, the ecclesiastical structure would provide rules governing the ownership and use of church property, which is precisely what the General Conference did in the Plan of Separation. Furthermore, the church was the property "of the Methodist Episcopal Church in the United States in its aggregate form or capacity," not of the individual members of the congregation.[62]

In support of this claim, the Southern faction cited the Supreme Court's decision in Mason v. Muncaster, an 1824 case relating to the sale of property by an Episcopal church in Virginia. The Court found that the parishioners had no individual title to the property; rather, it was "the property of the parish, in its corporate or aggregate capacity, to be applied and disposed of for parochial purposes, under the authority of the Vestry, who are its legal agents and representatives."[63] While the case does show that the individual members do not have title to the property, it also seems to suggest that the church and glebe are the property of, and to be controlled by, the particular parish vestry, not the broader Episcopal Church. This argument runs counter to the one the Southern faction wanted to make, that the trustees of the Maysville church (the equivalent of the Episcopal parish vestry) were required to adhere to the Plan of Separation approved at the General Conference. The faction had a much more solid legal argument when it discussed the text of the deed itself. The deed required that the property be used for the Methodist Episcopal Church in the United States "according to the rules and discipline" established by the church in General

[62] *Ibid.*, 86.
[63] Mason v. Muncaster, 22 U.S. 445 (1824), https://bulk.resource.org/courts.gov/c/US/22/22.US.445.html.

Conference.[64] The General Conference had directed that the property belong to whichever church (North or South) that the majority of the congregation supported, and, in this case, the lower court had found, as a matter of fact, that the majority supported the Church South.

One recurrent feature of the Southern faction's appeal is its constant reference to outside, Northern agents interfering with what should properly be decided by Kentuckians. The appeal chastises Judge Reid for "extending Northern jurisdiction over Maysville…to the detriment of the church and the peace of society."[65] This decision to "turn the channel of the Ohio river" creates the possibility that the North could encroach further upon the South, "extend the jurisdiction of the Ohio Conference over the entire South," and "select the preachers who are to minister to the entire South."[66] All of this purported Northern interference is contrary to the will of the General Conference and is "evidence of [an] omnipotent power of the [court] over the consciences and temporalities of the church not heretofore understood or practiced."[67] The Southern faction urged the Court of Appeals to "cut [the Maysville church] loose from the Northern Abolitionists who are pirating upon our property [and] endeavoring to undermine our political institutions."[68] Northerners are portrayed as abolitionists diametrically opposed to Kentucky and Southern interests, an appeal clearly calculated to resonate with the Kentucky Court of Appeals. Phrases such as "if I am a *Kentuckian*, I do not wish that a New England or Ohio Abolitionist

[64] Refer to the full-text of the Trust in the Appendix.
[65] *Ibid.*, 90.
[66] *Ibid.*, 91.
[67] *Ibid.*, 93.
[68] *Ibid.*, 99.

should rule over me" and "no true-hearted *Kentuckian*, whose mind is not dethroned, or whose judgment is not warped, can desire it [emphasis original]" reinforce this rhetoric of outside interference.[69]

In a similar vein of argument, the appeal also foresees the North sending "her worst spirits to conduct and lead her invading forces…on the subject of Abolition."[70] Such "unjustifiable interference" was already having consequences, as "the colored people [of Kentucky] no longer attend the preaching of the South."[71] The inevitable outcome of finding for the Northern faction would be the breakdown of master-slave relations. According to the Southern appeal's fiery conclusion, nothing less than the fate of Kentucky as a slave state was at stake.

The Northern faction's appeal agreed with that of the Southern faction, in that neither supported the application of the 1814 statute. It also gave as evidence for this assertion the text of the deed itself, which it claimed required that "the property [be] held for the use of the members 'as a place of worship,' and for the use of the ministers 'to preach and expound God's holy word therein.'"[72] In their view, the deed therefore created "two distinct classes of beneficiaries," both of whom were "recognized in their *individual* capacities, and not as associated into *societies* and *conferences* [emphasis original]."[73] This distinction is important. Unlike the Southern faction, which interpreted the deed to mean that the church was the property "of the Methodist Episcopal Church in the United States in its aggregate form or capacity," the

[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*, 99-100.
[72] "Substance of Mr. Waller's Argument," in *The Methodist Church Case*, 103, quoting the deed.
[73] *Ibid.*

North argued that the deed required the property to be held in trust for the benefit of the local members and ministers.[74] In order to receive this beneficial interest, the members and ministers had to "belong to the Methodist Episcopal Church in the United States of America."[75] Neither the General Conference nor the Court of Appeals had any right to interfere with this "solemn, irrevocable condition of the trust."[76] According to the Northern faction's argument, a person could only be a member (or a trustee) of the Methodist Episcopal Church in the United States if he or she were part of a society "connected with and under the jurisdiction of the General Conference."[77] By this argument, the Northern faction sought to exclude anyone adhering to the M.E. Church South from membership in the Maysville Church, which would thereby exclude them from serving as trustees and from gaining any beneficial interest in the property under the trust.

So long as one accepts the definition of membership (being under the jurisdiction of the General Conference) offered and the assertion that the M.E. Church was the legitimate successor of the "Methodist Episcopal Church in the United States," the Northern argument is technically correct. The General Conference of 1844's "Report of the Committee of Nine," which was adopted and led to the Plan of Separation, stated that the General Conference of any Southern church would be a "distinct ecclesiastical connection" from the General Conference already in existence.[78] The Louisville Conference of 1845 that formally established the M.E. Church South

[74] "Mr. Hord's Argument," in *Ibid.*, 86.
[75] "Substance of Mr. Waller's Argument," in *Ibid*., 103.
[76] *Ibid.*
[77] *Ibid.*
[78] J.M. Buckley, *Constitutional and Parliamentary History of the Methodist Episcopal Church*, 273.

agreed, "solemnly declar[ing] the jurisdiction hitherto exercised over said Annual Conferences by the General Conference of the Methodist Episcopal Church entirely dissolved."[79] Those adhering South agreed that they were under the exclusive jurisdiction of the General Conference of the M.E. Church South and had no jurisdictional ties to the General Conference of the M.E. Church. Thus, by adhering to the Church South, they had "forever parted with their legal rights under the deed," according to this Northern argument.[80]

Less compelling is the Northern faction's subsequent argument about whether the General Conference had actually approved the split of the Southern conferences. The appeal contended that the "action of the General Conference…did not *provide for or contemplate a division or re-organization of the Church* [emphasis original]."[81] This interpretation stressed that the Southern conferences had voluntarily left the General Conference and that the General Conference neither "advise[d]" nor "authorize[d]" this separation.[82] It instead "simply *submitted* to the necessity [of separation], and resolved to meet the emergency with 'Christian kindness and the strictest equity [emphasis original].'"[83] To substantiate this claim, the appeal examined the deliberations and resolutions of the General Conference of 1844, quoting Northern ministers opposed to the separation of the church.[84] Yet this sampling of Northern opinion represents only a limited perspective of the General Conference. The Southern delegates' understanding was that the General Conference was authorizing the potential division of the church. Following the

[79] *Ibid.*, 277.
[80] "Substance of Mr. Waller's Argument," in *The Methodist Church Case*, 107.
[81] *Ibid.*, 109.
[82] *Ibid.*
[83] *Ibid.*, quoting the "Plan of Separation."
[84] *Ibid.*, 109-112.

Louisville Conference's decision to bring about that split, the separation proceeded according to the Plan of Separation the General Conference had laid out. It seems rather pointless for the General Conference to have expended the effort to delineate the Plan of Separation if it did not intend for it to be the model by which any separation would be effected. That the General Conference as a whole adopted the Report of the Committee of Nine and the subsequent Plan of Separation indicates that the consensus of the ministers there represented was that the General Conference would accept and authorize the separation.

Both sides of the controversy, then, presented compelling legal arguments. For the Southern faction, the trust's emphasis on the control of the General Conference was paramount to its interpretation. As the General Conference had authorized and endorsed the Plan of Separation, the trust should be interpreted accordingly. For the Northern faction, even if the General Conference had authorized and endorsed the Plan of Separation (a contention they disputed), that acceptance could not alter the vested, civil rights created in the trust. Only the members of the Maysville church who adhered to the Methodist Episcopal Church and were under the jurisdiction of the General Conference could be beneficiaries under the trust.

It was left to the Kentucky Court of Appeals to sort out these conflicting legal arguments and render a verdict. Chief Justice Marshall wrote the Court's opinion, finding for the Southern faction and awarding them control of the property. In so doing, he adopted elements from both the Northern and Southern appeals. Marshall began by agreeing with both sides that the 1814 statute was not applicable in the case. Marshall held that the statute merely

standardized the practices of the trustees and did not prescribe "the establishment of a rule which might in many instances, defeat the obvious intent of the deed."[85] Such a rule would be "perhaps beyond the competency of the legislative power."[86] This determination makes sense, as the statute did not facially require the equal splitting Judge Reid had ordered.

After establishing that the statute did not apply, Marshall next examined the language of the deed of trust. Agreeing with the Northern faction, he found that the local society at Maysville "and its members alone" were the only beneficiaries possible under the first provision of the deed.[87] Rejecting the Southern claim of the M.E. Church as a whole being a beneficiary, Marshall reasoned that, because "membership [in the M.E. Church as a whole] [was] itself acquired only by a membership in some local society connected with the general organization," only the local members could be considered beneficiaries.[88]

While this finding in isolation would help the Northern faction, Marshall limited its impact by agreeing with the Southern faction that the use of the building in accordance with the will of the General Conference was "of paramount importance."[89] That the Southern faction was the rightful holder of the property under the Plan of Separation approved by the General Conference, "which had jurisdiction over the original society," constituted "a strong and, *prima facie*, a satisfactory proof of right."[90] Marshall was very concerned with overstepping his role as a civil judge and interfering

[85] "Opinion of the Court of Appeals," in *The Methodist Church Case*, 131.
[86] *Ibid.*, 132.
[87] *Ibid.*, 136.
[88] *Ibid.*
[89] *Ibid.*, 139.
[90] *Ibid.*

with the decisions and workings of an ecclesiastical body like the General Conference. Given that the Northern faction "acted in defiance of the highest tribunals of the Church," it would be difficult for the Court to award them possession of the property.[91]

After establishing this framework for adjudicating the case, Marshall next turned to the issue of the deed's reference to the "Methodist Episcopal Church in the United States." The Court found that that previous church had divided into two separate churches and that neither of these resulting churches could claim to be synonymous with the old church. Instead, both new churches were its "legitimate successors."[92] Such a finding was necessary, the Court reasoned, in order for the deed to remain "effectual to secure its substantial and primary objects."[93] It represented a clear victory for the Southern faction, as one of the major Northern arguments had been that the M.E. Church South was not a part of the "Methodist Episcopal Church in the United States" specified in the deed. Applying as restrictive and literal a standard to the language as the North urged would subvert the purpose of the deed, which was to secure a place of worship for the Methodist community in Maysville. The General Conference was competent to authorize the division of its jurisdiction, and the deed should not fail because it had done so.

This finding brought the Court to another of the Northern appeal's major arguments, that the General Conference had not approved the division of the church. To refute this claim, Marshall looked to the text of the resolutions the General Conference had

[91] *Ibid.*, 140.
[92] *Ibid.*, 145.
[93] *Ibid.*

passed in 1844, finding in them "a weight of authority not easily overcome."[94] These resolutions "necessarily involve[d] a partition of the governing power between [the] two jurisdictions, each possessing within its territorial limits, the same authority and power as had previously belonged to the whole church."[95] The opinion also pointed to the assent of overwhelming numbers of both Southern and Northern delegates to the General Conference in approving the Plan of Separation as evidence of their consent to its provisions.[96]

Based on these findings, the Court of Appeals awarded full control of the property to the Southern faction, as it held the majority of the congregation and was therefore entitled to it under the Plan of Separation. The opinion is closely argued and effectively rebuts the major Northern points about the powers and intentions of the General Conference. On the all-important question of how far to rely on those ecclesiastical powers and intentions in interpreting the requirements of the civil trust, it strikes an effective balance between the extreme positions advocated by each faction. To the frustration of the Northern faction, the Court found that the Plan of Separation should be an essential consideration in interpreting the trust. Yet it also refused to adopt the Southern faction's view that the ecclesiastical determination should defeat consideration of any civil, vested rights created by the trust. The Court was concerned about its obligations to preserve the distinction between it and the church and was reticent to second-guess the decisions of the church in questions of doctrine and authority. But, in so doing, it did not abrogate its responsibility to uphold the deed of trust as a binding

[94] *Ibid.*, 153.
[95] *Ibid.*, 156.
[96] *Ibid.*, 158-159.

civil document. The opinion also gains merit for discarding a less benign aspect of the Southern appeal, namely its blatant attempts to play on racial and sectional tensions. Instead of using these arguments as the basis for the ruling, the opinion sticks to legal arguments. It offers none of the race baiting that characterizes the Southern appeal's conclusion, and it consciously avoids any mention of the role of slavery in precipitating the division. Given the role such appeals to racial and sectional fears would play in many subsequent decisions—most notably Dred Scott v. Sanford in 1857—the opinion should receive credit for its strict adherence to the two sides' legal arguments.

Maysville was not alone in experiencing such sectional tumult. By the mid-1840s, division was becoming an increasingly common phenomenon across a wide swath of American society. The Methodist Episcopal Church presents but one example of this trend. Other major religious organizations, including the Baptists and the Presbyterians, underwent similar splits. This division was not merely sectional; tensions between native-born Americans and immigrants, for example, also flared. But sectional division between the South and North would characterize the remaining years before the Civil War. Institutions that had helped bind the nation together, from the Methodist Episcopal Church to the Whig Party, would dissolve into competing, sectional factions. As the abolitionists had demonstrated in the General Conference of 1844, more radical perspectives would begin to dominate and shape discourse on the essential question of slavery. The Maysville Church Case was but an opening skirmish on the longer march toward the inevitable sectional conflict, as the Northern faction's appeal recognized. While the nation's "political

union still endure[d]" in 1847, the unresolved issue of slavery would "continue to agitate the nation" for many years after.[97]

[97] "Substance of Mr. Waller's Argument," in *The Methodist Church Case*, 127.

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Genetic Modification: Do We Have the Right to Create a Superhuman Society?

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In this paper, I consider the hypothetical legality of human genetic modification by examining both the moral and ethical contributions to the debate as well as relevant prior case law focusing on other issues in the realm of reproductive rights. Specifically, I turn to judgments regarding contraception, abortion, and sterilization: Griswold v. Connecticut (1967), Eisenstadt v. Baird (1972), Roe v. Wade (1973), Planned Parenthood v. Casey (1992), Gonzales v. Carhart (2007), Skinner v. Oklahoma (1942), Maher v. Roe (1977), and Harris v. McRae (1980). The combination of philosophical reflection and examination of relevant legal history leads me to conclude that while genetic modification cannot be banned outright, it can--and really ought--to be regulated and controlled via measures such as denial of reimbursement/funding for such procedures.

I. Introduction

Rapid technological advances in medical research have turned science fiction fantasies of the past into feasible possibilities. In today's world, we have the ability to genetically modify our children—but do we have the right to do so? Adam Moore[98] contends that we do; our rights to privacy and liberty, defended by libertarians and liberals alike, necessitate a heightened judicial scrutiny of regulations and restrictions on these procedures.

[98] Adam Moore, "Privacy, Liberty, Property, and the Genetic Modification of Humans," *Journal of Philosophical Research* (2005): 81-94.

Unfortunately, the legal system is well behind the scientific world. It was not until 2010 that the U. S. Supreme Court agreed to hear a case on genetically engineered *food*[99]; thus, for now, we are left to our own devices to attempt to find an answer to whether or not we can alter actual human beings. The question is both extremely controversial and complex, raising a host of moral and ethical dilemmas. Public opinion suggests that many citizens are hostile to the idea that we have the right to "play God"; others object on more concrete grounds, citing the dangers of testing and the exorbitant cost of the procedures. On the other hand, banning the process altogether would seem to violate our deeply held rights to privacy and personal liberty. When taking into account all of these concerns, the proper solution probably lies somewhere in between a total prohibition and the largely unlimited availability Moore advocates (though I believe it should more closely resemble the latter). In this paper, I will demonstrate the need for this middle ground by examining the moral and ethical arguments on both sides of the issue, as well as looking to prior case law on related issues to determine an appropriate legal status for genetic modification.

