



# UNDERPOL

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## SENIOR CAPSTONE CLASS SPRING 2018

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Jack studied at Eugene Lang College of Liberal Arts for four years. He has enjoyed his time and is graduating with a Political Science major and a History minor. He looks forward to the opportunities and adventures life has to offer and is excited to pursue his interests.



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## A NOTE FROM THE EDITORS:

At the beginning of the semester Dr. Woodyly told us that in addition to writing our senior theses, we would also collectively produce a print journal to showcase our work. Operating within the time constraints of a single semester, and attempting to produce not only a quality body of work, but a quality journal proved to be more difficult than we could have imagined. In addition to the late nights researching and compiling our own individual pieces, there were hours and days spent over the course of the semester (and into the Summer) in InDesign, Illustrator, and Photoshop, learning how to use the software and create a layout design.

This collection is a representation of our time at Lang, and of the broad diversity of knowledge and interests that we as a class have been able to cultivate in the Politics department. From a theoretical exploration of what it means to be categorized as mixed race in America; to the role of shame in underreporting of sexual assaults; to questions of citizenship and political belonging in Kuwait; to an allegorical screenplay on infrastructures of control; to a political ecology of a Staten Island landfill; to an essay on gun violence and state power; to a legal study of the Warren Court—this body of work is our way to reflect on what we have learned and an attempt to share and connect with the world and communities around us.

When it came time to compile this journal, we wanted to produce something that mirrored not only the quality of the content, but the themes addressed within our theses as well. From the images included in this journal to the cover art, we have attempted to hone in on the increasingly rough, harsh, and sometimes dystopian political landscapes that we have seen throughout the past four years of our studies. In our courses at Lang, at times it has seemed that professors have been surprised at our generations' lack of political engagement or our general desensitization. In the Senior Capstone class this Spring, Dr. Woodyly often commented on the dystopian themes we brought up, that somehow resurfaced in the design. To that we say, yes; you are right. But hopefully this body of work also shows that we are paying attention, that we are personally affected, and that we will try our best to keep in mind the values and lessons our communities here have taught us.

We want to thank Dr. Woodyly along with our peers for putting in more work than we all initially anticipated, and for understanding that with creativity we would refuse to compromise rigor. Producing this journal was a learning process, and it is by no means completely perfect. But we also hope that as we finish our undergraduate studies at Lang, our learning is not at an end, and the questions and struggles we address in our theses remain with us. This journal is the artifact that we will take, and we hope it acts as an invitation for you to reflect with us.

**EMMA MCLAUGHLIN**  
**ALICE NEMOTO**



IMAGE BY RAKAN AL-HAZZA

# RACE AND (MIS)INTERPELLATION: A CASE FOR BECOMING THE “BAD RACIAL SUBJECT” IN THE UNITED STATES TODAY

BY ALICE NEMOTO

Abstract: Race in the United States is a topic with immense history and meaning that has affected and still haunts both the social and political structure of this country and the ways in which individuals form an understanding of who they are and their placement in this world. This paper seeks to look at the impact that formal implementations of a racial binary (Black/White) into standards and logics through tools such as the law and the census has had, first, on how collectively we have built an understanding of what “race” is and the attributes (both physical and of character) that we prescribe to certain races, and secondly, the ways in which the creation of this logic and “social stock of knowledge” affects the ways in which we read ourselves and those around us often preventing us from forming meaningful bonds and forms of solidarity when it comes to the inherent violence, oppression, and discrimination that is embedded within this logic and language of race. I will use the site of the “mixed-race” experience to flesh out this tension that I have identified and look to Louis Althusser’s concept of “interpellation” to examine how race and racial identity play out in the sphere of everyday life in how others attempt to *racially* interpellate, or rather misinterpellate, individuals.

Keywords: Race; Mixed-race; the United States; Interpellation; Identity

## INTRODUCTION

In Paul Gilroy’s chapter “The Crisis of ‘Race’ and Raciology” from his book, *Against Race*, he invites the reader to imagine a world without “race.” When he says that race and raciology—defined as “the discourse of race-difference and all the stereotypes, prejudices, images, identities and knowledges it carries in its wake”<sup>1</sup>—“cannot be readily re-signified or de-signified, and to imagine that its dangerous meaning can be easily re-articulated into benign, democratic forms would be to exaggerate the power of critical and oppositional interests,” and that “the demise of ‘race’ is not something to be feared” but rather embraced for its potential to “free ourselves from the bonds of

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all raciology,” one might be persuaded by his argument.<sup>2</sup> Growing up in a time where multiracial identity and identification is becoming ever more apparent and present in our society, my experience of race and its importance in the society of the United States has revolved around its critiques, its hollowing-out and exposure. Had I discovered Gilroy’s piece early-on in examining my own relationship to race, I might have willingly and fully taken-on the project towards the abolition of race. However, I cannot fully embrace that project. This paper at its core asks the question, *is there anything salvageable in race?* There is a *tension* in the idea of race between racial categorization by the state and other individuals in society, and the experience of racial identity which is internal, a personal process, and it is from this tension that I believe an examination of race in the United States is essential in any attempt to move forward.

It is not to say that racial categorization and racial identity are distinct, but rather that they are varying experiences, intertwined and connected by the same language. It is precisely for this reason that I cannot simply “abandon” race, its logic and language. There is something there in this pain, in this past, worth looking at on a closer, more meaningful level. It is for this reason that I ask, *how can we define and locate the tension between the formal racial logic of the United States (consisting of the law and institutions) and the lived experience of racial identity within it?* It is a project and attempt to describe my own existence, my *embodiment* of this tension as someone who feels neither/nor when it comes to my racial categorization—a “mixed” identity. In the first part of my paper I will look to Ian Hanley López, Michal Omi, and Howard Winant in an attempt to map out the foundations of race and racial logic within the United States. My first claim is that *the formal categorization (the law and institutions) of race is the foundational structure to how we both conceive of and articulate race in the United States*. From there, I will look at the *language* of racial identity through the lens of tools of categorization and classification and the site of the Census. It is here that I ask the additional question of *how are these categories and identities enacted?* That is, *how does race play-out in the sphere of everyday life? What are the consequences of being misinterpellated? What are the potential effects*

*of discrimination, exclusion, and inequality that limit how we are viewed and able to act? How do these factors impact how we perceive ourselves?* It is in this section that I look to Peter L. Berger, Thomas Luckmann, and Stuart Hall to explore the creation of meaning in relation to race and racial identity. From this language and creation of meaning morphs a new kind development and relationship—the language of the body and the process of identification. I will then turn to Charles Mills in an attempt to add another dimension to this conversation by asking, *how do we read each other and ourselves?* I argue that there is a tension between the formal racial logic of the United States and the lived experience of these racial identities *because we read each other and ourselves through visual assumption using the language of race, and this tension arises when the assumptions are wrong—wrong in the sense that we are perceived, acknowledged, and understood as something that we do not identify ourselves with.* I will define this tension as a kind of “misinterpellation” and look to Louis Althusser in terms of conceptualizing the “mixed-race” experience of racial categorization.

In the chapter “The Transformation of Silence into Language and Action” in her book, *Sister Outsider*, Audre Lorde states: “I have come to believe over and over again that what is most important to me must be spoken, made verbal and shared, even at the risk of having it bruised or misunderstood.”<sup>3</sup> I will turn to Serguei Alex Oushakine, W.E.B. Du Bois, Gloria Anzaldúa, and Mariana Ortega in an attempt to expand the dialogue of race from a “mixed” perspective that sees the value in examining this tension, embracing the uncomfortability, and being unapologetic and explicit about the experience of racial categorization and identity. There is something important in this activity and examination of self that is crucial for any sort of understanding and development of true solidarity. We cannot build connections and new, anti-racist social bonds without first understanding our own relationship to race and how that affects how we see, read, interact with others. I will then look to Jacqueline Scott to explore the potential roadblocks that lie ahead of this project, and the ways in which we might build a framework within which to look at race and racial identity in the future. What Gilroy fails to analyze on a deeper level is

a separation between racial categorization and racial identity. In the United States race operates both formally, through law and tools of categorization such as the Census, and as a social construct with real, physical effects. Racial categorization inherently involves a type of naming, designation of persons to make them *legible*—primarily to the government for their own (mis)use—and the creation of a kind of legibility to more readily differentiate and hierarchize. The history of the United States is a history of race, and a history of race implemented by law. In López’s book *White By Law*, he precisely examines the role that the law and the courts had in shaping our conceptions about race within the United States, ultimately arguing that it was these legal institutions that constructed race as a binary: by defining “Whiteness” in opposition to everyone else, who was not White. López’s argument is one that places the formal aspects of race—its categorization and the language this categorization provides us—as the core of how we conceive of race within the United States.

Racial categorization is a designation, and one that has immense social, political, and economic implications and histories of violence, discrimination, and subjection to it. It is a designation, a formal title that is *lived* and *experienced* every day. Our experience of race cannot be simplified to a mere category. As Omi and Winant argue in their book, *Racial Formation in the United States*, race is a social construction in the United States, and one that acts as a “master category” in society, suggesting “that the establishment and reproduction of different regimes of domination, inequality, and difference in the United States have consciously drawn upon concepts of difference, hierarchy, and marginalization based on race.”<sup>4</sup> For Omi and Winant, race is something located in society, enacted and acted upon by individuals and lived out as a core of our identity. As Omi and Winant state, “Bodies are visually read and narrated in ways that draw upon an ensemble of symbolic meanings and associations.”<sup>5</sup> It is for this reason that Omi and Winant define “race” as “a concept that signifies and symbolizes social conflicts and interests by referring to different types of human bodies,”<sup>6</sup>—that it is “a concept, a representation or signification of identity that refers to different types of human bodies, to the perceived corporeal and phenotypical

markers of difference and the meanings and social practices that are ascribed to these differences.<sup>7</sup> For me, at this current moment, my experience of race has come down to racial categorization, my body, and the inability of the two to cohesively fit.

The topic of race has always been one of continuous presence and simultaneous distance for me. My mother is a White American of European decent, and my father is Asian and a naturalized U.S. citizen originally from Japan. Growing up, I was aware of my “mixed” heritage and was immersed in both American and Japanese culture, going to both American and Japanese schools and going to Japan each summer until I was eighteen. It was only very recently that I realized that my entire conception of self was one based in ethnic, not racial terms. When I identify myself to others, I always say that I am “half-Japanese”—my own assumption being that other people perceive my Whiteness, and that my “Japanese-ness” eludes them. Ethnicity for me and many others who live in contention with the Black/White binary acts as a way to make up for the gaps that are felt with racial categories, and informs the way in which we form and understand our racial identity.

I did not think of myself in racial terms because I did not want to. For me, being “mixed-race” signified, and still signifies, a constant reminder that no matter how I identify, I never feel acknowledged or read in a way that *feels* right. For this reason, I cut myself off from this *language* of race, and truly prevented myself from developing my own racial identity. Confronting this language and experience is painful. It hurts me twofold—one, that I feel as though I am unrecognizable, that the language to describe me does not “fit” with how I am physically perceived; and two, that I feel guilt and shame for not being recognized by others, that I feel the need for a kind of recognition that to my knowledge and experience so far, does not exist. And it is not just the fact that individually, internally this process is in constant rhythm, it is the fact that this feeling affects how I am able to *act* in the world. For years I tried to suppress, to ignore any direct relationship with my racial identity, and today I am feeling the void and underdevelopment of my own understanding of race and self that those years of avoiding this tension has caused, preventing

me from connecting to the mixed community and being able to collectively work through our tensions and claim a space to talk about the future and the change we want to see. Race as a category within the United States affects the formation of our identity. Racial identity is important for our understanding of self, and this is what determines the ability of our success to engage with the world and to actively contest these categories and those around us that constantly attempt to interpellate us in a specific, truly oppressive way.

### HOW IS RACE FORMALLY CONSTRUCTED?

In *White By Law*, Ian Hanley López places a discussion of race within the context of law, looking to the Supreme Court cases that were argued about naturalization and race from the post-Civil War era to the 1920s. Since Congress’ first conception and articulation surrounding Citizenship, naturalization was limited to those classified as “white persons,” which resulted in the Supreme Court’s role in defining “whiteness” on a case-to-case basis.<sup>8</sup> As López points out, this inevitably turned the framing around these petitions not simply as defining who was White, but in explaining why someone was White, and in what context to think about race and its implications within conceptualizing citizenship and nationality.<sup>9</sup>

Within the “prerequisite cases” that he examines, he identifies two rationales that the Court used in making their decisions: “scientific evidence” and “common-knowledge.” López specifically highlights two cases—*Ozawa v. United States (1922)* and *United States v. Bhagat Singh Thind (1923)*, decided within three months of each other—that demonstrate the official rationales used to justify each ruling, and the implicit, deeper motivations behind them that reveal the weakness and malleability of legal expressions of the concept of race. López argues that “the early prerequisite courts assumed that common knowledge and scientific evidence both measured the same thing, namely, the natural physical differences that divided humankind into disparate races.”<sup>10</sup> In *Ozawa*, Ozawa’s emphasis was on skin color and his apparent whiteness as opposed to his Japanese ancestry, to which the Court responded:

‘Manifestly, the test [of race] afforded by the

mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races."<sup>11</sup> (López 58).

In *Thind*, however, the Court stated that,

“It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today...What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the words ‘Caucasian’ only as that word is popularly understood.”<sup>12</sup>

For López, the Court “abandoned scientific explanations of race in favor of those rooted in common knowledge when science failed to reinforce popular beliefs about racial difference.”<sup>13</sup> The Court’s location of “race in common knowledge suggests that race is part of the external world, and that our perception of race is a matter of its objective existence rather than of its subjective creation.”<sup>14</sup> López argues, “The celebration of common knowledge and the repudiation of scientific evidence show that race is a matter not of physical difference, but of what people believe about physical difference.”<sup>15</sup> He states:

“There is no core or essential White identity or White race. There are only popular conceptions—in the language of the prerequisite cases, a ‘common knowledge’—of Whiteness. And this common knowledge, like all social beliefs, is unstable, highly contextual, and subject to change.”<sup>16</sup>

López’s overall argument is: “The legal system influences what we look like, the meanings ascribed to our looks, and the material reality that confirms the meanings of our appearances. Law constructs race.”<sup>17</sup> López identifies the legal system as the ultimate source of our conceptualizations of race, whereas in actuality laws act as enforcement of conceptions that are based in a shared sphere of

common-knowledge. This is not to say that laws do not play a role in shaping the conception and function of race within society today, because they do in fact provide a historical foundation of classification with regards to how the state identifies individuals racially. What is important here is that López places the performance and construction of race within this combination of appearance, meaning, and reality, as *expressed* through the language of the law. What López assumes is that the construction of race and the place in which common-knowledge gains significance is developed through the relationship between the state and the individual—that it is a top-down relationship where the state is the main actor in providing the meaning behind race, whereas these laws are only given their power through their social context and the ways in which individuals understand, interpret, and interact with one another.

Geoffrey C. Bowker and Susan Leigh Star in their book, *Sorting Things Out*, provide insightful analysis on the significance and consequences of classification. They define “classification” as “a spatial, temporal, or spatio-temporal segmentation of the world,” and a “classification system” as “a set of boxes (metaphorical or literal) into which things can be put to then do some kind of work—bureaucratic or knowledge production.”<sup>18</sup> For Bowker and Star, “Systems of classification (and of standardization) form a juncture of social organization, moral order, and layers of technical integration. Each subsystem inherits, increasingly as it scales up, the inertia of the installed base of systems that have come before it.”<sup>19</sup> Specifically, Bowker and Star’s definition of “infrastructure” can help concretize the structural aspects of categorization while also mapping out the relationship that these categories have to real individuals. They identify nine characteristics within their definition of infrastructure: embeddedness; transparency; reach or scope; learned as part of membership; links with conventions of practice; embodiment of standards; built on an installed base; visibility upon breakdown; and fixed in modular increments, not all at once or globally.<sup>20</sup> The logic and function of categorization “is the strategy of moving toward universality: rendering things comparable, so that each actor may fit their allotted position in a standardized system and comparisons may be communicated across

sites.”<sup>21</sup> Bowker and Star’s analysis is particularly useful when approaching the subject of racial categorization. As Omi and Winant point out,

“as social beings, we must categorize people so as to be able to ‘navigate’ in the world—to discern quickly who may be friend or foe, to position and situate ourselves within prevailing social hierarchies, and to provide clues that guide our social interactions with the individuals and groups we encounter.”<sup>22</sup>

What the law, and ultimately categorization, provides is the standard language of race—that is, it provides us with the terminology that makes up the shared “social stock of knowledge”<sup>23</sup> that we all reference when trying to describe and understand race in our everyday lives.

Where it may be true that the literal language of race is grounded in formal aspects of law and institutions through the tool of categorization, this language does not stay in abstraction. It is enacted by individuals and institutions. Whereas López rightfully focuses on the law in the linguistic foundations of the creation of race, there cannot be a reduction to the law and formal institutions in having monopoly over this creation of meaning. The language of race only takes on its meaning in the sphere of everyday life. It is not simply that this language informs how we articulate and perceive ourselves, it is literally that this perception is shaped by how we interact with others and the ways in which this interaction is premised on a limitation—of stereotyping, discrimination, and outright hostility—that creates a false boundary that boxes individuals into certain racial categories. In *Racial Formation in the United States*, Omi and Winant argue that, “In the United States, *race is a master category*—a fundamental concept that has profoundly shaped, and continues to shape, the history, polity, economic structure, and culture of the United States.”<sup>24</sup> From this premise comes the establishment of “racial formations,” or “the sociohistorical process by which racial identities are created, lived out, transformed, and destroyed”<sup>25</sup> It is “a *synthesis, a constantly reiterated outcome*, of the interaction of racial projects on a society-wide level.”<sup>26</sup> For Omi and Winant, “race cannot be discussed, cannot even be *noticed*, without ref-

erence—however explicit or implicit—to social structure.”<sup>27</sup> They go on to add that, “Processes of classification, including self-classification, are reflective of specific social structures, cultural meanings and practices, and of broader power relations as well.”<sup>28</sup> So then, the question must be asked, *where is the site of racial categorization?*

Within the context of the United States, the site of racial categorization can be centered around the Census. Naomi Zack in her piece, “American Mixed Race: The United States 2000 Census and Related Issues,” provides a useful timeline to the history of racial categorization within the United States. Racial categorization first appeared in the 1850 Census, where the categories were restricted to “White,” “Black,” “Mulatto,” “Black slave,” and “Mulatto slave.”<sup>29</sup> Before 1850, the categories were simply defined as “free White males / free White females,” “free Colored males / free Colored women,” and “slaves.”<sup>30</sup> By 1900, the “one-drop rule”—“whereby Black designation resulted from any Black ancestry, no matter how remote—had become “the social rule of the land,” where it was then officially implemented into the 1930 Census.<sup>31</sup> Quoting Neil Gotanda, López points to the fact that, “the metaphor is one of purity and contamination: White is unblemished and pure, so one drop of ancestral Black blood renders one Black. Black is contaminant that overwhelms white ancestry.”<sup>32</sup> Then in 1977, the Office of Management and Budget issued Statistical Directive No. 15, that “defined the basic racial and ethnic categories to be utilized by the federal government for three reporting purposes: statistical, administrative, and civil rights compliance.”<sup>33</sup> It established “five standard categories”: “American Indian or Alaskan Native,” “Asian or Pacific Islander,” “Black,” “White,” and “Hispanic.”<sup>34</sup> Zack notes that with the 1980 and 1990 Censuses, the category of “ethnicity as Hispanic or non-Hispanic (replacing what was formerly labeled ‘Spanish’), came to be counted separately from race, but the one-drop rule remained in effect for racial categorization.”<sup>35</sup> Zack’s piece is a good place to ground the discussion of this paper as it relates to the function and implications of racial categorization, in that it highlights the contradiction between being identified and personally identifying—between the standard practices of categorization and a sense of individual autonomy

of respondents as it relates to *their* racial identity. The ways in which people look to their racial identity—perceived or self-identified—to gain a certain access and mobility within their social interactions. That is, it allows us to more specifically ask, *how are these categories and identities enacted?*

Zack's primary focus is on the 2000 Census, where respondents were now allowed to check more than racial category. As Zack points out,

“In all of the census counts through 1990, an individual's race was supposed to be indicated by checking only one of the boxes presumed to correspond to the main social racial categories... Thus, there was no allowance for mixed-race identification, although the category 'other' was recognized in the 1980 and 1990 censuses, and on many local record-keeping forms.”<sup>36</sup>

Zack takes a closer look at questions eight and nine (related to ethnicity and race) on the 2000 Census. Question eight states: “Is Person 1 Spanish/Hispanic/Latino? Mark X the ‘No’ box if not Spanish/Hispanic/Latino.”<sup>37</sup> Zack points out the fact that, “In question 8, the general category, ‘Spanish/Hispanic/Latino’ is not identified as racial or ethnic, and it is presumed that respondents already know the criteria for self-inclusion in one or another of the subcategories.”<sup>38</sup> Additionally, when it comes to question nine—“What is Person 1's race? Mark X *one or more races to indicate what this person considers himself/herself to be*”—“the phrase ‘considers himself/herself to be’ clearly bases racial categorization on self-identification.”<sup>39</sup> With the 2000 Census,

“The lack of either explicitly structured taxonomies or criteria for membership in specific categories suggest that those who composed the census form assumed that Americans have unequivocal and ready answers to questions about their identities in the Spanish/Hispanic/Latino category in terms of race.”<sup>40</sup> (Zack 16).

