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## THE DIALECTICS: JOURNAL OF LEADERSHIP, POLITICS, AND SOCIETY

Vol. 5  
2011-2012

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# THE DIALECTICS

## An Introduction

*The Dialectics: Journal of Leadership, Politics, and Society* is a refereed, multidisciplinary electronic publication housed at the Abington College of the Pennsylvania State University. The Journal's aim is to promote discourse and scholarship and to encourage students to pursue and engage in thoughtful discourses on topics of societal importance.

The Journal's publication has been made possible by the Lord Chancellor's Chair and the generous support of Albert and Suzanne Lord.



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# ACCESS FOR ALL: FEDERAL FUNDING AND REGULATION OF FOR-PROFIT HIGHER EDUCATION

*By Ashley McAlarney\**  
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*P*rofit-seeking companies can provide opportunities for education that are traditionally unavailable to many citizens. However, at times, some engage in shadowy business practices that can harm students and demonstrate a misuse of public funds. The entanglement of private education and public money, associated with the for-profit sector of higher education, grows more controversial when misrepresentations of programs and inadequate training leave students unable to find employment and pay back federal loans. Recent efforts have been made by the Department of Education to impose regulations on for-profit schools to ensure that they are using fair business practices. Under these rules, if a school is not preparing students for gainful employment after graduation, it is deemed ineligible for federal funding, and attendees cannot receive federal loans and grants to pay for their education.

The scholarly and political discourse regarding higher education finance includes debates between advocates for restructuring of the federal aid system and supporters of more private initiative. In this paper, I will argue that the proposed gainful employment regulation concerning for-profit colleges should be enacted to protect the students involved and regulate the actions of the schools that wish to receive federal funding. I will first explain the rise of for-profit higher education and federal funding. I will then highlight the fraud committed by some of these businesses and show how government should be able to regulate the activities of for-profit schools. Finally, I will discuss the proposed gainful employment rules and demonstrate how for-profits that wish to receive federal funding should be regulated to protect students and provide them with the skills to gain employment. I conclude that the projected regulation can limit for-profit schools so that they can continue to widen access to education in America while avoiding fraud and mistreatment of students.

As education administrator and scholar Richard Ruch (2001) notes, the rise of the for-profit education industry is a direct response to social and economic needs of those who are unable to enter the traditional higher education system. Private schools run by corporations such as the University of Phoenix, Strayer University, DeVry University, and many others offer education ranging from career certificates to the doctorate level. Students in these programs are able to earn their degrees online, in evening classes, and at commuter campuses, as the for-profit education industry works to widen the options for potential students to accommodate their lifestyles and financial situations.

A common problem for non-traditional students is funding their education, and the United States government has provided a solution in the form of federal funding that allows more people gain access to post-secondary schools. The Higher Education Act of 1965 (HEA) was enacted to provide resources to support colleges and universities and to offer need-based

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financial assistance to students. Title IV of the legislation outlines the financial aid policies and eligibility requirements for schools that wish to receive funding under the HEA. Every few years, a reauthorization by Congress is required, when amendments to the programs can be made. The most recent HEA reauthorization occurred in 2008; it is known as the Higher Education Opportunity Act (HEOA). For-profit, private businesses can use federal student aid funding for up to ninety percent of their revenue (HEOA, 2008). Title IV offers low-interest loans and grants to students, allowing many to enter the higher education system. However, there is evidence that some for-profit schools are taking advantage of their students to make sure that they receive federal funding and remain eligible for Title IV. Results from investigations of accused business fraud have led to recently proposed rules by the Department of Education to combat this problem.

When revenue-motivated schools are unregulated, the companies are not accountable for their actions, and students may not receive the education and employment opportunities promised to them. The current debate over federal funding includes the claim that these schools recruit students with shadowy tactics in order to receive the maximum amount of federal funding allowed under Title IV: up to 90% of the schools' annual revenue. The concern over fraudulent business practices in the for-profit education industry prompted the U.S. Government Accountability Office to launch an investigation of a handful of these schools in August 2010. Investigators acted as applicants to fifteen for-profit colleges and programs and found that, in multiple cases, the school representative encouraged them to falsify information on their Free Application for Federal Student Aid (FAFSA) in order to qualify for grants or loans (GAO, 2010). In addition, admissions and financial aid officers from multiple schools provided "deceptive or questionable" information to the applicants regarding accreditation, graduation rates, employment prospects, duration and cost of the program, and financial aid (GAO, 2010). Four investigators who filed online interest forms received 436 calls from for-profit schools in one month, and 179 of these calls were to just one applicant who had expressed interest in a business program (GAO, 2010).

This sampling of for-profit programs and their enrollment methods provides one explanation for the large number of loan defaults on the part of students at these schools. When applicants do not receive the proper training or the benefits that they were promised upon enrollment, they are not adequately prepared for the workforce and can face unemployment, which may lead to loan defaults and poverty. Another factor in this business fraud is that the for-profit schools typically target underrepresented groups that have the most to lose from predatory business tactics. Legal scholars Fox Garrity, Garrison, and Fiedler (2010) argue that for-profit colleges and universities focus on the "disadvantaged student market because of the guaranteed revenue attached to it" and spend less of these profits on instruction.

Given the existence of deceptive practices and the fact that for-profit schools are largely maintained through government funding, the logical solution is federal regulation of this sector of higher education. When government money is used to finance for-profit instruction, there is a basis for the government to hold these corporations accountable to certain quality standards. Courts have agreed. A federal district court in New York, for instance, discerned in *New York State Association of Career Schools v. State Education Department* that regulation was appropriate in a for-profit school case. When the New York State Association of Career Schools (NYSACS) protested a legislation that set the procedures for course and curricula approval at proprietary career schools, the Association claimed that the limits on the schools' activities violated their First Amendment rights to free speech and association, among others. The district

court for the area granted the Department's motion for a summary judgment in 1993. The court determined that the curriculum and course regulation was constitutional under the state's police power, which granted the right to regulate private schools, and the government interest in regulating the schools was deemed compelling. In this case, limits on business practices and the state's interest in approving coursework, most likely for the sake of the students, was reasonable enough to grant such powers. The case is applicable to the national level in the context of private business and federal funds. The government has a vested interest in regulating business practices of the for-profit higher education sector.

Above all, the for-profit schools are businesses, rendering their relationship with students a seller-consumer one. In today's commercial, fast-paced society, numerous students are working toward specific career goals via the higher education system. As University of Hawaii Professor of Law Hazel Beh (2000) writes, "[m]any students expect the school to accommodate the student's schedules and interests and not vice versa" (p.4). Beh applies the contract law principles of good faith and fair dealing to the student-college consumer relationship. The for-profit schools make promises to students in printed literature and through personal contact. When students bring legal action against *non-profit* schools regarding such agreements, courts typically defer to the schools and their educational autonomy in academic matters and other judgments. From the contract perspective, this action effectively ends the protection of the students as consumers (Beh, 2000). The schools run by businesses should not receive the same deference, however.

The U.S. Department of Education (DOE) has proposed legislative changes to Title IV funding rules that can succeed in protecting student consumers and combat the deception and fraud in the for-profit education industry. As U.S. Secretary of Education Arne Duncan has commented on the proposed regulation, "[w]hile career colleges play a vital role in training our workforce to be globally competitive, some of them are saddling students with debt they cannot afford in exchange for degrees and certificates they cannot use" (Proposed Rule, 2010). The DOE's projected changes for Title IV insist that for-profit schools prepare students for gainful employment in today's work economy. In July 2010, the DOE announced potential amendments to the program that will limit the actions of these businesses to ensure that they comply with eligibility requirements. The stricter rules demand that students achieve gainful employment through for-profit programs; their federal loans must be paid back at a certain rate and the schools will need to report what salaries students earn after they graduate. The proposed regulation calls for openness and publication of schools' financial information and business practices (US Department of Education Program Integrity, 2010). The Department of Education can determine if programs are ineligible from Title IV aid in accordance to these new regulatory powers. The businesses have the incentive of federal funding eligibility that can help them strive to meet the DOE's requirements.

Americans deserve access to higher education and the assistance to finance their efforts in order to gain better employment. The proposed gainful employment regulation can achieve these aims by regulating for-profit school activity. Instances of fraudulent practices by some of the schools show that these businesses sometimes place profit-motives ahead of honest information and useful job training. The schools are providing educational services via government funding. Accordingly, the government must impose some limits on their activity. Gainful employment regulations can protect students from the loan defaults that result from the lack of adequate job training.

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# STEM CELL RESEARCH: PROMISES, POLICIES, AND ETHICS

*By Megan Sariego\**  
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There are over 128 million chronically ill Americans suffering from diseases such as diabetes, cancer, osteoporosis, Alzheimer's, Parkinson's, cardiovascular disease, and many more (Herold, 2006). Many diseases and health conditions are cell-based and degenerative, meaning that they get steadily worse over time. Unfortunately, there are currently no permanent cures for these conditions. However, with the help of stem cell research, there might one day be hope for the chronically ill patients.

## **A Personal Experience**

For the past two years, I have been heavily involved in an organization called the Penn State Dance Marathon—THON, for short. It is the largest student-run philanthropy in the world, raising money for the Four Diamonds Fund, created by Charles and Irma Millard after their son, Christopher, passed away due to pediatric cancer. During Chris' three-year struggle with cancer, he wrote a story that was entitled "The Four Diamonds." The hero of this story, Sir Millard, needed to find the four diamonds of Courage, Honesty, Wisdom, and Strength in order to overcome the evil sorceress, Raptinahad (What is THON? - Chris' Story, 2011). In reality, this story was an anecdote for Chris' own struggle with cancer and the characteristics he needed to overcome the fatal disease. Chris passed away at the age of 14, but his legacy lives on through the foundation.

The Four Diamonds Fund was created in order to help those suffering from pediatric cancer. The mission of the Fund is "to conquer childhood cancer by assisting children treated at Penn State Hershey Children's Hospital and their families through superior care, comprehensive support, and innovative research" (What is THON? - About The Four Diamonds Fund, 2011). The Fund strives to provide assistance for the children and their families, whether it is for something closely related to fighting the disease (such as funding research) or something less involved (such as helping to pay for gas to get to and from the hospital).

Penn State University began having a Dance Marathon in 1973. It started out as a 30-hour marathon and raised over \$2,000 that year to be donated to the Butler County Association for Retarded Children. Within the next few years, Penn State changed many things about this event, including the amount of time it lasted, the cause it donated to, and the location where the marathon took place. In 1977, Penn State began its partnership with the Four Diamonds Fund, and the marathon has since solely benefitted that cause (Expanded History, 2011). Today, Penn State's Dance Marathon lasts for 46 hours. Participants, or the "dancers," in the marathon are

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required to remain standing and awake for 46 consecutive hours. THON weekend is a celebration of the yearlong efforts that Penn State students have made to raise money for the Four Diamonds Fund through fundraising events, standing outdoors with collecting cans, and receiving other donations.

This year, I had the honor of being chosen as a “dancer,” representing Penn State’s Abington campus. I participated in the 46 hour no-sitting, no-sleeping dance marathon in February. The weekend was full of laughter, smiles, and tears, as we played games, got to meet Four Diamonds Families, and dealt with the physical and emotional pain caused by the constant standing and lack of sleep. Throughout the weekend, I was in physical pain. I was exhausted and even the well wishes of others were not raising my hopes. At some points, I couldn’t even bear to eat regardless of how much I was told that it would be good to bring up my energy level. I knew that the pain I was feeling was just temporary and I kept pushing through no matter how badly I wanted to give up. What I went through is nothing like what cancer patients deal with everyday. My pain dissipated after a night’s rest, but their pain continues and will not cease until a cure is found. At the end of THON weekend, the total amount of money raised for the year was revealed. This year alone, THON raised \$9,563,016.09 for the Four Diamonds Fund. Since the beginning of THON, over \$69 million has been raised for this cause and that total will continue to grow as the years pass. We believe that one day we’ll dance in celebration, when childhood cancer has finally been defeated. But, until then, we will keep dancing until a cure is found. Stem cell research could be what is needed to battle this deadly disease and save the thousands of children that are diagnosed with cancer every year.

### **What is stem cell research?**

Each human being is equipped with forty-six chromosomes, twenty-three coming from the mother and the other twenty-three from the father. These forty-six chromosomes contain all of the person’s genes. Different types of cells are used for different functions in the body, and, depending on the function, genes become active in a cell or are left inactive. The cells can take on forms such as skin cells, blood cells, bone cells, brain cells, etc.