II. Background

Before I begin, however, it is imperative to understand the basic facts and current status of human genetic engineering. The term applies to several different, but related procedures. Perhaps the most widely recognized is cloning, which can be divided into reproductive and therapeutic uses. Reproductive cloning is a form of asexual reproduction in which the nucleus of an egg is replaced with that of a body cell to form a clonal zygote that is then implanted in a

[99] Monsanto v. Geertson Seed Farm, et al. (09-475)

woman's womb. Therapeutic cloning uses the same basic procedure, but the embryo is used to generate stem cells rather than implanted in the womb and carried to term. The second main form of genetic engineering is genetic modification or manipulation, which involves changing the genes in a living human cell. Much like cloning, genetic manipulation can be divided into two categories: somatic, which targets the body cells of a person without affecting his or her reproductive cells; and germline (also called inheritable genetic modification), which targets the genes in eggs, sperm, or very early embryos using an in vitro fertilization (IVF) procedure. Germline engineering can be used to prevent future children from inheriting certain diseases and conditions by altering the specific genes that predispose them to these ailments. However, it can also presumably be used to change other characteristics of a child, such as intelligence, sex, and other physical features. A desire to alter a child in this way is often viewed as an inappropriate motive in comparison to disease prevention. Germline engineering is banned in many countries, but it is currently legal in the United States. There is also an alternative, far less controversial procedure called pre-implantation diagnosis and selection (PDS). PDS also uses an IVF procedure; however, rather than manipulating the genes of unhealthy embryos prior to implantation, it simply selects the healthy ones. The Association of Reproductive Health Professionals (ARHP)[100] summarizes the differences between germline engineering and PDS as follows:

> [PDS] is more straightforward than germline genetic manipulation, and does not open the door to an out-of-

[100] "Human Cloning and Genetic Modification" *ARHP - Association of Reproductive Health Professionals*.

> control techno-eugenic human future. The only situation in which germline engineering would be required over pre-implantation selection is one in which a couple would like to endow their child with genes that neither member of the couple possesses. This is the "enhancement" scenario, which we believe would lead to a dystopic human future if it were allowed. PDS, on the other hand, would have only a minimal effect on the human genome, even if it were widely used, because the procedure selects from the range of existing human traits. But ***engineering*** the genes by means of germline modification would allow novel forms of human life to be created within one generation.

However, the ARHP points out that PDS also could be used to select certain cosmetic and behavioral traits, rendering it equally objectionable germline engineering in the minds of those for whom this motivation is the main cause for concern.

The controversies and questions regarding ethics and legality that surround these procedures are very similar (and in many cases the same); however, for purposes of this paper I will be focusing on germline engineering.

III. Moral and Ethical Considerations

As with many new medical treatments, germline engineering carries significant risks. Unlike non-reproductive procedures, however, the process affects not only the patient who elects to get the treatment, but also, at the very least, the child created through it. If the procedure turns out to produce an unforeseen complication

or side effect, the parents are potentially subjecting their child to a lifetime of pain. Furthermore, if the effects of the engineering are irreversible, they will be foisted on to all future generations as well. Ronald Dworkin argues that these potential dangers are not that likely to be significant; moreover, they are not enough to justify a ban on research.[101] His is a fairly utilitarian approach; letting even a small number suffer for the gains of others who will then receive a safer treatment is a principle that many may find morally unacceptable. Dworkin's opinion is nonetheless realistic in the sense that some recipients of every new medical treatment take on these risks so that the procedure may be perfected; however, the key difference in the case of genetic engineering is that those who will most likely bear the negative effects did not consent to being the guinea pigs for society. A counterargument may suggest that the children whose parents elect to try genetic engineering would have suffered from whatever disease they intended to prevent anyway, but that does not change the fact that the effects of genetic engineering could prove even more debilitating. In addition, there is no guarantee that the original disease will be eliminated, so the suffering might only be compounded.

The risks involved seem to increase in gravity when parents choose to use germline treatment for non-disease prevention reasons, wishing to alter the intelligence, sex, or other physical features of their child. Many doubt these changes are worth the potential side effects. Moreover, as John Attanasio argues, "essential human dignity may also be compromised by the realization that one is the

[101] Ronald Dworkin, "Playing God: Genes, Clones, and Luck" in *Sovereign Virtue: The Theory and Practice of Equality* (2000) 439.

product of genetic fabrication".[102] In addition, John Robertson observes in his book *Children of Choice*[103]:

> Parents might have unrealistic expectations of children who have been subject to efforts to make them superior. This could create an unhealthy psychological environment, engender disappointment if the child is merely normal, or affect the child's self-esteem and self-concept in unforeseen, harmful ways.

Considering these potential outcomes, many suggest that genetic engineering for such purposes should be banned even if it is available for disease prevention. However, others like Attanasio believe we do not have the right to distinguish between motives and even propose that "the right to form the body and mind […] is analogous to molding the child through education".[104] It is also important to note that we do not discriminate against certain reasons in cases of abortion; amniocentesis allows parents to know the genetic makeup of their future child, and they may choose to abort the fetus if they are dissatisfied with the sex (note an exception for residents of Arizona, which recently became the first state to ban abortion for race or sex-selection).[105]

Perhaps we will still conclude that it is irresponsible for the parents to take such a gamble on their child's life, but then again, we

[102] John B. Attanasio, "The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide" *The University of Chicago Law Review* 53.4 (1986): 1296.
[103] John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1996) 165-66.
[104] Attanasio, 1291.
[105] Marcy Darnovsky, "Behind the New Arizona Abortion Ban" *Biopolitical Times*.

must remember that it is not always the government's place to prevent individuals from making hazardous decisions, particularly in regard to their personal lives.

Genetic engineering does not affect only individual lives, though; it has the potential to enormously impact society as a whole. Unesco's International Bioethics Committee suggests that we do not have the right to alter the human genome because it is owned in common by humankind.[106] The changes we make today will be passed on to all future generations. However, the same is essentially true of any other medical advances or technological innovations that drastically alter our way of life. These inventions are protected by intellectual property rights, and, as Adam Moore argues, there is no valid reason why genetic engineering technology should be treated any differently. It is an individual creation, not a social discovery, and therefore cannot be automatically deemed public knowledge for the sake of trying to regulate it.

Regardless, the committee is correct in observing that the use of genetic engineering technology will have a substantial impact on future citizens, especially those who do not undergo treatment. The prospect of a quick fix, an easy way to prevent certain debilitating diseases and conditions is thrilling, no doubt. Unfortunately, the demand for funding in the area of genetic engineering could take too much away from the treatment of these diseases, meaning that no further advances will be made, despite a majority of the population still being at risk for the conditions. Furthermore, as instances of genetic engineering become more frequent, the social stigma of

[106] Darryl R.J. Macer, "UNESCO Bioethics Committee and International Regulation of Gene Therapy" *Gene Therapy Newsletter* 4 (1994): 4-5.

hereditary diseases and handicaps will increase, worsening in yet another way the quality of life for those who must still live with them, either because their parents were morally opposed to genetic engineering or, even more likely, because they could not afford the procedure.

One of the main arguments used by liberal thinkers against genetic engineering cites the exorbitant cost of the treatment. Surely it will only widen the already prevalent class disparity in our society. This effect may cause some great discomfort; however, the same problems are the result of any new technology or cutting-edge medical treatment.[107] Furthermore, as Dworkin points out, our general impulse is to extend availability to the poor, not deny it to the rich.[108]

Nevertheless, genetic engineering, particularly of the enhancement variety, does seem to come dangerously close to violating our deeply held principle of equality of opportunity, even at the theoretical level (we tend to be much more forgiving toward those acts which violate it on only in practice). John Attanasio[109] argues:

> Two critical interests in the area of equality of opportunity are education and employment […] Educational opportunity is a function of wealth, effort, and intelligence. Because [people who have been genetically enhanced] will disproportionately possess these resources, the drug will redistribute educational

[107] Moore, 91
[108] Dworkin, 440
[109] Attanasio, 1307

> possibilities. This redistribution will be particularly problematic, since intelligence and effort will (potentially) be tied permanently to wealth.

A seemingly insurmountable lack of economic mobility already appears to plague our overwhelmingly non-engineered society, and an increasing reliance on genetic enhancement would undoubtedly exacerbate this problem. Moreover, we do have programs of affirmative action designed to help minorities traditionally disadvantaged by race or socioeconomic status overcome obstacles in attaining education and employment. It seems unlikely that we would restructure such programs to include non-genetically engineered people, who would not only form a numerical majority of the population (at least for a while), but would also lack the capacity to compete with those designed to be super-intelligent. To force employers and educators to accept non-genetically enhanced applicants over those who are objectively more capable thanks to the treatment is highly unrealistic. Therefore, if genetic engineering eventually did become prevalent, we would have no way (or possibly even desire) to offer the same opportunities to the non-enhanced. According to influential American philosopher John Rawls, one of the two principles of justice that a rational person not knowing his or her lot in life would choose for society states, "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[110] If we can easily foresee the use of genetic

[110] John Rawls, *A Theory of Justice* (1971) 83.

enhancement violating the latter half of this principle, can we in good conscience permit it?

On the other hand, one might argue that as long as the legal status of non-genetically engineered persons does not differ from those who are enhanced (i.e., they retain equal voting rights, and employment and educational institutions do not bar them as a rule), the use of genetic enhancement procedures would not violate this part of the principle in theory. Furthermore, it is clearly consistent with the first half. An increased number of citizens with extraordinary abilities would only benefit society as a whole. The new inventions, boosted economy, and achievements in the arts that could be the result of contributions by genetically enhanced individuals would be to the advantage of each member of the community, enhanced or not. Therefore, while the relative socioeconomic position of non-genetically enhanced persons has the potential to decline, it could also rise objectively. In that case, one could also argue that to *not* allow the use of genetic enhancements is unjust as well.

Other arguments supporting the right to genetic engineering rely on the supposed impracticality of a total ban. William Gardner contends, "Prohibition of genetic enhancement is likely to fail because compliance with the ban will be undermined by the dynamics of competition among parents and among nations."[111] No international ban currently exists, so parents have the ability to get the treatment regardless of whether or not the United States decides

[111] William Gardner, "Can Human Genetic Enhancement Be Prohibited?" *The Journal of Medicine and Philosophy* 20 (1995): 69.

to prohibit it. As use increases, other parents (except those who have religious or ethical objections) will feel pressured to adopt the treatment in order to provide their children with the abilities to meet the world's increasingly competitive demands. As demand for the enhancement and disease-preventing procedures rise, some doctors will recognize a lucrative opportunity, and a black market is likely to develop. In this scenario, many parents (albeit fewer than if the treatment were legal) will still elect to use genetic engineering, but it will be far less safe due to the complete lack of regulation and funded testing.

Another negative effect of a total ban on positive genetic engineering might be an increased (or at the very least, not decreased) reliance on abortion, sometimes referred to as negative genetic engineering.[112] Many parents cannot emotionally bear or afford to take care of a severely disabled child. Without genetic engineering available to prevent such suffering in the child's life, these individuals are left to turn to abortion as the only other option to having the child. The number of these tragic situations will not be entirely eliminated (especially for parents who abort due to economic crisis), but it can be greatly reduced by allowing parents to seek germline treatment.

IV. The Right to Privacy

While the aforementioned moral and ethical dilemmas are vital to consider, they alone cannot determine the legality of genetic engineering. We must also turn to prior case law, in particular the decisions regarding the legal status of contraception and abortion, as

[112] Attanasio, 1280

genetic engineering presumably falls into the same category of reproductive liberties found under the fundamental right to privacy. Privacy is a somewhat controversial right even today, as the word "privacy" is not explicitly mentioned anywhere in the Constitution or the Bill of Rights. In fact, it was not truly established until the 1967 case *Griswold v. Connecticut*[113], a decision that struck down an 1879 law prohibiting the distribution of information as well as the use of contraceptives. In writing for the majority, Justice Douglas argued that this law violated the various "zones of privacy" that could be found in the following parts of the Bill of Rights: the First Amendment's right of association; the Third Amendment's prohibition against the quartering of soldiers in private homes during times of peace; the Fourth Amendment's explicit guarantee of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"; the Fifth Amendment's Self-Incrimination Clause, which "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment"; and the Ninth Amendment's provision that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The concurrence by Justice Goldberg (joined by Chief Justice Warren & Justice Brennan) stressed this last element, stating, "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever…"

[113] Griswold v. Connecticut, 381 U.S. 479 (1965)

Following *Griswold*, the decision in *Eisenstadt v. Baird* (1972)[114] striking down a Massachusetts law that prohibited the dissemination of contraceptives to unmarried couples clarified that the right to privacy in reproductive choices of this sort applies to all individuals. As Justice Brennan stated in the plurality opinion, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The right to reproductive autonomy was expanded even further a year later in the famous case *Roe v. Wade* (1973)[115], which struck down a Texan law prohibiting all abortions except those necessary to save the mother's life. Justice Blackmun delivered the majority opinion, concluding:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Roe did permit some state regulations and restrictions on later stage abortions—and more were deemed permissible in the subsequent case *Planned Parenthood of Southeastern Pennsylvania v. Casey*[116], which I will discuss in greater detail in the next section—however,

[114] Eisenstadt v. Baird, 405 U.S. 438 (1972)
[115] Roe v. Wade, 410 U.S. 113 (1973)
[116] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)

the decision was nevertheless a strong confirmation of the basic right to making the decision about whether or not to have a child. Logic suggests that the decision about what kind of child to have, using which methods and technologies, should also be included under the right to privacy that permits such reproductive autonomy.

V. Regulations and Restrictions

The right to privacy may be fundamental, but it is not absolute. Even strict judicial scrutiny allows certain state interests to override this right, particularly in respect to cases regarding abortion. The exceptions to the right of reproductive autonomy in the following decisions suggests that while genetic engineering would be nearly impossible to prohibit entirely without violating the fundamental right to privacy, the government does possess the power to regulate it.

Roe v. Wade[117] provided the initial and most extensive rights concerning abortion. The decision prohibited state interference during the first trimester of pregnancy, leaving the decision to the mother and physician; during the second trimester, the State's interest in the mother's life allowed it to regulate—but not ban—abortions in ways "reasonably related to maternal health"; and "subsequent to viability," or when the fetus could potentially survive outside the womb (then thought to be the third trimester), the State's interest in the "potentiality of human life" permitted (but did not require) it to regulate or proscribe abortions except when necessary to preserve the life or health of the mother. Because genetic engineering occurs at the earliest stages of embryonic

[117] Roe v. Wade, 410 U.S. 113 (1973)

development, the *Roe* framework probably would allow for only minimal regulations of the procedure, most likely under the state interest of preserving the health of the mother, who would be carrying an altered fetus for nine months.

However, the *Roe* framework was replaced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[118] Although the majority opinion began by stating, "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed," it also emphasized "the State's power to restrict abortions after fetal viability" (which, due to advances in medicine, was adjusted to approximately twenty-eight weeks) and the "principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey* upheld rules and regulations that required doctors to inform the woman of philosophic and social arguments against abortion. It also allowed states to require that a woman give her written informed consent after a twenty-four hour waiting period before the procedure. Presumably, the same restrictions could easily be placed on genetic engineering without creating an undue burden on the parents seeking the treatment; thus, I believe *Casey* provides an appropriate standard for determining the government's power to regulate new reproductive technologies.

The most recent Supreme Court abortion case, *Gonzales v. Carhart* (2007)[119], upheld the Partial-Birth Abortion Ban Act, a federal law prohibiting a particular method for late-term abortions. If the government wanted to ban genetic engineering altogether,

[118] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)
[119] Gonzales v. Carhart, 550 U.S. 124 (2007)

some might propose that this case could potentially be used in support. The government would need to argue that genetic engineering poses a significant medical danger, and that alternative methods are available (PDS could be used here). However, I do not find this case to be very applicable, as the potential medical side effects of genetic engineering are generally not considered serious enough to justify a total ban, and no real alternative exists for couples who have *no* chance of producing a healthy child biologically related to both the mother and father (PDS requires at least a minimum chance of healthy sperm and eggs). *Gonzales v. Carhart* also would not allow the government to distinguish between motives for using genetic engineering (enhancement vs. disease prevention) because the procedure is essentially the same.

The other main case that some might suggest could provide support for a ban involves not abortion, but eugenics. Genetic engineering is frequently compared to the eugenics movement of the early twentieth century, in which states would require those deemed mentally defective to be sterilized. In striking down a law requiring sterilization as punishment for "habitual criminals" in *Skinner v. Oklahoma* (1942)[120], Justice Douglas's opinion touched upon concerns similar to those raised by genetic engineering, stating, "The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."

Like the eugenics movement, one of the goals of genetic engineering is to advance society by eradicating undesirable traits and conditions

[120] Skinner v. Oklahoma 316 U.S. 535 (1942)

that plague the human race. However, genetic modification differs vastly from the law overturned in *Skinner* because it is a voluntary, not compulsory procedure. *Skinner* simply suggests that the government may not require parents who are expected to produce an unhealthy child to undergo genetic engineering against their wishes. Note that the First Amendment's guarantee of religious freedom would also likely prohibit any compulsory genetic engineering laws. Although the State's interest in preserving the life of a child can override his or her parents' refusal of medical treatment on religious grounds, fetal rights are weaker than those of a born child; moreover, the treatment directly affects the mother in this case, invoking her right to personal autonomy.

VI. Funding

While the government can neither prohibit nor compel parents to use genetic enhancement, they can control use somewhat through funding. A state that concludes genetic enhancement will benefit society has the ability to encourage use of the procedure by providing funding for it; doing so would also eliminate the aforementioned ethical dilemma that stems from potential class disparity. However, I do not believe many states are likely to do so. As described earlier, the appropriate legal status of genetic engineering is most comparable to that of abortion; both should be protected by, but not absolute under the fundamental right to privacy. Because abortion is so morally controversial, the Supreme Court has consistently upheld bans on funding (*Maher v. Roe* (1977)[121], *Harris v. McRae* (1980)[122]). Genetic engineering poses

[121] Maher v. Roe, 432 US 464 (1977)
[122] Harris v. McRae, 448 US 297 (1980)

many ethical and moral concerns similar to those raised by abortion; therefore, the government is likely, and constitutionally permitted, to ban funding for this procedure, too.