As Bowker and Star point out (in reference to Landis (1961)), “the definition of the law was inherently ambiguous,” that “this was intentional, and that the ambiguity shifted the burden of proof to the individual.”<sup>41</sup> Zack goes on to state that “since these answers were deemed worthwhile to collect,

it must have been further assumed that they were accurate according to some *unstated* criteria for ethnic and racial categorization.”<sup>42</sup> Zack's conclusion is that, “Despite the rich array of possibilities for racial identification, the Census 2000 does not allow respondents to reject racial identification completely or even to identify as ‘mixed’ without specifying how they are mixed.”<sup>43</sup> What the 2000 Census assumes is that Americans today have a solid understanding of race as it relates to their identity. This means that not only do we know what language to use to describe “who we are,” but that we understand the implications for what that racial identity *means* and represents to us. They expect the categories we select to be adequate, and that people will be able to easily translate whatever their multifaceted identity is in the same parameters and language given to us before. The 2000 Census represents a fundamental misunderstanding of what it means to be raced in the United States. It assumes that the issue of racial identity stems from the previously held belief and organizing principle that race exists and that a person can either be “Black” or “White.” That our experience and formation of racial identity through the Census's binary past can be amended through the ability to identify and recognize the existence of multiracial selves without acknowledging what this existence entails. It is here that we must then ask, *how does race play out in the sphere of everyday life?*

### RACE AND THE SPHERE OF EVERYDAY LIFE

In *The Social Construction of Reality*, Berger and Luckmann provide an account of the ways in which reality and meaning are constructed precisely through the context of society and the relationships between individuals. Berger and Luckmann turn to Mannheim's discussion of “relationism” in establishing the role of perspective when looking at knowledge, and its importance in assessing our capacity of understanding the external world.<sup>44</sup> We all live in a world, in the “sphere of everyday life” that provides the stage in which reality becomes “subjectively meaningful” for individuals in establishing “a coherent world.”<sup>45</sup> Within the sphere of everyday life, individuals acquire a knowledge of the norms and routines that they share with others through what Berger and Luckmann call “common-sense knowledge.”<sup>46</sup> This knowledge and objectivation is only made possible through language

and its capacity and potential of signification—a collective signification and language between individuals, in relation to establishing understandings of everyday life.<sup>47</sup> As Berger and Luckmann argue:

“Language is pliantly expansive so as to allow me to objectify a greater variety of experiences coming my way in the course of my life. Language also typifies experiences, allowing me to subsume them under broad categories in terms of which they have meaning not only to myself but also to my fellowmen.”<sup>48</sup>

This then creates a “social stock of knowledge” that provides the foundation for everyday life—one that is constantly transformed by the interactions, participation, and performances of individuals when engaging with reality.<sup>49</sup> Meaning is always relational, and essentially involves a constant exchange and engagement with others in interpreting and establishing a true understanding of reality. As Stuart Hall notes, “Reality exists outside language, but it is constantly mediated by and through language: and what we can know and say has to be produced in and through discourse.”<sup>50</sup> He goes on to state that “the different areas of social life appear to be mapped out into discursive domains, hierarchically organized into *dominant or preferred meanings*,” and that “the domains of ‘preferred meanings’ have the whole social order embedded in them as a set of meanings, practices and beliefs: the everyday knowledge of social structures, of ‘how things work for all practical purposes in this culture’, the rank order of power and interest and the structure of legitimations, limits and sanctions.”<sup>51</sup>

It is helpful to integrate Berger, Luckmann, and Hall into a discussion on the construction of race specifically because race is socially constructed and legally sustained, and only develops meaning in the sphere of everyday life when it is individually performed. As Omi and Winant state, “A vast web of racial projects mediates between the discursive or representational means in which race is identified and signified on the one hand, and the institutional and organizational forms in which it is routinized and standardized on the other hand.”<sup>52</sup> They point out that “the way we interpret our experience in racial terms shapes and reflects our relations to the institutions and organization through

which we are embedded in the social structure. Thus we expect racially coded human characteristics to explain social difference.”<sup>53</sup> As Hall states, “the degrees of symmetry—that is, the degrees of ‘understanding’ and ‘misunderstanding’ in the communicative exchange—depend on the degrees of symmetry/asymmetry (relations of equivalence) established between the positions of the ‘personifications’, encoder-producer and decoder-receiver.”<sup>54</sup> The language of race in its meaning and effects goes beyond mere categorization. It is encoded into our everyday lives both implicitly and explicitly, affecting the very ways in which we prescribe meaning to the bodies that we visually read. From someone speaking to you in a certain language assuming that surely you must speak that language as well; from the assumptions tied to culture, in prescribing certain racial associations to music, television, film, or literature such as hip hop or rap with Blacks (often as a negative connotation), or perhaps the television series *Duck Dynasty* and *Fresh off the Boat* with the experiences of southern Whites and Asians as a whole respectively; from the adjectives and phrases that have been used to describe notable people of color such as Barack Obama and the countless attempts to undermine and disqualify not only his intelligence and ability but also his character, to someone like LeBron James—one of the best and most well-known professional athletes today, a Black man, told to “shut up and dribble.” It forces us to first and foremost ground our understanding of others in in what we perceive their racial identity to be. It is not about the individuality of the person, but rather the ways in which we can only understand race through stereotypes and generalizations that perpetuate and motivate discrimination and divisions, outright hostility between individuals based on differences in races. The language of race is a tool of identification and of justification for oppression, exploitation, and the diminishment of individuals into objects of the white gaze.

In the second half of his piece, he introduces a framework of “criteria for racial identity” (of self- and other-identification). Mills provides his own criteria for “racial self- and other-identification”: bodily appearance, ancestry, self-awareness of

<p><i>Problem Case I – “Conscious episodic passing (natural whiteness) for strategic reasons”</i></p> <ul style="list-style-type: none"> <li>• Body naturally White</li> <li>• Knows he has at least one Black ancestor but deliberately chooses to “pass”</li> <li>• “Passing” for special opportunities and advantages, while still identifying as Black and maintain contact with the Black community</li> <li>• They will not have many of the same experiences as other characteristically Black experiences</li> <li>• “Always black but sometimes pretend to be White”</li> </ul>	<p><i>Problem Case VI – “Unconscious ‘passing’ as Black”</i></p> <ul style="list-style-type: none"> <li>• “Genetically” White body and all-white ancestry</li> <li>• <i>Unaware</i> of actual ancestry</li> <li>• <i>Grows up as Black, thinks of themselves as Black, is culturally Black, and is categorized by the community as Black</i></li> </ul>
<p><i>Problem Case II – “Conscious passing (natural whiteness) for ultimate assimilation”</i></p> <ul style="list-style-type: none"> <li>• Person <i>wants</i> to be <i>taken</i> for White</li> <li>• They need to move away from their family and communities</li> <li>• They will consciously integrate themselves within White culture</li> <li>• This person is <i>accepted</i> as White by those around them, not experiencing racism</li> <li>• This person is aware of their ancestry</li> </ul>	<p><i>Problem Case VII – “White renegade”</i></p> <ul style="list-style-type: none"> <li>• “Race traitor”</li> <li>• Not merely betraying their race but in some sense <i>changing</i> their race</li> <li>• “Honorary” Black</li> <li>• “Set out to support and identify with black struggles, steeps himself in black culture, joins non-separatist black political organizations”</li> </ul>
<p><i>Problem Case III – “Unconscious passing (natural Whiteness)”</i></p> <ul style="list-style-type: none"> <li>• Unconscious passing</li> <li>• This person is unaware of their ancestry</li> </ul>	<p><i>Problem Case VIII – (“Black’) White renegade”</i></p> <ul style="list-style-type: none"> <li>• The White renegade who does in fact have Black ancestry</li> </ul>
<p><i>Problem Case IV – “Mr. Oreo”</i></p> <ul style="list-style-type: none"> <li>• Cannot “pass” <ul style="list-style-type: none"> <li>○ “Dark”</li> <li>○ “African features”</li> <li>○ Known Black history</li> </ul> </li> <li>• <i>They identify themselves</i> as White</li> <li>• <i>Rejects</i> Black culture</li> </ul>	<p><i>Problem Case IX – “‘Biracial’ (self-identified)”</i></p> <ul style="list-style-type: none"> <li>• Thinking through the context of the U.S. (one-drop rule) and through Caribbean and Latin American classifications of multiracial communities and people</li> </ul>
<p><i>Problem Case V – “Mr. Oreo and the Schuyler machine (artificial Whiteness)”</i></p> <ul style="list-style-type: none"> <li>• “Schuyler machine” – to transform one’s appearance as “White”</li> <li>• “‘Artificial’ does not necessarily contrast with ‘real’; it just contrasts with ‘natural’”</li> </ul>	<p><i>Problem Case X – “‘No-racial’ (self-identified)”</i></p> <ul style="list-style-type: none"> <li>• Naomi Zack: “The concept of race is an oppressive cultural invention and convention, and I refuse to have anything to do with it...Therefore, I have no racial affiliation and will accept no racial designations”</li> <li>• At the same time, “It ignores the fact that in a racialized society people will continue to have racialized experiences, whether they acknowledge themselves as raced or not”</li> </ul>

ancestry, public awareness of ancestry, culture, experience, and self-identification.<sup>60</sup> This is where Mills introduces the concept of personal identity as it relates to his overall project, in which “there is an answer to the question ‘Who are you *really*?’” that is not necessarily the same as the answer to the question who the person is *taken* to be.<sup>61</sup> With the introduction of the “problem cases” (as presented in the chart above), Mills asks, “what happens when, through naturally occurring or artificially devised problem cases, individuals are produced whose racial ontology is not immediately or maybe not even indefinitely clear?”<sup>62</sup>

If we look at the first problem case, “passing” is used as a tool to obtain certain privileges—to use their ability to pass to their advantage in certain social contexts such as being able to maneuver in predominantly white spaces or not having their race be the driving factor in decisions related to employment or investments. The goal is purely strategic, as opposed to Problem Case II where the goal is ultimately assimilation. Both Problem Cases I and II are conscious of their passing, as opposed to Problem Cases III and VI that demonstrate the tension that arises between the community, environment, and apparent reality that one grows up and develops their identity in, and how ancestry can have both an incredibly significant effect and no effect at all depending on whether or not a person is aware of their ancestry. Additionally, Problem Cases IV and VII represent a move to embrace an identity, a culture, and community that is not the one that they were assigned—a rejection of the assumptions, stereotypes, and parameters that their assigned race has placed upon their identity and how they see themselves. It is for this reason that Problem Case V presents an interesting layer to both discussions about passing and of rejection and goals to assimilate, explicitly looking at the blurred line between “artificial” and “natural” when it comes to determining whether a person is “really” this race or that. Without prior knowledge, history, or context what markers determine our ability to say that a person is definitively a certain race? Where does the problem arise—when individuals decide to “play” a certain role and pass or transform their identity into something that is more reflective of how they understand themselves and relate to the world around them, or when those

around them realize that they have been “played,” that their entire perception of these individuals is in fact ruptured and in need of reassessment? This is why the mixed-experience is complicated and frustrating at times. As reflected in the last two problem cases, it is the experience of existing between multiple boundaries and of having to navigate various perceptions about yourself depending on what social sphere you are in at a given moment. For me, it is thinking about the ways in which I transform—the mannerisms, speech patterns, the introduction of certain topics or interests such as my love for baseball and basketball or why I think a good bowl of ramen should not be more than \$16—when I am talking to someone who is a White American as opposed to a person in Japan, both in an attempt to be recognized as both a White American and Japanese when both will only assume one of these. I will be read and recognized in a certain way, and I have accepted the fact that their perception is something that I have no control over.

To return to Bowker and Star momentarily, they introduce a discussion in their book related to two systems of classification: Aristotelian classification vs. prototype classification. Aristotelian classifications work “according to a set of binary characteristics that the object being classified either presents or does not present. At each level of classification, enough binary features are adduced to place any member of a given population into one and only one class,”<sup>63</sup> whereas “prototype theory proposes that we have a broad picture in our minds of what a chair is; and we extend this picture by metaphor and analogy when trying to decide if any given thing that we are sitting on counts.”<sup>64</sup> They suggest that “One might observe that technical classification schemes are constructed in such a way as to fit our common-sense prototypical picture of what a technical classification is.”<sup>65</sup> If we think about racial categorization and identity in a similar manner to prototype theory, Charles Mills incorporates a series of “problem cases” to examine how his criteria for racial self- and other-identification materially and physically plays out—that is to complicate how we understand his classification schema of racial identification when it comes to the fluid, ambiguous nature of the real existences and experiences of race.

Mills' "problem cases" truly do demonstrate a "problem"—a problem embodied in the inability, or rather unreliability, for the language of race to adequately describe identity as experience. It is not simply that one "is" or "is not." Race and its language are not titles in the abstract, devoid of social, historical, temporal, or spatial contexts—and yet their logic and function relies on generalizations perpetuated by the formal techniques of categorization that base their meaning in our ability to assume knowledge of race and racial identity. One's race can determine what kinds of life chances one is likely to have based on how one is "read." It is for this reason why, inherent in Mills' "problem cases," it is not simply striving for an acknowledgment of self-identification but rather striving for ways to transcend the confinements that racial categorization has placed upon those who find themselves excluded from the "White" side of the binary, with all its political, social, and economic privileges.

#### ALTHUSSER AND "(MIS)INTERPELLATION"

Louis Althusser's piece, "Ideology and Ideological State Apparatus," is an exploration of his conception of "ideology," and can be framed as an overall discussion of the relationship between individual and state, but more specifically related to an examination of subject formation and subjection. For Althusser, "there is no ideology except for concrete subjects, and this destination for ideology is only made possible by the subject: meaning, *by the category of the subject* and its functioning."<sup>66</sup> By this Althusser means that, "the category of the subject is the constitutive category of all ideology...insofar as all ideology has the function (which defines it) of 'constituting' concrete individuals as subjects."<sup>67</sup> Althusser describes this as a "double constitution"—where ideology is "nothing but its functioning in the material forms of existence of that functioning."<sup>68</sup> Althusser states that,

"Ideology 'acts' or 'functions' in such a way that it 'recruits' subjects among the individuals (it recruits them all), or 'transforms' the individuals into subjects (it transforms them all) by that very precise operation which I have called *interpellation* or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: 'Hey, you there!'"<sup>69</sup> (Althusser 174).

In this moment of "interpellation," "he becomes a *subject*...Because he has recognized that the hail was 'really' addressed to him, and that 'it was *really him* who was hailed' (and not someone else)."<sup>70</sup> Ultimately, Althusser's argument is that "ideology has always-already interpellated individuals as subjects, which amounts to making it clear that individuals are always-already interpellated by ideology as subjects, which necessarily leads us to one last proposition: *individuals are always-already subject*."<sup>71</sup> By this, Althusser means that "it interpellates them in such a way that the subject responds: '*Yes, it really is me!*' if it obtains from them the *recognition* that they really do occupy the place it designates for them as theirs in the world, a fixed residence."<sup>72</sup> This hail is politically important because how one is hailed has a concrete impact on how the state will *treat* you—that is, how you will be allowed to move through society, and the opportunities that will be afforded to you.

I believe that it is useful and insightful to look to Althusser's concept of interpellation as it relates to the formation of racial identity within the United States. If we think about it in terms of Mills' "problem cases," a key aspect that is highlighted is the ability of "passing" as it relates to how individuals are able to form their identity when so much of this creation is influenced and predicated upon individual appearance and the perceptions of this appearance by others and society as a whole. In the sphere of everyday life, when we come face to face with one another, we look to the language of race and our social stock of knowledge to read and attempt to understand whom we are dealing with. As it relates to interpellation, we can say that it is this language of race embodied in racial categorization that exists *prior* to any interaction that we have in the sphere of everyday life—that is, that in theory we always already have a designated racial category. Through our interactions in the sphere of everyday life, we are "called upon" through specific language and with a racial category already in mind. The formation of our racial identity is predicated on how we are interpellated—the relationship and reaction between how others read us and how readily we accept their reading.

Another important component to Althusser that deepens our conversation of interpellation as

it relates to the formation of racial identity is the nature and political implications of interpellation. Althusser uses the example of “Christian religious ideology” to demonstrate what he describes as “the duplicate mirror structure of ideology”:

“1. the interpellation of ‘individuals’ as subjects; 2. their subjection to the Subject; 3. the mutual recognition of subjects and Subject, the subjects’ recognition of each other, and finally the subject’s recognition of himself; 4. the absolute guarantee that everything really is so, and that on condition that the subjects recognize what they are and behave accordingly, everything will be all right.”<sup>73</sup>

Essentially that “the individual *is interpellated as a (free) subject in order that he shall submit freely to the commandments of the Subject*, i.e. in order that he shall (freely) accept his subjection, i.e. in order that he shall make the gestures and actions of his subjection ‘all by himself’. *There are no subjects except by and for their subjection.*”<sup>74</sup> The free subject who accepts this interpellation is for Althusser the “good subject,” as opposed to the “bad subject” who, when called upon, rejects this interpellation—*No, that is not me*. The racial logic within the United States functions on the same necessity of the “good *racial* subject.” When we call upon race and racial identification in the United States, we are 1) expected to know what “race” means, and 2) accept the validity behind the logic of racial categorization. That is, that whatever “race” we are categorized as is “right,” and that how we act in the sphere of everyday life correlates to the conceptions that we have from our social stock of knowledge about what the identity of each race implies. What formal racial categorization implies within the socio-historical context of the United States, is a perpetuated conception of race as definitive. That we are prescribed a race at birth, and that this categorization will be attached to us permanently, at all times. Althusser’s concept of interpellation resonates with me because it outlines a process of subject formation that demonstrates how aspects of categorization as they relate to identity are truly oppressive. We are made to believe that race, at least within the context of the United States today, is simply a matter of categorization that signifies an individual’s belonging to a particular group—and *not* that *our* sense of identity is

predicated on a standardized, predetermined in its structure, conception of what it means to be a particular race. I have never known what it feels like to be the “good subject.” There is a constant awareness on my part where I “know” what “Whiteness” means, and I “know” what being “Japanese/Asian” means, but that I can only ever be the “bad subject” because I am interpellated, read, perceived as “White”, perhaps with “something else,” but something else in addition to my Whiteness. My experience as someone of “mixed-race” background is one of constant “misinterpellation.” When I am misinterpellated as “White” and only “White,” it reveals this inner tension that I have—where I want to reject my “Whiteness,” and simultaneously feel as though I am *deficient* when it comes to my ability to “claim” my Asian identity because I am only recognized and acknowledged as “White.”