After the fourth or fifth day of fertilization, a human embryo is referred to as a blastocyst. The embryo has about 150-200 cells at this point, and there are two types: cells that will develop into the placenta and other membranes to connect the embryo to the uterus and an interior group of cells called the inner cell mass. The inner cell mass is what actually develops into the embryo that will eventually become a fetus. It contains human embryonic stem cells.

A stem cell is different than a regular cell because it does not have a specific function. It can either divide into two identical copies of itself or it can divide into one copy of itself and a copy of another specialized cell. Regular specialized cells (such as skin or blood cells) can only duplicate themselves to a limited extent. Stem cells maintain this special ability over time and continue to exist throughout the organisms’ lives in order to replace their specialized cell whenever it is needed (Korobkin & Munzer, 2007).

As previously stated, there are over 128 million Americans suffering from degenerative, cell-based diseases. Defeating these diseases involves regenerative cures. By performing studies on stem cells, researchers can better understand how these types of diseases are formed in the body. If a researcher can understand how a disease is formed, it would become much easier to discover different treatments.

In addition to the learning experience that stem cell research can provide for scientists, it can allow them to test the disease treatments on the cells. A scientist could either make the stem cell into a regular specialized cell to test if the treatments are toxic or harmful to a person or he/she could transform the stem cell into a diseased specialized cell to test if the treatments are effective. Instead of using humans as their test subjects, scientists would just use stem cells that they have collected. Not only does this decrease the riskiness of trying out a new treatment, it would also be time and cost efficient when bringing a new treatment to the market.

A third potential for stem cell research is to use the stem cells to actually cure the diseases directly. This is specifically what is referred to as regenerative medicine. The stem cells could be “prompted to differentiate into healthy mature cells” and “replace diseased or dead cells and thus restore proper functioning” (Korobkin & Munzer, 2007). The stem cell could either be injected into the person at the diseased area of the body to grow new healthy cells or it could be prompted outside of the body to form replacement cells or tissues and then surgically entered into the body.

The first two potentials for stem cell research are definite; there is no doubt that it could provide a learning experience and good test subject for scientists. However, the third potential is not entirely certain. As the authors of *The Promise and Politics of Stem Cell Research* have noted

Alleviating suffering is the promise of regenerative medicine and of stem cell research, in particular. No reputable scientist makes any guarantees about cures or treatments. All anyone can say with certainty is that this research offers great promise. Its promise is an anchor of hope for those suffering from disease and for their caretakers. It is a reasoned hope, based on fact and research, not snake oil as some opponents argue (Solo & Pressberg, 2007, p. 4).

### **What is the debate?**

There are two types of stem cells: human embryonic stem cells and human adult stem cells. The inner cell mass in the embryo contains human embryonic stem cells, which have the ability to create all of the tissues in the human body. After two months of fertilization, the embryo’s stem cells become human adult stem cells (Korobkin & Munzer, 2007). These stem cells can only produce one category of specialized cells and are found in different parts of the body, such as the brain, bone marrow, digestive system, liver, pancreas, muscles, and skin (Bellomo, 2006). Adult stem cells can be used for research, but, because they can only produce one type of cell, they are much less useful.

Human adult stem cells have already been used for treatments. The most common developed treatment using adult stem cells is the bone marrow treatment for leukemia. Bone marrow is transfused back into the patient to regenerate necessary cells that were destroyed from chemotherapy and radiation (Korobkin & Munzer, 2007). However, despite the usefulness of adult stem cells, embryonic stem cells could be much more effective. There could be some types of cells that do not have any adult stem cells and could only be treated with human embryonic stem cells.

An advantage of using human embryonic stem cells is that they live longer in vitro, making them more available to scientists. The human embryonic stem cells from a single blastocyst can produce millions of cells in months, which cannot be done by human adult stem

cells (Korobkin & Munzer, 2007). This could mean that treatments using embryonic stem cells could be more successful or last longer. This also provides enough cells to treat more patients than adult stem cells could treat.

A problem occurs that when human embryonic stem cells are isolated from an embryo, that particular embryo gets destroyed in the process (Herold, 2006). This is where the stem cell debate gets mixed in with abortion debates. Some believe that a fetus is not a human until it is born; some contend that a fetus is a human at the moment of fertilization; and yet others have suggested different time periods throughout the pregnancy. Unfortunately, the varying opinions have been a cause for the slowing down of stem cell research. Some believe it is unethical to destroy an embryo in order to use its stem cells for research, while others believe it is ethical because of the millions of lives this research could save. However, there are frozen embryos in clinics that are not being used. In 2002, a study found that “there were approximately 400,000 frozen embryos sitting in clinic freezers in the United States alone” (Herold, 2006).

### **The Need for a Solution**

It would be in the nation’s best interest to allow federal funding to be used for human embryonic stem cell research. Scientists have been trying to do what they can with the existing embryonic and adult stem cells, but it is clear that what we currently have cannot produce the change that could be created from having more available embryonic stem cells. We have already allowed abortion to take place, so why not make use of the embryos that are not being used? The embryos could save the lives of millions. As Herold (2006) notes, there are

...60 million Americans with some form of cardiovascular disease (including coronary heart disease and stroke), 16 million diabetics, over 8 million cancer patients, 30 million with an autoimmune disease, 10 million with osteoporosis, 4 million with Alzheimer’s disease, and over one and one-half million with Parkinson’s disease. Add to that the victims of spinal cord injury, severe burns and other serious injuries, osteoarthritis, multiple sclerosis, muscular dystrophy, and chronic kidney, lung, and liver disease, and the number of chronically ill Americans easily surpasses 128 million (p. 10).

Our lawmakers need to act. If stem cell research is necessary to cure the diseases that affect so many, then it must be approved for federal funding.

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# PATRIARCHAL MORALITY: AN INVESTIGATION OF NEW NATURAL LAW

By James P. Hurley\*  
University of Oxford

When legal philosopher H.L.A. Hart (1963) wrote in *Law, Liberty, and Morality* that “interference with individual liberty may be thought an evil requiring justification for simpler utilitarian reasons; for it is itself the infliction of a special form of suffering—one very acute—on those whose desires are frustrated by the fear of punishment...[T]he suppression of sexual impulses generally is...something which affects the development or balance of the individual’s emotional life, happiness, and personality[.]” he was commenting on the intimacy that the law holds with the individual. The statement has come to help define many arguments presented in contemporary legal, political, and moral philosophy, specifically those that deal with issues of morality, law, and authority. The arguments that are the concern of this paper, however, are only a slice of that picture: the intersection of law and human sexuality.

Specifically, this study will focus on the work of John Finnis, a legal scholar and philosopher who articulated the theory of “new natural law” and produced works that concisely, eloquently, and succinctly advance the theory. As it will be demonstrated, Finnis’ arguments, as they relate to sexuality—and homosexuality in particular—suggest a secular source, but are, in fact, the compilation of both Finnis’ conservative Catholic views and the works of Germain Grisez, a Catholic moral theologian. In essence, I argue that Finnis’ arguments are theological with a veneer of secularism and should be recognized as such.

Finnis does not label his arguments as theological; on the contrary, he labels them as secular. As such, I suggest that the reader needs to be aware of this inconsistency in the text and attempt to decipher the agenda that Finnis has inserted into the text; the reader needs to be critical and proceed with a certain sense of awareness if he or she is to understand the text in its proper context. Nonetheless, it is important to acknowledge that simply because a work has theological bases, its persuasiveness or import must not be reduced.

## **Sexuality and the Law**

The issue of sexuality and law is relevant today for two primary reasons. First, how same-sex marriage and the law interact is an important consideration. Second, as Hart (1963) correctly points out, there is a very distinct form of suffering that is created when interference with individual liberty, and sexual impulses in particular, exist. One needs to look no further than the suicides in the United States by homosexual teenagers to see Hart’s assertion. As a federal task force in the United States once concluded, “gay youth face a hostile and condemning environment, verbal and physical abuse, and rejection and isolation from their families and peers,” and as such are two or three times more likely to commit suicide (Sedwick, 1993). I advance the notion that governments should protect their citizens through the law and argue that this notion is a clear case of the law’s interaction with homosexuality.

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\* James Hurley is a student at Oxford University. His research interests deal with legal history, and the intersection of law, morality, and litigation.

## “New” Natural Law

At the very heart of Finnis’ argument, which I will refer to as “new” natural law, is a belief in a basic set of principles and values that are always a part of human flourishing. The principles are good for their own sake and not for their instrumental value (Ball, 1997). The way that Finnis (1980) articulates this in *Natural Law, Natural Rights* reads as follows: “a set of basic *practical* principles which indicate the basic forms of human flourishing, as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions.” Finnis goes on to suggest that the basic goods are life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and “religion.”

As for homosexuality, Finnis has inherited his views from Christian theologians such as Thomas Aquinas, who believed that homosexual acts were wrong because they could not produce offspring. For Aquinas, seeking sexual gratification for its own sake was unnatural—a view adopted by Finnis. I argue that there should not be this jump from the inability to reproduce to the conclusion that homosexuals necessarily seek sexual gratification “for its own sake”—and nothing else.

Finnis has constructed his arguments on what he considers to be the immorality of homosexuality based on secular reflections and not on religious principles. He argues, for instance, that “the evil of homosexual conduct...can...be defended by reflective, critical, publicly intelligible, and rational arguments” (Finnis, 1994). He further advances this notion in his earlier pinnacle work when he states that “the basic aspects of human well-being are discernible only to one who thinks about his opportunities, and thus are realizable only to one who intelligently directs, focuses, and controls his urges, inclinations and impulses” (Finnis, 1980). But, in the preface of *Natural Law, Natural Rights*, he admits that there is not much originality in his arguments, and that his “ethical theory...and theoretical arguments...are squarely based on [his] understanding of [Grisez’s] vigorous representation and very substantial developments of the classical arguments on these matters.” Finnis thus *admits* here that his understanding of the most basic issues in his “secular” text have developed from his understanding of a purely theological work. Yet, somehow, Finnis expects the reader to understand his work in a secular sense.

Even though Finnis thinks that acts of homosexual conduct are always wrong, he does subscribe to what he calls a “standard modern position”—the position that the government must not punish immoral acts that are committed in private (Finnis, 1994). However, Finnis also goes on to say that in the private realm “the state’s proper responsibility for upholding the true worth (morality) is a responsibility subsidiary (auxiliary) to the primary responsibility of parents and non-political voluntary associations.” Clearly, Finnis’ support for the protection of homosexual conduct in the private realm is haphazard at best, as he suggests that although the government should not regulate such acts, there are informal authorities (families and nongovernmental entities) that can, and arguably should, regulate such acts.

The state’s *discouragement* of homosexual orientation and conduct, however, is an entirely different matter for Finnis. He suggests that in the public sphere, government has a legitimate role in assisting young people to “avoid bad forms of life.” In fact, he even goes onto say that government has a role in assisting all citizens “in their own resistance to being lured by temptation into falling away from their own aspirations to be people of integrated good character and to be autonomous, self-controlled persons rather than slaves to impulse and sensual

gratification” (Finnis, 1994). It is these two ideas that form the standard modern position that Finnis advances.

In “Law, Morality and Sexual Orientation,” Finnis (1994) states that all same-sex sexual acts violate the good or goods inherent in marital sexual acts of a, potentially, procreative kind. And, by doing so, the decision to engage in sexual acts with a member of the same sex runs against the modes and responsibilities of practical reasonableness, one of the seven basic goods Finnis outlines in *Natural Law, Natural Rights*. As Bamforth and Richards (2008) note, it is for this reason that Finnis believes the sexual acts of homosexuals to be immoral.

If one is to believe the assertion referenced above, I think, then, that *marriage* has become one of Finnis’ fundamental goods, and certainly this is not an appropriate use of the term. Ball (1997) states that Finnis is not incorrect *because* he incorporated an argument of morality and the good to defend his position that government policy should discourage homosexual conduct and orientation. But, rather, Finnis’ argument is incorrect because it is inconsistent and unpersuasive.