VII. Conclusion

Human genetic engineering is likely to remain highly controversial due to the abundance of moral and ethical concerns surrounding it. However, banning the procedure altogether (or, alternatively, compelling it) would be a violation of the rights to privacy and reproductive autonomy established in cases such as *Griswold*, *Roe*, and *Casey*. The government can and should nonetheless regulate genetic engineering to minimize the potentially harmful effects on individual citizens and society as a whole. Moreover, it has the power to discourage use of genetic modification by denying citizens any reimbursement of the costs. The fate of the human genome, then, will not change overnight. The government's ability to control use along with the public's moral uneasiness secures a gradual adoption of genetic engineering even with the establishment of a legal right to use it; thus, we will remain looking ahead to a brave new world until tomorrow.

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A Transformative Era in Cloud Computing: Questions, Developments, and Affirmations in Light of Snowden's NSA Revelations

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Cloud computing has been single-handedly impacted and brought into a new era by Edward Snowden's National Security Agency (NSA) revelations in June 2013. The watershed year of 2013 has been described as "an inflection point,"[i] a complete shift in direction in the Internet, in which "the curtain (was) raised on the surveillance state."[ii] The resultant public alarm regarding NSA Internet surveillance is particularly relevant in cloud computing, where data is housed and managed by external organizations. This 2013 seismic shift coincides with the first annual report by the Internet Monitor research project of the Berkman Center for Internet & Society at Harvard University, entitled "Internet Monitor 2013: Reflections on the Digital World." This report and the flurry of news articles addressing Snowden's NSA revelations present a multi-faceted microcosm through which to examine the impact of Snowden's revelations on the double-edged sword of international cloud computing. Cloud computing's ongoing controversy— its benefits of cost efficiency and flexibility versus its risk of privacy issues— now has been brought to new heights by Snowden's revelations of NSA surveillance. The Snowden revelations' upside is that public awareness has been illuminated and concern for individual rights has been rekindled, while its downside is that American cloud computing's explosive global growth and dominance has been called into question. Policy must be recalibrated to honor public and private rights equally for a healthy balance between national security and individual security, in order to preserve American dominance in cloud computing. First, I will discuss the state of affairs preceding Snowden's NSA Revelations in May 2013. Then, I will show effect—the impact on cloud computing. Finally, I will discuss the future—implications and suggestions—to lead toward a convergent cooperative balance between individual security and national security in cloud computing.

1. The State of Affairs Before Snowden's NSA Revelations

1.1 Cloud Computing Overview:

Cloud computing refers to the storage of data in external networks, rather than in users' local computers, generally through the Internet.[iii] Due to cost and flexibility benefits, the explosive trend toward the use of cloud computing's off-site data storage has been rapidly replacing the dominance of traditional in-house Information Technology (IT). Cloud computing's three levels— Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS)— are interconnected. SaaS is the top most easily recognized form of the cloud with which the consumer interacts directly, PaaS is the middle portion that acts as framework for hosting and developing programs and application, and IaaS is the large foundational infrastructure of power, physical servers, and storage.[iv]

Software as a Service (SaaS):

SaaS provides software for the end user remotely through the Internet or an alternate network. Examples of SaaS include Gmail, Google and Facebook. The "hegemony of these giants"[v] represent just one evolutionary development in the so-far "Three Generations of the Networked Public Sphere," or NPS, according to author John Kelly. The first generation was only five or six years ago in the form

of decentralized blogospheres. The second generation occurred with the all-powerful influence of new social media giants like Facebook and Twitter. The currently evolving third generation of the NPS is the addition of social media platforms like Tumblr and Pinterest that supplement, rather than supplant, the towering giants of Facebook and Twitter. Kelly likens the social media evolution to that of life forms evolving from ocean to land, where addition and diversification, not supplantation, occurs.[vi]

Platform as a Service (PaaS):

PaaS enables websites and applications to be launched into the Internet; it facilitates user web creation, multiple users, development collaboration, and subscription management. Examples include Microsoft Azure and Google App Engine.[vii]

Infrastructure as a Service (IaaS):

IaaS is the base or hardware infrastructure where the cloud is stored. This includes "servers, processing power, storage, networks, and other physical resources."[viii] Examples include Amazon Web Services, such Amazon's "Elastic Cloud Compute" (EC2).[ix]

1.2 Cloud Providers' Treatment of User Data, Pre-Revelations:

Cloud platforms have been notoriously passive in responding to US government requests for users' personal data, unquestioningly handing over users' information.[x] In fact, cloud servers' business models are predicated on mass mining of user data for marketing profits. To maintain profitability under this business model, user

default settings automatically share user data, often without users' knowledge. Most users do not know or take the time to change their preferences to protect their privacy. Even if individual user settings are changed, there is no way to know if these preferences are being honored. In fact, it has been documented that companies routinely circumvent users' privacy preferences indicated on other businesses' websites, violating Federal Trade Commission (FTC) regulations.[xi] This business model of data mining makes SaaS end-user cloud computing a particularly suitable medium for NSA surveillance.

1.3 NSA Surveillance in Cloud Computing, Pre-Revelations:

As a result of the USA Patriot Act, NSA surveillance infiltrated even more deeply into the Americans' personal information through cloud computing. After 9/11, the USA Patriot Act expanded US government surveillance capabilities. The government could now tap into business records,[xii] library borrowing histories, Internet habits,[xiii] and user information through cloud services by American owned companies in any global location.[xiv] The USA Patriot Act extends US government surveillance capabilities beyond US soil to US-owned cloud computing companies, like Google and Microsoft, that house, for example, European data on European soil.[xv] The ramifications of this NSA surveillance on cloud computing has clear effects on business decisions regarding cloud computing.

1.4 Governments and Cloud Computing, Pre-Revelations:

Governments have been both motivated and cautious to board the exploding trend in cloud computing, as China demonstrates. While China is rushing to catch up to the cloud computing revolution,[xvi] Chinese skepticism of data security by non-Chinese governments has limited future development plans to clouds owned, operated, and housed solely on Chinese soil.[xvii] Economic powerhouse China represents only 3 percent of the world's cloud computing and has designated $1.5 billion to a 5-year prioritization plan (2011-2015), to catch up to the rest of the world in cloud computing.[xviii] However, China will not generally board other countries' clouds, but, rather will develop and utilize its own private clouds.[xix] Microsoft, the first Chinese accredited international cloud, just offered its cloud to China in June 2013, with its Windows Azure platform together with Chinese data center service provider, 21 Vianet. Meanwhile, Baidu Cloud boasted 70 million users by mid 2013, a 350% increase from 20 million users less than one year before.[xx] The independent behemoth of China's Baidu Cloud will surely be an international force and powerhouse in years to come. Current virtually borderless cloud computing may become more nationalized and fragmented as powerful countries like China take cloud computing into their own hands.

1.5 Businesses and Cloud Computing, Pre-Revelations:

Even before Snowden's revelations, cloud computing stored business and client data with third party providers, in various unreported countries, creating concern for businesses of data surveillance through the USA Patriot Act. Thus, cloud storage is potentially

problematic for multinational businesses, since absence of location knowledge violates the EU Data Protection Directive tenets. The EU Directive mandates that data not be transferred from Europe to the United States, where regulations do not meet European standards. Furthermore, the most common method of complying with the requirements of this EU Directive—the US Safe Harbor Program— is rendered useless in cloud computing, where data can be stored anywhere in the world, outside of both Europe and the United States.[xxi]

Further, the fear of the USA Patriot Act's unfettered surveillance powers has prompted European IT companies to market their services by emphasizing data storage limitation on European-only sites.[xxii] Yet, it will be shown later that Snowden's revelations have brought these fears and business reactions to new heights.

1.6 Whistleblower/Leaker, Edward Snowden, Pre-Revelations:

An NSA colleague classified enigmatic high-school dropout Snowden[xxiii] as "a genius among geniuses."[xxiv] Snowden's political leanings were indicated by his vote for a third party candidate in the 2008 presidential election. Snowden said he wanted to blow the whistle on the NSA at the time, but waited in hopes that Obama would bring the change he promised the American voting public.[xxv]

Snowden gave up his comfortable life in Hawaii when he unveiled NSA secrets to the world through the Guardian, faced accusations of treason, and became a fugitive from the United States government.

His life in Hawaii included his reported $200,000/year salary as an NSA contractor for a private sector company, Booz Allen.[xxvi] In March 2013, just two months before his NSA revelations, Snowden is said to have taken a pay cut from a previous job to join Booz Allen, in order to have greater access and collect information on the NSA more efficiently,[xxvii] having planned his NSA revelations well in advance.

1.7 Circumstances Surrounding Revelations

In May 2013, Snowden shocked the world, revealing the invasive and pervasive level of United States governmental surveillance, an internationally relevant issue in the virtually borderless world of cloud computing. Both the circumstances surrounding Snowden's revelations and his stated motivations should be understood to evaluate their credibility.

Snowden's NSA revelations were broad reaching and stunning, bringing to light a deeper understanding of covert NSA activities, particularly in cloud computing. Snowden revealed the existence of PRISM and other NSA programs that mass mined American citizens' personal communications, including phone calls, emails, and social networking, to a shocking level.[xxviii] Through PRISM, the NSA can access individuals' "emails, video chats, pictures and more".[xxix] Cloud computing— including Gmail's email and photo

attachments, Gchat, Facebook, and Twitter— is a major platform for these NSA-mined modes of communication.

Snowden justified his actions by citing the US Constitution, the Universal Declaration of Human Rights, and the Nuremburg Principles. He declared: "I didn't want to change society. I wanted to give society a chance to determine if it should change itself".[xxx] The US constitution's 4th amendment affirms "the right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures".[xxxi] Its 5th amendment asserts "…nor shall private property be taken for public use, without just compensation".[xxxii] The Universal Declaration of Human Rights sustains "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."[xxxiii] Snowden cited these amendments and quotations to demonstrate his opinion of the criminality of the United States' indiscriminate seizure of private data.[xxxiv] He continued:

> I believe in the principle declared at Nuremberg in 1945: "Individuals have international duties which transcend the national obligations of obedience. Therefore individual citizens have the duty to violate domestic laws to prevent crimes against peace and humanity from occurring."[xxxv]

By citing the US constitution and Universal Declaration of Human Rights, Snowden discusses his opinion of the unconstitutionality of NSA surveillance; by quoting the Nuremberg principle, Snowden justifies his own breach of domestic law for the purpose for the

greater good. Snowden, in his video interview to *The Guardian*, said he chose against making anonymous revelations, as he felt it important that the public know his background and motives to judge the quality and reliability of his information.[xxxvi]

Despite his justifications, the following month, June 2013, Snowden was charged with espionage by the government of the United States and his passport was invalidated. However, non-US airport officials turned a blind eye, and Snowden is currently living in Russia under a temporary one-year asylum. His media influence continues, as he has since been on Russian television, interviewing Russian President Vladimir Putin.[xxxvii] Snowden and his NSA revelations remain a visible presence and will continue to influence decisions regarding cloud computing.

2. Impact of Snowden's NSA Revelations on Cloud Computing

The impact on cloud computing of Snowden's NSA revelations was transformative and marked the threshold of a new era, bringing both benefits and difficulties. Although privacy concerns existed before Snowden's revelations, the new flurry of debates has proliferated in light of the controversy.[xxxviii] Benefits of the Snowden revelations include heightened awareness, lively discussion of individual privacy rights, trending to greater transparency in data requests, and open debate to create international systems protecting public data privacy. Difficulties of the revelations include international mistrust in American cloud computing causing massive pullout and economic

strife on American tech companies and, therefore, the American economy at large.

2.1 Government Reaction: Domesticating Cloud Servers

International governments, such as Brazil, are now wary of storing their data in United States based clouds. In a direct reaction to the Snowden revelations' emphasis on widespread digital surveillance,[xxxix] Brazilian President Dilma Rousseff made clear that Brazil will reduce dependence on US based cloud platforms to avoid NSA surveillance.[xl] This trend to transfer data to domestic servers will shape the architecture of cloud computing for years to come, fragmenting surveillance from US to regional sources.[xli]

Germany is another important country steering clear of cloud services in the United States. Germany Chancellor Angela Merkel recommended that Germans use in-country instead of American online services, as a result of the Snowden revelation that the NSA had monitored her phone conversations. Germany even recommended, through Interior Minster Hans-Peter Friedrich, that Germans stop using Facebook and Google to avoid NSA espionage.

American cloud services are already suffering because of governments' fears of US based cloud computing. In fact, in light of the NSA revelations, IBM is spending over $1 billion to construct data centers overseas, Microsoft has already lost substantial business, including the country of Brazil, and non-US tech companies are gaining business lost to American businesses as a result of the fear of storing data in the United States under NSA

surveillance.[xlii] Nations' regulations and recommendations will directly affect corporate capabilities and business decisions.

2.2 Business Reaction: The "Snowden Effect"

Snowden's NSA revelations have produced the "Snowden Effect:" a heightened awareness of American espionage that is magnifying businesses wary of cloud computing that may ultimately store data in the United States.[xliii] "The impact of the Snowden leaks could threaten the future architecture of the modern Internet," writes Gerry Smith of the World Post.[xliv] He continues, "In recent years, computing power has shifted from individual PCs to the so-called cloud—massive servers that allow people to access their files from anywhere."[xlv] With Snowden revealing NSA espionage on US-based cloud companies like Google and Yahoo, the Snowden effect has created a loss of trust in businesses with US cloud providers.[xlvi]

In just a few months of Snowden's revelations, a full 10% of non-American companies have withdrawn their business from American cloud businesses, according to a survey by Cloud Security Alliance.[xlvii] A study by the Information Technology and Innovation Foundation projects that American cloud services over the next three years could see as loss of $35 billion.[xlviii] To compete in the global economy, it is vital the American privacy rules be changed to match European privacy rules.

Corporate leaders are pulling out of the cloud, and cloud providers must act quickly to regain trust and reestablish business. In NSA

Aftershocks, a study by NTT Communications, 90% of it 1,000 "decision makers" surveyed in the UK, Hong Kong, France, Germany, and, notably, the United States have been affected by the Snowden revelations in decisions related to cloud usage. A substantial 62% noted they did not submit their companies' Information and Communications Technology (ICT) into the cloud, because of the Snowden revelations.[xlix] In the Snowden Effect aftermath, only those cloud providers that act quickly and provide consumers with all-important "data integrity, governance and security" will survive the brave new world of cloud computing.

2.3 Organization Reaction: A Proactive Approach

Organizations are now taking a proactive approach to protecting their own and the public's privacy from the US government, in light of the Snowden revelations. For example, the Electronic Privacy Information Center (EPIC) took the fight to reverse the NSA's demand for all of Verizon's customers' telephone records all the way to the US Supreme Court.[l] Other non-profit advocacy groups sent letters to NSA Director and US Trade Representative, asking if their organizations were under surveillance by the NSA.[li]

One shocking effect of the Snowden revelations on organizations is a suggestion to return to pre-technological means of communication: the carrier pigeon and "sneakernets." Anthony Judge, former Assistant Secretary-General of the Union of International Associations,[lii] a "non-profit, apolitical, independent, and non-governmental" organization,[liii] suggested the use of carrier pigeons. Judge cited a example of a British carrier pigeon that delivered a

five-minute video, flying 75 miles, faster than is taken to upload from a small farm onto YouTube.[liv] In the same vein, "sneakernets" are also a possible way around ubiquitous online surveillance. Sneakernets are people who hand-deliver sensitive data via USB drives to circumvent online intelligence, as was exemplified by courriers to Osama Bin Laden, North Korea and Cuba.[lv] These extreme concerns for privacy filter down through every layer of society.

2.4 Individual Reaction: New Concern for Privacy

The Snowden effect is showing itself in extreme concern for privacy among individuals. The Snowden revelations may be bringing back the idea of individual privacy as a social norm.[lvi] A Harris Poll in November 2013 revealed that 80% of individuals changed their social media privacy settings, most in the previous six months.[lvii]

As a result of the Snowden revelations, individuals' interest has also increased dramatically on privacy tools, including anonymizers and encryption. However, only the most technically savvy makes use of these techniques. This leaves the vast majority of the general public unprotected.[lviii] Individuals' search for encryption techniques has exploded, as indicated by the quadrupled 139 million hits on the encryption download page of Tor (The Onion Router) encryption service in 2013. While Snowden also revealed in 2013 that the United States government is working on decrypting Tor, slides revealed by Snowden also show the US government's frustration in breaking Tor's code: "We will never be able to de-anonymize all Tor users all the time. With manual analysis we can de-anonymize a very small

fraction of Tor users."[lix] True to Tor's name, short for "the onion router," Tor's layers increase the layers of protection substantially. After analyzing the revealed NSA slides with *The Guardian*, cybersecurity expert Bruce Schneier concluded, "Encryption works… The NSA can't break Tor."[lx] Nonetheless, until encryption is made user friendly, only a minority will use it, and citizens' privacy will remain unprotected.