Racial subjectivity in this context—that is of being the “good racial subject”—depends on our ability to accept the ways in which our racial identity is reduced to generalizations and stereotypes. More explicitly, in our ability to accept the White gaze as a filter for our reality. To be a “bad racial subject” is to reject the white gaze, to dismantle the hierarchy and take aim at our conceptions of “Whiteness,” or rather of White privilege. It is about rejecting the ways in which race is used as a tool (regardless of what race you are) to tell you who you should be, what you should be doing, and how you should read, organize, and place others in a very antagonistic kind of way. To finally return to the question posed at the beginning of this paper, *the tension between the formal racial logic of the United States and the lived experience of racial identity within it can be located in misinterpellation*. There is a tension because we read each other and ourselves through visual assumption using the language of race, and this tension arises when the assumptions are wrong—wrong in the sense that we are perceived, acknowledged, and understood as something that we do not identify ourselves with. This tension is the implicit White gaze within the logic of the language of race and of racial categorization that affects the ways in which we are able to transcend the political, social, and economic confinements placed on us based on generalizations and stereotypes.

**EMBRACING THE TENSION AND BEYOND**

The hardest part about realizing and locating this tension, is actually acknowledging it. In his piece, “The State of Post-Soviet Aphasia,” Serguei Alex Oushakine attempts to understand and explain the experience of those who grew up in a post-Soviet Russia in their establishment and construction of a Russian identity, and in their relationships to others in how they placed themselves within Russian society. As Oushakine points out, aphasia is traditionally “understood as a process of ‘regression and disintegration’ of the individual speech.”<sup>75</sup> In his piece, Oushakine uses aphasia as a foundation within which to highlight the weakening of social symbolism in its inability to provide individuals with the right signifiers that adequately represent their perspectives and experiences.<sup>76</sup> What Oushakine describes is a state of “in-betweenness”—of “discursive ‘losses and compensation,’”<sup>77</sup> where it is “as if, words not only ‘lost’ their former political appeal, but also somehow became *meaningless*,”<sup>78</sup> leaving individuals with a sense of ambivalence and uncertainty in being able to name and describe their experiences and identity. Specifically what is highlighted in Oushakine’s focus on post-Soviet society in Russia is the event and process in which a society undergoes a major rupture and transformation, and ultimately the effects that occur within individuals’ conceptions of identity and belonging when the framework within which to understand these things is changing.

I find Oushakine’s piece helpful in the sense that his framework is very applicable in describing and trying to analyze the concept of race within the United States today. Just as Oushakine describes the experiences of those who grew up in a post-Soviet Russia, I myself am a child of the 1990s growing up in a society at a time in which major transformations are underway with regards to how we understand and experience race. Part of this change is directly related to the linguistic and symbolic ways in which we understand and discuss race. Race for me has always been representative of the “symbolic shortages” Oushakine discusses, where “one [not only] has to make do with the symbols s/he already has,” but “the lack of mediating structures coincides with the lack of ‘tools’ with which to understand the transformation.”<sup>79</sup> For me, it created exactly a cycle of “paralysis” that Ousha-

kine warns of, where I felt abandoned in this state of “in-betweenness” and had no means of understanding myself and my experience, and no way to relate or connect to those who were around me.<sup>80</sup>

For me, I was disappointed in the language of race, and distanced myself from it so as not to feel the hurt that living in a constant state of unaddressed tension creates. As Audre Lorde reflects, “of course I am afraid, because the transformation of silence into language and action is *an act of self-revelation*, and that always seems *fraught with danger*.”<sup>81</sup> Lorde states that “in the cause of silence, each of us draws the face of her own fear—fear of contempt, of censure, or some judgment, or recognition, of challenge, of annihilation. *But most of all, I think, we fear the visibility without which we cannot truly live*”<sup>82</sup>—“for we have been socialized to respect fear more than our own needs for language and definition, and while we wait in silence for that final luxury of fearlessness, the weight of that silence will choke us.”<sup>83</sup> Lorde’s piece is a description of her own self-examination and how this self-reflective process can help free us from this tension. Lorde states that “for every real word spoken, for every attempt I had ever made to speak those truths for which I am still seeking, I had made contact with other women while we examined the words to fit a world in which we all believed, bridging our differences.”<sup>84</sup> As bell hooks observes, “Shifting how we think about language and how we use it necessarily alters how we know what we know.”<sup>85</sup> Visibility in this sense is about creating the space to accept the project of the “bad racial subject,” and to begin to find a new language and articulation for which to politically make our claims.

It is through pieces such as W.E.B. Du Bois’, “The Souls of Black Folk,” that I find a sense of relief, in hearing an articulation—in finding the words to describe how I feel and immediately feeling assured in knowing that I am not alone. Du Bois’ piece is powerful because it is a study that is grounded within his own personal reflection of what it felt like to be “Black” within America at that moment in time. Du Bois states,

“Between me and the other world there is ever an unasked question: unasked by some through feelings of delicacy; by others through

the difficulty of rightly framing it. All, nevertheless, flutter round it...To the real question, How does it feel to be a problem?"<sup>86</sup>

Whether it is like this in actuality or not, I feel as though when my race becomes a point of question and contention, there are a multitude of questions that people suddenly have because they have somehow discovered me to be something they previously did not think I was. It makes me feel as though I have to convey this experience and articulation of being "mixed-raced" as fulfilling and more exciting in trying to meet their expectations and anticipation of what having multiple identities as important as race is like. Du Bois' articulates the concept of a "double-consciousness" where there is a "sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity."<sup>87</sup> He goes on to state that, "One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder."<sup>88</sup> My experiences made me grow up to think that my identity was to be understood as a binary and more or less fixed when it came to categories such as race. I felt trapped between what I wanted to see myself as, and the ways in which I prevented myself from fully realizing the possibilities of this conception. The twoness that Du Bois speaks of is that of the White gaze. His is an articulation of duality and of power—power in the sense that it is this White gaze that structures and determines not only his position within society, but also how to view and understand this position. Though this "double-consciousness" is directly interwoven with the history of the United States as it relates to the history of African-Americans and those labeled as "Black" and should not be individually diminished in this comparison, I think that an expansion of the scope of this "White gaze" can be useful in articulating and explaining the "White gaze" that I am trying to define.

Though Du Bois' notion of a "double-consciousness" is helpful, being "mixed-raced" is not simply the experience of being raced, but of being *mis-raced*. It is for this reason that I turn to Gloria Anzaldúa's book, *Borderlands: La Frontera The*

*New Mestiza*, in trying to show a reflection and articulation of the "mixed-race" experience. Similar to Du Bois, Anzaldúa grounds her exploration through the framework of her own experiences of being a "*mestiza*." What makes Anzaldúa's book important for me is her language and articulation in expressing her experience and understanding of her own identity. She uses the terms that I was afraid to use in describing and truly understanding my own experiences. She articulates what is at stake for those who are "mixed-race"—it is a "struggle of flesh, a struggle of borders, and inner war,"<sup>89</sup> and "a swamping of her psychological borders."<sup>90</sup> Not only does she describe the reality of this pain, but she also does so in a way that does not fall into the trap of self-pity or paralysis. There is an acknowledgement of the ambivalence in a way that introduces the benefits of being in this state of "in-betweenness." The new "*mestiza*" "has discovered that she can't hold concepts or ideas in rigid boundaries," and that she "copes by developing a tolerance for contradictions, a tolerance for ambiguity"—"She has a plural personality, she operates in a pluralistic mode—nothing is thrust out, the good the bad and the ugly, nothing rejected, nothing abandoned."<sup>91</sup> Anzaldúa describes a "*mestiza* consciousness" wherein her existence,

"communicates that rupture, documents the struggle. She reinterprets history and, using new symbols, she shapes new myths...She strengthens her tolerance (and intolerance) for ambiguity. She is willing to share, to make herself vulnerable to foreign ways of seeing and thinking. She surrenders all notions of safety, of the familiar. Deconstruct, construct."<sup>92</sup>

The "*mestiza*" is a sight of exploration with which to look at race precisely because those who are "mixed-raced" are in this position within society that lies external to the racial binary, giving us a unique perspective that requires us to think on our feet and envision the different possible answers, understandings, and meanings when we are confronted with race on an everyday basis.

"Mixed-race" people have to go through this regardless of whether or not those around us are aware of it. Anzaldúa states, "Rejection strips us of self-worth; our vulnerability exposes us to

shame... We are ashamed that we need your good opinion, that we need your acceptance."<sup>93</sup> At the end of the day, all I wanted to feel growing up was a sense of belonging—a belonging which I now realize is a constant process and activity, rather than a “you’re in / you’re out” kind of a relationship. Within moments of “misinterpellation,” it is an *awareness* of the ways in which you are viewed by others that then allows us to synthesize our experiences, to predict and speculate how we are read, to play with and openly contest this reading.

In her piece, “Hometactics: Self-Mapping, Belonging, and the Home Question,” Mariana Ortega introduces the terminology of “multiplicitous selves”—“selves that occupy multiple positionalities in terms of culture, race, sexual orientation, class, and so on.”<sup>94</sup> Ortega argues that, “there is no sense in which one can be said to *fully* belong. There are only different senses of belonging depending on which markers of identity are chosen. Full membership and belonging, the safe, comfortable home is indeed an imaginary space in need of demystification.”<sup>95</sup> In her own self-reflection, Ortega states that “for me, hometactics have been a way of not just surviving in my travels across different worlds but of feeling a sense of much needed familiarity and relief in the midst of an existence filled with contradictions and ambiguities that lead both to moments of intimate terrorism—or of cactus needles embedded in the skin—and exciting moments of creativity and resistance.”<sup>96</sup>

It seems quite fitting now to return to a discussion about Paul Gilroy. When Gilroy invites us to imagine a world without race or racial categorization, he is inviting us to imagine a world in which we abandon the language of race, or at least how it operates within law and the sphere of everyday life today. At the beginning of this paper I stated that I was not ready to accept Gilroy’s invitation precisely because I am not ready to “abandon” race, its logic and language, and the material reality it has produced with actual consequences for differences in life chances that simply cannot be erased. I am in a constant search for meaning and ways to articulate this meaning. I have already passed the hardest point of acknowledging my own tension and the effects that being misinterpellated has had on the formation of my identity, but it has become

obvious that the experience and living out of racial categorization and racial identity will be a constant point of tension that will require self-reflection and connecting with others. Racial categorization and identity cannot simply be something that we can use and then abandon like an “on/off” switch.

Jacqueline Scott in her piece, “Racial Nihilism as Racial Courage: The Potential for Healthier Racial Identities,” Scott grounds her discussion of race and ways to tackle racism through Friedrich Nietzsche’s concept of “nihilism.” As it relates to the ultimate demise of existence as expressed through nihilism, Nietzsche argues that instead of succumbing to a weak pessimism, “we should instead experiment (*versuchen*) with embodying ‘a pessimism of *strength* [*stärke*]...an intellectual predilection for the hard, gruesome, evil, problematic aspect of existence, prompted by well-being, by overflowing health, by the *fullness* of existence.”<sup>97</sup> In the preface to *The Gay Science*, Nietzsche speaks of a kind of “self-mastery.” He states that, “[O]ut of such long and dangerous exercises of self-mastery one emerges as a different person, with a few more question marks—above all with the *will* henceforth to question further, more deeply, severely, harshly, evilly and quietly than one had question heretofore.”<sup>98</sup> He goes on to add that “this type of self-mastery involves not only seeing life differently (more pessimistically), but also giving birth to a new self (‘one emerges as a different person’).”<sup>99</sup> As it relates to her project towards contesting racism, Scott states that those who take on this “pessimism of *strength* [*stärke*],” “amass profound self-knowledge and this allows them to figure out how best to wield/ deploy their powers (will to power) as they experiment (*versuchen*) with different ways of contending with racism and expressing themselves as racialized individuals or communities.”<sup>100</sup> Scott notes that “while this experimentation might lead them to fall into weak pessimism or self-deluding optimism, this self-mastery might also allow them to attempt new experiments that would move them into healthier engagements with racism.”<sup>101</sup>

This paper will even serve as a specific moment in time for my own understanding and articulation of my identity. The terms that I use are not permanent. What is important is the articulation of the

experience in a way that engages with the feelings and material consequences of being racially interpellated, or misinterpellated. Not only this, but it is an engagement that also requires an openness—not everyone is at the same stage and position towards understanding and developing their own racial identities, but what is important is to not internalize this discussion and allow yourself to remain in a state of isolation and paralysis. What makes race so powerful today is our inability to have an open discussion without fear of having someone judge, diminish, and even silence our own experiences and reality. Anzaldúa states, “The struggle has always been inner, and is played out in the outer terrains. Awareness of our situation must come before inner changes, which in turn come before changes in society. Nothing happens in the ‘real’ world unless it first happens in the images in our heads.”<sup>102</sup> This paper is not only a form of self-reflection, but is also reflective of my process in trying to deconstruct my own racial identity and find the words to piece it back together. The key to breaking this “silence” and the power that the language of race has is through personal reflections and an honest discussion of the many difficulties that have not only rose from the history of race as a whole within United States’s history, but within our current moment as it relates to “mixed-race” people and how to place and find ourselves within society.

Scott (in line with Nietzsche) argues that “we must first see racism in a different way: it is less a sickness to be cured and more a congenital handicap that, if we accept it, might help us to find new ways of being in the world and emerge stronger.”<sup>103</sup> I do not believe that we are in a place right now within the context of the United States where we can “move on” from race as it relates to the formation of our identity. Right now, I am not sure if or when we will reach this point—I do not close off this possibility, or resent Gilroy for his invitation to imagine a world in which my tension can be released or shared amongst those around me. There simply is a multitude of types of work to be done, in various forms and degrees, enacted and called upon by various individuals. It would be false and destructive to suggest that this work is a homogeneous project. Race is hierarchical, and the levels at which individuals experience and explicitly feel the effects of the White gaze are reflective of

this. The experience of race, and of being mixed-race, has many contexts and consequences.

We must embrace and embody the identity of the “bad racial subject”—it is not about rejecting racial categorization necessarily, but about rejecting the White gaze that is implicit in its logic. To actively contest and deconstruct the ways in which we are told to read bodies, experiences, life expectancies, and positions within society, of others and of our own. It is a way to gain a new perspective, new tools and tactics to challenge and erode the political, social, and economic boundaries that have oppressed our conceptions of self and inflicted our bodies with physical and ideological harm—the boundaries and logic that have convinced us that it is the racialized “other” that is at fault and not the system from which this perception is derived. Without this rejection and acknowledgment of the privileging of Whiteness that is inherent in all racial organization and interaction within the United States, we cannot even begin to imagine a world such as the one Gilroy is proposing. The only way to tackle race is through a collective effort that seeks to actively contest the White gaze and make transparent the ways in which we are prevented (politically, socially, and economically) from achieving and actualizing power and autonomy.

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IMAGE BY ISABELLA KLEIN

# SHAME'S ROLE IN SEXUAL ASSAULTS

BY ISABELLA KLEIN

**Abstract:** Throughout time, countless women have been sexually assaulted by men. We live in a society where people are conditioned to be dominated by men. Society believes that women should dress in a feminine manner which only perpetuates this dominance. Men label women as weak and easy targets that are sexual beings. This stereotype allows for the abuse of woman and for this abuse to go unreported. Shame and societal norms cause victims of sexual assault to feel uncomfortable or partially at fault for their assault. As a result over 30% of sexual assaults remain unreported and many perpetrators of the act remain unconvinced. Justice in this society does not prevail.

**Keywords:** Shame; Male Domination; #MeToo; Reporting on Assault

***\*This essay contains a recount of sexual violence and a survivor's narrative.***

Every 98 seconds a woman is sexually assaulted.<sup>1</sup> After an assault one is often faced with a difficult choice. Do you press charges and pursue legal means of achieving justice? Do you stay quiet? What should you do? Often many seek advice from their friends, family, and the police. But sometimes this advice is not received well. Victims are often shamed into not pursuing charges by these people. Between 2005-2010 victims of sexual violence gave the following reasons for not reporting the crime. 20% fear retaliation, 13% believed the police would not help, 13% believe it was a personal matter, 2% believed the police would not be able to help, 8% believed it was not important enough to report, and 30% gave another reason.<sup>2</sup> Fear, shame, humiliation, and lack of faith in the police force put victims of crimes in precarious situation.

Unfortunately, we live in a world where women are blamed for their own sexual assaults. There are countless horror stories of women being raped and men justifying their actions saying that the women wanted it. When asked how the man knew, he often claims that the women was dressed provocatively and that justifies there cruel actions. Parents, friends, and the perpetra-

tor him or herself, the police, and any number of people can play a role and either intentionally or unintentionally causes the victim to be ashamed of what happened to her. Shame is overpowering and can cause one to doubt whether or not what happened was or was not their fault. Everything a person thought about their attack can be thrown in their face and twisted around till it is eventually their fault, or one at least had some role in it. At this point this shame can cause one to rethink everything, which inevitably leads to an outstanding number of sexual assaults going unreported. According to RAINN, "only 310 out of every 1000 sexual assaults are reported to the police. That means about 2 out of 3 go unreported."<sup>3</sup>

This paper will examine the relationship between shame and sexual assault through the responses to sexual assault that are perpetrated in society, the regimes of power that sustain them, and the social processes that are legitimating them. These elements lead to shame's role in limiting a victim's ability to report their assault. Male domination has created an environment in which women are the weaker sex and prone to being assaulted. Society reinforces these tendencies by silencing victims of sexual assault and the law further works to deny women justice and oppress them.

This topic is not only political, it is personal. I experienced the worst day of my life 10 years ago. I like many went into a situation thinking that nothing would happen and was proven incredibly wrong. When I was 15 years old my friends invited me to their house. I was told we were going to smoke a joint and hang out. I was excited, I had just moved back home from Minnesota after living there for 2 years. It was the summer before school was about to start and I was nervous, unsettled, and not sure what my place was in the school after being away for so long. After reaching out to some old friends I finally got the opportunity I was looking for. I wanted the chance to reignite old friendships and was eager to do so. The invitation I had received seemed like the perfect opportunity to rekindle old friendships before I returned to school. I was young, eager, and susceptible. My assaulters invited me to his friend's house. I went assuming it would be harmless fun. When I arrived he and his friend were not the only

ones there. There were a total of 4 men. One was much older than me and I did not know who he was. I had heard of him because his dad was well known throughout the town of being one of the firefighters who died in 9/11 so I naively assumed that this made him ok and trustworthy. Besides the boy who had invited me the two other guys had also gone to school with me the majority of my life. Their names were Brad, Eric, Anthony, and Matt.

I would have never thought that anything would happen, I felt safe and secure even though I was in a room filled with guys. We started to smoke. I got high, flirted with Sam, and went to go to the bathroom. On my way there Anthony offered me a drink. I took it, without thinking, without second-guessing. I was excited if anything. I felt like I was cool and accepted. This was the first time I had felt secure since moving back "home" from Minnesota. After this everything was a blur. I remember becoming dizzy, I couldn't see. Everything was moving around me. I was scared and I couldn't understand what was happening to me. This after all was not my first time consuming alcohol or doing drugs. I was, as my parents would later call me, promiscuous. The next thing I knew Brad was on top of me, my pants were down to my ankles, and he was raping me. Another boy Matt was attempting to get me to perform oral sex on him, and the other two boys stood there watching, waiting for their turn. I didn't realize what was happening to me, I couldn't move, I couldn't fight back. I submitted to what was happening and was unable to do anything; after all I was drugged. The next think I remember was throwing up all over them. The boy who's house it was at started yelling at his friends, telling them to get me out of the house because I was making a "mess". They left me on the street like I was garbage and walked away laughing. Ridiculing me for throwing up and ruining the fun.