Finnis (1994) defines “homosexual activity,” “homosexual conduct,” and “homosexual acts” as references to “bodily acts, on the body of the person of the same sex, which are engaged in with a view to securing orgasmic sexual satisfaction for one or more of the parties.” As Ball (1997) points out, there is a “built in moral misappropriation” in Finnis’ definition of homosexual intimacy. Finnis reduces homosexual conduct to the quest for “orgasmic sexual satisfaction,” and, in doing so, connotes a lack of restraint and self-control by those engaging in homosexual acts. But many homosexual sex acts, similar to heterosexual sex acts, are based on *more* than this simple “orgasmic sexual satisfaction” paradigm that Finnis articulates. The acts are often engaged in by individuals based on mutual affectionate feelings for one another, namely, love. Finnis misconstrues the goal of homosexual activity to be one of sole desire, and not based on love. It is true that some homosexual sex acts are based on desire alone, but the very same can be said about heterosexual sex acts. As Scrutton (1986) writes, “love has an aim which is separate from that of desire. Love seeks companionship, in which mutual well-being will be the common purpose; it is nourished on counsels and conversations, on gifts and tokens, on affection, loyalty, and esteem.” Suggesting that the sexual activity is what drives and defines homosexual relationships, as Finnis does, trivializes the relationships and the humanity of the individuals who are homosexuals. It would not be fair to suggest that all heterosexual couples in committed relationships are on a pure quest for orgasmic satisfaction, so how can one do it here in relation to homosexuals?

The definition of homosexuality that Finnis has advanced is beneficial to his argument because it allows him to distinguish between sex in a heterosexual marriage on one side and gay sex on the other. It gives him the ability to disregard the love that may be present in committed homosexual relationships and presumes love is the foundation of all heterosexual relationships. Finnis states, for instance, that “genital intercourse between spouses enables them to actualize and experience their marriage itself, as a single reality with two blessings (children and mutual affection). Non-marital intercourse, especially but not only homosexual, has no such point and is therefore unacceptable” (Finnis, 1994).

Finnis (1994) uses the language that homosexuals cannot “actualize and experience *their marriage*.” This is valid point, but is not persuasive, for the simple reason that homosexuals by and large are not permitted to marry in most countries. So, if they cannot marry, they cannot “actualize and experience” *their* marriage. Regardless of language, the real issue that must be taken apart in this passage is when Finnis suggests that a homosexual relationship cannot create a

“single reality” because there are two blessings in which the couple is unable to partake. They are (1) children and (2) mutual affection. In regards to the ability to procreate, Finnis is indeed correct, the ability of same sex couples to have children of their own is impossible. They can, however, have children in two other ways: through adoption or by the help of a sperm donor. As for mutual affection, it would be trivial to spend time suggesting that homosexual couples do anything but actualize their love for one another through mutual affection. Of course they do, as would any couple in a loving relationship. It is indeed possible for two men, or two women, to love each other and to channel that love through a desire for each other sexually, just as it is possible for heterosexual couples to do the same.

The last issue that will be dissected here is in relation to the notion that Finnis believes that during heterosexual intercourse the two individuals become one organism—the “one-flesh union” thesis. He writes that “the union of the reproductive organs of husband and wife really unites them biologically [...]; reproduction is *one* function and so, in respect of that function, the spouses are indeed one reality” (1994). On this “one reality,” Bamforth and Richards (2008) examine the work of theologian Germain Grisez and his text *The way of the Lord Jesus*, a foundation of modern theological scholarship. It is here where one can identify the source of Finnis’ footnote on this topic, and it is here where Finnis’ theological stance is center stage. The source of Finnis’ footnote states, “with respect to reproduction, each animal is incomplete, for a male or a female individual is only potential part of the mated pair, which is the complete organism capable of reproducing sexually. This is true also of men and women: as mates who engage in sexual intercourse suited to initiate new life, they complete each other and become an organic unit. In doing so it is literally true that they become one flesh” (Grisez, 1993).

It is important to note that the only source that Grisez cites for this assertion is the Bible, Genesis 2:24. The verse cited in its total context reads that “man shall leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.” The spirit and the connotation of this passage does not argue a biological cohesion of two people, rather it suggests a cohesion of unit, of identity, between the two individuals—and not that they literally become *one* organism. For if *that* were to occur, then the child produced would have been produced asexually. The production of human offspring in an asexual manner is farfetched at best, because it is precisely the function of our sexual organs that create our offspring. It is interesting that Finnis only cites Grisez as support for his one reality statement—and Grisez only cites the Bible. Yet, somehow, the reader is to understand that Finnis’ argument can be understood outside the scope of religion? His arguments simply cannot be assumed secular. The critical reader is forced to proceed with a certain sense of caution in order to decipher any agenda that may be present in the text.

## Conclusion

Religiously-based arguments disguised as secular contentions present a number of challenges to the reader—namely, what role do religiously-based arguments have in constitutional litigation or in political debates? Although it has not been the main aim of this paper to offer a response, it is indeed important to skim the surface of these questions. To what extent, if any, can a theological, or religious argument, be used in the context of modern day constitutional democracies? Does the ability to be white-washed with secularism allow the argument greater flexibility, or does it demand the arbiter to proceed with greater caution?

Based on a modern reading of democracy, constitution, and “rights,” religious arguments *should* not come into account. It is not my contention, however, that they should *never* be taken into account. I suggest that if an issue such as homosexuality comes up in a political debate or in litigation, a religious argument should not be the *sole* base of any single decision. Secularism and the rule of law should guide the *base* decision, and religious arguments, *should they be legitimately applicable*, should only serve as *subsidiary considerations*. They should not define the proceedings or the outcome of the case. Furthermore, it is imperative (if one wishes to adhere to the structure of a legal system of a constitutional democracy) that religious arguments be *clearly labeled as such*, and not painted over with a veneer of secularism.

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# INTERNATIONAL HUMANITARIAN LAW: POSTCONFLICT ROLE IN WORLD WAR II, RWANDA, AND SRI LANKA

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*Jeremy Sarkin* writes that in the aftermath of violent, and especially ethnically based-conflict, a governing body has three reconstruction goals available to it: truth, justice, or reconciliation (2000). These may sound similar, or perhaps complementary, but each can have a separate and distinct connotation for the respective treatment of people and the past. How, then, should the law deal with a country's violent past? Uncertainty about this question has led to the most pressing problem in international humanitarian law (IHL) today: the inconsistency of its application.

This paper focuses on three important cases in the history of IHL: the International Military Tribunal (IMT) at Nuremberg, the International Criminal Tribunal for Rwanda (ICTR), and the case for an international war crimes tribunal in Sri Lanka. Each is set in a drastically different geographical, social, political, and historical setting, allowing a broad scope for analysis. These are not comparable situations, but the issues surrounding the implementation (or, conversely, non-implementation) of IHL are the same.

## **The IMT Nuremberg**

The IMT Nuremberg following World War II was not the first trial to practice IHL, but it represented two important advances. First, it marked the beginning of IHL's application in a systemic (formally institutionalized) and communal way, which set precedent used in many future trials. Secondly, Nuremberg began what Meron (2000) calls the "humanization" of humanitarian law.

The various Allied governments saw the creation of precedent as the IMT's primary purpose. They knew that future legislators would look to the Court as a model, so they wanted its running to be as fair as possible. In the end, of twenty-two defendants on trial (including Martin Bormann, tried in absentia), eleven were sentenced to death, seven were given sentences ranging from ten years to life, and three were acquitted. This last fact speaks more than any other to the strict adherence of the Tribunal to the principles of justice (Harris, 1954).

Another major issue during the beginning phases of the Tribunal's planning was its jurisdiction. State sovereignty had long been the "gold standard" of international relations; a ruler had the authority to do as he pleased within his own realm and no one could interfere. With IHL, however, came the implication of the international community's right to interfere. Decisions on the extent of the Tribunal's jurisdiction determined where national and

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international powers began and ended for international relations in the coming years. At this time, the international community's right to violate state sovereignty did not go very far. The IMT Nuremberg was set up, for example, to prosecute crimes which had "no particular geographic location" (United States, Agreement, 1946); that is, those crimes that would not or could not be prosecuted domestically. In other words, the IMT was not designed to take the place of domestic courts.

However, the Court's definition of its subject matter jurisdiction (i.e. the crimes it could prosecute) was instrumental in establishing the international community's right to interfere, under certain circumstances, in domestic political and military affairs. The charge of crimes against peace (another name for aggressive war, the waging of war for imperialist purposes) is the best example. Historically, due to the principle of state sovereignty, all state actions were considered equally valid and irreproachable. In charging defendants with crimes against peace, the Tribunal established the abnormality and moral unacceptability of waging aggressive war, and the United Nations asserted its role in defining standard behavior (Wright, 1947).

Significantly, however, the Tribunal continues to face one major criticism: that of victor's justice, the idea that the winner of a war prosecutes the loser simply because it can, without a fair and equal look at its own crimes. The Indian judge at the IMT for the Far East, Mr. Radhabinod Pal, was the most notable voice of this perspective. Pal (1947) wrote his final opinion as a protest against what he perceived as a widespread willingness to indict the loser of the war and ignore every distasteful action that allowed the victor to win. Allied bombing raids on Germany and the dropping of two atomic bombs on Japan make this a difficult charge to address.

The IMT Nuremberg also contributed significantly to a greater alignment between IHL and human rights law (Meron, 2000). Historically, lawyers and politicians assumed that neither side would willfully harm civilians without cause. In the name of a "fair fight," the law permitted some perpetrations against innocents, though it prohibited excesses. The younger field of human rights law allowed no perpetrations. When both sides were respectful, IHL was enough to keep war crimes rates low; when one side was willing to "play dirty," however, as was the case in World War II, the rules had to change from protecting the state (IHL) to protecting the individual (human rights law). Nuremberg represented an important step in bringing the two closer.

## **The International Criminal Tribunal for Rwanda**

By the time of the 1994 genocide in Rwanda, the world was a vastly different place than it had been in the 1940s. The Cold War had shifted global power bases, while styles of fighting shifted from international wars between major powers to smaller-scale battles between guerilla fighters, terrorists, and revolutionaries.

Into this turmoil stepped the most shocking genocide in living memory. On 6 April 1994, an unknown individual or group shot down President Juvenal Habyarimana's plane over Kigali, Rwanda. This sparked a massive genocide of Tutsis throughout the country, carried out mostly by Hutu civilians. The United Nations' reaction has become the stuff of bureaucratic infamy: evasion, finger pointing, and inaction. One hundred days later, one million people (both Tutsi civilians and those sympathetic Hutus who tried to protect them) were dead. A Tutsi rebel force known as the Rwandan Patriotic Front (RPF), led by Paul Kagame, took control of the country, amid many of its own human rights abuses.

The International Criminal Tribunal for Rwanda (ICTR), created on 8 November 1994 and still operating today, aims to bring justice to perpetrators, contribute to national

reconciliation, restore peace in the Great Lakes region of Africa, and halt future violations of IHL (Lyon and Drumbl, 2005). Opinions on its success in terms of national reconciliation vary, and success in preventing future violations is simply unknowable. However, the ICTR has failed almost entirely at its goals of bringing all perpetrators to justice and bringing peace to the Great Lakes region.

Two of the main obstacles to the Tribunal's success at bringing perpetrators to justice are the government's sporadic lack of cooperation and the sheer number of suspects. The Court and the RPF government have, since the opening of the Tribunal, engaged in a series of what Peskin (2008) calls "virtual trials," power struggles to determine how history will remember the genocide. Both sides seek moral legitimacy in the eyes of the international community. For the RPF, the simple fact of holding a tribunal lends legitimacy; however, the government also fears that its own crimes, committed as it ascended to power, will come under scrutiny. On the other hand, the United Nations sees the ICTR partly as a way to respond to Nuremberg's criticisms of victor's justice and to make up for the fact that it failed to react appropriately during the genocide (Lyon and Drumbl, 2005).

As these two objectives (of the ICTR and the government) clash, the RPF government tries to force its will by preventing witnesses from attending the trial, stopping Tribunal members from entering the country, and otherwise hindering the Tribunal's work. The ICTR does not have any means of forcing cooperation other than its own negotiations (Lyon and Drumbl, 2005), which necessitate concessions on the non-prosecution of RPF crimes. Both sides are playing for the highest stakes: a place in history.

Additionally, the number of suspects has made it difficult for the ICTR to deal efficiently and fairly with the genocide's aftermath—in the 16 years since the genocide ended, the Court has passed judgment on 64 cases, nine of which are now taking up more resources on appeal (International Criminal Tribunal for Rwanda, 2011). Considering the 110,000 suspects identified by the RPF, it is clear that dealing with such large numbers of suspects should not be the function of IHL.