2.5 Cloud Providers' Changing Treatment of User Data:

Protection of User Data and Transparency of Surveillance

In the aftermath of Snowden's revelations, cloud providers are now showing signs of standing up to government requests for user data and providing greater transparency of government requests. For example, Twitter is now being praised for its challenging government requests for user identities, in particular the identity of an Occupy Wall Street protester.[lxi] In addition, Twitter notifies users of governmental requests for their information in a more transparent fashion than other public platforms.[lxii] In another move for greater transparency, in June 14, 2013, Yahoo filed to have court papers from NSA's 2008 PRISM gathering of Yahoo users' data, unsealed and open to the public. Prior to Yahoo's request, the last unsealing of governmental requested records was ordered over a decade earlier, in a Patriot Act case in 2002.[lxiii]

Encryption of telephone, texts, email, and video chat is now being proactively marketed to consumers wary of government

interception, especially on cloud computing mediums. Yet, despite these baby steps, most cloud companies lack both resources and initiative to protect our individual rights, leaving us to navigate the murky waters against these titanic forces on our own.[lxiv] A more organized effort is necessary to create a safety net policy to protect individual privacies.

3. Implications and Suggestions

3.1 International Consortium Agreement:

Leveling the Playing Field of Cloud Computing

As espionage is pervasive in many countries, an international consortium agreement must be implemented to institute policy reform internationally and level the playing field in cloud computing. While the spotlight is now shed on United States counter-terrorism intelligence, other countries participate in the same intelligence gathering of individuals' data. In fact, *The Guardian* reported that Britain's version of the NSA, known as the GCHQ, has been duplicating the NSA efforts through a system set up by the NSA.[lxv] Similar to the United States' PRISM program, the United Kingdom runs its own Tempora program that work in conjunction with the United States' Prism program to tap cable and networks on anything traveling through the Internet, via an ability called Upstream. This is then stored and immediately accessible through a database, XKeyscore.[lxvi] This means that efforts to keep data outside the US could be fruitless, as data would simply be mined by other resident cloud countries.

To restore trust in cloud computing, loopholes in anti-espionage legislation must be identified and solutions found. For example, as revealed in Snowden's documents, Five Eyes—an agreement among the five Anglophonic countries of Australia, Canada, New Zealand, the United Kingdom, and the United States—enables the countries to skirt domestic anti-espionage laws by spying on each other's citizens and reporting their findings.[lxvii] A level playing field and fair play must be instituted for equitable international relations and global growth.

3.2 Balanced Policy: National and Individual Security

Anti-terrorism laws must be structurally balanced with preservation of privacy rights. Although it is discomforting to have our individual rights to freedom violated, the massive data mining system, PRISM has prevented a planned suicide bombing from taking place in New York subways in 2009.[lxviii] On the other hand, Senators Wyden (D-Ore) and Mark Udall (D-Colo) fail to see any tangible anti-terrorism benefit from the data mining of the Patriot Act.[lxix] With such controversy surrounding the efficacy and risks of data mining, transparency is needed to protect individuals' privacy. The current lack of transparency was demonstrated when the government refused to reveal the intercepted communication of Americans, even after repeated requests by Congress.[lxx] Balanced legislation, considering both national and individual security, and transparency is essential for the national, individual, and, thus, cloud computing needs.

3.3 Transparency: Repair Public Trust

Transparency of government surveillance is essential to repair public trust. To this end, obscured data, inconsistent data, and weak internationalization must also be mended. Data can be "obscured" by issuing lists that combine national security and domestic criminal requests, as recently demonstrated by Facebook and Yahoo! Combined, proper analysis of each independent list is "obscured."[lxxi] Therefore, security and domestic criminal requests must be issued separately for clear analysis. Data can be "inconsistent" by varying definitions on terms like "user" or "court order" by various companies.[lxxii] Thus, a consistent system of definition of terms must be instituted across the board for accurate comparison and analysis. "Weak internalization" refers to the fact the companies supply requests for information from only the United States and not other countries.[lxxiii] Thus, companies must supply requests from any country requesting information. By separating national security lists, issuing a consistent definition of terms across companies, and supplying requests to the public from any country requesting information, transparency will be greatly improved.

3.4 Legislation: Update with Technology

Antiquated legislation struggles to stay relevant to technological advances and must be modernized to meet user privacy needs. For example, the Stored Communications Act (SCA) was established before the advent of both high-speed Internet and massive free cloud storage and can be easily abused by United States law enforcement. Using this outmoded SCA legislation, law enforcement can issue a subpoena without court order and obtain "a person's name, physical

address, IP addresses, data about when she signs on and off of an online service, and her payment processing information."[lxxiv] This wealth of information is available without court supervision or notification of the target of investigation. If law enforcement notifies its target, it can then access virtually all the target's emails.[lxxv] Policies and laws must be updated and made relevant to current cloud computing technologies, in order to continue to preserve individual privacy rights.

3.5 Data Encryption: User Friendly

Data encryption must be made user friendly and cloud compatible to enable widespread use and public trust in cloud computing. While secure data encryption is widely available—including PGP for email encryption, OTR for instant messaging, and Redphone for Internet telephony—the procedure to set up and use these systems has been convoluted, so the general public, valuing convenience, continues to opt out of these systems. In addition, encryption carries other issues, such as unrecoverable user passwords, interference with useful features by cloud platforms like Gmail to search emails and Facebook to index and render searchable posts, and the requirement that both sender and receiver install the technically challenging encryption systems. Therefore, even when users have encryption installed, they generally use unencrypted methods, since their contacts are not encryption equipped.[lxxvi] Encryption must be made user-friendly and cloud compatible, so that the public will use it, restoring trust in cloud computing.

3.6 Academia: Research Solutions to Implement Effective Policy

Academia can research issues, provide a platform to find solutions, and communicate through the appropriate channels to effect public policy and private solutions. As the Berkman Center for Internet & Society at Harvard University is demonstrating by its first annual edition of The Internet Monitor,[lxxvii] a symposium of diverse panelists can collaborate to work towards raising public awareness and finding solutions. These solutions can reinvigorate cloud computing in the post-Snowden era.

4. Conclusion

Cloud computing in the post-Snowden era is now at a crossroads where the reinstitution of public trust on a global scale is instrumental for continued growth, particularly in the United States, but also globally. A conscious balance between both national and individual needs must be legislated, internationally and domestically. The pre-Snowden era has been characterized by unbridled growth with only a wary side-glance at the dangers of privacy issues. The Snowden revelations have offered us an opportunity to reexamine the fundamental needs for individual security and privacy, while balancing the need for national security. The post-Snowden trend toward international fragmentation and non-participation in cloud computing can be redirected by

implementing legislation, transparency, and privacy protections all designed to restore public trust.

The future of healthy international cloud computing requires research and implementation of solutions. Suggestions include an International Consortium Agreement that would level the playing field, policy that balances national and individual security, transparency to repair public trust, legislation that is updated with technology, data encryption that is user friendly and cloud compatible, and academia research for continued research and policy recommendations for implementation. A single nation, as well as the international community, is a living organism. The state is the body and the individuals are its cells, forming an interd ependent ecosystem. The body can no more thrive without the health of its cells than cells can thrive without the health of the body. In this way, the state can no more flourish without the well-being of its individuals than individuals can flourish without the well-being of the state. For this ecosystem to flourish, a balancing act is needed between national security and individual security. Only by instituting this balance between the state and its individuals can healthy global growth continue in cloud computing.

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The GMO Labeling Controversy

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This goal of this paper is to outline policy choices and solutions for the genetically modified organism (GMO) labeling controversy. It begins by outlining a brief history of GMOs and how past court decisions have allowed them to become patentable and thus profitable. There are three policy choices presented, and the legal, economic, and political benefits and drawbacks of each policy are addressed. The paper concludes by offering a recommended option, which is a compromise aimed at reconciling the legal and political challenges posed by GMO labeling.

In May a farmer in Oregon found unapproved genetically modified wheat growing in his fields. What followed was a renewed controversy surrounding genetically modified foods (GMOs), and the role they should play in our society. This controversy that has been reappearing in the public spotlight since the first GMO, the "Flavr-Savr" tomato, was approved for commercial use in the US in 1994 (James and Krattinger 1996). Inevitably what this controversy boils down to for the public is a right to know. Does the public have a right to know where their food comes from? In other words, should it be required for GMO foods to have a label? This is a contentions issue; this year alone there have been 95 different bills proposed in 28 different states concerning labeling laws (Kalin 2013). This paper

will outline three policy approaches to this divisive issue, with an ultimate focus on the most feasible option.

It is impossible to consider possible policy options before understanding what constitutes a GMO. Due to innovations in the biotechnology arena, we can now alter the DNA sequences of different organisms. In the 1970s scientists developed "recombinant DNA techniques" which allowed scientist to "cut" one part of a DNA sequence from one organism and "paste" into another, creating a unique hybrid DNA sequence that otherwise would not have occurred in nature due to the difference in organism kingdom or phylum (Marchant et al. 2010). It is important to note that this is fundamentally different from breeding practices used before this technology. Prior to recombinant practices, breeders employed selective-breeding. For example, a pure bred Chocolate Labrador is the result of the selective breeding between a Golden Labrador and a Black Labrador. The combination of alleles from the Golden Labrador and a Black Labrador produce the Chocolate Labrador. This is similar to recombinant DNA practices in that DNA is being combined in a novel way, however, such combinations can only occur between within the same species because of prezygotic and postzygotic barriers that prevent interspecies mating. Biotechnology has allowed scientists to overcome these biological barriers to produce hybrids that would not have existed otherwise. For example, you cannot use selective breeding to cross a tomato with a fish because of the postzygotic barrier of mechanical isolation, which makes it physically impossible for different species to reproduce.

In the early twentieth century scientists turned to chemical mutagenesis and irradiation to produce seeds with desirable traits

(Marchant et al. 2010). In other words, scientists would expose seeds to chemicals and radiation to give them specific traits, like a desirable color. However, this type of breeding "produces genetic changes that are far less precise and certain than those possible with genetic engineering" and can cause "mutations in many other parts of the genome… which often have deleterious effects on the organism" (Marchant et al. 2013, 7). Thus, scientists began to seek a more targeted approach to altering genes. The goal was alter the DNA sequence of the organism in such a way that the organism was ultimately improved, not harmed by the process. Scientists found their answer in recombinant technology.

Therefore, a GMO is an organism that whose DNA has been altered by the artificial insertion of foreign DNA. This is done to transfer some characteristic or property that is beneficial to the organism because it does not inherently express those properties. For example, tomatoes are very sensitive to the cold, which can mean a loss of crop if temperatures drop. The Arctic Flounder Fish lives in freezing waters and so has a resistance to the cold. Scientists were able to take the gene that allows for this resistance from the fish and insert it into the tomato, transferring the antifreeze property to the tomato. Other crops are being inserted with bacterial genes for herbicide and pathogen resistance. These are all examples of genetically modified organisms.

Before jumping into the history of labeling, it's important to understand the scope of GMOs. Most underestimate how pervasive GMOs are in our society. To understand how this happened, it's necessary to jump back to the 1980 *Diamond v. Chakrabarty* Supreme Court decision. In this landmark case, the Supreme Court

ruled that "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent" (Chakrabarty 1980). Previously, under the Plant Variety Protection Act (PVPA), breeders were given 20-25 year exclusive use of GMO plants, with exceptions (United States Department of Agriculture 2006, under "Agricultural Marketing Service: Plant Variety Protection Act). However, patents could now be extended to plants, since whether the subject was living or not was irrelevant, and patents offered a more stringent form of protection than coverage under PVPA. Attracted by this type of protection corporations began to "fund substantial research and development efforts" in the agricultural sector (Mascarenhas and Busch 2006, 127). What has resulted from the extension of patents is the "rapid monopolization" of agricultural spheres such as the seed sector. For example, in the seed industry, presently "10 multinational corporations control half of the global seed market" (Mascarenhas and Busch 2006, 127). This rapid monopolization has allowed companies to dominate the GMO market and flood the market with GMO products. For example, Monsanto's Roundup Ready soybeans, which contain a genetically modified herbicide tolerance, accounted for "91 percent of the worldwide GM soybeans…in 2004" (Mascarenhas and Busch 2006, 129). Thus, the issue of GMOs is not one that can continue to be avoided in the policy arena.

In the past decade the public has faced the growing presence of GMOs by calling for labeling requirements, premised on a right to know attitude, whereby products containing GMO products would have to be labeled as such. The first bill was proposed in 2007 and

since then there has been a flurry of legislative activity, and on May 23 of this year the Senate voted against an amendment to the federal farm bill that would have required labeling of GMOs (Wilce 2013). However, earlier this June Connecticut became the first state to pass strict labeling laws, but it will not take effect until it is passed by at least four of the following states: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Pennsylvania or New Jersey (Kalin 2013). This was done in order to minimize the negative economic effects such labeling laws would have on large companies (Kalin 2013).

Thus, in the absence of a federal law, each state is passing their own labeling laws and this is having an impact on other states. This also affects the way companies to business. For example, General Mills owns and sells Betty Crocker products in every state throughout the US, and Betty Crocker contains GMO products (NON-GMO Project). If Connecticut's law passes then General Mills will have to send different products to Connecticut (labeled) than they do to the other states. Therefore, Connecticut's law would effectively be interfering in interstate commerce. This problem will only become more pronounced as each state takes a different approach to labeling. According to Article I section 8 of the U.S. Constitution, Congress has the power to "regulate Commerce with foreign Nations, and among the several States" (US Constitution). Thus, Congress has the authority and legitimacy to address this issue because left alone, state dependent GMO labeling acts interfere with interstate commerce. Additionally, such bills also interfere with foreign commerce. In response to the situation in Oregon, Japan, Korea and Taiwan have halted wheat imports from the US. These countries

have notoriously strict GMO policies, and they are not alone. It is likely that any law passed by a state, either in support of or against GMO labeling, will affect foreign commerce through export of crops. Again, this is a federal power, so Congress has the authority to step in to prevent state entanglement in foreign commerce.

However, even though Congress has the power to step in, this doesn't necessarily require them to do so. But there is a compelling reason for them to utilize this power, and that is food safety concerns. The US government has a history of being concerned with providing consumes enough information to "assure informed choice by consumers, create and awareness of actions necessary to assure food safety and wholesomeness, and to promote honest and fair dealing in the market place" (Vanderveen 2000, 49). This history of concern with such aspects is supported by the "eight major laws that provide the authority to regulating agencies to implement and enforce food-labeling requirements in the United Sates. These are the Federal Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, the Federal Meat Inspection Act, the Poultry Products Inspection Act, the Egg Products Inspection Act, the Federal Trade Commission Act, the Federal Alcohol Administration Act, and the Tariff Act" (Vanderveen 2000, 49). Therefore, having both the authority and the precedence of involvement, the US government can and should intervene into GMO policy making with the goal of ensuring food safety.

Policy 1

The first policy option is to require labeling of all products that contain GMOs. This would be utilizing the precaution principle,

which errs on the side of caution when assessing harmful affects of new technology. As a new technology, there is no conclusive scientific evidence proving either harm or no harm from long-term consumption of GMO products in humans. The best example of this comes from the Flavr Savr tomato. This GMO tomato was supposed to stay riper longer, however when the Calgene researchers responsible for the development of the fruit, conducted a study on the transgenic tomato, "four out twenty female rats fed one of the two lines of transgenic tomato" and then "in the third study gross and microscopic lesions were found in the rats" (GHO). However, researchers continued to support the view that the tomatoes were safe for human consumption, pointing to procedural errors in the previous study. Despite the possible health risks the FDA approved the tomato for human consumption and it was put on the market. Which side was correct in this case is irrelevant. The point is that the evidence for harm of lack of harm was weak for both sides; nobody could prove anything. And consumers were completely unaware of this potential risk. It was this possibility of risk that prompted public outcry for labeling. The issue was not about "scientific evidence of safety but the consumer perception of safety" (Jukes 2000, 3). The common fear is that GMOs will become analogous to smoking, which at first was considered perfectly safe and later linked to cancer. Consumers feel that they cannot choose an item without "comparable information", like the kind nutrition labels provide (Jukes 2000, 2). This information gap is an example of a market failure and the government should intervene accordingly. Required labeling of all GMO products would provide consumers with information to make a fair decision when purchasing food, and it will

assuage consumer fears over unknowingly consuming a possibly harmful product.

Furthermore, there are allergen concerns. According to US National Surveys, 25%-30% of adults claim to have food allergies (Jukes 2000, 6). Data on actual prevalence of food allergies suggest only 1%-2% of adults and 5% of children younger than 4 have food allergies. This is still a substantial amount of people. It is important note that the aforementioned surveys refer to food allergies caused by a "heightened immunologic response" to certain foods like nuts or eggs (Jukes 2000, 6). These are life-threatening allergies that differ from non-immune mediated responses, and so it is a matter of life and death for those who suffer from immune mediated allergies to know what is in their food. This is because a person "allergic to a specific food can avoid the food when is in in pure form but may consume the food accidentally when it is an intentional or unintentional ingredient…death has resulted when an allergic component has been unknowingly consumer" (Jukes 2000, 6). For example, a hypothetical chip brand uses GMO corn. The presence of corn would be indicated on the chip label. However, let's say the GMO corn contains a gene from a nut. This would not be indicated on the nutrition label since it is part of the GMO corn. Now if someone with a severe nut allergy were to pick up the chips, check the ingredient label to ensure there are no nut products and look for the required may contain traces of nuts label, and finding no indication of nuts this customer buys and consumer the chip products. It is not out of the realm of possibility that they could have a life threatening allergic reaction to the chips due to the nut gene present in the corn. Again, there is a gap in consumer

knowledge whereby they cannot make fair, safe and comparable choices between different foods. Required labeling would prevent against such scenarios.