I tried calling my brother; I couldn't even dial my phone. I saw a woman walking down the street, I somehow managed to ask her for help. She was kind enough to help me call my brother, who then ran from my house which was just a few blocks away to come get me. I could not walk so the woman helped my brother and drove me home. My brother put me in my bed and I went to sleep. I woke up not recalling what had happened. About

two days later the woman returned with my shoes and my pants. They had been thrown out the window and she saw it and knew it was mine. The past descriptions of events are only pieces of what I have put together after years of thinking about it. My parents came to me and punished me for getting drunk. They took my phone away and grounded me, they did not allow me to talk to anyone, see anyone or do anything. They asked me who I was with at first I was hesitant I did not want to make any problems or be embarrassed. They made me tell them so I did. I told them Eric. My dad took me to his house. He left me in the car and went into talk to his parents. He came out and told me to never hang out with him again and after that my parents never mentioned his name again. I was confused I tried to reach out to the boys I had been hanging out with, but they did not answer.

I had a boyfriend at the time; I managed to get a hold of him a few days later. He would not talk to me. He called me a slut and a whore. He told me that I had cheated on him with his friends. After all it was a close-knit town and everyone talked. I was so confused; I was hurt and most of all ashamed. I returned to school and I began to see Eric, Brad and Matt around. I did not talk to them, and they did not talk to me. But I felt so uncomfortable. I knew something was wrong. After a few weeks people began calling me a whore and a slut in school. People told me that I was a drug addict and shouldn't be going around sleeping with people because I was going to pass them STD's. I really did not understand why this was happening. I would have never thought at the time that I was drugged. I assumed that I did it to myself; I put myself in the situation and earned what had happened to me. Months went by and I was still ridiculed.

One day I was outside smoking a cigarette and Eric came up to me, I asked him what happened, and he told me straight up. He said that they had roofied me and wanted to take turns having sex with me because I wanted it. He even said that they had a video of it. I was shocked. I finally understood what had happened to me was rape. I was only around 16 when I finally got to the bottom of my rape. I did not know who to talk to. I was an outcast at school, and I was scared. I felt violated more than I had before. I couldn't believe that peo-

ple who I had known my entire life would attack me and leave me on the street drugged and unable to fend for myself. What if a car had hit me? What if I would have died? What if no one would have been there to help? A year had passed and I wanted to tell someone, but I was scared that no one would take me seriously, especially since I had earned myself a wonderful reputation of being a slut and a drug addict. I remember going to health class one day. We learned about sexual assault. In a 45-minute period my teacher Mr. Fisk explained to us what to do in these “situations” and how we should move forward. He didn’t exactly specify what we should do but this topic resonated with me. He made me feel like I could talk to him and tell him what happened. I was truly suffering, I was scared every day I had to see my attackers, and I even had classes with them. I could not hold it in any longer. So I told Mr. Fisk, he was compassionate, kind, and caring. He talked to me about how I felt and told me that he understood. He even urged me to tell the principle what had happened. He said that I deserved justice and he wished he could give it to me, but that it was not his place. I thought about it and finally worked up the courage to do so.

I went to the principal’s office and told him exactly what had happened. I recounted the entire story to him and told him how I had been raped and drugged by two students in the school. I told him that if I had not thrown up I probably would have been raped by all of the boys. I told him that they even had a video of it and how they had been making fun of me for it. What I heard next came to me as shocking. He told me that it was my fault. I had obviously gone there knowing that I was going to do drugs. He told me to rethink about what I had told him. Maybe I had simply taken more drugs than I thought. He also told me that I had flirted with Brad, so that obviously made him think it was OK to have sex with me. I was ashamed and embarrassed he convinced me it was my fault. I told my health teacher what the principle had said to me. He was not as helpful as I thought. He told me that there was no longer anything he could do. After all the principal was his boss, and he could not go against him. I was told that I should listen to his advice and stop doing drugs and make sure that I did not put myself in any more risqué situations.

I went home turning to my parents hoping that they would help me. It turned out that they had known all of this time. They told me that they had already taken care of it with his parents, and that there was nothing more to be done. They discouraged me from going to the police telling me that I would look stupid since it had been a year since it had happened. Everyone around me turned against me. They made me feel like it was my fault I had been raped. They made me think I deserved it. My parents were ashamed, my friends were ashamed, and I was ashamed. I was let down by the system, I was let down by the school, and I was let down by my own family. I did not receive justice for what happened to me, and now I never will, instead I was punished for being raped. Unfortunately I am not the only one who has experienced such events.

Women are set up to be vulnerable to sexual assault by societies’ devaluation of women and focus on male needs. Male domination has existed in society since the beginning of time. We live in a world where men look down upon women, exploit them, and use them to do the things that are below them. Women get stuck performing reproductive labor. They work in the house, give birth to children, and cater to their husbands needs. In *The Second Sex* by Simone de Beauvoir, the author describes how men fundamentally oppress women by categorizing them as “other.” She argues, men are the subjects and women are the objects. Without a man, a woman is incomplete. To Beauvoir, men are the ones who dominate society, and their labeling the women as other is denying them a sense of humanity. Males have been superior throughout time. The author traced male superiority through contemporary times. In each example we can see female subordination to men. The author questions why females should be subordinate and disputes the concept of femininity all together. She claims that this is a sort of mythical representation of women that is oppressive in nature. Many of these mythical representations come from maternity and birth. In *Politics With Beauvoir: In Freedom in the Encounter* by Lori Jo Marso, the author writes about male domination and further analyzes Beauvoir’s second sex. The author writes,

Psychologists and biologists ‘ascribe meaning to vital phenomena,’ but ‘seeing in these facts the

harbinger of the battle of the sexes' is a political act, which in this case circumscribes the freedom of women by saying the female is, at one in the same time, a 'danger' to the male species but also 'naturally' suited for caring for children.<sup>4</sup>

It is interesting to think of women as fearful creatures that have a duty to bear children. These are the sorts of stereotypes that bring women down and cause them to be seen a certain way. Women are not born as "feminine," outer social processes are what make them "feminine" in this sense. Girls are conditioned through their upbringing to be passive and dependent on men. These outer social pressures are what imminently make women into the weaker sex. They become housewives, child bearers, and entertainers. They are not expected to work or provide for their families in the same way as men, "for man she is a sexual partner, a reproducer, an erotic object, an other through whom he seeks himself".<sup>5</sup> Why should men refrain from sexually assaulting women if that is what they see them as useful for. The way society has structured the picture of women, and the concept of femininity sets women up to be assaulted and used by men.

Male domination is a social process that excludes women from controlling their own lives. Women are expected to act a certain way, dress a certain way, perform certain activities, and live life in a certain way. All of these expectations that men have of women in society leave them in a vulnerable place. These preconceptions make women more susceptible to influence. Society is still like this even in contemporary times. In the work place, schools that require uniforms, and many other institutions, women are not only required but expected to dress a certain way. Although, women are beginning to feel more confident and there have been movements of women beginning to dress differently, for example there are now unisex clothing lines. Many unfortunately still feel a sense of obligation to remain feminine and are even required to at times. In 2016 there were two controversial occurrences of women being fired from their jobs because they could not wear heels as they were required to in the dress code. Fortune Magazine published the statements of one of these women:

"Nicola Thorp was sent home without pay from a scheduled receptionist job at PwC's London

office after refusing to wear shoes with a 2- to 4-inch heel. She says her employer, the Portico temp agency, had insisted that high heels are part of proper "female grooming," and that it argued that Thorp had signed its "appearance guidelines." Thorp told BBC Radio London, "I was expected to do a nine-hour shift on my feet escorting clients to meeting rooms."<sup>6</sup>

This perpetuates the male vision of women as objects. These sorts of behaviors can be demonstrated both in and out of the workplace. Beauvoir states, "In such a family [the] woman is oppressed. Man reigning sovereign permits himself, among other things, his sexual whims..."<sup>7</sup> This legitimizes sexual assault to them. Why not take advantage of weak women who are dressed in a certain way? They label women as sluts, whores, simply to be used, and unfortunately women are conditioned to surrender to these sorts of labels. Women do not have control over their lives. Men do. We can see this from the example above. It is most likely a male CEO that designs dress code for the women who work for him in order to please his male clients. Although women have entered the workplace they are still conditioned to be feminine and sexual, as Beauvoir shows. Through the conditioning of women, they are eventually denied the possibility to work and that they then must accept a life that is unsatisfying. This life consists of housework, child bearing, and "sexual slavishness." These concepts of femininity label women as sexual objects. They are made into sexual objects to be used by men for a certain purpose. Sexual assault is a structural problem in society that starts with male domination.

Being expected to dress a certain way and act a certain way weakens outside perceptions of women. Marso states "women really do have a circumscribed space of freedom due to the dominance and preponderance of male myths about femininity, and poor people really do have diminished life expectations because of the way ideologies of privilege create and sustain material conditions that trap whole groups of people in positions of material and psychological submission and hopelessness."<sup>8</sup> This analogy is incredibly real. Through my experience, I was able to see first hand how women are undermined and treated by men. Not only by my attackers, but also prominent male figures in my life, shut me down and labeled me

based on the way I dressed and acted. It is unfortunate how society has categorized people in such a way that groups whether women or the poor are stereotyped in such a way that they have difficulties breaking the chains that constrain them. In 2014, a male Preacher attending the University of Arizona produced a VICE documentary claiming that women who dressed provocatively were deserving of rape. The preacher, Saxton, states in the documentary, "I believe that there are certain qualities that may be worthy of rape. If a woman dresses provocatively, gets blackout drunk, and is wearing really revealing clothing, then I would say she is partially responsible for the rape."<sup>9</sup> This sort of derogatory comment is not typical, but it does show that there is this thought process within a male dominated society. If a women dresses in a sultry manner it may simply be to express herself, but men find this to be alluring and a welcome invitation to assault them physically or verbally. This also shows how an expression of femininity leads males to believe that they are sexually open and deserving of such treatment. Whether it is being raped, a whistle, verbal harassment, name calling, or someone molesting one on the subway, men feel free to do so. Women are subject to these sorts of attacks on a daily basis.

Although male domination allows for women to be taken advantage of, society reinforces this by denying them their voice. Women are constantly labeled as weak, naïve, and deserving of violence. We see the relationship of shame and lack of reports of violence play out in many cases. In 2015, a women in Michigan filed a suit against Michigan State University claiming that they discouraged her from reporting her sexual assault by three basketball players. The report states, "After the woman told counseling center staff that basketball players were involved, she said the staff made it clear that if she reported it to police 'she faced an uphill battle that would create anxiety and unwanted media attention,' according to the lawsuit."<sup>10</sup> The woman became so scared she did not seek help or counseling for about ten months after the event. Rather than support the victim, the university chose to stand up for the more dominant male basketball players. This is an unfortunate common occurrence. The counselors at the school shamed the victim into believing her story

was nothing and that reporting it made no sense. This is absurd and unethical. Any sexual assault should be reported, should be taken seriously by any institution. Society's response to sexual assault has subdued the reports of it causing victims to remain silent instead of speaking out against their attackers. This is partly because we live in a male dominated society that is politically controlled by men. In *Trauma and Recovery: The Aftermath of Violence- From Domestic Abuse to Political Terror*, Judith Herman describes the social responses to sexual assault and the traumatic results it has had on victims of sexual assault. Herman describes her work as being part of the feminist movement. Herman seeks to show the cultural and political factors that prevent psychological trauma from being recognized within the public sphere. She claims that sexual, domestic, and violent stress disorders such as PTSD should be renamed in order for victims to truly recover. Herman begins her work by arguing that stories of victims only become public for short periods of time, and then they fade and are never heard again. Specifically she is arguing this with regards to victims of sexual traumas. There are three important historical moments for Herman that shows a certain culture of societies neglecting victims. In all of these cases victims of sexual assault were ostracized by society, made to be invisible, and discredited. Shame was brought upon them for their own assault. Society made things worse for the victim. The three events were in the 19<sup>th</sup> century with the treatment of hysterical women, after WW1 the treatment of shell-shocked soldiers both in England and the U.S, and lastly the assaults on women that took place during the Feminist movements in both Western Europe and North America.

Throughout the book and through each example Herman shows that society can give a voice to people who are victims. She states, "to hold traumatic reality in consciousness requires a social context that affirms and protects the victim and that joins the victim and witness in common alliance."<sup>11</sup> But society can also deny victims by silencing them or rejecting them or shaming them. "the study of trauma in sexual and domestic life becomes legitimate only in a context that challenges the subordination of women and children. Advances in the field occur only when they are supported by legitimate an

alliance between investigators and patients and to counteract the ordinary social processes of silencing and denial.”<sup>12</sup> Herman’s work shows that years have passed and victims have continuously been silenced and denied justice. She argues that a strong political movement for human rights is necessary in order to combat the system that allows people to forget so easily what happens to women. Part of the reason society does not accept sexual assault and the impacts that it has on women is because we live in a male dominated society where women are fundamentally considered the weaker sexes. Women are seen as easy to exploit, and sexual assaults on women are at many times seen as OK or simply ignored. The political system we have in our society is also male dominated. It continuously sees women as others. It chooses to ignore violence against women and focuses on legislation that advances its goals. This puts women in a position where as Herman says they need to take the word sexual out of assault in order for their agenda to be taken seriously. This is not right. Sexual assault needs to be recognized by everyone. If women are assaulted sexually they will not receive the true justice that is deserved. Society is sexist and male dominated. These two factors leave women in a vulnerable position.

We can see an example of societies’ structural and social silencing of women who have been attacked through the example of Emma Sulkowicz. Emma was a fourth-year student at Columbia University. She filed a complaint with the university requesting that another fourth-year student be expelled, as he had raped her in their dorm room on August 27, 2012. The university found that Paul Nungesser was not guilty of any allegations and declined her request. Emma again attempted to get justice by filing a report with the New York City police department. Both them and the District Attorney’s office declined to press charges against Nungesser due to lack of reasonable suspicion. Emma was denied justice by the university and the police. She could have continued to remain silent, but she decided to take a stand. She along with a professor focused her senior thesis on a work of performance art. She entitled this “Carry That Weight.” This involved Sulkowicz carrying a 50-pound dorm mattress on which she was raped wherever she went on campus. This project was supposed to

represent Columbia’s mishandling of the assault. Nungesser was disturbed by this and filed a gender discrimination law suit against Columbia, and a separate lawsuit against Sulkowicz claiming that she was harassing him and that Columbia had done nothing to prevent this harassment. A Judge dismissed the law suit, but he was allowed to refile, leading to a settlement with Columbia. Although Columbia did not ban Sulkowicz from carrying the mattress across campus they did advise her not to. The society that we live in made it OK for a rapist to sue his victim for protesting against the lack of justice she received from each and every institution she filed a complaint with. She tried to take justice into her own hands and protest this travesty, but she was silenced. The university wanted to keep her quiet and so did her rapist. “Columbia officials asked Sulkowicz not to carry the mattress onstage, but in the end let her go ahead. Then Lee C. Bollinger, the university president, turned away as Sulkowicz approached him, not shaking her hand as he did those of the other graduates. (The university later said it was because the mattress got in the way; there’s a video if you want to judge for yourself.) The next day, the campus woke up to nasty posters in the neighborhood. With a picture of Sulkowicz and her mattress and the words “Pretty Little Liar” and “#RAPE-HOAX.” The trolling has since continued online.”<sup>13</sup>

This is incredibly unfair and reflects the male-dominated society we live in and how they are favored over women. The police, courts, and university claimed that there was no evidence, or that this allegation could not possibly be true. The university also did nothing to help Emma, if anything they perpetuated and aided in her embarrassment. Although society silences women, law solidifies the suppression of women’s rights. Rape law is incredibly weak and perpetuates societies suppression or denial of sexual assault. *In Rape: on Coercion and Consent*, Catherine A. MacKinnon begins her essay writing, “rape is an extension of sexism in some ways, and that’s an extension of dealing with a women as an object...”<sup>14</sup> In this piece the author criticizes laws regarding rape and consent, specifically she takes issue with the definition of rape, which is “intercourse with force or coercion without consent”. To MacKinnon rape laws legitimize male domination

over women and perpetuate the fiction they are the weaker sex. The law previously had solely focused on penetration which according to Mackinnon denies women's and excludes other forms of rape and makes rape as simple as penetrating a vagina. But there are more components to it than that. "Women's sexuality is a thing to be stolen, sold, bought, bartered, or exchanged by others. But women never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property. To be property would be an improvement."<sup>15</sup> MacKinnon describes how once a woman has sex or engages in sex they lose their purity and become vulnerable. This is how men justify their actions: if a woman has had sex before she is a sexual prowess and accessible to have sex with. She is no longer pure but slutty and thus being raped in a man's perspective is not too much of a loss. The law denies women justice and reinforces male domination. It is hard to prove that you are raped. Your character is undermined, and eventually you do not gain justice through pursuing a rape charge because the definition's revolving around penetration. The definition also makes it hard to prove that you did not consent to the sex. If you are drunk and unable to say "no" your attacker can simply claim that you wanted the sex because you did not say "no." But this is obviously untrue. "The law divides women into spheres of consent according to the indices of relationship to men. Which category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does."<sup>16</sup> These categories make some women very vulnerable to rape and legitimize male domination against women. MacKinnon continues by saying that, "the paradigm categories are the virginal daughter and other young girls, with whom all sex is proscribed, and the whore-like wives and prostitutes, with whom no sex is proscribed."<sup>17</sup> There are certain women who can consent but others who simply cannot. This is why according to the author inevitably any marital rape is denied by society and if you are a prostitute you are deserving of rape. The law is weak when it comes to rape. It does not work to support women. The law inevitably shames women and further victimizes them rather than protect them. The only way the law actually does work in your favor with regards to rape is if you are a young child

or an innocent women whose character cannot be brought into question. Law legitimizes and reinforces society's denial and suppression of rape. Since 1989 rape law has been "reformed". In the article, "Women's Sexual Agency and the Law of Rape in the 21<sup>st</sup> Century" the author discusses modern rape law reform and the language that it has incorporated besides the term penetration.