To deal with this problem, the Rwandan government began using *gacaca* (pronounced *ga-cha-cha*) courts, a traditional community-based form of jurisdiction that relies on a high level of participation in lieu of written laws (Rettig, 2008). Today, *gacaca* is more formal: the *Comité de Coordination* and other organizations supervise the courts. Criticisms of the system include that it enforces legal protections for defendants inconsistently; that the defense has no counsel; and that the judges are not competent, many having less than a primary school education (Taraku and Karlsen, 2002). There is no appeal outside of the system and no counsel for the defense bringing up questions of legal rights for the accused. These parameters fall clearly outside the terms of international law, making *gacaca* far from a desirable solution (Rettig, 2008).

As for its second goal, the ICTR has also failed almost entirely at bringing peace to the Great Lakes region. During and after the genocide, approximately 2,340,000 refugees flowed into Tanzania, Burundi, and especially the Democratic Republic of the Congo (DRC). In September 1996, the Rwandan army invaded the DRC with the alleged purpose of eradicating the "large, partially militarized refugee camps on its borders," which they suspected of hosting *génocidaires*, as well as (secretly) deposing the Western-backed Mobutu regime to gain access to the DRC's rich mineral deposits (Prunier, 2009).

This war has blossomed into a continent-wide and international proxy war and genocide significant for the millions of Congolese it has killed, displaced, and raped (UN report says DR Congo killings "may be genocide," 2010). Though a peace agreement was signed at Pretoria,

South Africa in 2002 and has officially held, undeclared violence against civilians has never really ended. For its failure to efficiently bring perpetrators to justice and prevent Rwanda's spearheading role in the war in the DRC, the ICTR has not achieved its stated goals.

### **Sri Lanka's Alleged War Crimes**

In contrast to World War II and Rwanda, the study of Sri Lanka's civil war and the aftermath is interesting because it is current. Since the end of the war in May 2009, the government and the United Nations have tried to work with and around one another to negotiate the consequences of a war that claimed tens of thousands of lives. The ongoing process of dealing with the fallout of Sri Lanka's civil war allows insight into the work of negotiating with a government, rather than simply the results.

From the time of its independence from British rulers in 1948, Sri Lanka has struggled with economic and social problems between its Sinhalese majority (roughly 75 percent of the population) and its Tamil minority (approximately seven to eight percent), which was favored by colonial leaders. Continuously, Sri Lanka's leaders have attempted to institute Sinhalese as Sri Lanka's *only* official language, sparking widespread discontent (and resulting in the eventual retraction of the bill) and to nationalize the island's major industries while encouraging university-level education, resulting in a large pool of over-educated and under-employed youth. The vision of a socialist society and the services traditionally provided to Sri Lankans, including free education and health care, created high expectations among Sri Lankans, but the stunted and inefficiently managed economy dashed these hopes. Elites and the media portrayed what was really an economic, class-based conflict as an ethnic struggle. The result, in the years following independence, was a steady rise in communal violence and the government's reactionary strangling of civil liberties (Richardson, 2005).

On 23 July 1983, tensions finally came to a head when a Tamil militant group called the Liberation Tigers of Tamil Eelam (LTTE), led by Velupillai Prabhakaran, attacked a group of 15 Sinhalese soldiers, killing 13. The event sparked mass violence around the island, leading to the government's declaration of war against the LTTE. For the next 26 years, war waged off and on, interspersed by attempts at mediation by India and Norway and by the calamitous tsunami that struck South Asia in 2004 (Richardson, 2005). Ceasefires were declared and ignored, but the war did not end until government forces killed Prabhakaran on 19 May 2009. It is estimated that 80,000 civilians lost their lives and 300,000 were displaced; massive levels of other war crimes are also reported (Sri Lanka extends emergency laws, 2009).

Since the war ended, there have been widespread accusations of war crimes on both sides and many international calls for a war crimes commission. Nevertheless, Sri Lanka's government insists that there is no reason to investigate. President Mahinda Rajapaksa categorically denies all claims of governmental wrongdoing. In a July 2009 interview for *TIME* magazine, he vowed that "there was no violation of human rights. There were no civilian casualties. If I did that, it wouldn't have taken 2½ years to finish this. I would have done this in a few hours. These are all propaganda." Rajapaksa further declared that in the east, there had been "zero casualties" (Thottam, 2009).

Unfortunately, the government's ban on humanitarian agencies and foreign journalists since September 2008 hinders our ability to see the situation objectively. Despite this lack of reliable information, the government has been roundly criticized for its human rights offenses, including the execution of prisoners of war, the bombing of civilian "safe zones" and hospitals,

political “disappearances,” and the illegal detention of civilians in internally displaced persons (IDP) camps (Human Rights Watch, 2009).

While these offenses are shocking, and in many cases inexcusable, global media should keep in mind the horrors inflicted by the LTTE. They were characterized by many governments as a terrorist organization and remain notable for such acts as the perfection of suicide bombing techniques, the use of child soldiers, and the assassinations of many politicians. Prior to the 9/11 attacks in New York, the LTTE’s eerily similar attack on the twin World Trade Center towers in the capital of Colombo was the most significant terrorist attack in the world (Bandarage, 2009). The terrorist mission and tactics of the LTTE and the legitimate grievances of the Tamil population should not be confused.

To deal with calls for a war crimes investigation, the government formed the Lessons Learnt and Reconciliation Commission (LLRC) in May 2010 (Human Rights Watch, 2010). However, it is not, as the international community wanted, designed to examine the war crimes committed in the last months of the war, but the failure of the 2002 Norwegian-brokered peace deal (Haviland, 2010). Although the LLRC has encouraged the open expression of Sri Lankans’ experiences and grievances, its close association with the government has led many international critics to the conclusion that it is not independent and is therefore invalid.

Apparently fed up with the government’s war crimes “investigation,” UN Secretary-General Ban Ki-Moon set up a three-member panel to look into the feasibility of creating a war crimes tribunal for Sri Lanka (Connolly, 2010). In late March 2011, the commission released its report, stating that it had found “credible allegations, which, if proven, indicate that a wide range of serious violations of international humanitarian law and international human rights law was committed both by the Government of Sri Lanka and the LTTE, some of which would amount to war crimes and crimes against humanity.” The report places the responsibility for these crimes squarely on the shoulders of the Sri Lankan government and senior army commanders (United Nations, 2011).

Political machinations are one thing, but what about the wishes of the average Sri Lankans? In meeting with a variety of people in Colombo in January 2011, this author heard several common themes in people’s hopes in the international community. Many Sri Lankans simply want to move on with their lives; war crimes prosecution as the international community envisions is not a priority for many. They might be interested in justice at the individual level—that is, finding out who killed their loved ones—but have no interest in an international tribunal (Ruki Fernando, personal comm., 26 January 2011).

In addition, Sri Lankans ask the international community to encourage advancing human rights principles but not use Sri Lankans as political leverage (Indi Samarajiva, personal comm., 27 January 2011). This can start by enforcing human rights evenly around the world: Sri Lankans are highly educated and aware of world events. They (especially the Sinhalese) see that the United States faces no prosecution for its questionable actions in the Middle East and Guantánamo Bay and wonder why, as the first nation to defeat terrorism, they should have to answer for the “byproducts” of that war. In fact, “the tendency of human rights organizations based in the West to use human rights to pressure weak ‘Third World’ states over selected, ethnically identified issues without exerting similar pressures on their own states have led to the charge of ‘human rights imperialism’ from some in the [Global] South” (Bandarage, 2009).

How, then, can IHL be enforced evenly around the world? Some would advocate more domestic-level trials like *gacaca*, albeit with major improvements. Certainly, the United Nations should research and seriously consider the wishes of locals. As for higher-up criminals, Madeline

Albright suggests that the United Nations form a preventative system under which proposed international humanitarian action would not always have to start “from scratch;” it could have a framework for research and action already set up (Goldhagen, 2009). But the most persistent problem in IHL, state sovereignty, hinders the creation of this system. To properly prevent violations of IHL, Albright’s “organization” must obtain the resources and authority to act for all states, without needing to obtain consent for specific actions from any state. The problems of “virtual trials” and state noncooperation should not be allowed to arise. It is a difficult problem and one that will not be solved easily; until it is, the fair practice of IHL could go a long way to solving the field’s most pressing issues.

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# THE SOCIOECONOMIC ROOTS OF SOUTHEAST ASIAN DEMOCRACY

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*Decades of debate over the causes and conditions of democratic transition and establishment have filled pages upon pages of books and journals worldwide. Since Lipset's (1959) often-cited and much-contested statement, "the more well-to-do a nation, the greater chances that it will sustain democracy," what has become known as the "modernization theory of democratization" has arisen as one such causal explanation. Over the years, the modernization theory and its variants have been applied to a wide variety of cases in attempts to challenge its validity. Amid all this wrangling, Southeast Asia has emerged as a region which seems to defy the logic of this theory (Case, 2002). Between its remarkably rich authoritarian regimes and staggeringly poor democracies, at first glance the modernization theory doesn't seem to apply. Yet despite what appear to be a number of exceptions to the modernization theory in the region, it still carries great weight in explaining the state of democracy in Southeast Asia. While leaders and other powerful political figures surely make a difference, individual agency seems to be secondary to the primacy of socioeconomic development. This study will begin by explicating the modernization theory, accompanied by some data to bolster its validity. With this theoretical foundation, I will then bring the analysis to the region at hand to show how each of the eleven cases examined, in its own way, validates the theory. I will conclude by discussing some of the implications of the analysis, focusing centrally on the future prospects for democratization in Southeast Asia.*

## **The Modernization Theory**

The modernization theory of democratization's central claim is that higher levels of socioeconomic development will make states more likely to transition to, and sustain, democratic forms of government. At its core, it is really a theory about power relations. In a poor, autocratic society, power is concentrated in the hands of the few at the top, resembling what Lipset (1959) calls an "elongated pyramid." With the increased individual wealth that comes with state modernization, the power becomes increasingly diffuse, spreading more evenly among the populace's growing middle class. To reemploy Lipset's (1959) analogy, rather than a pyramid, society begins to resemble a "diamond."

It is important to note that it is not simply the increase in individual wealth that directly determines democratic transition and consolidation. For instance, the jump from a per capita GDP of \$1,100 to one of \$1,200, won't automatically lead to a commensurate increase in a regime's quality of democracy in any place, any time. Rather, it is what generally accompanies

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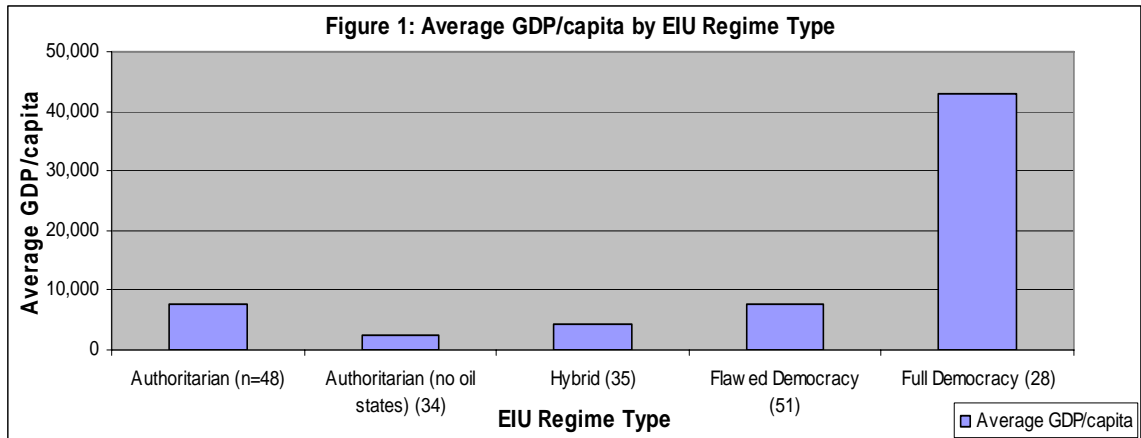
such increases. The reader should take note here that this study purposefully uses “socioeconomic development,” rather than simply “economic development,” to employ a term which encompasses the panoply of changes that generally accompany increased individual wealth in society. These include but are not limited to: a market economy; rising literacy and education levels; an increasingly affluent, urban, property-owning middle class; temperance of class divisions; the secularization of the public sphere; and the rise of an independent and robust civil society (Diamond, 1992; Fukuyama, 2005; Inglehart and Welzel, 2009; Lipset, 1994; Welzel, 2009). A newly-empowered and socioeconomically-developed middle class is expected to push for democratic reforms within the favorable structural context created by state modernization. And if a democratic transition does happen to occur, it will be more likely to be sustained with the support of this newly-empowered *demos*.