Finally, there is widespread public support for labeling laws. According to a 2008 CBS/*New York Times* poll "87% believed that [GMOs] should be labeled (quoted in National Science and Engineering Indicators 2010). These results are not unique. Between 2001 and 2006 the Pew Initiative on Food and Biotechnology conducted a survey which found that only about one-fourth of U.S. consumers favored "the introduction of genetically modified foods into the U.S. food supply" (quoted in National Science and Engineering Indicators 2010). Furthermore, 44% of respondents "reported a negative reaction to the phrase 'genetically modified food" (quoted in National Science and Engineering Indicators 2010). Therefore, if a federal labeling bill were to be introduced, it would likely have large public support that could drive the bill forward.

However, in that same 2008 CBS/*New York Times* poll only 53% expected that is was 'not very likely' or 'not at all likely' that they would buy food that was labeled as GMO (quoted in National Science and Engineering Indicators 2010). In other words, there is widespread support for the labeling of GMOs even if in the end most Americans end up purchasing the GMO labeled product anyway. Do American's have a right no know that supersedes the economic repercussions such an act would have? Such regulations would affect monolithic companies who have very powerful interest groups. These interest groups would be staunchly opposed to regulations because of the economic burden they would impose on companies. For a company that controls 90% of the world's wheat supply, or

example, such a change would be astronomically expensive because the entire production and shipping infrastructure would have to be rebuilt to separate GMO from non-GMO. Monsanto's litigation power is unquestionable after the series of cases they have brought against farmers in the past decade. It's likely that a required labeling bill would meet massive opposition, as the one that the Senate voted down this May did, and would not pass.

Furthermore, if such a bill did pass, there would be First Amendment challenges by corporations being forces to label their products. Corporations are people and as such they have freedom of speech. Requiring mandatory labeling strips them of their constitutional right and gives them grounds for appeal. One case that dealt with this issue was *International Dairy v. Amestoy*. This case dealt with a 1994 statue passed by the state of Vermont which required milk that had been produced from cattle treated with rBST, a synthetic growth hormone approved by the FDA, to be labeled. The district court upheld the statue, basing its justification "on strong consumer interest and the public's right to know" (Amestoy 1996). This decision was appealed to the federal court. The appellants claimed that being required to label their product was a violation of their first amendment rights. The federal court found in favor of International Dairy, stating that "consumer interest" was not sufficient enough to "require manufacturers to disclose about their production methods" (Amestoy 1996). In effect, this decision stated that consumers do not have a right not know, at least not one that supersedes the first amendment rights of corporations. In light of current evidence about GMOs, it is entirely possible that the Supreme Court could rule against a labeling bill as a violation of

corporations' First Amendment right. This would effectively crush all efforts to regulate and label GMOs because it would set the precedent that without conclusive data, corporations can produce GMOs as they please. This outcome would be extremely unfavorable to label supporters. This remains a possibility if labeling laws are implemented.

Additionally, requiring GMOs to be labeled would crush them in their infancy because it implies that something is wrong with GMOs. GMOs have the potential to solve many pressing world problems. For example, the Golden Rice Project is being used as a way to reduce mortality in developing countries (Golden Rice Project). Vitamin A deficiency is a problem in developing countries and can cause "marked incidence of blindness and susceptibility to disease, leading to an increased incidence of premature death of small children" (Golden Rice Project). Many of these societies are rice based, so introducing rice that has been genetically engineer to contain vitamin could save the lives of 25% of children could have been saved with this diet (Golden Rice Project). A mandatory labeling law would significantly reduce funds for research and there will be many lost opportunities.

Finally, even if such a law were passed and faced every challenge thrown at it, there would still be implementation and evaluation problems. Who will ensure that a non-GMO product is truly non-GMO? What are the consequences for failing to do so? Additionally, how will success be measured? The implementation of these regulations cannot be compared to smoking regulations because unlike smoking, there is no known health impact of GMOs.

As a result, success cannot be measured in decreased cancer incidence, for example.

Policy 2

The second possible policy would be to make it illegal to require the labeling GMO foods. The benefits of this are that it would allow research to continue uninterrupted, would avoid First Amendment challenges, and it would satisfy powerful interest groups. This could be rationalized based on the lack of evidence indicating harm from GMO use.

However, it is likely that the backlash from such a policy would be enormous. Based upon the fact that Connecticut is currently the only state with GMO labeling laws, and similar laws have been shot down in different states across the country, it is fair to say that the GMO labeling proponents do not yet represent a clear majority in the voting segment. However, if a law were passed banning labels on GMO bills, it is possible that the GMO labeling proponents could sway a larger amount of supported to their side. They could boycott companies that are known to use GMOs. In fact, there is already a minority of Americans who boycott General Mills and Kellogg because of their use of GMOs. If a large enough amount of people boycott these companies, they will be harmed in the same way this policy was trying to prevent. It is possible that so many could oppose the bill that it would loose its legitimacy, forcing Congress to waste valuable time and resources to revisit the topic.

Additionally, this could have potentially disastrous effects on our foreign trade. If three countries temporarily banned imports of US wheat because of what happened in one farmer's field in Oregon, such a blanket federal statement supporting GMOs will most likely alienate countries like Japan and France, who have very strict GMO policies. The possible benefits from GMO research may not outweigh the economic implications.

Finally, if such a policy were to be passed, it would result in GMOs becoming irrevocably entrenched into our food supply. In the event that GMOs are found to be harmful, the US would be in a very difficult situation. It would have to overhaul the entire production, shipping and selling of certain crops, which would lead to shortages, and food price increases. That's assuming the non-GMO version of the product could even be produced. The US would become dependent on imports from other countries, and countries that were dependent on US food exports would also suffer. It would be a disastrous economic and political situation.

Policy 3

The final policy option involves approving GMO containing products up to a certain percent of GMO with no labeling requirement. For example, not allowing any product on the market that contains more than 5% GMOs. This would require the creation of a government regulatory agency to approve each product that contains GMOs. This is not an unprecedented policy. In Japan, if food products "exceed 5 percent they must be labeled as 'GM Ingredients Used' or 'GM Ingredient Not Segregated'" (Non-GMO Report). They also provide Non-GM labels if the product falls below

5 percent but "the processor must be able to show that all non-GM ingredients were identity preserved from production through processing" (Non-GMO Report). The prosed policy is very similar to this, except it does not require labeling, due to the plethora of negative consequences this would bring, as previously detailed under Policy 1.

The biggest benefit to this policy is that it will force large companies to change their infrastructure to separate GMO from non-GMO, but they can do so at their own pace as they grow. This is more economically feasible than requiring sweeping and immediate changes to production and shipping. There are "direct costs of testing and segregation of GM products to comply with mandatory labeling requirements…[and] food shipment disruptions" that would result from forcing such an immediate infrastructure change (Merchant 2010, 53). This policy emulates the path taken by environmental regulations. For example, to reduce air pollution the EPA required CO2 filters to be placed in factory smokestacks. These filters could be attached to existing smokestacks and would reduce CO2 emissions. Even though this wasn't as effective in reducing CO2 as completely redesigning the factories to reduce CO2 emissions, it allowed business owners to alter their existing structures to meet EPA regulations, without a massive structural change. Forcing all existing companies to change their factory construction would have resulted in a massive backlash and widespread bankruptcy for those who could not afford to upgrade. Creating this slow separation between non-GMO and GMO will prevent GMOs from become too entrenched into our food supply so that in the event evidence emerges indicating harm from consumption, a record will exist of

which products contain which GMOs and in what percentages. The product could easily be removed from the market the same way a toy is recalled for newly discovered safety hazards.

Such a policy will also allow GMOs to become just entrenched enough that even the revelation of harm from a single GMO product would not be enough to crush the entire field of GMOs. This would allow research potential to be realized and to continue without the fear of sudden loss of funding. This could spur innovation in desperately needed areas, like biofuel.

This policy is also likely to satisfy foreign countries that are staunchly opposed to GMOs. It is very similar to Japan's policy, for example. In fact this policy may make it easier to trade with these countries because GMO will be strictly separated from non-GMO so there is little to no risk of a non-GMO product containing GMO. In other words, what happened in Oregon was the result of blurring lines between GMO production and non-GMO production. This policy will make companies accountable for this distinction and will result in fewer contaminations.

Finally, the creation of this government organization would shift the focus away from labeling requirements of GMOs to ensure consumer safety to finding products that were mistakenly approved because they contain too high of a percentage of GMO. The government organization proposed in this policy would handle such claims, and the act of consumers taking their grievances to this organization would give it legitimacy and power in deciding GMO matters. For example, the FDA regulates health claims, which is a stated "relationship between a food, food component, or dietary

supplement ingredient, and reducing risk of a disease or health-related condition" (FDA, under "Claims That Can be Made for Conventional Foods and Dietary Supplements"). For example, in 2006 the FDA filed a letter of denial pertaining to the proposed link between green tea and reduced cardiovascular disease (FDA 2003, under Qualified Health Claims). Consumers trust the FDA's statements and report health claims that have not been approved by the FDA. This cements the FDA's power to settle these matters. The proposed government agency would act in the same way.

However, creating such a government organization would expensive, and it would be difficult to gather the needed expertise that accompanies GMOs. Additionally, this organization would have to decide which percentages are acceptable levels of GMO. This is extremely subjective, because in practice what is the difference between 5 percent GMO and 6 percent GMO? Furthermore, the organization would have to develop methods to evaluate the success of policy. This will also be very subject and also very difficult to measure. It could me measured in the amount of products approved, or in the amount of products not approved. Every different criterion used for evaluation will produce different levels of success.

Additionally, it is likely that those opposed to GMOs will be opposed to this bill because, in their view, it would not go far enough to ensure consumer safety. However, as previously mentioned, this group is not in the majority. This policy would likely we enough to satisfy the majority of Americans who are on the fence about GMO policies. As a result, the GMO labeling proponents would fade into the minority.

Recommended Option

The best option is policy 3. This is the best compromise between ensuring human health and not crushing a potentially beneficial technology. It takes the benefits from a labeling law while avoiding many of the pitfalls. Economically and politically it is also the most feasible solution. The third policy is not as expensive as mandatory labeling and won't have the serious economic repercussions, both domestic and foreign, that the other policies have.

The third policy is also the most amendable to change. This comes in two forms. It can change with newly revealed information pertaining to GMOs, for example if a particular GMO proves to be harmful, but it can also change during the legislative process so it would be more likely to survive and be implemented. For example, a compromise on the creation of the organization could be the creation of a tiered fee system based on the percentage of GMO each product has. This would allow companies some leeway in the amount of GMOs that are allowed to be in their products. The funds obtained from this could then be given back to states in the form of research on GMOs, or perhaps on science education for K-12 to foster future researchers and avoid the bias that comes from providing government funding to research a specific topic. Such a compromise would satisfy powerful interest groups and also Representatives.

An area of contention could be that such a policy removes the matter of choice from American hands. It would be a government decision about consumer safety without consumer input. However, our society is based on the Roman *Res Republica*, or thing of the

people, in which the people elect a representative to speak for them. This is written in the Fourteenth Amendment of the US Constitution, "The House of Representatives shall be composed of members chosen every second year by the people of the several states" and in the Seventeenth Amendment, "The Senate of the United States shall be composed of two Senators from each State, elected by the people (US Constitution). Therefore, through electing their representatives, who will decide whether or not to pass this bill, the American people have effectively voted on this policy.

The creation of this government organization may seem to be a daunting task, but it is actually not so. Currently the US uses a "coordinated framework" to approve GMOs (Merchant 2010, 13). This involved distributing the "regulatory responsibility for the safety of biotechnology products among several federal agencies" (Merchant 2010, 13). The individuals spread across these different government organization would simply be united under one roof. This would reduce government redundancy and translate into a more efficient handling of GMO approval.

Finally, the creation of such an agency in response to a pressing social problem is not unprecedented. In the 1970s following the publication of Rachel Carson's *Silent Spring*, the environmental movement took hold in the US. A whole host of government organizations were created to meet the environmental crisis including the Council on Environmental Quality and Agency for Toxic Substance and Disease Registry. Like the environmental crises, the issue of GMOs is not going away. Instances like the one in Oregon will continue to appear, and people will continually seek a solution, even if that solution isn't in the best interest of consumers

in general or in the United States. The recommended policy allows us to face the GMO controversy with a proactive solution, not a reactive one.

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The Disestablishment of Marriage.

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The purpose of this paper is to analyze the theoretical benefits of disestablishing marriage as a legal institution in the United States. By pointing out both the legal and moral inequalities in the institution, this paper aims to identify why marriage in itself is an unacceptable practice in American society and advocate the option of disestablishment as most suitable for confronting these issues. This focus seeks to reverse traditional thinking about marriage, as well as demonstrate the viability of alternative practices.

The Disestablishment of Marriage

In *Meyer v. State of Nebraska*, the District Court upheld a law making the teaching of subjects in any language other than English in all grades below eighth illegal (*Meyer v. State of Nebraska, 1923)*. Those who supported the ban on foreign language saw immigrant families as a political threat, and the Court maintained that the laws intended to "foster a homogeneous people" in order to cultivate good citizens (Ristroph and Murray, 1264). Instead, the laws excluded non-English speaking students from an education, fostered inequality and prejudice, and finally were reversed (Ristroph and Murray, 1264). Just as *Meyer* attempted to define the "acceptable citizen," the laws regarding the institution of marriage dictate the "acceptable" and "unacceptable" family. Despite the many visible successes of the marital unit in the United States today, the institution of marriage should be disestablished because of its

inappropriate place in the legal system, resulting in inequality and exclusion.

Disestablishing marriage will protect individuals from unnecessary governmental encroachment. Just as the non-establishment of religion ensures that a citizen's right to vote cannot depend on his or her religious affiliation, the disestablishment of marriage would guarantee that government-provided benefits for intimate caregiving would not require an individual to have a particular vision of marriage (Metz). In 2001, in response to the rejection of gay marriage in *Goodridge v. Department of Public Health,* former President Bush said, "Marriage is a *sacred* institution between a man and a woman... I will work with congressional leaders and others to do what is legally necessary to defend the *sanctity* of marriage" (Miller, 2205). By using "sacred," meaning "worthy of religious veneration," to define marriage, it appears that Bush uses his religious beliefs to justify excluding certain individuals from the institution. Since marriage vows use religious terms such as "holy matrimony," "before the Church," "accordance with the Holy Prophet," "the faith of Israel," state involvement is not appropriate in the marital union. If marriage is to represent the spiritual, emotional, and physical connection between individuals, the government should not be in the business of creating parameters to define the institution.

Government encroachment on the institution of marriage also impedes the viability of the family unit. In *Michael H. vs. Gerald D.*, Carole D. was married to Gerald D. when she became pregnant by Michael H. during an extramarital affair (Ristroph and Murray, 1254). While the child regarded both men as her fathers and both

served as father figures, the Court denied Michael's claim for recognition as the child's biological father, which would have been granted had he been married to Carole (Ristroph and Murray, 1254). *Michael* demonstrates the court's clear affinity for the marital family. In a similar sense, research has shown that social welfare policies are aimed at discouraging unwed single mothers (Metz). This perpetuates the negative stereotype assigned to single mothers and subsequently makes single motherhood an even more difficult challenge (Metz). By disestablishing marriage, intimate caregiving would no longer plague those who stray from the government's preferred marital model.

In addition to protecting the other than legally defined family unit, disestablishment of marriage will enable unwed individuals to have the same legal rights as married couples. Employment assistance, immigration benefits, medical insurance, and tax deductions comprise several of the benefits that are unavailable to individuals who stray from the traditional concept of marriage (Wardle, 443). In *Loving vs. Virginia,* a landmark civil rights case, the Supreme Court ruled that the government could not restrict marriage based on race citing the violation of the Free Exercise Clause and Establishment Clause of the First Amendment (Miller 2206). The Court said that this restriction highlighted state-sponsored marriage's intentional favor for certain individuals and discrimination towards others (Miller 2206). Therefore, *Loving* serves as a model for eradicating government control over marriage on the grounds of favoring those wishing to engage in the traditional marriage prototype.

Thus, disestablishing marriage would help eliminate the unconstitutional exclusion of specific groups of individuals. Marriage, which is currently limited to the union between one man and one woman, deems same-sex couples, polygamous partners, and other non-traditional partnerships non-normative and excludes and punishes them for their lack of conformity. While no individual should be punished because of the color of his or her eyes or skin, no individual should be punished for his or her sexual preference or lifestyle choice either. Although some argue that alternative forms of unions are recognized under the laws in some areas of the United States, these unions still do not afford all the legal benefits of traditional marriage. Even if the benefits were equivalent, in *Brown v. Board of Education,* the United States Supreme Court declared that state laws establishing separate but "equal" public schools for black and white public schools were inherently unconstitutional (Miller, 2187). Similarly, while the option of civil unions for non-traditional couples may appear a just alternative, the sheer separation of marriage-like institutions is by definition discriminatory.