Another element that was incredibly controversial was the term 'force.' "It became clear that the force element which required women to fight back in order to produce evidence of force, required women to engage in a physical battle that they were almost certain to lose."<sup>18</sup> There were multiple cases including the *People v. Dorsey* that resistance created so much more violence that allegedly police officers began to advise victims not to resist. Rape laws have been reconfigured by most states to now include various degrees. This is first degree, second degree and third degree rape. The author points out another problem with this change. She states, "this reconfiguration of rape reflected a sense that, however, coercive a sexual encounter with a much more powerful acquaintance might be, it was not likely to be perceived, by the victim or a jury, in exactly the same way as would be an encounter with a stranger wielding a weapon."<sup>19</sup> There continued to be more change and reform to the laws over the years including what to do about a woman's sexual history. The most recent law specifies verbal consent meaning whether or not someone said "no". According to NY rape law "non-consensual sexual intercourse committed against the victim through physical force or some other duress (including threats or use of drugs) is referred to as rape."<sup>20</sup> Rape law has progressed but it is still very vague and ends up working against victims in many ways. The law regarding rape is incredibly specific which ends up working against women rather than for them. Rape law specifies that there must be penetration, and there must be a specific denial of consent. The law caters towards specific women who have maintained a certain sense of dignity. Due to the sexual elements of these cases, if you are a prostitute and you are raped it will be harder for a jury to believe your case especially if physical harm is not done. If you do not have bruises, or cuts, or burns people will assume that

you turned against the man who was paying you. The law makes it hard to prove that you did not consent to the sex especially when you have a more “promiscuous” background. The narrowness of the law also makes it harder for charges such as marital rape to be brought to court. After all, you are married and had consented to sex many times, so how can it all of the sudden be considered rape. The law needs to be changed to be more favorable to woman of all backgrounds, ethnicities, income levels, and class. New legislation needs to be passed that allows for all kinds of women to gain justice. This legislation should allow for a more broad definition of consent and also demonstrate that all women can be assaulted. It should ensure that there is no discrimination of the victim. The law should simply provide justice. In my case, I was not even given the option to seek justice because I was told that my sexual history and use of drugs would make me look guilty rather than get me justice for what had happened to me. A woman’s sexual history should not be used against them by any means what so ever. The NY penal code even has a provision stating potential defenses for rapists. Some of these are “Lack of knowledge of victim’s incapacity to consent based on a mental disability, mental incapacitation or physical helplessness, Valid medical or health care purpose. Defendant was less than four years older than the victim at the time of the act (for second-degree rape). Client or patient consented to conduct after being informed that such conduct was not performed for a valid medical purpose (for third-degree rape). Spouse of victim (where victim was deemed incapable of consenting due to age, mental health, or other specified restrictions.)”<sup>21</sup>

The fact that they even post possible defenses to rape in any degree is absurd and degrading. It shows that potentially if you do commit a crime the government is ready and willing to help you find an excuse as to why it occurred. It is already contentious enough as it is considering many cases come down to “he said/she said.” The process of denial of sexual assault starts with male domination, society then justifies it, and then law solidifies a system in which women are silenced. I was shamed into believing that I deserved what I got, after all I was a whore and did drugs and put myself into the situation. This

rhetoric and justification is common. Cases have occurred where men claim that because women dressed provocatively she was deserving of rape or she wanted it. Men also claim that if a woman was drunk and flirted with them a little bit that if they have sex with her when she is passed out then it was consensual. But this is simply not true. Male domination is the way society is formed. Men are conditioned into being dominant and continuing this cycle for their lifetime. Women are also conditioned to be submissive to men. Male domination and the idea that women are submissive allows for heterosexual sex to become violent. Men take advantage of women no matter who they are and justify their action regardless of whether they know what they are doing is wrong or not. In my case people I knew and grew up with took advantage of a situation in which they were dominant over me. They had power over me and teamed up against me in order to get what they wanted. I was the other, lesser than them and deserving of the attack. They took advantage of me because of the way I was dressed and the labels I had been given. This was only a step in the cycle of shame. Male domination has set society up to believe that women are the weaker sex and that certain a women’s sexual life is shameful in some way. Society blames women who are not young, innocent, and pure. If you are not any of these things it is easy for society to take up the man’s side and say that you were in some way deserving of the rape, or that perhaps it did not happen at all. We hear about so many cases in society of young women getting raped on school campuses.<sup>22</sup> These cases are similar to what happened to me. These women are shamed and name called and considered to be sexually promiscuous. For example if a women attends a party and drinks at the party and is then raped, the accused often blames the victim, saying that they wanted it because they attended the party in the first place. This sort of victim blaming causes shame. These stories are often buried by universities to not gain any negative attention because the university cares more about their appearance than giving justice to the victim.<sup>23</sup> In my case, both my parents and the school sought to shut me down. They did not want any negative attention drawn to them or the school. Money and politics were involved, and to them it was easier to push me down than to let me gain justice. I was shamed and told

that it was my fault anyway and that I would not be able to prove anything because it had happened so long ago. This is not necessarily just because of my parents and the school, but also because society has conditioned people to think that rape unless the victim pure is potentially not rape. They wanted to silence me rather than risk attention. As Herman pointed out in her piece, throughout history there has been a culture of societal neglect, which she calls a sort of amnesia. Through this neglect, women are rendered invisible and discredited. This societal neglect stems from male domination and lack of political support for women. Society perpetuates the male dominated society, which silences women and disallows justice, but the law further empowers this lack of justice. Fortunately, some social and legal progress has been made with regards to sexual assault and woman's empowerment. In 1994 the Violence Against Woman Act was passed by congress. The bill was drafted and initiated by senator Joe Biden. The bill expired in 2011 but was re-signed by President Barak Obama in 2013. This act provided 1.6 Billion dollars to investigate and prosecute any violent crime against a woman. It also provided that mandatory restitution on those who were convicted. Another important factor was that it allowed for victims to sue in civil court if the prosecutors chose not to press charges in the case.<sup>24</sup> Although imperfect, this act is a monumental step in moving forward for all women. The bill is even written gender-neutrally so it allows male victims of violent crimes to also pursue justice under the legislation. Another important stipulation made is the immigration status of the victim. Any victim who is a green card holder or a non-citizen of the united states may come forward and report their attacks without fearing deportation or their green card being revoked. This is a major step because many women who are immigrants fear that they cannot report their assaults to the police because if they do it could potentially alert the police to their immigration standing and thus result in their deportation.

We should not live in a world where any woman fears or is too ashamed to report a sexual assault. This is unacceptable. This act is a step forward but it is still not enough. It does not solve any of the underlying problems of male domination or social constraints with regards to sexual assault.

A monumental step forward for women was the #MeToo movement. In October of 2017, widespread allegations against Harry Weinstein the famous movie producer began to arise. Celebrities left and right began claiming he sexually assaulted them or attempted to do so. Weinstein, like many more accused celebrities, congressmen, and the president himself, have been accused of sexual assault and harassment. These women were taken advantage of by men in a position of power. Weinstein held business meetings with many women who had roles in his films or wanted one. He was aware that he held the power, he believed that these women needed him for roles, jobs, and standing in society. He used it to his advantage. At the time, these women feared that their careers could be lost and felt threatened in some way by these men. This scandal came forward years later because of the fear and shame that was placed on these women by men who believed they could dominate them and leverage them in some way. This unfortunate moment became positive for many because having celebrities and people in the media come forward and say they were sexually assaulted gave many women comfort and courage to admit what had happened to them. Thus began the #MeToo movement. After the allegations arose "Social media was flooded with messages Sunday, mostly from women, who tagged their profiles to indicate that they have been sexually harassed or assaulted."<sup>25</sup> Male domination is reflected very clearly in these examples. The women claimed that they had not come forward because they feared they would lose their jobs, standing in the community, and more. They were shamed into believing that men like Weinstein could get away with what they did because no one would believe them if they came forward. Men should not exploit their positions in order to assault women. They should not think that it is OK to invite a woman into their hotel room under false pretenses and instill fear in her. No one should have to be in a position where they fear for their job or life and have to have unwanted sex or sexual interactions in order to survive. One of the most important aspects of the #MeToo campaign is that it allows for women to feel that they are not alone. This helps alleviate some of the shame they may feel. Some, when attacked, do not understand what happened or why, and this causes many to feel insecure about

reporting it. Others fear losing their job. Some like me are made to feel ashamed about their “role” in the assault. This campaign shows that women of all backgrounds have experienced sexual assault. According to #MeToo’s website “17,700,000 women have reported a sexual assault since 1998”<sup>26</sup> This should not be to this magnitude. The idea of not being alone can be comforting to many. This is incredibly empowering and allows women to step forward and report their assaults. This is a revolutionary movement that can help break some of the chains that society has placed on women. By reporting men of all levels of power, this can help break the power they hold over women. Sexual assault is incredibly unfortunate, but many people are assaulted everyday. Male domination has conditioned society to reinforce negative perceptions of women and victims. Instead of helping women gain justice for their attack, society participates in blaming them or sexualizing them. The law acts as another factor that reinforces societies blame on women. It is simply a legislative mechanism to shame women and excludes them from justice. Although the law does work for some, it has failed way too many times, thus it needs to be reformed. I was denied justice along with countless others because I was told it was my fault. The law would not have helped me because a trial would have only reinforced society’s claims. The defense lawyers would have destroyed me like many in court. I would have been told that I was drunk and flirting with them, and even that I went there in the first place to have sex. My case would not have met the definitions of the law, and it would have been four against one. I would have not even had a chance. These kinds of issues prevent people or cause people to second-guess reporting the crime or pursuing charges. This system needs to be restructured from the bottom up, because as it is people are afraid to even report sexual assaults. The #MeToo movement and Violence Against Woman Act have been a good start, but it is not enough. If male domination were to cease and females had a strong political movement backing them, it is possible that justice would prevail. If men would stop thinking of women as sexual objects who are made to breed children, it is possible that justice will prevail. But until then we must protect ourselves from the dangers of the world and continue fight to achieve this justice.

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**ENDNOTES**

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IMAGE BY RAKAN AL-HAZZA

# THE DILEMMA OF BELONGING IN KUWAIT

BY RAKAN AL-HAZZA

**Abstract:** In this article I examine how citizenship in Kuwait was formed and how it subsequently affected the notions of belonging in the country. Kuwait, along with the other Gulf Cooperation Council countries, provides a unique experience of belonging where a majority of the population does not have access to citizenship nor any of the civil rights that come with it. Borrowing from Nira Yuval-Davis' *Politics of Belonging*, I examine the ways belonging in Kuwait has shifted throughout its history from pre-oil sheikhdom, to its state formation phase, and finally ending on a discussion belonging in Kuwait today. I argue that during its transition as a nation state, the subsequent codification and modernization effort lead the way to rigid interpretations of belonging that manifested violently in the following decades.

**Keywords:** Citizenship; Belonging; GCC; Bidun; Modernization; Kuwait

## INTRODUCTION

We do not exist on our own. We are often dependent on the lives of others to find our meaning and place in this world. Some of the largest truths that we hold so close intrinsically are tied to the narratives that we inherit. These narratives dictate our place within communities and help us locate our identity. The aspiration to belong does not only provide us with a sense of comfort. It is an important social and political tool that helps us navigate our societies and political systems. While the need to belong is universal, the politics of belonging differ. Recognizing that dictates that there is a responsibility to track down the policies that emphasize different social markers, which consequently spawn narratives of belonging and identity. While generally speaking there is an emphasis on understanding belonging through the lens of majority over minority, it is important to highlight the examples where the opposite is true. The countries that make up the Gulf Cooperation Council (Saudi Arabia-Kuwait-Bahrain-UAE-Oman-Qatar) have significantly higher non-citizen populations than they do citizens. In Kuwait, the non-citizen populations in this region are comprised of two main groups, the Bidun and the expatriate populations. The Bidun are a legally stateless population that are marked by their lack of citizenship.

There are roughly 100,000 Biduns in Kuwait<sup>1</sup>. The expat (expatriot) population, on the other hand, constitutes roughly 70% of the population with just under 3 million of the total 4 million inhabitants in Kuwait.<sup>2</sup> The word Bidun is a reference to the phrase *Bidun Jinsiya*, which directly translates to 'without citizenship'. Because they lack citizenship to any country they are viewed as illegal immigrants by the state. The expatriate populations on the other hand, have citizenships tied to countries outside the one they are currently residing in. These groups are marked by their exclusion from the social, political, and civil rights provided by citizenship, but on a larger scale their spatial rights. Considering four out of the six countries (Kuwait, Qatar, Bahrain, UAE) have larger expatriate populations than they do citizens, these countries provide a distinct experience of citizenship that is uncommon around the world. Even with large dependence on foreign workers, expats are often held as strangers to the land, even in the cases of families who have lived in this countries for multiple generations.

The Arabic word in use for expatriate translates to newcomer, a term that does not accurately represent the experience of a significant percentage of the expat population, but is one that defines them within the legal, social, civic and spatial landscape. In a country where the majority of the country is said not to belong, what are the markers that dictate who belongs and who does not? Furthermore, considering that all the countries in the GCC gained their independence in the last century, what are the elements that created a rigid national identity? In the case of Kuwait for example, there is a fair bit of diversity amongst its citizens. However, within the current climate it has gotten increasingly more difficult for individuals to seek naturalization and increase this diversity. What are the characteristics that initially existed in Kuwait that allowed different groups of people to be considered Kuwaiti, that do not exist today? If the Bidun population are considered to be outsiders, even with no other place to belong to, how was the distinction created? These questions are not just relevant to the Kuwait and the member countries of the GCC, but as whole to the way we interact with our communities, countries, and who we deem as outsiders. Belonging in Kuwait is not solely tied to feelings one attributes

to where they feel at home, but the scaffolding that holds up the state. Politics of belonging in Kuwait are heavily molded by state formation period that came with narratives of origin as well as spatial, civic and economic restructuring during its attempt at modernization. These elements created a climate that lead to exclusionary and restrictive policies that reimagined what it means to be Kuwaiti and what it means to belong in Kuwait. To gain a better sense of this shift, I will initially explore Kuwait's history of belonging chronologically starting from its origins, to its time as a Sheikdom, the discovery of oil, the state formation period, and finally end with a discussion of the current climate.

### WHAT IS KUWAIT?

To understand modern conventions of belonging, it is important to go back through the history of the area that is Kuwait today and trace the origins of the state that we have today. While the state dictates a large part of the conversation of belonging today, it is only a recent development within the area. Kuwait, for example, only gained its independence on June 19th of 1961. While often countries such as the United States are thought of as young, Kuwait and other countries that have gained independence within the last century, have significant parts of the population that were born before the creation of the state. While nationalistic waves have definitely influenced those individuals' notion of belonging, there was a time when the belonging was not defined by the elements that define it today. The state system with its association with Westphalian sovereignty was not arrived at as a natural conclusion, but a vessel that Kuwaiti society took on and adapted. The shift from Sheikdom to 20th century nation-state meant there was also a shift in governance in regards to the responsibilities held by the government. Choosing to essentialize the state system without considering that its conditions that were constitutive to its developments will present a scenario that removes the 'consciousness' of the state and how the state chose to develop in regards to those same constitutive elements as well as the relevance of these constitutive elements today.

Amongst the earliest mentions of Kuwait within Islamic history was tied to the Battle of Chains. In 636 AD, The Rashidun Caliphate and Sasanian

an Empire fought over the right to control the land that is now known as Kuwait. The Rashidun Caliphate was able to defeat the Sasanian Empire and the land became known as Kuzma. It was an important battle due to the Kuzma's strategic location on the corner of the gulf. The Caliphate was able to gain an advantage within the area as after acquiring Kuzma<sup>3</sup>, as it gave the Caliphate control over the Eastern side of the peninsula, but also created room for future conquests. Four months after the Battle of Chains, the Caliphate began its expansion into modern day Iraq in hopes of capturing Al Hirah which was under Sasanian Empire<sup>4</sup>. Kuzma, being the vacant port city that was, ended up being in the command of Al Hirah.

Kuzma initially became a prosperous port city, connecting trade routes from Persia, Mesopotamia, and the Arabian Peninsula<sup>5</sup>. However, in the centuries that followed, the area's coveted position was no longer prized because it lost relevance within the conflicts of the area. It was not until the expulsion of the Ottoman powers in Kuwait by the Bani Khalid tribe that we begin to see what we now today consider as Kuwait. After some decades of Khaldi control, the Bani Utub Confederation of Tribes began settling in Kuwait and eventually were able to gain control of rule. Bani Utub interest at the time was to dance on the wire between the existing empires that dominated the area and maintain practicality as a legitimate trade route.<sup>6</sup> There was an advantage to Kuwait being small in its aspirations as it gave Bani Utub the ability to benefit from its geography. During the Ottoman-Persian war in 1775, Kuwait benefited from the region's instability as it became a place of refuge for Iraqi and Iranian merchants escaping Ottoman persecution.<sup>7</sup> The incoming populations brought innovation which in return pushed Kuwait into a new era of economic prosperity, increasing the wealth of nation as well as establishing a connection with the East India Company.<sup>8</sup> This relationship between the Kuwaitis and the British enabled Kuwaiti traders to reach farther than ever before, but also brought in more individuals seeking to establish themselves in Kuwait. The Kuwaiti population became a diverse one, largely fueled by its place as port city. As noted by Frank Broeze in a study of different important port cities in Asia since the 13th century, "Gateways of Asia"

The ethnic composition of Kuwait reflected partly its location, partly its character as a port city, and partly the fact that in times of expansion the indigenous labour force was insufficient to meet and had to be supplemented by immigrants who arrive, virtually without any exception, along trade routes linking Kuwait with its well-established hinterland and foreland. Of the population at large, by far the greatest part was and remained Arab. Most of these were native born and descended from the first settlers to Kuwait along the trade routes from southern Iraq, Bahrain, Hasa, and the interior Nejd.<sup>9</sup>

While the majority of the new members of the population were Arabs, Persians and Africans made up a significant part of the population.<sup>10</sup> Although new immigrants were initially driven by the opportunities that provided by its thriving port, the social and political climate that was in Kuwait was congenial to maintaining a diverse population.

#### **AUTONOMY, SECURITY, AND THE PROTECTORATE**

While Kuwait did well maintaining its autonomy, its attempts to avoid conflict became increasingly harder. Due to suffering economic losses, the Ottoman Empire was in the process of reinterpreting its relationship with the Arabian Peninsula. In 1871, Kuwait aided the Ottomans expedition in Nejd in hopes of remaining on positive relations. This re-introduced Kuwait into the Ottoman Empire but only in a nominally as it became part of the Basra Vilayet.<sup>11</sup> This led to growing voices of discontent amongst the Kuwaiti population. Due to Kuwait's small size, it felt the need to rely on its allies for assistance. However, within the case of the Nejd-Ottoman conflict, Kuwait's position left it as a strategically vital area to any expansionist attempts. The anxiety that was felt of tied encroaching attack caused a crisis within the country as ruling began feuding. Muhammad Bin Sabah, the ruling sheikh of Kuwait at the time, was subsequently murdered by his brother Mubarak Al Sabah.<sup>12</sup> Mubarak then took his place as sheikh and attempted to handle the situation himself. Mubarak contacted the British in hopes that they would protect them, knowing that without the support of a larger army, annexation was far too likely. Initially, the British hesitated in fear of inciting the French and Russians involved in the area, however after learning of Germans and Russians plans of benefitting from

Kuwait's position through establishing a railroad, the British agreed to step in.<sup>13</sup> In the Anglo-Kuwait Agreement of 1899, Kuwait agreed to give up their rights to control their foreign service in exchange of being under the protection of the British Empire.<sup>14</sup>

Now given the responsibility of maintaining Kuwait's integrity, The British met with the Ottoman in 1913 to discuss their respective roles in Kuwait.<sup>15</sup> Although Kuwait heavily emphasized their desire to be autonomous, the British tried to reach an agreement with the Ottomans that put the two in remote positions of control of Kuwait. However, the eruption of World War I halted these plans and stopped them from occurring as they were never ratified. After the end of World War I, the Ottomans were not able to continue their control over the Arabian peninsula, as they were in midst of recovering from the war, leaving many of the stipulations that were in the agreement to be the main focus of Kuwait's independence. While it did lead to Kuwait's independence, the policies implemented in Kuwait during this era were done in regards to British influence within the area and not with Kuwait's independence in mind. However, if Kuwait was to be independent, it would be ultimately to serve British interests first.

The British involvement in the area was not limited to Kuwait, as during World War I, the British increased its efforts within the Middle East to weaken the Ottoman Empire's grasp over the area. Sharif of Mecca, Hussein Bin Ali, was in correspondence by British High Commissioner of Egypt, Sir Henry McMahon, discussing the possibility of British support if the Arabs were to revolt. In a response letter, McMahon noted

Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sharif of Mecca...I am convinced that this declaration will assure you beyond all possible doubt of the sympathy Great Britain towards the aspirations of her friends the Arabs and will result in a firm last alliance.<sup>16</sup>

While the revolt was successful, the local Arab tribes and confederations did not know they did not, in fact, have self-autonomy. While they were assisting the Arabs revolt, British Colonel Sir Mark

Sykes and French Diplomat François Georges-Picot created an agreement between the French and British on how to partition the now 'vacant' lands that were left by the Ottomans<sup>17</sup>. Although the new split lands were technically not under British or French rule, the new countries of Iraq and Trans-Jordan were protectorates with leadership placed by the French and British. The sons of Sharif of Mecca were placed as the rulers of Iraq and Trans-Jordan, while the Sharif was given Hijaz.<sup>18</sup> Britain's role as protector never lived up to its initial expectations, as the protectorates did not have the protection they were desperate for in the beginning.