In sum, what modernization theory predicts is that, in most cases, it is the shift in relative bargaining power, from the ruling societal elites to the newly-created middle class, which will allow the latter to prevail and set a democratic transition in motion (Haggard and Kaufmann, 1997). The literature on modernization theory is certainly not unified on these issues, however, as there is debate over whether economic modernization is more important for the *initiation* of democratization (Boix and Stokes, 2003), or for the *maintenance* of stable democracy after a transition has taken place (Prezowski and Limongi, 1997). There is also disagreement over what level of economic development is required, but commonly-cited figures generally float around \$7,000 per capita GDP (Boix and Stokes, 2003; Diamond, 1992; Fukuyama, 2006; Prezowski and Limongi, 1997). Some theorists also point that under \$1,000 GDP/capita, states are highly unlikely to transition to or sustain democracy (Boix and Stokes, 2003; Prezowski and Limongi, 1997), and that the range (\$1,000-\$7,000) of per capita wealth forms something like what Huntington (1984) refers to as “the zone of transition.” Whatever the case may be, it seems quite clear that Lipset’s famed statement has firmly stood its ground, as there is broad consensus that socioeconomic development and democracy are positively correlated (Burkhart and Lewis-Beck, 1994; Diamond, 1992; Huntington, 1984; Ichimura and Morely, 1999; Inglehart and Welzel, 2009; Lipset, 1994), and that the causal arrow runs from development to democracy (Boix and Stokes, 2003; Burkhart and Lewis-Beck, 1994; Diamond, 1992; Huntington, 1984; Inglehart and Welzel, 2009).

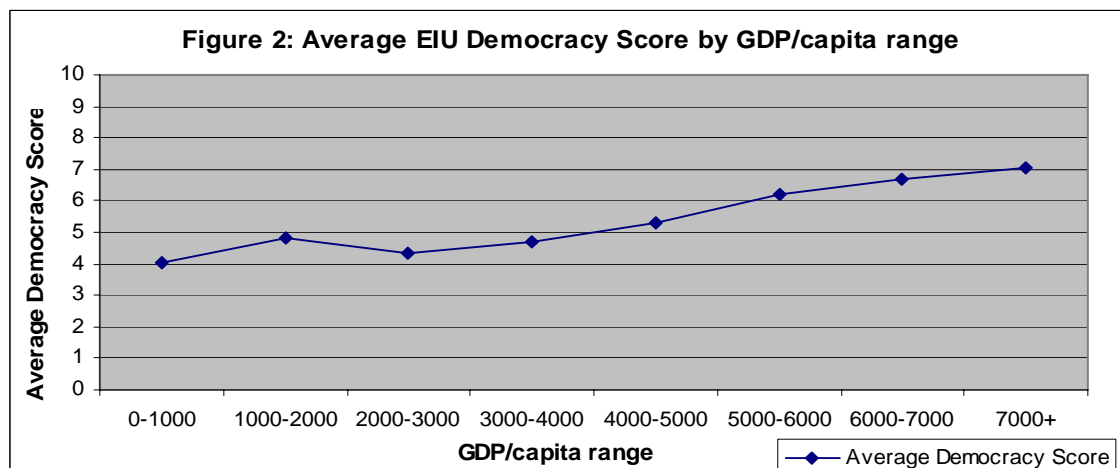
It is also important to remember to not allow exceptions to define general rules, and this old aphorism should be well-heeded with regards to the modernization theory. Like anything else in social science, it is not perfect, neither a silver bullet nor a panacea. Undoubtedly, individual agency matters. Yet it is also clear that individuals act within the structural context of certain levels of socioeconomic development. If the agents being referred to are the populace, they will be more likely to successfully push for democracy when they are empowered through increased social and economic resources. If the agents are societal elites, in most cases they will be relenting to bottom-up pressure from a newly-empowered middle class, rather than altruistically forfeiting their power positions. It is not that agency doesn’t matter; it is that it is most often preceded by structure. But perhaps I should allow the numbers to speak for themselves.

In 2008 the Economist Intelligence Unit (EIU) developed an index that measures the quality of democracy in 165 states and territories around the world (2008). The index scores states on a scale from zero to ten (zero being perfectly non-democratic and ten being perfectly democratic) based on a fairly rigorous set of criteria that measure electoral processes and pluralism, civil liberties, government function, political participation, and political culture. Based on these criteria, political regimes are characterized as “authoritarian” (0-3.9), “hybrid” (4.0-5.9),

“flawed democracy” (6.0-7.9), and “full democracy” (8.0-10). Looking over the data for 2008 supports the claims made by modernization theorists. The average GDP per capita among “full democracies” is \$43,096, among “flawed democracies,” \$7,537, among “hybrid regimes,” \$4,333, and among “authoritarian” regimes, \$7,801. Once primarily oil-producing economies are controlled for, this final category falls to \$2,388 (See Figure 1). Figure 2 (below) shows the process of democratic development as states progress through Huntington’s aforementioned “zone of transition.” States with GDP/capita between \$0 and \$1000 have an average democracy score of 4.04, progressing all the way up to states above \$7,000, which have an average score of 7.02 (See Figure 2).



Further, of 54 states with a GDP/capita above \$10,000, a mere eight are authoritarian. The eight states have something in common: Equatorial Guinea, Libya, Oman, Saudi Arabia, Bahrain, Kuwait, the UAE, and Qatar are all primarily oil-producing economies. And of 69 states with a GDP/capita less than \$3,000, only two (India, East Timor) have democracy scores of seven or better. In sum, in 2008, if your GDP/capita was above \$7,000, you were, on average, a “flawed democracy” leaning toward “full democracy” (7.02). If the GDP/capita was below \$7,000, you were likely a “hybrid regime” leaning towards authoritarianism (4.71).



## **Southeast Asia**

I must now turn to this study's region of interest, Southeast Asia, which, for the purposes of this paper, will include all ASEAN member-states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar/Burma, Philippines, Singapore, Thailand, Vietnam), and East Timor. Here the data seems to continue to support the modernization theory. In 2008, the average EIU democracy score of a Southeast Asian state with a per capita GDP above \$7,000 is 6.69, within the "flawed democracy" range. For states below \$7,000, the score drops to 4.72, a lower-level "hybrid regime" score. Other indices correlate with the EIU findings. The Polity IV Index (2010) measures political systems on a twenty-point scale from negative ten (perfect authoritarian) to ten (perfectly democratic). In 2008, the average Polity Score of a SEA state above \$7,000 GDP/capita was 4.46, and below \$7,000, 0.85. Freedom House's Freedom Index (2010) assigns scores from one (full freedom) to seven (no freedom) for both political rights and civil liberties; adding these scores and dividing the total by two provides a "combined score." The 2008 Freedom Index combined scores show Southeast Asian states with per capita GDPs above \$7,000 averaging 3.87 (higher), and below \$7,000, 4.93 (lower)

Of course, the use of quantitative data in analyzing only eleven cases can be highly misleading, requiring individual case examination. For our purpose, Southeast Asian states can be broadly categorized in three ways: (a) those that fit the modernization theory readily; (b) those that are easily-explainable exceptions to the theory; and (c) those in the "zone of transition."

### **Those that fit readily**

Four of the regional states conform nicely to the modernization theory, although for somewhat disheartening reasons. Cambodia, Laos, Vietnam, and Myanmar/Burma are just as authoritarian as the theory would predict them to be. Cambodia's current GDP/capita sits at \$805 (IMF, 2010), its EIU (2008) democracy score at 4.87 (low-hybrid), and Freedom House (2010) has given it a combined score of 5.5 and labeled it "not free." Laos, too, is a very lowly-developed state, with a GDP/capita of \$878 (IMF, 2010), and its EIU democracy score is, appropriately, 2.1 (authoritarian). Much like the cases of Cambodia and Laos, Vietnam also fits readily. In spite of recent impressive growth levels, it remains relatively poor (GDP/capita \$1,060), and highly autocratic, with a democracy index score of 2.53 (EIU, 2008). And Burma, which has one of the more repressive governments in the world, has a per capita GDP of \$459 (IMF, 2010), and a democracy index score of 1.77 (authoritarian), the fifth-lowest of the entire dataset (EIU, 2010). As a result of their authoritarian forms of government, the four states—Cambodia, Laos, Vietnam, and Myanmar/Burma—are almost exactly as undemocratic as the modernization theory would predict.

### **The exceptions**

Southeast Asia also includes a number of states which, on the surface, appear to be exceptions to the modernization theory. The first, most prominent, and most often-cited by critics as undercutting the legitimacy of the theory (Case, 2002) is Singapore. With the region's highest GDP/capita of \$37,293 (IMF, 2010), its highest human development rating (0.94) (UNDP, 2010), and its highest transparency rating (9.2) (Transparency International, 2009), one would expect Singapore to have a much higher democracy score than the 5.89 (hybrid) that it does

(EIU, 2008). But there are two very good reasons for this. The first is the size of Singapore's massive civil service relative to its small population on a territory smaller than that of New York City. For a population of just 4.66 million, Singapore maintains a civil defense force of 522,800, totaling 11.2 percent of the entire populace (IISS, 2010). Comparatively speaking, the next-closest regional state is Vietnam (6.2 percent), whereas most states in the region, such as, Malaysia (1.7 percent), Thailand (1.0 percent), Indonesia (0.4 percent), and the Philippines (0.3 percent) have civil defense forces that are relatively *much* smaller. If we add the 66,000 or so non-defense-sector civil servants to Singapore's total (UN, 2005), this number swells to 12.6 percent of the population officially tied to the ruling regime, the People's Action Party (PAP). Further, if we assume that each civil servant has just one dependent, we arrive at the conclusion that about one in every four Singaporean is dependent on the success of the PAP. As such, the party has successfully "co-opted the state" (Dayley and Neher, 2010) to maintain its power. The second reason is that since its independence in 1965, Singapore has been afforded the incredibly rare blessing of highly capable authoritarian leaders. With the regions highest level of individual wealth, most transparent government, highest literacy rate (94.4 percent) (UNDP, 2010), and longest life expectancy (80.2) (UNDP, 2010), Singapore is enviable to most in the region and the world, leaving citizens little reason to throw off their yokes and demand a democratic shift.

The next notable exception is the micro-sultanate of Brunei. With its high level of economic development (GDP/capita \$26,325) (IMF, 2010), the modernization theory would predict it to be more democratic than the combined score of 5.5 and the "not free" designation Freedom House (2010) has given it. This anomaly can be explained by the fact that, like the eight highly-developed authoritarian states referred to earlier, Brunei is a state that is quite literally "floating on oil" (Kingsbury, 2004). According to the CIA (2010), over 50 percent of Brunei's GDP is accounted for by crude oil and natural gas production; the commodities comprise over 90% of the exports.

The final exception in the region is East Timor. Being one of the poorest states in Southeast Asia with a per capita GDP of \$542 (IMF, 2010), its democracy index score of 7.22 ("flawed democracy") (EIU, 2008) is surprisingly high, as is its Polity IV (2010) score of seven. This contradiction can be explained by the fact that East Timor is an embryonic state that has only had official international recognition since 2002, after breaking away from Indonesia in 1997. That it is so democratic has more to do with international pressure, a desire to attract development aid, and global norms than any natural process of development. It is also important to point out that in spite of its impressive democracy scores, its abysmal transparency rating of 2.2 is even worse than that of authoritarian Vietnam (2.6) (Transparency International, 2009). Also, according to the World Bank (2010b), its government functions at a lower level than that of Cambodia. Furthermore, the Failed States Index (2010) has placed it between North Korea and Ethiopia as the eighteenth-most failed state in the world. In sum, Singapore, Brunei, and East Timor are easily-explainable exceptions to the overall logic of the modernization theory.