Lastly, disestablishing marriage will eliminate the current institution of marriage's inherent inequality. Society validates the relationship of married couples who cohabitate, have children, and take part in activities typically practiced by those in romantic relationships. By default, those who participate in "married culture" yet are not legally bound are automatically invalidated and regarded as having lower status. Michael Warner, a social theorist at Yale University, argues, "Marriage sanctifies some couples at the expense of others. Stand outside it for a second and you see the implication:

if you don't have it, you and your relations are less worthy" (Cruz, 1023). Therefore, marriage, by definition, results in discrimination.

While there is much support for the disestablishment of marriage, there is some support for maintaining the traditional marriage model as well. Without traditional marriage between a man and a woman, there is potential for the subsequent abolishment of the family unit. The primary function of marriage is to "foster and protect the propagation of the human race," as was resolved by Hawaii legislature after the decision in *Baehr v. Miike,* which is for the most part biologically limited to heterosexual couples (Dent, 593). In addition, the disestablishment of marriage could endanger child rearing, the primary social function of marriage. It has been argued that children of families that stray from the traditional two-parent, heterosexual marriage model are more likely to have problems with educational achievement, drug use, criminal activity, physical and emotional health, social adjustment, and adult earnings (Dent, 594). Although the quality of a child's school is also important in his or her development, some recent studies have shown that it is nearly impossible for children to excel academically and personally without proper stimulation in a traditional home environment (Dent, 430).

While disestablishment potentially endangers the traditional family unit, it also arguably eliminates an important outlet for an individual's self-identity. Generally, individuals define themselves through their affiliations and associations. Marriage then may be seen as the ultimate symbol or expression of loyalty to an association, and a means of adopting a formal status in order to make a symbolic statement of commitment and self-identification

(Cruz, 938). In such cases, marriage serves as a forum from which individuals can express and protect said emotions and sentiments. In *Zablocki v. Redhail,* the U.S. Supreme Court held that that Constitution protected "something less tangible than living together and having children, and more important: the values of self-identification and commitment," thereby enforcing the importance of protecting the right of marriage (Metz). Author and professor Steven Carter argues, regarding the inherent value of marriage, "Most people see the value of children or the horror of murder without the need for explanation. It is not merely an instinct but part of their vision of the good," (Dent, 435).

Finally, the disestablishment of marriage would eliminate the long-standing and respected tradition of the marital unit. Under the First Amendment, it is unconstitutional for the government to limit symbolic expression in such a fashion (Cruz, 996). More broadly, traditional marriage is inherently tied to our altruistic concern for future generations and the welfare of others; goodness is arguably learned from the family in a community where marrying and raising children is normal. Marriage is one of the few social institutions found in all cultures throughout history, and that fact alone argues that marriage is important to the survival of a culture (Dent, 431). If the traditional family is no longer the norm, such altruism will arguably erode and equal acclaim will be given to partnerships that counter procreation (Dent, 598). Therefore, disestablishing marriage would potentially alter not only the institution of marriage, but also the focus and goals of individuals.

Nevertheless, the counter argument advocating the preservation of the traditional marriage model falls short in several

ways. While disestablishing marriage may transform the concept of the traditional marital unit, the concept of the "family" would remain constant and merely create leeway for multiple possible interpretations. In *Stanley vs. Illinois,* the Supreme Court struck down a state law requiring the children of unwed fathers to become wards of the state upon death of the mother (Ristroph and Murray, 1252). Yet even as the Court emphasized constitutional protections for biological fathers, wed or unwed, it noted with favor that Stanley shared in the parenting of his children, living with them and their mother for eighteen years and sharing responsibility for their upkeep (Ristroph and Murray, 1253). Stanley was able to act like a father and a husband, performing his paternal role in a manner that did not threaten his family's quality life, yet legally, he had no rights concerning his children. The traditional marital model does not necessarily dictate the family structure.

While marriage may serve as an option for aiding in the formation of one's self-identity, an individual certainly has the opportunity to continue this process through engagement in romantic associations and affiliations in civil society without endorsing an institution that is inherently discriminatory. Much like the separation of church and state, individuals would gain equality in their opportunity to engage in a diverse set of associations necessitated by America's heterogeneous population, without the state's interference. For example, Metz proposes to defend liberty, equality, and fairness through the creation of what she calls an "ICGU status" (Metz). This would provide individuals with legal recognition, protection, and certain material benefits, but would be expressly tailored to protect intimate care in its various forms and

without any purposeful expressive significance (Metz). Leaving the definition of marital status to civil society is no different than leaving the control of bar-mitzvah status to civil society.

While disestablishment may abolish the traditional symbolism of the union of marriage, the sentiments synonymous with loving, supportive, relationships would not erode. And while tradition is an important part of the foundation of America, it is certainly not grounds to preserve any given practice when its integrity is up for dispute. In the *2004 Tenth Circuit Judicial Conference* in Utah, Harvard professor Michael J. Sandel argued in conjunction to the issue of gay marriage, "Segregated schools were not prohibited for a very long time. Does that mean it was wrong to change that?" (Sandel, 192). While the procreative definition of marriage-like unions would wither with disestablishment, it would not signify the demise of child-bearing. Instead, the concept of procreation would be removed from the marital unit and replaced as the product of simply one type of civil relationship, given no greater or lesser respect than other relationships. As a result, the qualities fundamental to cohesive married couples would remain, yet would be carried out through a wide variety of means.

Although marriage may be a longstanding tradition in American society, it is morally and legally unacceptable for the government to continue supporting a practice that excludes individuals and creates inherent inequalities. While the media today is filled with images such as "No on H8," simply advocating for changes within the marital model, there will always be alternative groups of individuals who still do not fit and will subsequently be forced to endure the pain of rejection not only from governmental

rights, but also from the acceptance of greater society. Instead of focusing on altering marriage to complete the theoretically impossible task of including all individuals, the government should focus on ensuring protections and rights to humans at large. The disestablishment of marriage will therefore lead to greater liberty, equality, and fairness, and curb unnecessary discrimination.

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Remorse in the Courtroom: Structural concerns surrounding the treatment of remorse as a mitigating factor and the lack of remorse as an aggravating factor in U.S. criminal law

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From a philosophical perspective, emotions are human experiences defined by the integration of beliefs and thoughts, feelings, desires, and actions. The dynamism and complexity of human emotions drastically affects the way in which human beings interact with and perceive one another.

In U.S. criminal law, the presence and absence of the emotion of remorse can fundamentally alter the way in which we, the general public, as well as the judge and the jury, perceive the defendant and the victim. Because juries are responsible for both convicting a defendant and determining the length of the sentence given to the defendant, it is imperative that juries have a concrete, standardized method by which to determine whether the presence of remorse is genuine and should therefore serve as a mitigating factor, and whether lack of remorse is indicative of a cruel mind and should therefore serve as an aggravating factor.

This paper will explore this issue by first defining remorse as a complex emotion from a psychological perspective. I will then turn the discussion to the role of remorse in criminal law by analyzing the "acceptance of responsibility" standard outlined in Section 3E1.1 of the Federal Sentencing Guidelines, and discussing how courts equate this standard to the "display of remorse," even though the Guidelines do not provide any concrete measures by which to assess the validity and the adequacy of the remorse being displayed by the defendant. These structural concerns lead me to conclude that remorse should not be used as a mitigating factor in criminal trials.

I will then explore what happens at the opposite end of the spectrum, i.e. how courts treat the lack of remorse in criminal trials. The paper will outline the variety of reasons, both psychological and neurological, that can cause a lack of remorse within the defendant. I will turn to psychopathy as a case study in order to explore how lack of remorse is treated by many courts as an aggravating factor because it reveals something sub-human about the defendant. However, I will argue that courts should not treat the lack of remorse in psychopaths as an aggravating factor, but should instead consider the neurological basis for why these individuals are ego-centric and unable to empathize with the victims of their actions.

I will thus end the paper on a cautionary note – that courts in the United States should not place an emphasis on the display of remorse or the lack of remorse, especially because such an

emphasis can lead the jury or judge to issue an unjust sentence that does not fit the nature of the crime. Of course, I understand that entirely removing remorse from the courtroom is unrealistic, and as such, I will expand on Michael Proeve's and Steven Tudor's suggestions for the factors that juries should take into consideration to ensure a fair assessment of remorse in the courtroom.

Remorse in the Courtroom:
Structural concerns surrounding the treatment of remorse as a mitigating factor and the lack of remorse as an aggravating factor in U.S. criminal law

Introduction

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PART I – Remorse Defined: A Psychological Approach

Remorse is categorized as a "retractive" emotion in that the self withdraws from an action or a personality trait that is otherwise seen as belonging to or associated with the self.[1] The most common thoughts associated with remorse, thus, are: "I wish I had not taken this action" or "I wish my personality were different in x, y, z respects" (Proeve and Tudor, 31). The complexity of the emotion of remorse arises from the various motivations that lead individuals to have these thoughts. On one end of the spectrum is "prudence-based remorse," in which one regrets a past action because of the consequences it has produced for oneself (Proeve and Tudor, 32). This form of remorse can therefore be described as selfishly-motivated. The focus of this paper, however, will be remorse that arises from the sense that an action is morally wrong and needs to be rectified on this moral basis. This wrongful action can occur at three levels: 1) at the level of the individual, in which the wrong is a wrong done to someone in particular; 2) at the level of society, in which the wrong is a breach of societal norms or a disobedience of authority; and 3) at the personal level, in which the wrong prevents the wrongdoer from living up to ethical standards of conduct that she has set for herself (Proeve and Tudor, 32).

In order to experience remorse, a person must have thus committed a wrongdoing. This requirement can be traced back to the etymological roots of the term "remorse," which derives from the Latin term "remordere," which means to vex or torment. The Latin term in turn can be traced back to "mordere," which means to bite

or sting; "re" indicates that this feeling is continuous and repetitive, even omnipresent. Remorse is therefore a sharp and biting sensation, specifically a sense that one's deed is cutting into one's very soul (Proeve and Tudor, 33). Thus, the basis of remorse is the belief that one has wronged another (Proeve and Tudor, 37). It is not necessary that this statement be true (in fact, person A may not have wronged person B at all), but if person A firmly holds this belief, then person A can feel genuine remorse.

There are additional nuances that must be explored in order to understand the complexities of remorse. Let us first discuss what constitutes the wrongdoing. In order for one to feel remorse about an action, the wrongdoing committed must take the suffering of the victim beyond that which is experienced as a result of physical harm. That is, the victim must feel as if they have been disrespected, abandoned, or even dehumanized, by the person who has committed the wrongdoing (Proeve and Tudor, 43). Secondly, an individual can only be remorseful about her own action. If one feels sorrow for a wrong committed by another individual, then that emotion cannot be classified as remorse, but rather as a form of spectator regret (Proeve and Tudor, 41; Miller, 82-83). Of course, when a wrongdoing is not committed by a sole actor, identifying who is accountable for the wrong and who should thereby feel the pangs of remorse can become difficult. Furthermore, the object of the wrongdoing must be an external actor, i.e. I cannot experience remorse at having done a wrong to myself (Proeve and Tudor, 41). If one does commit an act of self-harm that one regrets in retrospect, then the experience is one of private shame rather than remorse. The presence of the external victim is therefore a key feature of remorse. Because remorse is an emotion that occurs as a result of an interaction between two (or

more) individuals, the dynamics of relationships between these individuals can change. Where there was no relationship between the wrongdoer and the wronged prior to the wrongdoing, then the wrongdoing creates a relationship; if a relationship did exist, then the relationship is altered as a result of the wrongdoing (Proeve and Tudor, 41). In both cases, the remorseful wrongdoer feels a sense of obligation to respond to the person who has been wronged. The response can manifest itself in various forms – through an apology, amends, material reparations, etc. (Miller, 81-82). Remorse can therefore be classified as a "backwards-looking emotion," in that it concerns a past action, and as a "forward-looking emotion," in that it is centered on the remorseful offender's duty to set things right or at least begin making amends (Proeve and Tudor, 41). The remorseful person's self-perception is also altered as a result of the wrongdoing and the subsequent sense of obligation. The remorseful person, who is attentive to the consequences of her action, realizes that she herself has changed as a result of the wrongdoing and so has her relationships with others', including family, friends, as well as the victim (Proeve and Tudor, 43).

PART II – Remorse As a Mitigating Factor in the Courtroom: Case Study of Section 3E1.1 of the US Sentencing Federal Guidelines (2012)

Now that we have unpacked the various components of remorse, let us discuss how remorse is perceived in the sentencing phase of criminal trials in the United States. The following discussion focuses on the 2012 U.S. Sentencing Federal Guidelines in order to determine the role of remorse in the sentencing of

individuals who have been convicted of felonies and class A misdemeanors.

Section 3E1.1a of the Guidelines provides a reduction in sentence by two levels "to the defendant who clearly demonstrates acceptance of responsibility for his offense" (O'Hear, 1508, 1515; USSC 2012). The offense level can be decreased by an additional level if the defendant "has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently" (USSC 2012, S3E1.1).[1] A two or three level deduction can be translated into a sentence that has been reduced by as much as 40% (O'Hear, 1512). It is important to note that the defendant who originally challenges her guilt at trial is not given an opportunity to attain this reduction, regardless of whether her remorse is genuine (O'Hear, 1518; USSC 2012, S3E1.1 Application Note 2). This means that a prerequisite for remorse to be viewed as a mitigating factor during the sentencing phase of trials is a guilty plea, which places profound limitations on the role of remorse in sentencing, regardless of the intent of the Sentencing Guidelines; the limitations and their subsequent implications will be discussed later.

There are two competing thought camps on what constitutes "acceptance of responsibility" – one group interprets "acceptance of responsibility" through the lens of the "remorse paradigm" and the other, through the "cooperation paradigm." Under the remorse paradigm, section 3E1.1 calls for an inquiry into the defendant's state of mind by allowing judges to reduce sentences by two or three levels for defendants who (1) fully and freely admit to committing

the offense; (2) accept punishment as an appropriate consequence for the offense; and (3) who demonstrate sincere commitment to avoiding future criminal activity (O'Hear, 1511). Under the cooperation paradigm, section 3E1.1 is concerned not with the defendant's state of mind but rather with her post-offense conduct. This paradigm advocates for encouragement of the defendant's behavior if it contributes to the recovery of the victims and if it protects the community from additional criminal activity (O'Hear, 1511-12). These two paradigms may sometimes overlap each other (e.g. one's post-offense conduct can demonstrate one's remorse for committing a wrongdoing), but there is a fundamental analytical difference between the two paradigms. Specifically, the cooperation paradigm warrants that a judge examines "a defendant's conduct from the standpoint of its social desirability" whereas the remorse paradigm warrants that the judge examines "the same conduct as part of a broader inquiry into the defendant's subjective state (O'Hear, 1516). In the case of a person who does not feel genuine remorse for carrying out an action but who still proceeds to assist state officials in clarifying the details of the crime out of a sense of societal obligation, for example, the judge who emphasizes genuine remorse would reach a different outcome in sentence reduction as compared to a judge who emphasizes cooperation with state officials. It is because of this discrepancy that forming a consensus on the interpretation of "acceptance of responsibility" in the Federal Sentencing Guidelines is an imperative concern.

In order to facilitate the process by which judges can determine whether a defendant who has pled guilty has indeed accepted responsibility for her wrongdoing and is therefore deserving of the two- or three-level reduction in sentence, the Sentencing

Commission has outlined eight post-offense factors judges should take into consideration. The factors are:

> (a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct;
> (b) voluntary termination or withdrawal from criminal conduct or associations;
> (c) voluntary payment of restitution prior to adjudication of guilt;
> (d) voluntary surrender to authorities promptly after commission of the offense;
> (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
> (f) voluntary resignation from the office or position held during the commission of the offense;
> (g) post-offense rehabilitative efforts; and
> (h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility (USSC 2012, S31.1 Application Note 1).

Application notes 1b-1h are conventionally interpreted in line with the cooperation paradigm in that they constitute socially desirable actions and are not explicit displays of remorse (O'Hear, 1521-1522). Factor 1a seems to be indicative of the remorse paradigm in that truthfully admitting the extent of involvement in the offense requires taking responsibility for one's action, acknowledging harm to the victim, and arguably also ascribing a sense of responsibility within the wrongdoer to attempt to rectify or at least ameliorate the effects of the wrongdoing. However, even though factor 1a requires

judges to evaluate a defendant's "remorse," factor 1a, in addition to factor 1c, do not explicitly enumerate any actions typically associated with remorse – for example, what constitutes restitution? Is the defendant responsible for monetary payment of damages for restitution? Is the defendant expected to compensate for emotional damage that may have been inflicted on the victim as part of the wrongdoing? The definition of remorse presented in the introduction of this paper states that the dynamics of the relationship between the wrongdoer and the wronged is shaped by the wrongdoer's obligation to rectify all (or as many as possible) aspects of the wrong. Because no explicit references are made to remorse (in contrast to cooperation with state officials) in the application notes to S3E1.1 of the Federal Sentencing Guidelines, and because the Sentencing Commission itself does not state whether remorse should be prioritized over cooperation (nor does it define remorse or refer to remorse explicitly), we can thus make a case that the Federal Sentencing Commission expects for the acceptance of responsibility to be viewed through the cooperation paradigm.