After the end of Ottoman rule in the Arabian Peninsula, a power vacuum was created that prompted the Najd Sultanate to attempt to annex its neighbors. Najd was led by Ibn Saud with his Ikhwan army, and were one of the most dominant forces in the area. Noticing Kuwait's vulnerability, The Ikhwan attacked Kuwait with intentions of annexation and changing the social dynamics of Kuwait.<sup>19</sup> The Ikhwan made a list of five demands that were put forward to the Kuwaitis: Abolish prostitution and smoking, Evict the Shiite population, adopt the Ikhwan doctrine, Label Ottomans as heretics, and destroy the American missionary hospital.<sup>20</sup> Kuwaiti forces responded by contacting the British to step in and protect borders of the country. As a result, British High Commissioner to Iraq, Percy Cox, met with Ibn Saud in the Uqair Convention of 1922 where they discussed the conflict between Ibn Saud and the Kuwaitis.<sup>21</sup> As a result of the Kuwaitis signing over their foreign service to the British, there was no Kuwaiti representative attending at the Uqair Convention.<sup>22</sup> With the British being removed from the situation, and the lack of Kuwaiti representation, Ibn Saud managed to gain two thirds of Kuwait's land through these discussions.<sup>23</sup>

Although Kuwait lost more than half its land, Kuwait continued to be subjected to a blockade implemented by Ibn Saud. The Great Depression escalated as Kuwait's economy suffered more, but hints of a more financially secure future became evident. By 1938, the Anglo Persian Oil Company as well as Gulf Oil, gave Kuwait Oil Company the necessary equipment to dig for oil in Kuwait.<sup>24</sup> However, due to the development of World War II, production facilities were shut down

as the British focused their attention on the war. It is worth noting that during the time the Kuwaiti population succumbed to years of poverty following the blockade, however the production was halted nonetheless. The Kuwaiti population recognized that this could change the dynamic of the country dramatically. In her book about Kuwait Oil Company and its relation to the state, *The Kuwait Petroleum Corporation and the Economics of the New World Order*, Mary Ann Tétreault notes,

As denizens of one of the world's most hostile environments, the Kuwaitis had become shrewd and opportunistic and were quick to equate oil with money. But money for whom? Not for themselves, they realized, but for their Ruler with whom outside parties; in the absence of a viable alternative, would be obliged to negotiate. They also saw the political hazards, that these foreign contacts would enhance the rulers prestige and the oil company payments would weaken the financial leverage that had hitherto enabled them to influence rulers and maintain a balance of power. Equally to the long distance traders and pearl merchants was the likelihood that oil operations in Kuwait would involve the recruitment of their crew and divers into local workforce. The ability of oil to the potential to reshape the community as a whole became a point of conflict ever since its inception. The prospect of oil not only has the potential to reshape the economic landscape of Kuwait, but also the political and the social.<sup>25</sup>

Kuwait and Kuwaiti society as we know it today did not start with formation of the state, but rather the state of Kuwait as we know it today is a culmination of the inherited history of the area. The state system was not the byproduct of discussion had within Kuwaiti civil society, but Kuwait's attempt at securing autonomy through inheriting a western political system. While that undermines the existing political systems, it does not remove all remains of the pre-state society. The histories of the area do not dissolve but rather, they organize their place within the state system. Historically, Kuwait has been dependent on its constant flow of migrants not only to remain economically successful, but to also maintain its autonomy. Its success as a port city signified its importance within the region and with that success came a respect for its autonomy.

Annexing Kuwait meant there would definitely be attempts of retaliation by neighboring states that are now left out from the trade opportunities presented by its ports. Thus, to reap the benefits of these opportunities, Kuwait's ability to self-govern was largely left to the people that made up the port population and the ruling family that was elected, the Sabah family. The power struggle that existed was completely reliant on the merchant's ability to be successful and thus, the efforts of the Sabah family were to create a social and political climate that was conducive to that success. The discovery of oil put Kuwaiti society where instead of having the success of the merchant class fuel the society and push it forward, it was now the role of the government and its institutions. Furthermore, the quick success of oil meant that it accompanied a complete appropriation of existing practices and efforts. The culture of pearl diving and boating that once was the face of Kuwaiti culture became diluted as oil became the new face of the country. The Great Depression, constant raids and blockades by Ibn Saud, and the relinquishing of foreign affairs to the British put Kuwaiti society in situation of abject poverty which threatened the whole community. Oil was seen as a way out of that poverty as there were no viable alternatives to depend on. And thus, the fiscal connection that once existed between the people and the rulers was severed.

## BELONGING

In her article, "Belonging and the Politics of Belonging," Nira Yuval Davis explores the concept belonging as it pertains to Britain and British Identity, and the ways it is formulated. To better analyze the concept of belonging, Davis utilizes three levels of analysis to better illustrate the ways that belonging is formulated. The first of these levels is social location, the second individual identification, and the third level being the ethical and political value passed onto to these identifications. Davis imagines social location as:

When it is said that people belong to a particular gender, or race, or class or nation, that they belong to a particular age-group, kinship group or a certain profession, what is being talked about are social and economic locations, which, at each historical moment, have particular implications vis-a-vis the grids of power relations in society.<sup>26</sup>

The second level of analysis, identification, is tied to the way individuals use that social location to construct an identity and the subsequent emotional attachment that comes from that. Davis explains, "Identities are narratives, stories people tell themselves and others about who they are (and who they are not)"<sup>27</sup>. Though narratives often are directly related to the collective as whole, these narratives become resource to the construction of the individual's identity within that group. These identity narratives help individuals make sense of themselves by providing the context of the groups past and present. Davis notes though that it is important to look at the experience of identification solely as a cognitive tool, but relate to emotional investment and desire to be attached to something greater. The third level of analysis is tied to ethical and political values that come about as a reaction to these identities. While the first two levels of analysis discuss the way people contextualize themselves from within the group, the third level of analysis ties to the way that contextualization occurs on a larger level from outside of the group, and the values that are used to make those judgements. Davis indicates ,

Belonging, therefore, is not just about social locations and constructions of individual and collective identities and attachments but also about the ways these are valued and judged. Closely related to this are specific attitudes and ideologies concerning where and how identity and categorical boundaries are being/ should be drawn, in more or less exclusionary ways, in more or less permeable ways.<sup>28</sup>

It is this third level of analysis that opens up the conversation, in a sense that it allows us to trace the ways that identities encounter elements that shape them and situate within the society as a whole. It is in that level of analysis where identities are contested and emplaced within society that we head into the politics of belonging.

Citizenship is a much debated topic within the study of the politics of belonging, as it is common marker of identity within the world. In a world that has state systems, we often look at citizenship as markers of who belongs where. However, often citizenship provides only a single narrative belonging that more often than not has been exclu-

sonary. Even within the 'universalist' character of liberal citizenship, a more majoritarian, hegemonic form of belonging ends up being centralized. The account of citizenship that is provided is one tied to the experience of those who fully enjoy the rights and privileges of said citizenship without incorporating the possible prejudices that prevent certain individuals from accessing those rights due to their gender, race, religion etc. In cases of Kuwait where the majority of the population are excluded from citizenship, this lens that is applied to citizenship essentializes it without accounting for difference. Outside the relationship between the state and its citizens, there are a plethora of questions regarding spatial rights of those who are under the governance of the same state. Davis writes,

Much of the debates concerning citizenship and belonging have been focused on which rights, which responsibilities and whether or not the two should be related. In recent years there has also been a growing body of literature on the thorny issue of cultural rights and the associated question of individual v. collective rights. As I have pointed out elsewhere, however, before we consider these different kinds of citizenship rights, we need to consider another kind of rights--spatial rights--namely, the right to enter a state or any other territory of a political community and, once inside, the right to remain there. Much of the energy of different political projects relating to the politics of belonging focus on these issues: the right to migrate, the right of abode, the right to work and, more and more recently, the right to plan a future where you live.<sup>29</sup>

It is through these approaches that our understanding of belonging expands and becomes more inclusive. Considering the demographics of Kuwait, the spatial rights that were laid out by Yuval-Davis are all relevant to the question of belonging. To give emphasis to these rights is to recognize the majority of the population of Kuwait perhaps can view a sense of community and home in Kuwait in spite of being labelled and outsider. The politics of belonging is not only shaped by the policies created by the state and the narratives that come out of it, but also the contention of these narratives. Non-citizens through context recognize that in spite of not having citizenship, they are a vital part of the community. Davis writes,

The politics of belonging involves not only the maintenance and reproduction of the boundaries of the community of belonging by the hegemonic political powers but also their contestation and challenge by other political agents.<sup>30</sup>

This lens assists in providing a more encapsulating picture within an area, one that is not just limited to the hegemonic political powers, but the ongoing challenges to these boundaries. This is imperative that in this case as centering state citizenship would only provide us with a limited analysis of the population. Yuval-Davis argues that within a globalizing world, the debates surrounding citizenship, spatial rights, and community membership are being reframed by everchanging regional politics and neoliberal work policies. Yuval-Davis points out, "when it comes to membership's rights and responsibilities in the arena of the politics of belonging, the duties involved become much more ephemeral and actually become requirements, rather than mere duties. The central question here is what is required from a specific person for him/her to be entitled to belong, to be considered as belonging, to the collectivity."<sup>31</sup> Stepping outside citizenship-centric view allows to visualize belonging outside the state/citizen paradigm, and focus in on how community membership is created. Within this framework, state citizenship is not ignored, but is highlighted as a status tied to history of politics that is defined by its inclusion and exclusion.

## CITIZENSHIP

T.H. Marshall's theory of citizenship is a historically significant theory that has been highly contested since it was brought into being, largely due to its inability account for difference. This theory was a part of Marshall's "Citizenship and Social Class" and it largely focuses on the development of citizenship and what is entitled to the citizen. Marshall's view of citizenship is informed by a British post-World Wars lens of citizenship, one which was influenced by a Keynesian brand of economics, that views citizenship as system of rights which exists in opposition of market relations and class systems. Marshall describes citizenship as "A status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."<sup>32</sup> This de-

scription is then elaborated on by discussing the components that make up this equality. The first of the three is the political component of citizenship, in which all citizens are guaranteed “[The] right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body.”<sup>33</sup> The second component, is based on civil equality in which, “rights necessary for individual freedom, liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts and the right to justice.”<sup>34</sup> Third of the components are the social components of citizenship, which include “the whole range from the right to a modicum of economic welfare and security to the right to share to the full in social heritage and to live the life of a civilised being according to the standards prevailing in the society.”<sup>35</sup> Marshall argues that these components and rights are a result of a culmination of developments during the last three centuries, which became intrinsically tied to citizenship.

While Marshall’s scope elucidates the ways citizenship is conceived and bestowed, his analysis has come under critique as one marred by his personal experience as white British male. Marshall’s theory does little to take in difference amongst the population and disregards the role of the state in development of citizenship. It is difficult to assume the role of the state is one that is tied to bettering social disparity when the state is largely tied to creating those disparities. Secondly, the components that make up his conception of citizenship were largely tied to the developments in Britain over the course of three centuries, components that naturally coincided with the country’s development. These same values regarding national citizenship became universalized through the nation-state system. The issue here is one not simply related to the possibility of universal values, but the way these universal values were achieved. These values did not arrive out of thin air, but were ones that were seized and enacted, leaving out how these actions (sometimes done in spite of hegemonic politics norms) became associated with citizenship, presents an incomplete view of citizenship, and by default, belonging as a whole.

Within the context of the State of Kuwait, the

process of attempting to define Kuwaiti identity through formal citizenship further highlights the issue that comes with the transferring of these values. In 1959 Kuwait passed its nationality law knowing that after the discovery of oil it was on its way to nationhood. This process highlights the elements of “mistranslation” that occurs when nonwestern nations adopt western values and codify them into their new found state system. Elements of the Marshallian conception of citizenship are relevant within the clauses of the new Kuwaiti nationality laws, however are combined and appropriated within the new Kuwaiti context. The principle of *Jus Sanguinis*, or receiving citizenship through blood, was found in the Kuwaiti case but tied to a conception of patrilineal inheritance of collective identity, a conception tied to inheriting family or tribe names. Article 2 states:

Any person born in, or outside, Kuwait whose father is a Kuwaiti national shall be a Kuwaiti national himself.<sup>36</sup>

As family and tribe names were inherited solely through the father, citizenship was treated the same way. This made it not possible for women to transfer their citizenship over to their children. Other concepts like *Jus Soli*, or birthright citizenship, proved to be problematic in the case of Kuwait as did not correspond with some of the inhabitants’ lifestyle. Article 1 of the nationality law stated:

Original Kuwaiti nationals are those persons who were settled in Kuwait prior to 1920 and who maintained their normal residence there until the date of the publication of this Law. Ancestral residence shall be deemed complementary to the period of residence of descendants<sup>37</sup>

The year 1920 was provided as the base mark of Kuwaiti citizenship due to it being the year the border wall was put in place. The border wall was initially put up not as a definite border for Kuwait but in order to hold back the droves of Ibn Saud Ikhwan soldiers who were continuously attempting raids during that period. Given the nomadic lifestyle of the Bedouin societies of the area, many Bedouins were not able to prove their relationship to Kuwait and thus were not entitled to citizenship. The documents that were needed by individuals for proof, such as birth documents or previous

rent permits, were documents that did not coincide with lifestyle of all the individuals in Kuwait. Due to that, many of the Bedouin population were put in a peculiar position, to prove their relation with Kuwait, a relation that many of them thought did not need any proving. Through time some of the population was able to gain citizenship. Those who were unable to gain citizenship were not able to for two main reasons: they could not provide residential ties to before 1920 or they simply failed to register. For many of the cases, the idea of formal citizenship bared no importance or relevance to their lives that they did not recognize the gravity of citizenship. But nevertheless, these individuals became the first Biduns of Kuwait. While studying the Bidun situation in Kuwait, Human Rights Watch was able to find many cases where individuals did not recognize the value of citizenship and simply did not register for that reason. In an interview with a 27-year-old Bidun man named Talal, he reveals,

I come from a Bedouin background. My family's life [in the past] ... all they worried about was finding water sources, grass for the sheep, basic necessities in life. You can imagine; they were not educated. I remember a time in my childhood when I was actually visiting my uncles and aunts, and they were [living] in tents and what not. It was not such a very long time ago. When Kuwait became an independent country, the whole concept of citizenship was a new thing to people. My grandfather [thought], "I'm not even sure I need this." He just decided not to do it [obtain his citizenship papers].<sup>38</sup>

Because of that decision two generations over, Talal as well as the majority of his family still do not have citizenship. What was originally guessed to be a population of 7,000 individuals over time became a population that exceeds 100,000 Bidun.<sup>39</sup> The translation of values that occurred with the development of formal citizenship, became codified and enforced in problematic ways that restructured belonging. Now there is a way of enforcing rigid barriers of what it means to belong, and with it came social and political privileges.

In the Kuwait Nationality law, individuals who were granted citizenship through Article 1 and Article 2 had full access to rights. However, individuals who are not tied to the 1920 date would then be

considered to belong to a lesser degree of citizenship. Article 3, which has to do with orphans taken in by the state, and Articles 4, 5, 7, and 8 which have to do with naturalized citizens, all come under the legal territory of Article 6, which states:

A person who has acquired Kuwaiti nationality by virtue of the provisions of any of Articles 3, 4, 5, 7 or 8 of this Law shall not have the right to vote in any Parliamentary election within 30 years following the date of his naturalization. The provisions of this Article shall apply to any who have already acquired Kuwaiti nationality by virtue of naturalization prior to the enactment of this amendment. The 30-year period shall be deemed to start to run in the case of such persons from 6 July 1966.

A person to whom this Article applies shall not have the right to stand as a candidate for or to be appointed to membership of any Parliamentary body.<sup>40</sup>

The articles highlighted here illustrate the exclusionary nature of citizenship in Kuwait. Even amongst citizens there are social, political and civil rights that were available depending on your degree of citizenship. The values that were created based on egalitarian ideal became intrinsic in the stratification of the population. Men who received the citizenship through Articles 1 and 2 exist in a different sphere of rights than everyone else.

The Bidun initially were given some support initially as the government went through claims and witness accounts trying to decipher who amongst the population actually belong, according to them.<sup>41</sup> As a result, the Bidun were given a status that distinguishes them from outsiders and benefited from government social welfare programs.<sup>42</sup> They were also included in the Kuwaiti category in the Ministry of Planning's annual census. That is until 1985 when Kuwait began to apply the Alien Residence law of 1959 on the Bidun population, which was followed by a series of regulations resulted in disenfranchising the Bidun.<sup>43</sup> In 1986, the government encumbered the right to travel by placing restriction on eligibility to travel documents.<sup>44</sup> The following year the government began to refuse the Bidun the right to renew or register for a driving license or even register their car.<sup>45</sup> The same year

they also began to end the right of education for Bidun children and began instructing private school to only accept children with official residency permits.<sup>46</sup> By 1988, the Ministry of Planning transferred the Bidun statistics from the Kuwaiti column to the alien column, the same year the education ban was extended to universities as well as public clubs and associations.<sup>47</sup> This process highlights the stratifying mechanism of citizenship, in which citizenship is not solely a bestowed status but a tool in national identity building. Lacking citizenship not only infringes on your social, political, and civic rights, but your spatial rights as well. The spatial rights that were mentioned by Yuval-Davis in the previous section are all under threat if you are not a citizen, but beyond that your own identity comes into question. By classifying the Bidun as aliens, the government essentially changed the narrative of these individuals from people who fell through the cracks, to an illegal immigrant encroaching on the state. By 2000, the National assembly passed amendments that would make some Bidun eligible for naturalization.<sup>48</sup> The amendment come with the condition that they would sign an affidavit that admits their foreign nationality and disregard their claims of Kuwait origin.<sup>49</sup>

While the legal status of Kuwaitis was governed by the Nationality Law of 1959, the legal status of non-Kuwaitis was dictated by the Alien Residence Law of 1959. When the government started enforcing the Alien Residence laws on the Bidun population, it severely limited the Bidun's ability to navigate society. That is largely due to Article 12 of the document which states, "Article 12 prohibits providing residence to or employing a foreign national whose residence in Kuwait is illegal. It also prohibits employing a foreign national sponsored by another employer for the duration of his contract."<sup>50</sup> Kuwait is amongst the countries that employ a sponsorship system that is often referred to as the Kafala System. The Kafala System does not come in one form across all countries, but is signified by relationship between employer and employee. In the Kafala System, an expat is sponsored by a national citizen employer, and have various elements of their residency determined by their profession.<sup>51</sup> This puts the expat in a position where they are left at the mercy at who is employing them. In the case of fair and just employers,

the experience can be relatively unobjectionable. However, in what is a consistency in many cases, employers use the uneven relationship to take advantage of the employee and prevent them from accessing any of their rights. Because the sponsor is responsible for the employee through the Kafala System, the employer is responsible signing off on any decisions regarding the employee's future. Meaning, if the employee is a position where they are in a job they do not like, they cannot find a new one without the sponsor signing off on it. This puts the expat at a position where not only are the rights that they have are defined by their status as employees, the only way they have access those rights is through their sponsor. Considering the dynamic of the country, it is a situation where the minority of the population are put in charge of the majority. Not only does this create an element of servitude within the interactions, it puts Kuwaitis in a place where they are by default in charge. The expat cannot break this dynamic nor protest it due to the fear of being deported. While the Ministries of Foreign Affairs, Interior, and Labor are in charge of enforcing these rules, the Head of Police and Public Security Department play the largest role. The police notably are in charge of issuing residency permits and issuing written deportation orders. Article 16 of the residency law states:

The Head of the Police & Public Security Departments may issue a written deportation order for any expatriate even if s/he holds a valid residence permit in any of the following situations: If a judgment was issued from the court for the deportation of the expatriate. If the expatriate has no means of living Deportation can be issued in cases of violation of public order, public security, or public morality.<sup>52</sup>

The ambiguity in the third clause of the article places the expat in a position of uncertainty regarding their place in Kuwait. In practice, it ends up being a way of consistently policing the majority, and making them attempt to stick to the status quo. Consequently, the issue of expat residency becomes viewed as a security issue rather than a labor issue. The codification of different identities through law created a dynamic where those with citizenship were seen as the true people of Kuwait. The non-Kuwaitis in this situation were seen as outsiders inhabiting Kuwait, either for

temporary work or through illegal means. The state formation period that followed did not attempt to correct the imbalance, but rather created policies and development that only left the gaps bigger. The subsequent urban development programs and social welfare programs that defined the state formation period only served to put more emphasis on who belonged and who did not.