### **The "zone of transition"**

The last four regional states, Indonesia, Malaysia, Thailand, and the Philippines, fall under the "the zone of transition" category. As far as their economic development goes, the four sit in between the affluence of Singapore affluence and the relative poverty of East Timor. The Philippines has a GDP/capita of \$1,745; Indonesia, \$2,238; Thailand, \$4,108; and Malaysia, \$6,897 (IMF, 2010), all not too rich and not too poor. With regards to their levels of democratic

development, the states also form a middle ground, with EIU index scores all in the sixes (Philippines, 6.12; Indonesia, 6.34; Malaysia, 6.36; Thailand, 6.81), Polity IV scores between four and eight (Thailand, 4; Malaysia, 6; Indonesia, 8; Philippines, 8), and Freedom House combined scores between 4.5 and 2.5 (Thailand, 4.5; Malaysia, 4; Philippines, 3.5; Indonesia, 2). Some states in this category, such as the Philippines, have had relatively free, fair, and competitive democratic elections, while others, such as Malaysia, have not. Some states, such as Indonesia, have seen recent improvements in their quality of democracy, measuring 3.5 and “partly free” in 2005 and increasing to 2.5 and “free” by 2010 (Freedom House, 2010). Others, on the other hand, such as Thailand, have seen it decay, going from 2.5 and “free” in 2005 to 4.5 and “partly free” in 2009 (Freedom House, 2010). While it is clear that Indonesia has progressed considerably more in this process than Malaysia, neither can be said to be fully democratic or fully authoritarian. What essentially brings these four states together is the fact that they are in a state of flux between more-authoritarian and more-democratic forms of governance, and that, in this state, they can, at times, both progress as well as regress. As a group, they are only somewhat democratic. They are also relatively corrupt, measuring between 2.4 and 4.5 out of ten in the Corruption Perceptions Index (Transparency International, 2009). And, finally, they have governments that generally function at only mediocre levels, ranking between 35 and 59 out of 100 (Indonesia, 35.48; Philippines, 37.38; Thailand, 43.48; Malaysia, 58.93) according to the World Bank (2010b). Effectively, these states are *in transition*.

## Conclusion

In sum the, it appears that the modernization theory applies to Southeast Asia after all. Between the states that are an obvious fit (Cambodia, Vietnam, Laos, Burma/Myanmar), the states that are easily-explainable exceptions (Singapore, Brunei, East Timor), and the states in the “zone of transition” (Indonesia, Malaysia, Thailand, the Philippines), the modernization theory is applicable to each case in its own way. With this in mind, can anything be said about the future prospects of democracy in Southeast Asia?

First, the states to watch are Malaysia and Vietnam. Malaysia is the most highly-developed among the states in the “zone of transition” and the least democratic. As it leaves the zone and begins to push beyond the \$7,000 per capita GDP mark, it will be increasingly likely to take steps in the direction of democracy. Vietnam is just entering the zone (GDP/capita \$1,060), and, as it continues its rapid ascent, it will be interesting to see whether increasingly-empowered voices for democracy will be heard at the highest levels of government.

Secondly, the fast-paced economic growth in the region is certainly a hopeful prospect. In regional autocracies, economic growth over the past decade (2000-2010) has been impressive, with Laos averaging 6.73 percent GDP growth; Vietnam, 7.46 percent; Cambodia, 9.25 percent; and Myanmar a whopping 12.98 percent (World Bank, 2010a). A number of Southeast Asian states have also weathered the global economic crisis impressively. While the global average rate of economic growth was -0.8 percent in 2009, Vietnam sustained a 5.3 percent growth rate; Laos, 6.4 percent; and East Timor, 7.2 percent, the sixth-highest rate in the world (CIA, 2010). If these states continue to grow, they should become increasingly democratic.

Thirdly, just because it is *possible* for all of Southeast Asia to become democratic does not mean that it is *probable*. As long as we exist in a world of finite economic resources, it is likely that global democracy will, in most cases, continue to reflect this reality.

Lastly, the most effective way to promote democracy in the Southeast Asian region is to encourage further economic growth. Overthrowing authoritarian regimes by force or backing elites who *claim* to be democrats seem to be far too risky ventures to undertake. While economic growth may not automatically lead to democracy, it is perhaps the most reliable enabling agent for democracy's future.

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# THE MEDIA IN CHINA: AN ONGOING EVOLUTION

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*Winds flap the sail, tortoise and snake are silent, a great plan looms. A bridge will fly over this moat dug by heaven and be a road from north to south. Over tall chasms will be a calm lake, and if the goddess of these mountains is not dead she will marvel at the changed world.*

-Mao Zedong, June 1956

Chairman Mao Zedong wrote these words in a poem during the latter years of the Great Leap Forward—an optimistic though problematic era for China. He spoke of change economically, politically, and culturally. His words foreshadowed watershed moments in Chinese history, including the Hundred Flowers Campaign, Anti-Rightist Movement, and the Cultural Revolution. Mao launched China on a path that would fundamentally alter the nation's course of history, creating a global power that would have to cope with human tragedy. But, while Mao certainly brought change, it is doubtful that the mountain goddesses would marvel at all his changes. One of the changes brought affected the functions of the Chinese media. This paper will examine the Chinese media during the Mao and reform eras and will study the changes in media behavior under Mao and later periods. The first half of the paper will provide an analysis of the media during the Mao era, highlighting the functions, methods used, and the effects of the media during that time. The paper will strive to illustrate the basic framework within which the media operated under Mao in order to lay a foundation for comparison with the reform era, to which the second half of the paper will be devoted.

## **Mao and the Media**

The primary function of the media during the Mao era was to act as the link between the Chinese Communist Party (CCP) and the general Chinese population. The media were to be proactive in transmitting the ideological messages of the party and mobilizing the public. While recovering from the Long March of 1934-1935 and building an army in Yan'an, Mao and the early CCP developed a system of mass line governance (Chang, 1989). Because China was so large in terms of geographic size and population, Mao saw it necessary to ensure that the nation was unified under a blanket of intense ideology. Thus, his theory of mass line governing was forcefully applied to journalism. The media were to be the “mouth and tongue” of the CCP—mobilizing the masses toward social progress, but never reporting on the internal affairs of the

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CCP (Ni, 2008). Thus, the media's primary purpose was to ensure that every person was constantly bombarded with the ideals of communism.

The media's function as transmitter of the CCP's ideology resulted in several other sub-functions. In addition to propagating policies, the media were charged with educating the masses, organizing the masses, and, ultimately, mobilizing the masses. This was done to strengthen the socialist state (Bishop, 1989). These functions can be seen in several different points in Chinese history. For instance, during the Korean War of 1950-1953, the radio was used extensively to broadcast to groups of people huddled around radios in villages or factories in an effort to rally the nation behind the Chinese-backed counterattacks on the United States' forces. Newspapers also pushed for party organization by transmitting the party's message (Bishop, 1989). The CCP exercised strict censorship to prevent criticisms, uprisings, or challenges to authority. Often, newspapers would attack critics and verbally destroy opposition (Chang, 1989). While the message that was promoted by the CCP often went through different phases and slight variations, it remained fairly constant throughout the Mao era. The message that was transmitted was one of praise for Maoism—Mao's modified version of Marxism and the belief in political transformation via revolutionary struggle by the masses against class structure and state corruption (Chang, 1989).

During the Mao era, any private ownership of newspapers that previously existed was abolished. Moreover, the CCP limited the number of media sources to a few big titans that the party directly controlled. During the Cultural Revolution, for example, only 43 publications were in circulation, and almost every newspaper sought to copy the *People's Daily* verbatim. Journalism suffered as the CCP placed excessive emphasis on class position and often distorted reality (Ni, 2008). The most influential newspapers such as *The People's Daily*, *Liberation Daily*, *Beijing Ribao*, and *China Daily* placed an emphasis on the style of communication. Namely, they sought to display their message in a brilliant and vivid manner that the masses would remember (Chang, 1989). Other media hallmarks during the Mao era included memorable posters, revolutionary artwork, and Mao's *Little Red Book*. Mao himself became the centripetal force to whom everyone looked (Mao and the Art of Management, 2007).

The media were also instrumental in Mao's sociopolitical campaigns. During the First Five Year Plan of 1953-1957, for instance, newspapers would report amazing success stories and attribute the successes to communist ideology; the film industry emphasized nationalism, patriotism, and industrial development; and a number of Chinese classics were reprinted to mobilize people and encourage national pride (Bishop, 1989).

In short, the media infiltrated all areas of Chinese life. They provided educational and organizational material to party members who then educated their constituents. Media sources also provided inspiration on a broad level by mythologizing Mao and transforming lesser figures, such as peasant Lei Feng, into heroes. This inspiration was absorbed by parents and taught to children. Music, plays, films, and operas all transmitted the merits of Maoism to viewers. Soldiers in the People's Liberation Army learned the CCP's message from their fellow soldiers and officers in the barracks. Mass organizations and campaigns buttressed the concepts of political participation and personal networks (Bishop, 1989). And the personal communication system guaranteed that, despite China's size, every individual would receive the CCP's message.

The CCP-controlled media brought ideological uniformity. However, the belief that Maoism was the supreme form of governance proved to be an ideological shackle. It prevented economic liberalization, blocked off foreign competition, discouraged talented students from pursuing careers in journalism, and impeded technological innovation (Chinese Media, 2007).

Another role of the CCP-controlled media during the Mao era was the suppression of opposition. For instance, after the Hundred Flowers Movement of 1957, during which Mao encouraged suggestions and criticisms of the CCP, the media were actually utilized to attack emerging critics. During the Anti-Rightist Movement, those who criticized the government were subjugated to verbal abuse, physical torture and, in some cases, death (Alternative Reality, 2008). In 1965, the vice-mayor of Beijing, Wu Han, was attacked for his play “The Dismissal of Hai Rui” because of its critical air towards rule under Mao. Any desire for real news coverage was condemned and seen as bourgeoisie. Accordingly, real change to media coverage was never realized during the Mao era (Chang, 1989).

An additional function of the media during this time was the mobilization of millions of people during various campaigns and movements. This mobilization created a type of political fanaticism that could be harnessed to bring about far-reaching results. The Great Leap Forward witnessed mass mobilization focused on economic change. Although the Great Leap Forward failed to realize its goal—to bring China up to par with other modernized countries in a few months—it did demonstrate the power of the CCP controlled media. Rural communication was especially impressive as almost all of China was organized into communes and mobilized toward production within a matter of weeks (Bishop, 1989). In summary, the roles of the CCP controlled media during Mao, as outlined above, were ideological uniformity, suppression of ideology, and mass mobilization. Much of this was to change in the years after Mao’s death in 1976.

### **The Media During the Reform Era**

The media’s function in the post-Mao reform era has become increasingly a reflection of consumerism—namely providing entertainment and information to Chinese citizens. The information that is provided to the Chinese masses has taken the form of news coverage. During the SARS epidemic of 2002 and the Avian flu epidemic of 2003, for instance, television channels such as *Caijing* covered the stories in great detail (Pei, 2007). The media has also become a source of entertainment. In this arena, the Internet has been particularly instrumental. Pirated films, shows, and movies are commonplace. Social networking sites such as “Tencent” have become increasingly popular. The general trend has been toward a more social world—where people can joke around, play games, and use the Internet for their own entertainment (Alternative Reality, 2008).

In that sense, the media have become a consumption product. As people have been given more time for leisure, a result of modernization and economic reform, the media have become a matter of choice. Gone are the days of forced indoctrination. And while the national level ministries and local governments still play a large role in managing the media, increasingly they have been forced to realize that China’s current economic liberalization has resulted in the perception of the media as a cultural product (Howkins, 1980). Thus, the function of the media during the reform era has turned away from the ideological indoctrination of the Mao era toward a more consumer-based model with an emphasis on choice.

The methods of the media during the reform era have been a mixture of Mao era methods and modern techniques. The Mao era methods that have continued include state censorship. Sensitive topics like democracy and Tibet are still off limits for the media. The Chinese government has continued to detain more journalists in prison than any other country in the world. Newspaper publishing houses are still owned by the government, so newspaper content can be screened against opposition (Griffiths, 2006). While cultural despotism appears to have

weakened in the reform era, the government still has a monopoly over many of the traditional means of production and distribution. Much of this is due to a system of path dependency by China's leaders who are often supporters of the centrist media model of the Mao era because of an intrinsic fear of democratic pluralism (Howkins, 1980). Nevertheless, many of the methods have begun to change.

Emerging technologies have provided a number of new methods for new media to reach the masses. China now has 485 million Internet users. Even though the Chinese government has placed filters on Google's search engine and sites like Wikipedia in order to exclude politically sensitive information, the vastness of the Internet has simply provided a tool for fringe media groups to prosper (Alternative Reality, 2008). Furthermore, the CCP has deregulated much of the media industry, and with this has come a gradual diminution of CCP censorship of the media. Thus, the methods of the media during the reform era have included new tools of attracting users, thanks to technology and an overall reduction in regulation by the government.