The reality, however, is that many courts use Section 3E1.1 to determine whether the defendant is adequately remorseful for her action, even though no explicit guidelines to determine remorse are enumerated within the section itself or in the application notes. In *United States v. DeLeon Ruiz,* for example, the First Circuit court determined that "the reduction for acceptance of responsibility serves two distinct purposes: to recognize a defendant's sincere remorse and to reward a defendant for saving the government from the trouble and expense of going to trial" (46 F.3d 452). However, this court opinion is distinct in that it identifies the latter as a purpose of section 3E1.1, because reality is that "many courts

equate acceptance of responsibility with remorse, leaving the cooperation paradigm out of the picture – at least at the level of articulated principle" (O'Hear, 1524). In *United States v. Dyce*, for example, the court defined remorse as a "gnawing distress arising from a sense of guilt for past wrongs," in accordance with the Webster's Ninth New Collegiate Dictionary (91 F.3d 1462 [D.C. Circuit]). The court further noted that, in regards to section 3E1.1:

> While acceptance of responsibility may be an essential component of "remorse," the latter is not a necessary element of the former. A person may accept responsibility for a crime ("yes, I killed my wife") without feeling remorse ("she had it coming"). In its commentary, however, the [Sentencing] Commission made it clear that it contemplated a moral element to the section 3E1.1 reduction…. We [the court] hold, therefore, that implicit in the phrase "acceptance of responsibility," as used in section 3E1.1a, is an admission of moral wrongdoing.

However, as described previously, remorse is a complex emotion that requires the interaction of at least two actors, an obligation to rectify the impacts of a past wrongdoing, and a redefining of the relationship between the actors. Even though the court defined "remorse," it failed to provide any guidelines as to how it would determine whether the defendant was truly feeling a "gnawing sense of guilt" for her wrongdoing – how is the court expected to evaluate the "moral" aspect that is inherent in "acceptance of responsibility?" The same issue arises in *United States v. Fagan*, where the court iterated that "several circuits have specifically held

that a moral element is implicit in acceptance of responsibility" and expression of remorse would be indicative of the morality that would be necessary for reform of the person to occur (162 F.3d 1280 [10th Circuit, 1998]). Additionally, in *Riggins v. Nevada*, the court reasoned that "in a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies" (504 U.S. 127). In both cases, thus, we see that the appellate courts reached their verdict on the duration of the sentence primarily based on the defendant's display of remorse as opposed to post-offense conduct; in both cases, display of remorse was characteristic of "acceptance of responsibility." Because the Sentencing Guidelines do not detail a procedure by which to determine whether the defendant is demonstrating genuine remorse and fail to specify whether the genuine display of remorse should be seen as a prerequisite to "acceptance of responsibility," we can conclude that the verdicts reached by these courts overextend section 3E1.1 in its application.

Why have courts interpreted "acceptance of responsibility" through the lens of the remorse paradigm if the application notes to section 3E1.1 seem to endorse viewing "acceptance of responsibility" through the lens of the cooperation paradigm? Stephanos Bibas and Richard Bierschbach contemplate that because expressions of voluntary remorse are indicative of an offender's capacity for reform, those who display remorse are viewed by judges as deserving a lesser sentence (Bibas and Bierschbach, 24). In *Brady v. United States*, for example, the court stressed that a defendant who accepts responsibility for his action demonstrates that "he is ready… to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might

otherwise be necessary" (397 U.S. 742). This view is further elaborated upon in *United States v. Beserra*, in which the court specified that "a person who is conscious of having done wrong, and who feels genuine remorse for his wrong… is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are" (967 F.2d 254). Similarly, in *United States v. Blake*, the court stated that reflection and introspection are aspects of rehabilitation, and defendants who displayed these two aspects by accepting responsibility for their wrongdoing and subsequently apologizing to the victims and victims' relatives were well on their way to rehabilitation (89 F. Supp. 2d 328).

Structural Concerns & The Treatment of Remorse as a Mitigating Factor

We are thus presented with a wide array of court cases in which judges evaluate the offender for fulfillment of "acceptance of responsibility" on the basis of the remorse paradigm. As stated previously, the primary concern that arises is that there are no set standards by which courts can determine what constitutes adequate remorse, especially because the eight standards specified in Application Note 1 are written from the perspective of the cooperation paradigm.

This concern is exacerbated by structural impediments in the U.S. criminal justice system, which prevents expressions of remorse by defendants. In theory, the court system is supposed to encourage expressions of remorse, especially if many courts emphasize remorse as constituting the moral element of "acceptance of responsibility."

In practice, however, "far more attention is devoted [by courts, judges, juries] to prevention and punishment of crime than to ways in which criminals might be encouraged to repent and resume normal lives" (Bibas and Bierschbach, 96). When an individual is first arrested, she enters an adversarial system in which the two lawyers, as opposed to the defendant and victim, are the main actors – the two lawyers are the ones who meet frequently to ensure that their clients are getting the best deal possible in the most efficient way possible (Bibas and Bierschbach, 97). This interaction between the two lawyers, however, overtakes and even replaces that of the defendant and the victim, such that the defendant and the victim generally do not even meet each other from the time of arrest to trial and sentencing (Bibas and Bierschbach, 97).

This disconnect spills over into the pre-sentencing and sentencing phases of the criminal trial process. In the context of sentencing allocution (a direct address between the judge and the convicted felon prior to sentencing), a display of meaningful remorse is not possible. Sentencing allocutions are tightly scheduled and often in front of a judge who did not preside over the guilty plea (Bibas and Bierschbach, 98), meaning that the judge presiding over the sentencing allocution may not be able to adequately determine whether the defendant was truthful in "admitting the conduct comprising the offense(s) of conviction" at the time of the guilty plea (not just by relaying concreted details of the wrongdoing, but also in her emotions and display of regret for having committed the wrongdoing) and how actively involved the defendant was in "assisting authorities in the recovery of truths and instrumentalities of the offense" (USSC 2012, S3E1.1). Moreover, the sentencing allocution does not help bridge the gap between the defendant and

the victim. The two main parties in the allocution are the defendant and the sentencer (usually a judge), as opposed to the defendant and the victim. During the actual sentencing process, many victims are absent from the courtroom; when they are present, the defendant does not face them. In fact, defendants who wish to turn to their victims to relay an apology have to do so by turning their backs on the judge, which is not in line with expected court etiquette (Bibas and Bierschbach, 98). Many of the apologies that do occur are usually rehearsed or read off of pieces of paper; this is to be expected because the sentencing hearing is the defendant's first true opportunity to apologize to the victims and their relatives for the crime they committed (Bibas and Bierschbach, 98). The question thus becomes: if these structural impediments exist, is it fair for courts to be evaluating acceptance of responsibility through the remorse paradigm? To exacerbate this issue, there is no concrete protocol in place that allows judges to evaluate (1) if the remorse displayed is genuine; and (2) whether remorse should be evaluated prior to cooperation to determine adequate acceptance of responsibility. To safeguard against those who feign remorse, the opinion of the court expressed in *United States v. Hammick*, stated that "in the absence of sincere remorse or contrition for one's crimes, a guilty plea entered for the apparent purpose of obtaining a lighter sentence does not entitle a defendant to a reduction for acceptance of responsibility" (36 F.3d 594 [7th Circuit, 1994]). However, the court case does not specify how the court can determine if the remorse is sincere or insincere. Moreover, if defenders are aware of the factors for consideration listed in Application Note 1 to Section 3E1.1, then how are judges expected to distinguish between defenders who are displaying sincere remorse and truly accepting responsibility for the

crime they have committed from those who are following the "checklist" of eight factors to give off the appearance of being remorseful?

Numerous other psychological concerns surround the corroboration of remorse. Human beings can sometimes misinterpret their own emotional states and even deceive themselves about the emotions they are experiencing, so there can be a disconnect between an individual's true emotions and the emotions she conveys to the public (Proeve and Tudor, 49). This means that some offenders may not be able to adequately convey remorse, especially in the formal and alien environment of the courtroom (Proeve and Tudor, 111). As such, judges may make incorrect conclusions about the presence or absence of remorse. Moreover, different judges, and sometimes even the same judge, might make inconsistent decisions across different cases (Proeve and Tudor, 112). What one judge sees as remorse, another may not; e.g. some judges may look for displays of humility inside the courtroom as a demonstration of remorse, whereas other may emphasize the role of monetary payment outside the courtroom. Moreover, if the presence of remorse is to serve as a mitigating factor (in that it aptly satisfies the criterion of "acceptance of responsibility," then how should judges draw the line as to how much remorse is "enough." Can adequate remorse be characterized as monetary payment? A private apology? A public apology? It is no secret that different cases of remorse vary in their depth, intensity, effect and meaning (Proeve and Tudor, 122). These concerns continue to exacerbate the ambiguities of determining whether a defendant is deserving of a decreased sentence because of display of remorse. It is for this array of structural concerns that

appellate courts in the U.S. should not treat remorse as a mitigating factor.

PART III – Remorse as an Aggravating Factor in Courtrooms: Case Study of Psychopathy During the Penalty Phase of the Capital Trial

Why Do Some Individuals Lack Remorse? Psychological and Legal Perspectives

As we have seen, the "acceptance of responsibility" described in section 3E1.1 of the Federal Sentencing Guidelines has been interpreted by many appellate courts as being equivalent to "display of remorse"; in other words, display of remorse has been treated as a mitigating factor in sentencing,[1] despite the fact that no set standards for evaluation of genuine remorse exist.

The natural question that thus arises is whether lack of remorse is treated as an aggravating factor by U.S. courts. No federal statutory or decisional recognition exists in the U.S. that establishes that lack of remorse must be treated as an aggravating factor in criminal law cases, meaning that the treatment of lack of remorse falls in the hands of local courts (Proeve and Tudor, 156-7). Before we can discuss how the court systems in various jurisdictions have treated lack of remorse, we must first enumerate the reasons as to why individuals may not show remorse for having committed a crime. It is important to note that the lack of remorse, similar to the display of remorse, is case-specific, meaning that a remorseless individual is one who has committed a wrongdoing to another individual but does not experience the sharp pangs of guilt at a point

or at a stage at time when societal norms dictate that such a display would be fitting, if not expected (Proeve and Tudor, 140).

Let us first discuss individuals who may lack remorse because they refuse to believe that they are guilty of having committed a wrongdoing. Two scenarios exist: first, an offender may not believe that she is guilty of any crime (which may be a result of irrational self-deception that shifts the blame to another person, or as a refusal to believe that the crime was committed by the offender herself, or similar mistakes of fact and errors of interpretation); second, an offender may accept that she is guilty of a crime but not guilty of the moral wrongdoing associated with the crime (Proeve and Tudor, 141-2).[1] This may be because the defendant believes that the crime committed was "victimless" and that there is one to feel remorseful towards because no one was wronged.

External factors, especially heavy medication, can cause individuals to feel a lack of remorse in situations where they may otherwise feel remorse. In fact, in *Riggins v. Nevada* (also discussed previously), the court ordered a retrial on basis of the defendant being so medicated that he was unable to show remorse. In his opinion, Justice Anthony Kennedy noted that "serious prejudice could result if medication inhibits the defendant's capacity to react to proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencers must attempt to know the heart and mind of the offender." This opinion indicates the importance allotted to remorse as a mitigation factor, but also points to just how detrimental lack of remorse can be in determining the sentence that is given to a defendant.

Individuals may also feel a lack of remorse to a mental incapacity. Mental incapacities for remorse can be both non-culpable and culpable. Individuals who have non-culpable mental incapacities for remorse are those who may suffer from an intellectual impairment or mental disorder that prevents them from understanding "the basic nature of what [they] have done, and so undercuts the capacity to have the appropriate emotional reaction" to having committed a wrongdoing (Proeve and Tudor, 143). In most cases, the person is tried and found not guilty by reason of insanity. This was the case in *Atkins v. Virginia* (536 U.S. 304), in which the court determined that individuals who were deemed mentally retarded were exempted from the death penalty in part because… their demeanor may create an unwarranted impression of lack of remorse for their crimes" (Weisman, 3-4). In addition to the mentally insane, young offenders are also deemed to have a non-culpable mental incapacity for remorse. These young offenders are characterized by their inability to understand their wrongdoing either due to emotional immaturity or failure to conduct effective cost-benefit analyses for taking a particular action (Proeve and Tudor, 143). What offenders are "young" enough to fall into this category? The answer to this question is usually determined by the concept of *doli incapax*, which is a statutorily determined age cutoff that deems that children under a certain set age are "incapable of committing criminal offenses"; this may differ across jurisdictions (Proeve and Tudor, 143). Both young offenders and the mentally insane have a mental incapacity that renders them morally non-culpable for their crime. Because these individuals do not (generally) move onto the penalty phase of the trial, they will not be the focus of this discussion. This non-culpability can be contrasted with

psychopaths, who are seen as morally culpable and fit to be tried and punished; the case of the psychopath will be discussed shortly.

Some individuals lack remorse for having committed a wrong in addition to actually displaying a positive, affirming emotion towards their wrongdoing. These individuals are those that derive pleasure from seeing the victim suffer, a "kind of malicious joy or *Shandenfruede* [that is the very] antithesis of compassion" (Proeve and Tudor, 144). Some may gloat from having inflicted pain and suffering onto others. This category also encompasses psychopaths, who may experience pleasure from manipulating and exploiting others (Proeve and Tudor, 143).

The Case of the Psychopath: Neurobiological and Psychological Perspectives

Let us now discuss the case of the psychopath, who *is* considered legally and morally culpable for committing a crime (Proeve and Tudor, 143). Let us first define what we mean by psychopathy. The current edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) and the upcoming edition of DSM (DSM-5) do not have criteria specifically addressing the diagnosis of psychopathy; rather, they include a broader checklist for antisocial personality disorders that address specific behavioral patterns that psychiatrists can use to assist in the diagnosis of a patient as a psychopath. We will be using neurobiology, the behaviors listed in the DSM, as well as accounts from Robert D. Hare, an expert on psychopathy, to describe the general behaviors of a psychopath, with a specific emphasis on the role of remorse (or lack thereof) for committing a wrongdoing. We will then use both

neurobiology and psychology to determine how, and whether courts should, treat psychopathy as an aggravating factor.

What makes psychopaths distinct from "normal" individuals from a neurobiological perspective? The amygdala is the core structure in the brain that is responsible for emotional regulation, as well as instrumental learning. The amydala is thus the "structure involved in all the processes that, when impaired, gives rise to the functional impairments shown by individuals with psychopathy" (Blair, 5). A study by Tiihonen et al. used volumetric magnetic resonance imaging (MRI) to explore the relationship between amydaloid volume and degree of psychopathy in violent offenders and found that the higher levels of psychopathy were associated with reduced amydaloid volume (Blair, 5). Kiehl et al. also used functional MRI to examine neural responses in individuals with high and low scores for indicators of psychopathy, and determined that the higher-scoring group (the more "psychopathic" group) had reduced amydala response (Blair, 6). The orbitofrontal cortex (OFC), in particular, the medial OFC, receives projections from and sends projections to the amydala and is responsible for emotional and social decision making; researchers have found that lesions in the OFC can therefore lead to behavior traits characteristic of psychopathy and acquired sociopathy. Damage to the OFC, as well as administrations of propranolol (a beta-adrenergic blocker) can disrupt the processing of sad facial expressions, as explained by Harmer et al. (Blair, 6-7). A recent study conducted by Kiehl and Buckholtz (27) has revealed that brain damage to a horseshoe-shaped band of tissue in the innermost part of the paralimbic system can affect other interconnected brain regions in addition to the OFC and the amydala, including the anterior cingulate (controls empathy

and decision making), the posterior cingulate (which controls emotional memory and emotion processing), the insula (responsible for awareness of body states), and the temporal pole (integrates emotion and perception). When these regions are affected, the individual is unable to assess or control their emotions and symptoms of psychopathy can arise. Lifestyle, of course, can also lead to neurobiological impairments – substance abuse, for example, can lead to impairment of the amygdala, especially in younger children (as young as 5 years old) (Blair, 6-7).

We will now define psychopathy using a psychological framework. Hare states that a psychopath is a "person, who among other traits and behaviors, lacks a capacity for empathy and remorse… [and] lacks concern for the effects [her] actions have on the lives of others" (Hare, 34, 40). In general, psychopaths claim to have goals, but they show little understanding of the qualifications or steps required in attaining those goals; rather, they feel that their abilities will enable them to become anything they want to be (Hare, 38). Compulsive lying, including lying to impress others of the deeds they have committed, feeds into these images of grandeur (Hare, 40).