## MODERNIZATION

In her book, 'Kuwait Transformed' Farah Al-Nakib discusses the state formation efforts that occurred in the last century and the subsequent consequences of those efforts. The process of modernization began in 50's with the employment of British and American planning experts who in turn were expected to reimagine the country<sup>53</sup>. These efforts were largely pushed forward by Sheikh Abdullah Al Salem who was determined to pull into the future through urban development and social welfare<sup>54</sup>. The belief was that if Kuwait was to become a modern state in the 20th century, there was a need for it to step away from its traditional past and recreate itself as a modern nation. The urban development was focused on reimagining the Kuwaiti landscape through the building of schools, houses, hospitals, sewer lines, electric power stations and the rebuilding of the city hub<sup>55</sup>. While the social welfare included free education, healthcare, guaranteed state employment, state provided housing, marriage loans and various subsidized utilities. Al Salem was quoted saying that his goal with this project was to make Kuwait, 'The happiest state in the middle east'. Unfortunately, as a result of the planning, the pre oil character, one that came with its own values and lifestyle, was demolished and replaced with a newer landscape. Although this planning was done with the hopes of being a catalyst of progress, its top down nature.

Nakib notes that a large component of the pre-oil Kuwait landscape was determined by a sense of need and duty tied the lack of a municipal urban planning. Urban planning was largely an informal practice done to meet the needs of the people by members of the community. This strengthened the social relations, as belonging within the community meant it came with a participatory need. After the discovery of Oil, a municipality was created to restructure the country from a top down basis<sup>56</sup>.

Amongst the newest policies created was the guaranteed right to housing which ensured housing to its citizens. To provide for this guarantee, a process of suburbanization was initiated. The suburbanization was part of a large effort to not only place citizens in the new suburbs, but also move them out of the city to make way for a complete rebuild of the city. American urban planner Saba George Shiber noted, "The Story of new Kuwait is the story of 'exodus' from *ad-dira* (the city)."<sup>57</sup>

Nakib notes that this is not an attempt reminisce over simple times, but highlight the transformation that took place and how it affected the public's access to public spaces. The tight layout that once defined the Kuwaiti city provided and spectrum of public and semipublic spaces that played a pivotal social role within Kuwaiti society. The Kuwaiti neighborhood or *farij* was characterized by narrow alleys (*sikek*) and small squares (*barahas*)<sup>58</sup>. Individuals were able to navigate by foot going through past economic, social and political activities within this morphological 'urban' landscape that lead to the subsequent exchange of goods and ideas. It is not only that the population were constantly surrounded different cultures and lifestyles that made Kuwait, it is in the way the interacted. As Nakib puts it,

People needed diversity in their lives because none of the institutions or group in which they lived-their family, their *farij*, their professional or ethnic group- was capable of self support. The family depended on the *farij*, the *farij* on the merchants, the merchants on their own family network, and so on, and various interaction occurred within and between these groups. People developed multiple and complex loyalties and affiliations that cut across ethnic and socioeconomic subcultures. <sup>59</sup>

The combination of poverty and absence of proper bureaucracy contributed a creation of informal networks of solidarity amongst the inhabitants. The sense of solidarity was not based on a common identity but largely based on the relationships formed during these interactions. Before Bani Utub settled in Kuwait, there was no indigenous population in Kuwait and inhabitants were aware of that and viewed themselves to unequivocal members of the society. There was no need to be categorized as Kuwaiti because as identity it was

still one that was raw and in the early stages of development. Often the population was referred to as Ahl Al Kuwait or the people of Kuwait<sup>60</sup>. This identity was not tied to a specific culture in Kuwait, but rather the numerous cultures that existed in Kuwait that defined its landscape. The identity of people of Kuwait was tied the Baharna ship builders who built the Dhows, which were then utilized by Bedouin and African pearl divers who would eventually return have their pearl sold in Suqs that were protect by Beluchi guards<sup>61</sup>. The word for immigrants did not exist within the areas lexicon, only the word newcomer. Nakib explains,

Indeed, identities of origin were important to groups and they often classified themselves and others according to where they originally came from. This sometimes applied to individual families such as the Al Hasawi, Bastaki, and Al Najdi, as well as whole communities such as the Beluchis and Baharna. However, such monikers did not signal social exclusion or the absence of a sense of belonging in Kuwait Town... Dress, taste, or other forms of material culture, as well as family names, often distinguished members of particular communities, but these signals did not indicate that such groups were excluded from full participation in Kuwaiti society<sup>62</sup>.

There was an organization of coexisting communities and families, with differing opinions, practices and beliefs while respecting each other's rights to autonomy. The creation the welfare laws provided a genuine advantage tied to being able to be considered Kuwaiti by law. Due to the launch of the oil industry and the subsequent influx of immigration that arrived in order to fill out the newly found industries, the government felt the need to define in legal terms who was Kuwaiti and who was not.

The effects of this rapid oil expansion is often exotified through much of the discourse in the past century, highlighting as this overnight rags to riches story. A narrative that is blinded by the visual of skyscrapers emerging from what used to be a desert. It is a story that is relevant to the United Arab Emirates' history as it continued to inch its way towards being a touristic hub. In his *Kuwait: The Making of a City*, an impressed Stephen Gardiner proclaimed,

There was no breathing space between ancient

and modern, rags and riches; from a tiny place in the sand on the edge of the gulf... Kuwait hurtled like a missile into the high technology of the mid twentieth century. And over the next thirty years, the new city of Kuwait -optimistic, imaginative, confident, and utterly modern- was conceived, planned, built, replanned and rebuilt. The unique creation of oil, the story of this city.<sup>63</sup>

This discourse does well to explain the intentions behind such drastic urban planning but fails to take into consideration the lived experience of those who were affected by it nor does it take in the unintended consequences of such rapid change. While the new city was exciting and the building looked more extravagant, the way people inhabit those places and the consequences of that provides a more essential understanding of what happened. In fact, the exodus from the city and the restructuring that occurred largely contributed the gap in lifestyle in the following decades. The new construction that took place, resulted in several radial roads that went across the country<sup>64</sup>. The areas between the First Ring Road and Fourth Ring Road were 'intended exclusively for the Kuwaiti section of the population'<sup>65</sup>. Nakib notes

Stringent control ensured that state distributed plots were developed as detached single family villas only. Apartment buildings were strictly prohibited within the neighborhoods, as was renting of any kind (including rooms, floors, or outhouses within a villa). Non-Kuwaitis were prohibited from owning property in Kuwait and therefore could only rent accommodations in privately owned, multi-occupancy buildings. Such buildings were restricted to commercial areas being developed by the private sector, such as Salmiya, Hawalli, and the city center<sup>66</sup>

As a result of such planning, by 1969, 72 percent of families that made up the areas between the First and Fourth Ring Roads were Kuwaiti, while 81 percent of the populations inhabiting Salmiya, Hawalli, and Kuwait City were non-Kuwaiti<sup>67</sup>. The socio-spatial planning and segregation that took place largely was inspired by the settlements built by the British in the Kuwait Oil Company town, Ahmadi. Nakib explains,

Ahmadi's 1947 plan, designed by British architect James Mollison Wilson, divided the

oil town into three sections: One area for the British and American senior staff; another for Indian and Pakistani clerical, financial, and technical staff; and the 'Arab Village' for indigenous workers (Kuwaitis, Bedouins, Arabs, and Iranians). The Arab village was meant for the exclusive housing of natives with the aim of keeping them physically and socially separated from expatriate staff areas.<sup>68</sup>

The suburbanization that occurred had resulted in a separation that removed the nature of intercultural mingling that once pervaded the day to day life of the community. In 1969, a poll done in the Kuwaiti populated area of Shamiya revealed that 78 percent resident did not visit non-Kuwaitis.<sup>69</sup> On the other hand, in the expat populated Hawalli, 83 percent of residents said that they did not mix with Kuwaitis<sup>70</sup>. Not only does show the shift that occurred from the time of pre-oil Kuwait, it also hints that the indifference or social malaise that is starting to develop around that time. Not only were the different groups of people separated, it did not matter to the individuals if they did. What was once a landscape defined by informal networks of solidarity, was now defined by separation and indifference.

The Nationality law of 1959 and the Alien Residence Law of 1959 completely reinterpreted the relationship of newcomers to the native population. The dynamic that existed now did not provide the newcomers ways to integrate themselves with the Kuwaiti population, as through law and privileges provided by the state, they lost a lot of commonalities. Kuwaitis by law were eligible for marriage loans, free education, and variety of other privileges that created a material reality tied to the identity. These privileges provided a sense of similarity amongst Kuwaitis and helped homogenize a diverse group of individuals. The process of homogenization that occurred as reaction to the privileges lead to more and more Kuwaitis revolving their identities with their Kuwait-ness and taking pride in the privilege that came with it. One of the most common ways that Kuwaiti men began to stand out was through dressing in their national garb, the *dishdasha*.

Dressed in European-style clothes, the Kuwaiti can be mistaken for a Western Arab, a Turk, an Iranian, a native of the subcontinent, or a Westerner. Dressed in a *dishdasha*, his

identity was unmistakable. And this identification immediately set in motion a chain of reactions--always the same--among the people he interacted with, especially if they were expatriates. This in turn informed him of, and confirmed, his identity, one that was firmly anchored in social privilege and power.<sup>71</sup>

Nakib finishes the book off by referencing Henri Lefebvre's "Right to the City," asking younger generations of Kuwaitis to be involved in the urban process. This is not based on notions of nostalgia, but on the importance of having the population be involved in the social transformation of the countries landscape. Place and people sensitive measures are necessary to guarantee genuine progress in the countries future. The issues that developed during modernization have not gone away, but rather, through time got bigger. Kuwait's modernization period was one with the hope of springing it forward and creating a happy society. In 2013, a readers' poll in travel magazine, Conde Naste Traveler, placed Kuwait as 5th "unfriendliest city" in the world.<sup>72</sup> In 2014, Kuwait was ranked as the worst place for an expat to live amongst 61 countries in a survey report done by InterNations.<sup>73</sup> Given the recent statistics, it is hard to claim that Abdullah Al Salem goal for the 'happiest' state was fulfilled.

## THE PRESENT AND THE FUTURE

Despite the negative effects of rapid growth during the modernization period, the state has created a new nation building plan that will last until 2035.<sup>74</sup> This new development, New Kuwait, is said to bring Kuwait to the future with cross-the-boards development on various sectors. On a broad level, the goal of this development plan is to set the goal for seven areas, or pillars, of life in Kuwait by the year 2035. The seven pillars are: human capital, economy, living environment, healthcare, infrastructure, public administration, and global position<sup>75</sup>. Some of the pillar plans are exciting and are providing development in areas of life where Kuwait needs improvement, like health care and the environment. Other elements, however, echo the development plan of the 20th century, the one that has brought Kuwait to the modern age. The Kuwaiti is using socio-spatial planning again, as it aims by the end of this year to build six new cities based in South Jahra specifically for low wage expat work-

ers.<sup>76</sup> The description on the official website reads,

Through the workers cities project, the state aims to build integrated, highly-organised cities featuring all basic services which ensure dignified life for residents, while reducing the presence of workers in areas where families live; something that limit dangers to social security in residential areas. Accelerating the construction of these cities, therefore, is extremely important for the Kuwaiti society, given that they deal with a group of people who haven't had suitable housing for a long period of time; something that has been negatively reflected on society.<sup>77</sup>

This description in particular highlights the Kuwaiti Governments discriminatory and rather confusing point of view regarding the expat population. The 'threat of security' argument has been one of the

Like the case of low income expat workers who are being placed in South Jahra, Kuwait has always pushed the problem to its periphery rather than considering any meaningful way of engaging with it. And today in the midst of social tension, Kuwait is pushing migrant workers to a remote area to stop them from having an effect on the public.

In the last couple of years, Kuwait has been relentless with the deportations, deporting individuals for offences as simple driving without a license.<sup>78</sup> Minister of Social Affairs and Labor, Thekra Al-Rasheedi, has said that Kuwait is in the process of deporting 1 million expats by the year 2023.<sup>79</sup> This news was couple with the effort of Kuwaiti Minister of Parliament Safaa Al Hashem, who has made it her personal mission to kick even the out the balance of Kuwaitis and Expats in the country.<sup>80</sup>

**Table 9.** *General perception about life in Kuwait among Arab and Asian students: by gender*

General perception	Arabs (n = 491)				Asians (n = 482)				Total (n = 973)	
	Male (n = 249)		Female (n = 242)		Male (n = 211)		Female (n = 269)		n	(%)
	n	(%)	n	(%)	n	(%)	n	(%)		
<b>Extent of happiness with life in Kuwait</b>										
Extremely happy	95	(39.1)	125	(51.9)	102	(48.6)	138	(52.1)	462	(48.1)
Happy	138	(56.8)	106	(44.0)	102	(48.6)	116	(43.8)	462	(48.1)
Not happy	10	(4.1)	10	(4.1)	6	(2.9)	11	(4.2)	37	(3.9)
<b>How strongly consider Kuwait as home</b>										
Very strongly	115	(48.5)	159	(66.2)	88	(42.1)	132	(49.6)	496	(52.0)
Strongly	92	(38.8)	71	(29.6)	102	(48.8)	120	(45.1)	385	(40.4)
Not strongly	30	(12.7)	10	(4.2)	19	(9.1)	14	(5.3)	73	(7.7)
<b>Whether parents have any Kuwaiti friends</b>										
Yes	227	(96.6)	216	(92.7)	197	(93.8)	248	(92.5)	890	(93.9)
No	8	(3.4)	17	(7.3)	13	(6.2)	20	(7.5)	58	(6.1)
<b>Whether family routinely interacts with Kuwaiti neighbours/families</b>										
Yes	207	(88.8)	205	(88.0)	117	(56.5)	171	(64.0)	701	(74.4)
No	26	(11.2)	28	(12.0)	90	(43.5)	96	(36.0)	241	(25.6)

Table from Nasra M. Shah's "Kuwait is home: perceptions of happiness and belonging among second plus generation non-citizens in Kuwait," 20

most common arguments used in the past to justify discriminatory policies and attitudes towards expat workers. Given the history of the country it does make sense to some degree, that yes, the Kuwaiti government is rather cautious when it comes to any threat. In the past century, Kuwait was subject to attempts of annexation by neighboring countries three times. However, how does considering the majority the population a threat for 60 years solve the problem? Throughout time, Kuwait reacted these security issues without any proper success.

Al Hashem has gained much support within the last year, due to her inflammatory rhetoric aimed at expats. She has proposed numerous new laws, amendments targeting the expat population which in return only increased her support amongst her voters. As of late, it seems like the future is looking rather grim for expat workers as the social climate in Kuwait is not one that signifies positive change.

In spite of all of that, expats still find a home in Kuwait. In a survey done in 2012 by Nasra Shah,

**Table 19.** *Respondent's aspiration/plans for future education, country of residence, and happiness with life in Kuwait among Arab and Asian working men and women*

Aspirations/Plans	Arabs		Asians		Total	
	Men n = 76 (53.5)	Women n = 68 (46.5)	Men n = 55 (53.9)	Women n = 47 (46.1)	n = 252	
	n %	n %	n %	n %	n %	n %
Whether plan to gain additional educational degree						
Yes	38 (50.7)	38 (55.9)	28 (51.9)	24 (52.2)	132 (53.0)	
No	12 (16.0)	14 (20.6)	7 (13.0)	6 (13.0)	39 (15.7)	
Unsure	25 (33.3)	16 (23.5)	19 (35.2)	16 (34.8)	78 (31.3)	
Whether plan to move to another country in next 2–3 years						
Yes	25 (32.9)	13 (19.1)	15 (29.4)	14 (29.9)	69 (27.9)	
No	51 (67.1)	55 (80.9)	36 (70.6)	32 (70.1)	178 (72.1)	
Plan to move to which country						
Arab	7 (33.3)	2 (20.0)	3 (21.4)	4 (33.3)	18 (30.5)	
European	2 (9.5)	3 (30.0)	2 (14.2)	3 (25.0)	10 (16.9)	
North American	5 (23.8)	5 (50.0)	5 (35.7)	4 (33.3)	19 (32.2)	
Other	7 (33.3)	0 (0.0)	4 (28.5)	1 (8.3)	12 (20.3)	
If plan to move whether taken any steps to move						
Yes	9 (37.5)	4 (33.3)	10 (31.2)	8 (23.5)	32 (30.8)	
No	15 (62.5)	8 (66.6)	22 (68.7)	26 (76.4)	72 (69.2)	
After retirement, plan to return to home country or move to another country						
Return to home country	39 (52.0)	26 (38.2)	26 (49.1)	24 (51.1)	115 (46.4)	
Go to another country	8 (10.7)	8 (11.8)	2 (3.8)	3 (6.4)	23 (9.3)	
Don't know at this time	28 (37.3)	33 (48.5)	25 (47.2)	20 (2.6)	109 (44.0)	
Extent of happiness with life in Kuwait						
Extremely happy	30 (39.5)	37 (54.4)	12 (21.8)	8 (17.0)	88 (35.0)	
Happy	39 (51.3)	25 (36.8)	40 (72.7)	36 (76.6)	142 (56.6)	
Not happy	7 (9.2)	6 (8.8)	3 (5.5)	3 (6.4)	21 (8.4)	
How strongly is Kuwait considered as home						
Very strongly	40 (52.6)	44 (64.7)	21 (38.2)	12 (25.5)	119 (47.4)	
Strongly	24 (31.6)	15 (22.1)	21 (38.2)	23 (48.9)	84 (33.5)	
Not strongly	12 (15.8)	9 (13.2)	13 (23.6)	12 (25.5)	48 (19.1)	

Table from Nasra M. Shah's "Kuwait is home: perceptions of happiness and belonging among second plus generation non-citizens in Kuwait," 34

973 second plus generation non-nationals and 246 working persons were interviewed about a variety of issues regarding their time in Kuwait.<sup>81</sup> In spite of restrictive regulations, in spite of discriminatory discourse in the national assembly, in spite of Ministers of parliament dedicating their careers to deporting them, 48% of the students interviewed were extremely happy and 52% very strongly considered it home while the numbers for adults workers were 35 and 48 respectively. Furthermore, the choice to pick individuals who are second generation non-national meant that it was members of the community whose families have

managed to get past strict residency laws and stay for a lifetime even with no permanent residency. It is important to give light to the experiences of 2nd generation expats, as they break the narrative that views expats as leeches sucking money and jobs out of the state. Even within academic discourse about the topic of expats in Kuwait, so much of the literature is tied to individuals who temporarily stay in the country and not those who spend significant parts of their lives in Kuwait.