As the media industry has begun to prosper and become profitable, investments have begun to shower the sector (Pei, 2007). With these investments, there is now competition for funding. Throughout these developments, an increasing tension between the media and the government can be observed. The new functions and methods of the media are weakening the government's grip over the mass line. The size and complexity of the Internet have made it increasingly difficult for the government to control everything that goes online (Griffiths, 2006). At the same time, media companies must look after their own commercial interests; they must appeal to their audiences if they want to retain viewers and make a profit. What has emerged is a type of hybrid ideology, where the media try to balance their commercial interests with the wishes of the CCP, often times pushing state ideology to the limit. A fair amount of state protection still exists, as the CCP limits market competition in order to maintain strongholds in the media industry. Thus, there are many conflicting identities and images as the tensions mount (Lee, 2003).

## **Conclusion**

During the Mao era the media was dominated exclusively by the CCP. The function of the media in that era was to link the CCP to the mass line so that each individual would be able to understand the party's message. The methods of the media included complete control by the CCP, continuous propaganda used for mass persuasion, and a very large and effective personal communication system. The roles of the media were strict emphasis on ideological uniformity, the complete suppression of all opposition, and the mass mobilization of millions of people.

The reform era has witnessed a decline in the influence of the CCP over the media as market reforms and economic liberalization have begun to undermine CCP's control. During the reform era, a major function of the media has been to provide entertainment in the new age of Chinese consumerism. The results have been threefold. First, changes in the media landscape have highlighted the free market principles of investment and competition. Second, the reform era has witnessed a growing tension between the government and the media. And third, the media have been able to promote national pride in the midst of globalization and international pressure. As such, the media's influence and freedom have gradually increased since Mao.

Nevertheless, in the midst of the triumphs that the reform era has allowed the media to have, it is clear that there is still a long way to go. Much of the progress in the media sphere depends on political liberalization, which in turn depends on the success of economic reform.

Even with economic and political change, China will still have to cope with problems that are rooted in the Mao era and have years and years to go before they are finally resolved.

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# AMERICA'S EMISSIONS TRADING SCHEME: APPLICABILITY TO CHINA'S ENVIRONMENTAL PROTECTION

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China's rapid economic modernization in the past few decades would not have been possible without the nation's heavy reliance on coal combustion for energy and power. As such, the extraordinary economic boom comes with a price; the relatively unregulated burning of coal has led to excess emission of SO<sub>2</sub> into the atmosphere, creating acid rain that degrades the environment and threatens citizens' health. In 2000, SO<sub>2</sub> emissions reached nearly 20 million tons, resulting in the exposure of approximately 70 percent of southern Chinese cities to acid rain (Wang *et al.* eds., 2002). The total economic cost incurred due to acid rain was estimated to be over \$13 billion, constituting approximately 2 percent of China's GDP for 2000 (Wang *et al.* eds., 2002).

In response to the increasing SO<sub>2</sub> pollution, China has implemented a series of measures to at least halt the growth of SO<sub>2</sub> emissions, mainly through the command-and-control approach and the pollution levy system that centers upon the Polluter Pays Principle (PPP). Limited success has been achieved to date, however, due to suboptimal framework design in creating economic incentives and lack of legal enforcement. The United States, in contrast, confronted by the threats of excess SO<sub>2</sub> and acid rain, has successfully reduced SO<sub>2</sub> emissions through the establishment and enforcement of a cap-and-trade system. According to data published by the United States Environmental Protection Agency (EPA), total SO<sub>2</sub> emissions measured by continuous monitoring devices in the United States declined from 23.1 million tons in 1990 to 18.6 million tons in 1995 and to 15.8 million tons in 2003, a "greater than expected" decline thanks to cap-and-trade (Layzer, 2006).

This raises the questions of whether the cap-and-trade scheme can be effectively applied to the environmental protection framework in China and under what circumstances. We can look at the prerequisites of the cap-and-trade economic model, and at the differences in legal enforcement, monitoring, and verifications systems. We may conclude that the U.S. SO<sub>2</sub> emissions trading scheme could be adopted as the framework for China's future SO<sub>2</sub> reduction efforts, as long as the Chinese government makes a serious effort to create and maintain the necessary socio-political and socio-economic conditions on which the U.S. model is based.

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The problem with the current pollution levy system, the SO<sub>2</sub> reduction scheme that is most commonly applied in China, is that it fails to internalize the total social costs incurred on society due to SO<sub>2</sub> emissions and creates very limited incentive for technological innovation to curtail emissions. Implemented in 1978, the pollution levy system requires the polluters to pay for the excess amount of SO<sub>2</sub> they emit into the atmosphere at a rate of RMB 0.2 per kg, an equivalent to \$23 per ton, a rate too low to compensate for the average social costs incurred (Wang *et al.* eds., 2002). As the cost/benefit analysis indicates, it is more economically expedient for enterprises to pay the levy rather than installing desulfurization equipment, for example. For enterprises that can easily meet the emissions standards, there is no economic incentive for them to further reduce their emissions. Lack of enforcement is another problem. Although the central government sets the emissions standards, the local governments are required to be agents in implementing the regulation and collecting levies. It has been reported that revenue collections tend to be sensitive to local environmental and economic conditions. In the late 1990s, for example, emissions fees generally were collected only from profitable enterprises and the actual fees were negotiable with the local Environmental Protection Bureaus (EPBs) (Morgenstern *et al.*, 2005).

The cap-and-trade system, by contrast, has outstanding advantages. As a market-based instrument, it transforms the hard power of the standard command-and-control strategy into soft power by manipulating incentives under the creation of tradable permits. The rationale in favor of the market lies in the fact that the system would allow those with higher marginal control costs to buy emission permits from those with lower marginal costs, creating an economic incentive for the latter to reduce emissions below allowable levels. It is true that the cap-and-trade system may create pollution “hot spots,” geographic areas that are awash in sulfur dioxide emissions; and it is also true that firms that bear low marginal emissions cost might hoard their permits instead of selling them to squeeze their competitors out of the market (Ellerman, 2002). However, the tradable nature of pollution permits, at least in theory, gives rise to several advantages over economic charges. First, tradable permits diminish the uncertainty as to whether the acceptable level of environmental quality will be attained so long as the cap is monitored and enforced, since the government can effectively “cap” the pollution and leave it to the market to generate the necessary means to achieve this end. This approach eliminates the need for the government to estimate how polluting firms will likely respond to an emissions charge. Second, tradable permits do not need periodic adjustments to accommodate the effects of inflation or industrial expansion, as these changes are directly reflected in the permit price. Third, the system of tradable permits controls environmental quality in a manner that is less administratively and politically objectionable than the system of emissions charges, as the “invisible hand” of the market rather than governmental agencies becomes the scapegoat if anything bad happens (Ashford & Caldart, 2008).

China has been experimenting with the cap-and-trade system on a small-scale, as with the emissions trading pilot project in Taiyuan City in Shanxi Province; but these efforts have borne little fruit. In 1998, the People’s Congress of Shanxi Province approved the nation’s first regional total emissions control regulation with provisions for the use of tradable pollution permits in Taiyuan City (Wang *et al.* eds., 2002). Taiyuan City, whose industry is based on coal mining, coke production, iron and steel, and other metallurgical industries, construction materials, chemical manufacturing, and ceramics, was chosen because the city accounts for approximately 70 percent of the economic output of Shanxi Province. Shanxi provides nearly a quarter of the coal used by China, a country where 66 percent of the national energy supply comes from coal

(Morgenstern *et al.*, 2005). Two years after the implementation of the initiative, reported annual daily SO<sub>2</sub> concentrations in Taiyuan in 2000 averaged 0.2 mg/m<sup>3</sup>, more than three times higher than China's Class II annual standard (0.06mg/m<sup>3</sup>), which is not very different from the figure a few years earlier (Figure 2, Appendix) (Morgenstern *et al.*, 2005).

The lack of success in the Taiyuan case drives home the fact that the cap-and-trade economic model has prerequisites without which its advantages can be undermined. First, it is assumed in economic theory that multilateral, simultaneous trades take place under conditions of perfect information (Ashford & Caldart, 2008). Trades under conditions of imperfect information often result in early suboptimal trades that considerably reduce future cost-saving opportunities. In addition, imperfect information renders it significantly costly for willing buyers and sellers to attempt to identify each other. Practically speaking, perfect information is hardly attainable, but in the Taiyuan case, the emissions trading information system is so poorly set up that it is nearly dysfunctional. Information is often incomplete or inaccurate and is not updated in a timely manner. By contrast, the EPA in the United States electronically publishes comprehensive, transparent, and timely information regarding buyers and sellers (Buying Allowances, n.d.). The EPA website details the three means through which a company can purchase allowances from other companies or individuals who hold them, namely through the EPA's annual auction, through a broker, or through environmental groups. The contact information of the brokers and environmental groups is clearly listed on the website under "Buying Allowances" as well (Buying Allowances, n.d.).

Second, the cap-and-trade economic model presupposes competition where there are many players competing under homogeneous conditions. In the United States, for instance, there were more than 1,000 coal-burning electric utility power plants required to reduce emissions at about the same rate. The Taiyuan cap-and-trade scheme, however, was applied on a small-scale in a sector where the major players were powerful, state-owned enterprises. These entities exercised control over the permits market (Morgenstern *et al.*, 2005). With a powerful stance in the permits market, firms can treat their pollution permits as strategic inputs and thus hoard them; this was made most evident when certain firms refused to sell tradable permits to their competitors (Ashford & Caldart, 2008).

One consequence of the market control, as it was in the Taiyuan case, is that it is very difficult for new enterprises to enter into the cap-and-trade scheme. Squeezing competitors out of the market and posing barriers to newcomers work against the robust competition, an important prerequisite of the cap-and-trade system. In comparison, even though hoarding emissions permits may not be effectively prevented in the United States either, the U.S. SO<sub>2</sub> trading system circumvents the problem of market control forged by old, local industries by granting these powerful, parochial utilities a certain number of free permits. The strategy was to avoid opposition from these utilities. In many cases, local polluting industries oppose free markets in pollution permits because the market creates an incentive for existing plants that encounter high marginal emissions reduction costs to shut down (Merrill, 2000).

Of course, political realities make it necessary for the government to create political incentives, often in the form of providing free permits to powerful industries, in order to avoid resistance from the powerful incumbent polluters. In other words, grandfathering emissions permits in the United States not only effectively mitigates objection from the old, powerful enterprises but also promotes nearly perfect competition in the emissions trading market.

An additional consideration is that China does not have an established national SO<sub>2</sub> emissions monitoring system, and many of the equipments in the monitoring stations are too

outdated to establish a comprehensive environmental information network (Wang *et al.* eds., 2002). There is also a lack of technical and training support for staff to increase their proficiency in operating the Continuous Emission Monitoring (CEM) system (Wang *et al.* eds., 2002). In comparison, the U.S. government actively employs the CEM system to measure the amount of SO<sub>2</sub> generated by coal-fired boilers. The data is then recorded in EPA's Emissions Tracking System (ETS). The EPA has instituted the Allowance Tracking System (ATS) that keeps electronic record of all the transactions. The ATS effectively serves as an efficient, automated means of monitoring compliance with the SO<sub>2</sub> emissions trading scheme (Wang *et al.* eds., 2002).

Another problem in China has been that despite the intent to cut the local SO<sub>2</sub> emissions, there has been a lack of high-level governmental support and legal enforcement. In the Taiyuan case, for instance, the obvious institution to administer and to enforce the program was the Taiyuan EPB (Environmental Protection Bureau), as it was responsible for emissions regulation and already had in place the initial stages of the necessary monitoring and enforcement infrastructure. Unfortunately, the Taiyuan EPB is not an independent body and may not possess the requisite jurisdiction to act in case of violations, something relatively common, and problematic, in the Chinese hierarchical power structure. The provincial EPB is similarly handicapped (Morgenstern *et al.*, 2005). The lack of an *ad hoc* governmental body in this capacity is largely due to the deficiency in human resources and funding from the state (Wang *et al.* eds., 2002).