Moreover, as stated previously, psychopaths do not display remorse for committing a wrongdoing. Hare provides the example of serial killer Ted Bundy, who stated that guilt "is a mechanism we use to control people. It's an illusion. It's a kind of social control mechanism"… and the "past is just a dream" (Hare, 41). Bundy's account reveals two significant points: (1) his refusal to admit guilt, and (2) his implicit concern that guilt is a structural mechanism that is impinging on ego-centrism and control over his actions, both of which are behaviors that are characteristic of antisocial personality disorders as described in the DSM-IV and DSM-5. Unlike Bundy,

some psychopaths do verbalize remorse but then contradict themselves in words or actions. Psychopaths, because of their keen perception, "quickly realize that remorse is an important word in prison" so they claim to be remorseful for their actions; however, these individuals do not understand the moral self-evaluation that genuine remorse mandates. Hare gives the example of an inmate who claimed to have felt remorse when pressed further, revealed that he "didn't feel bad for his crime" because the murder victim "benefited from… learning a hard lesson about life" (Hare, 41). We thus see that lack of remorse internally assists psychopaths in rationalizing their behavior and excising themselves from any personal responsibility they may have for their actions (Hare, 42). Lack of remorse, in addition to the other behavioral patterns listed in the DSM, also means that psychopaths can ""torture and mutilate their victims with about the same sense of concern that we feel when we carve a turkey for Thanksgiving dinner" (Hare, 45). Hare, however, notes that crimes committed psychopaths do not tend to have this dramatic effect because psychopaths have the insight and sense of ego-centrism that allow them to "parasitically bleed other people of their possessions, savings and dignity; aggressively… take what they can't; shamefully neglect the physical and emotion welfare of their families; engage in an unending series of causal, impersonal and trivial sexual relationships" (Hare, 45).

Because psychopaths have an awareness of their actions and are able to conduct cost-benefit analyses for taking actions, psychopathy does not excuse an individual from criminal responsibility (Proeve and Tudor, 143). In fact, the psychopath's incapacity for remorse "is often seen as making the psychopath all the more obnoxious and dangerous and thereby meriting more

severe punishment" because she is aware of the act and has, in most cases, strategically and deliberately planned to carry out the act in a certain manner so as to give rise to desired consequences (as opposed to the "mentally insane," who are unaware of their actions or unable to control their actions (Proeve and Tudor, 143). Moreover, the psychopath's inability to feel remorse means that she is seen as someone "who does not suffer and cannot suffer for [her] misdeeds," which furthers many scholars' view that the psychopath must be punished legally through prison confinement or the death penatly (Weisman, 20). Furthermore, "the psychopath, for all his skill at mimicking sanity, is afflicted with a disturbance as intransigent and encompassing as those with the most obvious symptoms of psychological disorder" (Weisman, 18). The psychopath is also cast into a realm of "biological otherness" because the early onset of psychopathological behaviors have traditionally been "unresponsive to any of the treatment modalities currently available" (Weisman, 18). The social framing of the psychopath as someone who is a dangerous Other sets the stage for the treatment of lack of remorse, especially in psychopaths, as an aggravating factor in many legal jurisdictions throughout the United States.

We will look specifically at capital trials, where the decision in the penalty phase is between life without parole or the death penalty (in jurisdictions that still allow the death penalty), in order to demonstrate how prosecutors have used lack of remorse as an aggravating factor to encourage juries to choose the death penalty over life without parole in such cases. In *Shelton v. State* (744 A.2d 465, 501), for example, the statement of the defendant to the jury did not demonstrate any remorse, but rather just recounted the procedural rules for a capital trial: "The jury has found me guilty of

these allegations, and now it's the jury's turn to render a verdict. And that verdict is either life in jail or death. That's all I have to say" (Weisman, 23). Similarly, in *State v. Stephenson* (22 Ill.205 Ind. 141), the prosecutor rebutted the defense's claims that the offender was a "changed man" by stating that "nowhere in this record… have you heard one person say that the Defendant has shown any remorse or any sorrow over the death of his wife, over what he has done. None" (Weisman, 24). We, once again, the prosecutor calling attention to the defendant's lack of remorse as exacerbating the suffering of the victim; after all, one of the core aspects of remorse is that it affects the victim's and the community's perception of the wrongdoer. Some prosecutors also characterize the defendant as something other than human to in order to make the contrast between the defendant and the victim stark. In *People v. Jurado* (38 Cal. 4th 72[Cal 2006]), the prosecutor told the jury that "the defendant's grandmother testified… that she not only prays for [the defendant] but she prays for the victims and the victim's family… What a human thing… He's not like them [the defendant's family]. He doesn't share their goodness… their humanity" (Weisman, 25). In *People v. Farnam* (28 Cal. 4th 107 [Cal. 2002]), the prosecutor also characterizes the defendant as sub-human:

> No matter what words may be used to try and convince us that this defendant feels remorse and cares for others, et cetera, et cetera, those are words… the sadism, premeditation, and ritualistic repetition shown in these crimes are the classic trademark of the psychopath who feels no remorse and has no concern for anyone outside of himself. He's the beast that walks upright. You meet

> him on the street. He will seem normal, but he roams those streets, parasitic and cold-eyed (Weisman, 28).

In the preceding cases, we see that the defendant who does not display remorse is presented by the prosecutor as the Other, as the animal that should be confined for this personality and for the potential danger that she poses to the community. This characterization, in turn, makes it easier for the jury to view the defendant as someone who is sub-human and sentence them to the death penalty or life without parole.

The core concern that arises from treating lack of remorse as an aggravating factor is that personality and subsequent "inhumanity" overrides the neurological basis of the psychopath's lack of remorse. As described previously, impairments of the paralimbic system can lead to a misrecognition or lack of recognition of emotions, especially if core structures like the amygdala and OFC are damaged. Prosecutors need to move away from the portrayal of psychopathy as a *choice* that psychopathic individuals have embraced. Rather, it is necessary that jurists recognize that damage to the brain, as opposed to an intrinsic lack of humanity is what is at the core of the decisions that psychopathic individuals make. At the very least, MRI scans of the brain of the psychopathic individual should be made available to the jury before they have to determine between life with parole and the death penalty. Of course, at the same time, one must recognize that substance abuse and lifestyle choices can exacerbate the damage to the brain, and these factors too must be taken into consideration if the court chooses to assess lack of remorse as an aggravating factor. Moreover, jurists should be given the opportunity to hear what leading experts in

psychopathology have to say about the causality between the irregularities in a psychopathic individual's brain and her lack of remorse.

Conclusion

We have thus explained why courts should not treat the display of remorse as a mitigating factor and the lack of remorse as an aggravating factor. Of course, because emotions are an intrinsic part of what makes us human, it would be unrealistic to expect that the emotion of remorse can be completely excised from the courtroom. If US courts do generally continue to treat remorse as a mitigating factor, it is imperative that courts (attorneys, juries, and judges) use a comprehensive model, in line with the complex definition of remorse, to assess whether remorse is truly absent or truly present. Proeve and Tudor propose a model that takes the role of the defendant, the victim and the nature of the wrongdoing itself into consideration; they state that a remorseful person should demonstrate:

> (1) recognition that she has wronged or harmed another person
> (2) recognition that she was responsible for her action, which was voluntary
> (3) a sense that her life has changed in some way as a consequence of her action
> (4) various feelings of internal prickling, vexation or turmoil (can be expressed through one's demeanor or verbal expressions)

> (5) a desire to atone or make reparation, for example by expressing remorse, apologizing, making restitution to the person harmed, undergoing penance, and/or behaving differently in the future
> (f) a desire to be forgiven
> (g) some form(s) of having acted upon the desires to atone, make reparation, or be forgiven (Proeve and Tudor, 48)

These guidelines thus would ask the court to consider not only the physical state of the defendant (e.g. is the defendant weeping?), or her verbal expressions (e.g. did the defendant make a public apology to the victim?), but also requires the jury to truly contemplate whether the defendant recognizes that she has harmed a person, and that the relationship between the defendant and the victim, and the defendant and the rest of society has been forever altered.

Lack of remorse should *not* be a mere negation of these factors. Rather, in the case of psychopaths, neurobiological evidence (MRI scans, for example) should be presented before the jury so that the jury itself (based on expert opinion) can determine whether there is a causal link between irregularities in the brain and the lack of remorse being displayed by the defendant.

The treatment of remorse, thus, must be nuanced in order to ensure that the sentence given is indeed a form of justice in line with the foundational principles of our criminal justice system.

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Sexual Politics, Sexual Communities: The Making of the Homosexual Minority in the United States, 1940-1970

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In order to more keenly understand the gay movement in the United States, one must first enhance their knowledge of how, why, and by whom did this movement—this establishment of a sexual minority—come about. With that said, the logic behind my decision to read John D'Emilio's *Sexual Politics, Sexual Communities: The Making of the Homosexual Minority in the United States, 1940-1970* was to develop an understanding of not only what being gay or lesbian meant in mid-20th century America, but to also trace the genesis of a movement, which today seems to be succeeding in its mission at an ever-alarming pace.

The essence of D'Emilio's argument is that in an attempt to build a new identity and a new form of politics based on sexual preference, the homophile movement helped establish a community that then sustained and today still animates the "gay liberation" effort.

WWII is a crucial catalyst in D'Emilio's description of how homosexuality as an identity began to develop in American society. Before the war, and even for a short time after it, "Condemnation of

homosexuality," according to D'Emilio, "so permeated the culture that gay men and women could not easily escape it. They too internalized negative attitudes about their sexuality[1]" Yet, the massive disruption of traditional social patterns, the predominantly single-sex emotional attachments formed by the war, and the reconceptualization of homosexual behavior within the medical profession all culminated in the formation of a rudimentary gay subculture based in the heart of urban-American society.

Despite the liberating nature brought on by the development of a distinct homophile community, these changes made gays more vulnerable to attack. Cold warriors, like Wisconsin Senator Joseph McCarthy, linked homosexuality with the communist threat, attaching stigma to a sector of American society that had not yet fully formed. Yet, even in the most repressive times membership in the pioneering gay and lesbian organizations of the Mattachine Society and the Daughters of Bilitis (DOB) grew slightly.

It was obvious to even the first gay activists that homosexuals were a minority with a false consciousness; thus, it became clear to people like Henry Hay and Del Martin (Mattachine and DOB co-founders respectively) that the first steps toward civil liberation had to be educational. And so, the succeeding generation of leaders in the Mattachine Society and the DOB promoted a broad-based, democratic structure to the organization that was more supportive of professionals in their study of homosexuality, encouraged good citizenship, and began a network of discussion groups. These changes helped to not only inform the conscious of homosexual and heterosexual individuals alike, but also provided a way for those

questioning their sexuality to examine themselves in ways that they ordinarily could not.

In the 1960s, as President Kennedy championed an age of civil rights reform and the black civil rights movement came to the height of its political influence, a new gay militancy spawned as a reaction to the collective recognition that the pathway to liberation was not by way of conforming to the structures of heterosexual society, but rather by claiming, or, dare I say, demanding equal treatment under the law. All throughout the country, the gay subculture that had existed as a sort of underground cult in major cities for almost twenty years began its political life. For example, in San Francisco the worlds of the gay bar and the gay political movement began to coincide. The harassment of gays, the Tavern Guild—a political organization of gay bar owners and employees—and the Stonewall riots of New York City broke the barriers that had existed between the social and political lives of the typical gay man or lesbian woman. In essence, sexual community and sexual politics began to sustain each other.

In closing, the key element to keep in mind is that the gay movement has developed from one in which its members suffered from a lack of true identity to one that has become wholly self-reliant and that promises formerly outcast individuals a community that allows them to express, rather than repress who they are. For example, in many cities the lesbian and gay communities expended their own resources to maintain separate, homophile newspapers and magazines. And in politics, activists achieved headway by getting gay rights added to the platform of the Democratic Party in 1980. Through its open and active expression, the gay movement had

begun to make homosexuality less of a sexual category and more of a human identity, achieving far more than most activists, scholars, and even D'Emilio himself thought could be achieved in their lifetimes.

Interacting with Themes

There exists a tangential relationship between the gay movement and the fight of racial minorities and women for their rights. Like any sector of American society that has dealt with some form of legal oppression—blacks, Hispanics, Native Americans, Asian Americans, and women—gays and lesbians have struggled to be treated as equals under the law. The distinction, however, between the gay movement and that of others like it is that being gay or lesbian is not as outwardly evident as, say, being black or a woman. In other words, to be gay is not to have an explicit, physical distinction that automatically qualifies one as part of that particular community; rather, to be gay, as is suggested by D'Emilio, is to act upon a different set of biological and neurochemical stimuli that cannot be helped by the structure of a society or the way one was raised.[1] Yet, the dominant view of the time at which the gay movement began was that homoerotic behavior was, by nature, an immoral act of sexual deviancy, and that it deserved to be punishable like any other lewd or "improper" behavior. The difference, therefore, between the gay movement and, say, the "civil rights movement" is that African-Americans did not have to prove that they were black, whereas gay activists had to both establish a new sexual identity, while pioneering a movement that had never truly entered the public view until the 1940s.

Yet, the connecting themes between the struggle for gays and other minorities for their civil rights is, perhaps, best encapsulated by Supreme Court Justice Oliver Wendell Holmes, Jr. in his essay, *The Common Law*. Justice Holmes makes the keen observation that "the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudice which judges share with their fellow-men, have had a good deal more to do than syllogism in determining rules by which men should be governed.[1]"In other words, the fact that American law seems to have historically done the *opposite* of establishing a fairer, more equitable society when it comes to minorities and women, is not due to the invocation of logical thought or meticulous legalese; rather, the source of prejudice in the American legal system comes from a reflection of the moral and political precepts that happened to reign at the time. Throughout the 1800s, women were restricted in their freedom and denied their suffrage. Not until the 1950s did the Supreme Court recognize that racial segregation based on the principle of "separate, but equal" institutions was inherently unequal in *Brown v. Board of Education*. And, not until the case of *Lawrence v. Texas* in 2003 did the Supreme Court acknowledge the right of sexual privacy, striking down a Texas sodomy law that made same-sex sexual activity illegal. The underlying theme, therefore, is that American law has undergone a process of democratic incrementalism over time—a process that is not nearly over, but that is nonetheless observable in the day-to-day. It is this gradual march towards ultimate civil liberation that has marked and will continue to mark the success or failure of minority groups and women to garner true legal equality within American society.

Reviews

Rhonda Rivera of the University of Pennsylvania Law Review agreed with the *New York Times Book Review* in its summation of John D'Emilio's book as "a sympathetic history rendered in a dispassionate voice.[1]" Ms. Rivera would agree with D'Emilio that homosexuality was not even considered to be an identity before the 1960s. For example, she points to three pre-1950 Supreme Court divorce cases dealing with homosexual persons in which none mention "homosexuality" per se, but rather use terms like "unnatural love," "unnatural practices," "sodomy," and "pederasty" to describe homoerotic behavior.[1] There is absolutely no judicial recognition of the husband being homosexual. The Court's only references are to the impropriety of his sexual behavior. These Court opinions collectively demonstrate both a lack of understanding by justices on the issue and a desire, as D'Emilio argues, that society remain silent on the subject—that the courts should somehow look the other way instead of recognizing homoerotic behavior for what it was and is, a physical expression of homosexuality.

Walter Williams of the University of Cincinnati poses certain critiques on D'Emilio's composition. Williams does not question content, but rather its presentation. For Williams, the book was "too compactly written," and needed "more quotation from the activists themselves…and the inclusion of photographs" as a way of personalizing the people.[1] It is understandable why Williams would want a more in depth analysis of the history of how the gay movement was created, and D'Emilio probably could have written much more on the issue if he wanted. But, the mastery of the book,

as mentioned by Rivera, emanates from its clear language and in its brevity. These features of D'Emilio's writing allow for the author to hold the reader's attention for the duration of the book.

Finally, writing for the American Journal for Sociology Ken Plummer highlights D'Emilio's focus on the shifting alignments within the gay subculture of the 1940s, 50s, and early 60s. Plummer rightly states that D'Emilio "focuses constantly on the significant ambivalences of and contradictions between those with the imagination to grasp a future, more emancipated world, and those whose vision of change is restricted to the present.[1]" To the reader, this should seem like the most glaring contradiction with the development of the gay movement because, while gay activists like Henry Hay, who actually founded the Mattachine Society, helped establish homosexuality as an identity they stopped short of demanding equal treatment under the law out of the fear that to do so would cause too much bad publicity and threaten the delicate relationship between the esoterically known gay subculture and the broader heterosexual community. It was not until the following generation of gay leaders and activists, who joined in the broader movement for civil rights in the 1960s, that an establishment of true and distinct sexual communities and sexual politics was realized. Plummer's observation hits at the heart of D'Emilio's thesis, while carefully distinguishing the opposing schools of activism within the burgeoning gay community.

Opinion

I would recommend this book to any law or pre-law student simply because it is an interesting topic regardless of one's

engagement, or lack thereof, with the gay rights movement. The book is well written, succinct, and informative; it tends not to use very complex language or tedious legal jargon, but rather reads somewhat like a conversation. Moreover, because Mr. D'Emilio focuses on the process by which prejudice and intolerant attitudes enter the legal system, his message transcends the plight of gays and lesbians in their fight for equal rights. In a way, therefore, the story of "gay liberation" is similar to the struggle for women's suffrage, immigrant rights, or the call by millions in the "civil rights movement" for the end of segregation and police brutality. D'Emilio makes a successful case for why gays and lesbians are too a part of the ever-unraveling civil rights cause in America; it is clear that he too understands the gradual, but steady progress towards equality that marks the pain-staking process of inclusion in American society. Of course, there is more research to be done. Succeeding generations of scholars have and will continue to develop our understanding of this unique minority group in the American experience, as well as how it has matured politically. D'Emilio, however, has set a clear standard of scholarship and literary clarity that all his successors should emulate.

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