Furthermore, the conditions for the cap-and-trade system and the command-and-control system alike are rarely thoroughly explained in legal terms. For example, the Air Pollution Prevention and Control Law prescribes that pollutant-emitting enterprises must install devices that provide information regarding the emissions type, quantity, concentration, and technology used to reduce pollution; it also requires that changes in any of the items mentioned above must be reported promptly. But the regulation lacks a legal, uniform method for pollutant calculation (Wang *et al.* eds., 2002). The U.S. government, by contrast, has put in place laws to establish, enforce, and monitor every phase of the cap-and-trade scheme and related procedures. For example, after Title IV of the 1990 Clean Air Act Amendments (CAAA) that required a nationwide reduction in SO<sub>2</sub> emissions by 10 million tons from 1980 levels by 2000 was put in place, the EPA subsequently issued all Phase I permits for SO<sub>2</sub>, certified the continuous monitoring systems that utilities had installed and tested, and developed an emissions tracking system to process emissions data for all sources (Layzer, 2006). Even though China has an ostensibly more centralized power system, stronger government support and legal enforcement are two indispensable features that have made the U.S. SO<sub>2</sub> emissions trading system, but not the Chinese one, work.

As the analysis proceeds this far, one may argue that China simply does not have the soil for the cap-and-trade system to flourish. The political and socio-economic environment for the initiation of the cap-and-trade scheme in China is very different from that in the United States. For example, the U.S. SO<sub>2</sub> emissions trading program was built on an existing, well-established procedure for environmental enforcement; but a similar system does not yet exist in China. Furthermore, China has limited experience with markets for intangible commodities—a category that includes pollution credits. In addition, using the law to manage social problems except criminal acts is a relatively new development in China. Culturally speaking, personal responsibility has been a more important motivator than the law throughout Chinese history. Even though we are witnessing a proliferation of laws in recent years, including a legal

framework under which the emissions trading program could operate, they are usually written in broad terms, devoid of detailed guidance, and promulgated before substantial testing in practice (Morgenstern *et al.*, 2005). Owing in part to this lack of detail, local environmental regulators are still struggling with the very basic issues of how to ensure compliance and how to achieve regulatory independence.

On the other hand, it is important to recognize that the “growing pains” of the emissions trading system in China are inevitable yet not insurmountable. Despite its dysfunction, the legacy of the Taiyuan project is that it developed the foundation for effective and efficient SO<sub>2</sub> emissions control in Taiyuan and advanced the employment of the emissions trading model in both Shanxi and other parts of China that are most seriously affected by excess SO<sub>2</sub> emissions (Morgenstern *et al.*, 2005). Valuable lessons have been learned as well.

The socio-political and socio-economic factors that are crucial for the establishment and maintenance of an effective SO<sub>2</sub> emissions trading system, as entailed in the Taiyuan project, can be reached with strong and persistent support from the higher levels of government to simulate the conditions both in the cap-and-trade economic model, and more practically, in the U.S. emissions trading scheme. Echoing the deficiencies in the Taiyuan case, a more favorable environment for the SO<sub>2</sub> emissions trading scheme can be created by establishing a promptly updated online system of buyers’ and sellers’ information, improving the current monitoring and verification system, expanding the trading market scale to incorporate more players into the market, and bestowing legal force upon the emissions trading regulations.

First, the state should continuously provide sufficient resources to help establish and maintain an online system that contains buyers’ and sellers’ information to help them identify each other better. The information should be comprehensive, accurate, transparent, and updated in a timely manner. In this way, it will be easier for the buyers and sellers to make optimal trades to reduce costs as much as possible.

Second, the state should also devote resources to initiate and maintain the employment of more accurate and effective monitoring and verification systems. China may follow the United States in using ETS and ATS in verifying data and monitoring compliance with the SO<sub>2</sub> emissions trading scheme. Training should be promptly provided to the technicians operating these complex systems so that they can actually be put to good use in practice. China should also regularly send experts to study the application and operation of the ETS, ATS, and other related systems to obtain a better understanding of how these technical systems work.

Third, to foster better competition in the SO<sub>2</sub> emissions trading system, it is important to increase the number of players in the regional market so as to ameliorate the existing monopoly situation. Because the Chinese power industry is primarily state-owned, it is necessary to expand the scale of the market so as to have more buyers and sellers in the system. Inter-provincial trading should be legalized if it helps avoid monopoly in the market. Regulations should be promulgated to mitigate obstacles faced by young, private, and less powerful industries.

Most importantly, legal enforcement of the emissions trading-related regulations and strong and persistent support from the higher level of government should be guaranteed, without which none of the three goals above can be attained. Even though the current legal framework in China is not as well-structured as its American counterpart, the policy-makers and lawmakers should strive to be clear in laws and regulations so that the industry managers and administrators of the cap-and-trade scheme at all levels can have a better sense of what they are expected to do to make the SO<sub>2</sub> emissions reduction system work. Of course, uncertainties may await during the transition period from the pollution levy system to the SO<sub>2</sub> emissions trading scheme. If the two

systems do not work well together or the emissions trading system eliminates jobs, there is a possibility that the transition period can arouse social instability, the thing that worries the Chinese Communist Party the most.

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# THE INHUMANITY OF ISOLATION: THE PSYCHOLOGICAL DAMAGE OF SOLITARY CONFINEMENT AND ITS ILLEGALITY AS CRUEL AND UNUSUAL PUNISHMENT

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Solitary confinement is a form of rehabilitation whereby prisoners are confined to a bare cell for almost 24 hours every day and are denied any human contact (Benjamin & Lux, 1975). There is a line of court cases, including *Lollis v. New York State Department of Social Services* (1970), where courts have ruled certain cases of solitary confinement to be unconstitutional. In *Lollis*, the United States District Court in New York found that the use of solitary confinement on fourteen year old children constituted cruel and unusual treatment. It should be noted, however, that there is a distinct difference in the way courts handle cases dealing with children as opposed to adults. Nonetheless, the *Lollis* decision bodes well for the argument advancing the illegality of solitary confinement because the *Lollis* court recognized that certain qualities of this practice cause normal-minded people to experience mental illness. To reach its decision, the court used testimony from psychiatrists who asserted that there was no justification for the use of solitary confinement on children.

However, in general, courts have been hesitant to ban solitary confinement. Part of this may stem from the fact that our society is generally hesitant to interfere with the administration of prisons (Haney, 2003). But that should not be an excuse; many scholars in various disciplines have demonstrated that solitary confinement causes significant psychological damage to its subjects. Moreover, many legal scholars agree that there are aspects of solitary confinement that may be prohibited under the U.S. Constitution's Cruel and Unusual Clause. In this paper, I will argue that solitary confinement, as currently practiced in U.S. prisons, should be considered cruel and unusual punishment and therefore unconstitutional under the Eighth Amendment.

Currently, there is no simple application of the law in regard to what constitutes "cruel and unusual." The Eighth Amendment was written in order to prevent humiliating or torturous criminal punishment. This notion and the language of the Clause, however, are vague and subject to much interpretation. An important case in determining what is cruel and unusual is *Trop v. Dulles* (1958), where the Supreme Court determined that what is cruel and unusual as a punishment must be in accordance with the "evolving standards of decency that mark the progress of a maturing society." In other words, the current morals and ideals of society determine whether a particular punishment is considered cruel and unusual.

After *Trop*, the Supreme Court in *Furman v. Georgia* (1972) attempted to establish some consistency in the application of the Clause, particularly as related to the death penalty. The Court highlighted four principles that may be used to determine what is cruel and unusual: (1) the punishment must not be so severe as to be degrading to human dignity; (2) the punishment

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must not be administered arbitrarily; (3) the punishment must not be considered unacceptable in modern society; and (4) the punishment must not be excessive.

A line of cases deal specifically with solitary confinement. In *Hutto v. Finney* (1978), for instance, the Supreme Court placed a cap on the length of time a prisoner may be held in solitary confinement. In this case, the Court found that isolation for longer than thirty days is cruel and unusual punishment. In *LaReau v. MacDougall* (1972), the Second Circuit Court of Appeals found that the conditions to which prisoners were exposed during solitary confinement constituted cruel and unusual punishment. Specifically, the court objected to the prisoners being forced to live in close quarters with their own feces.

These cases are important. But, while they touch on the flaws of solitary confinement as a practice, they fail to carry significant weight for my argument because the cases overlook the effects of solitary confinement on the prisoners' psyche, even though much research has linked solitary confinement to a deterioration of psychological functioning. For example, psychologist Kenneth Lux and legal scholar Thomas Benjamin (1975) evaluated patients subjected to solitary confinement in a Maine state prison and found causes of prisoners' mental deterioration. They discovered that solitary confinement deprives persons of their senses. They also found that the involuntary aspects of isolation cause anger, hostility, and aggression. Moreover, they observed that sensory deprivation, even for a few days, causes individuals to experience hallucinations and delusions. Benjamin and Lux further noted that if an individual does not exercise his or her senses, certain skills such as perception and thinking begin to decline.

Benjamin and Lux (1975) also asserted that the "undifferentiated sameness and limited, rigid procedures of isolation in addition to other malevolent features, diminish the most important and human capacities: the ability to interact with other persons and the environment in a flexible and creative way" (p. 85). In other words, solitary confinement denies individuals of skills that are essential to their ability to function as autonomous human beings, with dignity and respect. As such, it is difficult to justify solitary confinement as a rehabilitative punishment if individuals are forced into a mental state whereby they lose the ability to interact with others in normal social settings. After losing parts of their cognitive ability, they may even be more prone to criminal activity when released back into society. Indeed, it seems that solitary confinement destroys a fundamental part of what makes an individual an individual.

Solitary confinement also appears to push prisoners toward experiencing mental health issues, having irrational thoughts, and making irrational decisions while in isolation. After Grassian (1983), a practicing psychiatrist, conducted interviews with prisoners exposed to solitary confinement, he reached troubling conclusions. Prisoners were unable to describe the emotions and mental states they experienced while confined, and they were prone to anxiety attacks. Grassian's subjects described experiencing panic, fear of suffocation, and paranoia, leading them to doubt their own sanity. Moreover, in multiple instances, prisoners resorted to bodily mutilation in order to escape solitary confinement. For example, one prisoner cut his wrists because he believed it was the only way he would receive attention from the prison guards. Grassian also found that the prisoners experienced perceptual changes, affective disturbances, difficulties with thinking, concentration, and memory, disturbances of thought content, and problems with impulse control. Grassian's subjects also reported becoming extremely agitated at the quietest of sounds or very weak odor. Similar to Benjamin and Lux's findings, Grassian's subjects claimed to hear imaginary voices and see hallucinations, both of which they had never experienced prior to being placed in solitary confinement. One of Grassian's subjects reported going into a "standstill psychologically." He felt disoriented to the

point where he lost his vision and could not hear clearly. He did not talk for 15 days, and his memory went blank.

In light of these findings, solitary confinement appears arbitrary and unnecessary. Indeed, if someone were to tell me that they were going to force me to undergo a practice whereby it was highly likely that I would deteriorate my psychological functioning, I would think that I was being tortured. What could be the meaning of exposing individuals to this type of treatment where they experience so many debilitating feelings and emotions? Solitary confinement's detriments heavily outweigh any benefits.

Nonetheless, it should be noted that there has also been research that has concluded that solitary confinement does not psychologically damage individuals. For instance, Suedfeld et al. (1982) downplay the stress and anxieties brought on by solitary confinement and argue that, among other things, there is an anti-solitary confinement bias that prevails in the literature on the topic. To corroborate their claim, Suedfeld et al. depended primarily on experiments where individuals volunteered to be placed in solitary confinement. The results of these experiments found that these individuals' stress and anxiety levels were unchanged. The few negative effects that the researchers reported were dismissed as inconsequential.

While their arguments are intriguing, I disagree with the findings of Suedfeld et al. (1982), as they use more emotion-rich language than statistics to argue their point. Additionally, the experiments they cite appear flawed. For example, in their experiment the researchers exposed the volunteers to solitary confinement for brief durations, much shorter than what is usually given in prisons. The fact that they used volunteers is also a questionable experimental technique. Perhaps these individuals prepared themselves for isolation, or perhaps they were versed in techniques to maintain calm in such situations. Either way, there is too much room for uncertainty in the validity of these results. Moreover, the volunteers knew that they were being observed, which again adds more suspicion in the validity of the results.

What is clear is that solitary confinement causes significant psychological risks. As such, the practice violates the principles established in court cases that determine what types of punishment are cruel and unusual. It appears that solitary punishments are designed to degrade human dignity and are unnecessary and arbitrary. As such, these punishments should fail the judicial tests established by the *Furman* case noted above. Furthermore, in light of the evidence that I have provided, solitary confinement fails to serve much of a rehabilitative purpose. On the contrary, the practice decays the minds of the individuals exposed, making it difficult for the individuals to function normally in society. Simply put, solitary confinement is cruel and unusual and should be held unconstitutional.

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