## CONCLUSION

What is most interesting to me about the case expats in Kuwait are the narratives that decorate the discourse of who belongs and why. Retracing the steps of identity building in the new state shows us the process in which identities are stratified and the contributing factors that formed it. Within the case of Kuwait, its history as a port city in between larger more powerful political entities put it in a place where the question of security was consistently relevant. After years of choosing sides between the Ottomans and British left them in poverty and with more enemies than they can account for, the promise of gaining nation-state status due to oil excavation seemed like an exciting new prospect. However, the discovery shifted the power dynamics of the society completely, removing the power from the merchants that once fueled society and placed it in the hand of the newly found government and its municipalities. Subsequently the ways which the government attempted to recreate Kuwait from a port city Sheikdom to a 20th century modern state were codified and enacted in problematic ways. Instead of the new developments contributing to a more egalitarian society they increased disparities amongst the population. The conception of formal citizenship created a situation where the basis of Kuwaiti identity was rigidly defined and the following modernization period stratified the new civic identity to an incredibly privileged position within the society. The government did not view anyone who was not a citizen as belonging, demonstrated by the Bidun population that was considered an illegal immigrant population, and the expats that were there on temporary residency. However, the Bidun and expat populations have proven that in spite of government regulation they found a home within Kuwait. That feeling of home that is found in Bidun individuals who to this day do not budge on their Kuwaiti identity, the feeling of home that is found within expats who managed to make what was temporary residency last for their kids' futures, these are feelings that are able to stand in the way of paperwork and legal documents.

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IMAGE BY RAKAN AL-HAZZA

# WHO IS IN CONTROL?: A SCREENPLAY TITLED THE RHIZOME

BY EMMA MCLAUGHLIN

*“Writing has nothing to do with signifying. It has to do with surveying, mapping, even realms that are yet to come.”*

Deleuze and Guattari, “Introduction: The Rhizome”

**Abstract:** This project explores Gilles Deleuze’s notion of the “Control Society,” asking questions about freedom, through a narrative allegorical screenplay. The screenplay takes the model of the rhizome, as described by Deleuze and Guattari, and applies it to the infrastructural control of the internet. The aim of this project is to re-think how we understand our own freedom in a digital age where we, along with those in powerful political and economic positions, are increasingly subject not to sovereign governments, but protocological infrastructures. The screenplay format offers a new means by which we may “map” systems of control and speculatively think about how freedom, control, and power are changed in a digital age. The rhizome allegory and inverted tree model of the Domain Name Server system offer a metaphorical, fantastical way to think about the infrastructures we operate within.

**Keywords:** Control; Freedom; Political Belonging; Internet; Rhizome

## INTRODUCTION

In his essay “Post Script on Societies of Control,” Gilles Deleuze outlines a shift in the relationship between power and freedom from what Foucault termed “*disciplinary societies*,” to what Deleuze calls “*societies of control*.”<sup>1</sup> In earlier work, written with Felix Guattari, Deleuze presents the concept of the rhizome as a root structure that can be used to think through multiplicity, connectivity, unification, and segmentation. Deleuze and Guattari attribute 6 principles to the rhizome: connection, heterogeneity, multiplicity, asignifying rupture, cartography, and decalomania.<sup>2</sup> I will return to these principles later, to describe their significance in thinking about the ways in which the internet, through its physical infrastructure and protocols (TCP/IP) is a rhizome. This rhizome, in combination with oth-

er protocols by which the internet operates and was historically built exists within a society of control that both unifies and decentralizes the way we are subject to power, allowing us as subjects to feel more free while simultaneously being subject to more controls.

My project will ask what protocols the internet uses to create accessibility, and how these protocols also regulate and restrict us. How does the infrastructure of the internet produce a more equitable system of knowledge access and a vast communication network through the rhizome at the same time that it enables what Deleuze calls a “society of control?” And, perhaps most importantly, who is doing the controlling?

While the internet produces accessibility through knowledge access and ease of communication, protocol acts as a form of language and procedure that can never be overcoded (meaning that without certain codes and protocols it simply will not work) much like the multiplicity of the rhizome. Protocol can work as a mechanism that regulates control as well as subjects, but while it regulates, it also spreads information and accessibility. While we feel free to access more information than ever before, we do it through an entirely regulated network of control. The regulation of this network has transferred from researchers to the US Department of Commerce to a multi-stakeholder, nonprofit organization.<sup>3</sup> Who these groups are accountable to remains up for debate when the majority of those they “control” are unaware of their existence. Most of us remain unaware of the rules of this network and its protocols restrict us. This network is operated by an authority that is not accountable in the way of other political authorities, such as governments.

While this protocol and the structures that support it exist alongside sovereign, state-based power now, this could change. As we are increasingly subject to supranational organizations supported monetarily by private funds, or social networks controlled by individuals and the data teams they have assembled, with very specific ideologies behind them, it seems plausible to imagine a shift to a non-state basis of governance. The political importance of a project like this is to present a scenario, allegorical to the system of the internet, in which every member of the world constructed is subject to this non-state governance, although they might be subject in different

ways, depending on where they fall within the hierarchy or, in the vocabulary of internet protocol, “the stack,” as described by Benjamin Bratton.<sup>4</sup>

My project will present the history of internet protocol, its initial purpose, and briefly analyze the political and economic project behind it. Next, in order to understand how hierarchies remain within the internet, I look at the Domain Name Server system, how it works as a literal, hierarchical ordering of access resembling an inverted tree, and who has controlled it (the United States Department of Commerce until 2016) and who controls it today (ICANN, a multi-stakeholder organization). I will examine how Transmission Control Protocol (TCP) and Internet Protocol (IP) both operate as procedures that at once unify and decentralize power and accessibility through language and code.<sup>5</sup>

This project aims to address what the internet, as part of a society of control, does for a re-articulation of power, control, and consent. This requires an analysis of who is in control of surplus value within the present system, and what that surplus value could look like when it transcends currency, in an age where data, algorithms, and privacy are entering more and more into political and economic discussions. I hope that thinking through the internet as a rhizome, and the DNS system as a hierarchical access point to information, can allow for a placement of the internet within a society of control, and challenge what this means politically as we spend more and more time online.

The purpose of presenting the rhizome and internet in the form of an allegorical screenplay is to think through the ways in which we can process this information and speculatively consider the political implications of a control society in which we are no longer subject to a sovereign power, but instead to a protocol, which fundamentally has a political aim that supports a decentralization of information and intelligence, in support of maintaining a capitalist, democratic system of government.

Deleuze and Guattari describe the rhizome according to 6 principles: connection, heterogeneity, multiplicity, asignifying rupture, cartography, and decalcomania.<sup>6</sup> Connection, meaning the connection between each point within the rhizome and

the possibility for multiple other connections. Heterogeneity meaning the difference between connections and points; multiplicity is the ability of the rhizome to multiply but also exist within multiple points and sources. Asignifying rupture refers to the rhizome’s ability to break and reform at any point. Cartography refers to the rhizomes mappability, and decalcomania refers to its ability to be traced or transferred, which comes from a term used in surrealist art with the transferal of glass. These terms are useful and central to the allegory I have developed within the screenplay, because they allow me to build a world that is mappable, can reform itself, act as a tracing to current political systems and militarized structures, and is diverse in its multiplicity and heterogeneity, yet entirely connected to each different point.

Explaining these concepts through allegory allows for a visualization of what a society of control might look like, in its most extreme, literal form along with an explanation of how people might act within such a society. And how a rejection or rebellion, or a sort of recognition might take place. In the end, characters may know that they live within this hierarchy but they are also able to recognize how those at the top of the hierarchy are subject to the same forms of control that they are. This control is a form of non-state governance and sovereignty; it is entirely disconnected from actual people in the end, and relies upon data that is organic matter. The stakes become the entire world; if those on the bottom were to climb to the top and get the things that those on the top have, such as greater wealth, access to resources, and the freedom that privacy allows for, the entire world would collapse. The choice becomes subjugation to the structure, or collapse.

What a solution to this might look like is not the aim of this project; the aim is to show the dangers in a reliance on any system of governance based entirely on protocols and codes when the stakes are not just how we live but if we live. Allegory seemed the most appropriate method to illustrate the rhizomatic nature of the internet, because allegory can act as a sort of decalcomania in itself through a transferal from one system, to a lens-like glass through which we may view a structure of control: in this case, a fictional screenplay.

With trends of increased use of electricity grids, the internet, gas lines, pipelines, and so many other things that we rely upon to work in a certain way, a danger comes in complete automation.

In order to understand this, we must think about the military history of the internet and its initial form, the ARPA Net, constructed during the Cold War as a defense mechanism in case of nuclear attack and to block counterintelligence operations by the Soviet Union.<sup>7</sup> The aim, in the use of the ARPA Net and the internet that followed, was to defeat an anti-Capitalist enemy. The metaphors used are mostly derived from other political or media theorists; the rhizome is used by Deleuze and Guattari, while the inverted tree is described by Alexander Galloway in *Protocol: How Control Exists After Decentralization*. He describes the inverted tree-like, vertical, hierarchical structure of the Domain Name Server (DNS) structure:

A new branch of the tree is followed at each successive segment, allowing the user to find the authoritative DNS source machine and thus to derive the IP address from the domain name. Once the IP address is known, the network transaction can proceed normally. Because the DNS system is structured like an inverted tree, each branch of the tree holds absolute control over everything below it.<sup>8</sup>

While a screenplay might seem like a nontraditional format to present this information, I find these metaphors illuminating when it comes to understanding how we are controlled in ways that are so much a part of our daily lives, they seem natural. Thus, the world created has very little technology or surveillance as we know it. While the alternate reality that I propose here is entirely fictional in its conflict, characters, world, and situation, it relies upon infrastructural actualities of the internet, such as Domain Name Server structure, the transferal of information through protocol, and theories of the rhizome and “the stack” to construct a world and systems of power that resemble current systems of authority and control, ultimately asking us to reflect upon who is in control.

THE RHIZOME

EXT. RHIZOME - CLEARING - NIGHT

The rhizome (9) grows up around the sides of the clearing, about fifty meters across. Its roots form huts surrounding the shadow of the large inverted oak tree (10) that grows from the sky. The roots are thin in the clearing, but create a soft ground like a forest floor. They grow thicker where they form the huts, or slight slopes in the ground.

The sky can't be seen through the trees, but the darkness signals that it is nighttime. An owl hoots somewhere. The trees are thick, and huge, like redwoods growing down from the sky, inverted. The thickest grows down into the middle of the clearing, its leaves shaking slightly. The tree sparkles with dew; its leaves rustle, louder now, and a rope drops. There's a thump as ROSA (Age 22) lands on the rhizome, holding MARY (Age 4), fast asleep, wrapped in a blanket. PAULINA (Age 22) holds the rope from a branch.

PAULINA

Rosa hurry! They'll be up soon.

ROSA

I'm coming!

Rosa sets Mary on the ground, kissing her on the forehead. She takes a necklace off and puts it around the little girl's neck. It's made out of gold, but the middle holds a charm of neodymium, the mineral the Extractionists (11) above harvest from their mines. The moss-like rhizome begins to grow up around her, swaddling her.(12)

PAULINA

You're going to wake her and the rest of them up! We have to go.

ROSA

They're bound to wake up anyways, Sissy. Pull me up.

PAULINA

Wait, give her this.

Paulina tosses Rosa a syringe.

ROSA

What is it?

PAULINA

It'll make her forget up there.

CONTINUED:

2.

ROSA

What? Will it hurt her?

PAULINA

Not yet, at least.

ROSA

What's that supposed to mean? Will she forget us though?

PAULINA

It'll protect her for now. Quickly. Trust me.

Rosa takes the shot and sticks it in Mary's arm. The little girl rolls over. Rosa grabs the rope, Paulina pulls her up, and they climb back up the tree growing out of the sky.

EXT. RHIZOME - D'S HUT - BEDROOM - MORNING

D (Age 43) sits on the edge of her bed, made of the interconnected roots.(13)

The roots form a sort of sleeping bag, soft enough to act as a blanket. Everything within the Rhizome comes from the rhizome, creating an organic material that remains interconnected. The asignifying rupture of the rhizome allows the connection to stop and begin between clothes, paper, the ground, the blankets, and every material the people living within the rhizome use. The rhizome breaks apart and forms back together

D looks over at her family; J (Age 45) behind her, then at CC (Age 13) and B (Age 6) asleep on a pile of softer roots in the corner. They all look pale, ghostly, and slightly malnourished. She closes her eyes. She hears a whimper outside, then Mary's cry. She jumps up and looks toward the window.

B

Momma what is that?

D

I....I don't know.

CC

It doesn't sound right. Too old to cry.

D turns around to see both her daughters looking towards her in fear. She shakes J.

(CONTINUED)

CONTINUED:

3.

D  
J wake up.

J  
What's wrong?

D  
Someone's crying outside.

J  
It's probably just that new baby.

The cry gets louder.

CC  
That's not a baby.

B  
Did somebody get hurt?

D turns fast.

D  
That's nonsense honey, nobody's  
hurt...probably just a nightmare.

J  
Go check.

D nods and goes to the door. She pushes it slowly open, walking into the clearing. Mary is sitting in the middle, wrapped in a colorful blanket, with tears streaming down her red face, the sun coming through the trees bouncing off her golden hair.

D screams.

EXT. NAME SERVER (14) - ROOT POOLS - DAY

Paulina pops her head above the water of the pool, followed by Rosa. The pool's water is crystal clear, showing the roots descending into it and space beneath it, no basin to the pond. Steam comes off the pond, and pockets of the memories, in clusters of colors wisp in and out, segmenting around the edges, like minerals (15). A beautiful villa sits on the hill behind them, surrounded by more pools, and more tap roots.

Paulina pulls herself out of the pool, coughing. Rosa floats on the surface.

(CONTINUED)

CONTINUED:

4.

PAULINA  
Do you see it?

ROSA  
See what?

PAULINA  
The memory. It's fresh, it should  
be red.

Rosa treads water, looking around the pond.

PAULINA  
There behind you! Take it.

ROSA  
What are you gonna do with it?

PAULINA  
Drink it. Leave no trace (16).

Paulina tosses Rosa a flask, and Rosa fills it with the red bubbles floating around her.

She climbs out of the pool and hands it to her sister.  
Paulina drinks half.

ROSA  
What does it taste like?

PAULINA  
Blood. It's fine though.

Rosa throws it back. There's a scream from inside the house.

ROSA  
She'll know by now. Is it late  
enough?

Paulina looks at the sun.

PAULINA  
Should be. Quick, before the miners  
(17) see us.

ROSA  
Wait, Paulina, what did you mean  
she'll forget all of this?

PAULINA  
It'll just make things foggy.  
She'll think it was a dream, and so  
will anyone she tells about it.  
Come on, we should go.

EXT. RHIZOME - CLEARING -DAY

Mary sits on the ground, as more and more villagers leave their houses. They are all pale and ghostly in comparison to her. B gets closer as the rest hang back.

J  
Stay back, baby.

B  
She's so glowy.

D  
Listen to your father, B.

B turns back to her parents. LC, (Age 28), looks at J and D.

LC  
What do you think she is?

D  
She's one of us.

LC  
She's not.

D  
She must be.

An older man, ZZ, (Age 67) steps forward, pointing to the sap dripping from above CC and LC's heads.

ZZ  
CC, LC, drink. Tell us what you see.

They put their hands out, filling them with the tree sap, before pouring it into their mouths.

B  
Well?

LC  
I don't...

ZZ  
From last night?

She shakes her head in confusion. The memory sap is blank. She takes another sip.

The drops of sap travel from each branch of the tree, touching the rhizome in places where the branches hang

(CONTINUED)

CONTINUED:

6.

lower. They connect and break apart as they go through the branches, linking back together (18). She watches the clearing get darker, as the sun that peaks through the trees above breaks apart, then it gets darker. Then there is nothing, and the image breaks for a second. When it comes back together, Mary is there.

CC

There's nothing.

D

What do you mean there's nothing?  
Don't play games CC.

CC

I'm not. She doesn't quite  
appear...it just goes then  
comes...and--

LC

She's not...I've never...she isn't  
there, then it breaks, then she is.  
It's not right...it's not  
fair...(19)

Mary stands up and looks around. Everyone steps away, cautiously.

MARY

Where's my Momma? Auntie Rosa?

J nods at D.

D

Honey, what's your name?

B tugs on her older sister's skirt, and CC leans over.

B

What kinda a name is "Rosa?"

CC

From before we had all this.

MARY

I'm Mary. Who're you?

D

I'm D...Mary where did you come  
from?

(CONTINUED)

MARY

I don't know. Where am I? Why's everything look like the root pools?

CC

What's she talking about?

D

G. Where's G?

G (Age 90) steps out from a hut in the shadows.

D

Do you know what she's talking about

G

It's only a myth, dear. Nothing more.

D

But--

ZZ

There's just a problem with the switching (20). The girl probably got lost from the next tree over. Maybe the swamps.

LC

She's not one of--

LC's sister, AD pulls her arm.

AD

Don't LC.  
(whispering)  
They won't forget (21).

LC

It's not the switching.

AD

What'll we do with her? 'Till its fixed?

ZZ

D, can you watch her?

MARY

Why do the trees go that way?

CONTINUED:

8.

D  
Of course. CC, bring her inside.

ZZ  
J. Come with me. Bring B.

J  
What for?

ZZ  
No secrets when they're that young.

J  
I thought none of us had secrets.

ZZ  
Don't get smart. It's not good for  
you.

EXT. NAME SERVER - REGAN'S VILLA - DAY

REGAN (Age 30), Rosa and Paulina's sister, runs down the stairs of the house, wearing silk pajamas with a military style jacket over them. She points a gun at her sisters (22).

REGAN  
What have you two done?

PAULINA  
What do you mean?

REGAN  
This isn't funny I've called The  
Authority.

ROSA  
On us, sissy?

REGAN  
Where is she?

PAULINA  
She's free.

REGAN  
What's that supposed to mean?  
(Looking to the pools behind  
them)  
Oh my god.

Regan sprints to the pools while Paulina calls after her.

(CONTINUED)

CONTINUED:

9.

PAULINA

There is no God, remember? Only our  
unceasing control.

By now the miners have come, scraping bits out of the segmented rocks, looking for neodymium, and hardened sap deposits. Rosa follows her. Regan reaches out and drags Rosa closer. Paulina follows her.

REGAN

Rosa, tell me.

PAULINA

Oh give her a break she didn't do  
it alone.

REGAN

This was your idea wasn't it?

ROSA

No, it was hers.

REGAN

Who's?

PAULINA

Mary's.

REGAN

My four-year-old told you she  
wanted to go through the root pools  
and you let her?

ROSA

Yes.

REGAN

Why?

PAULINA

So she could be free.  
(sarcastically)  
They're free down there, aren't  
they Regan?

INT. RHIZOME - SCHOOL

CC sits at a desk in a schoolroom, built into the rhizome hut. The teacher walks around the room, passing out paper made of root pulp. The other children look pale, and not as healthy as normal children, but everyone is very clean. Despite the dirt of the natural environment and roots, everything manages to seem very sterile.

(CONTINUED)

CONTINUED:

10.

TEACHER

Despite the events of this morning,  
we still have a math quiz.

A girl sitting in the front row, AG, raises her hand.

AG

Why do we have to do math?  
Shouldn't we try to figure out  
where that little girl came from?

TEACHER

Can anyone tell AG why that is a  
silly question.

CC rolls her eyes, but realizes what she's done, and stops  
turning bright red.

Q, a boy, raises his hand.

TEACHER

Yes, Q, please.

Q

Because we can't know where she  
came from if it isn't in the  
memory. And we shouldn't ask.

CC

Why shouldn't we ask?

TEACHER

Because nobody else needs an  
answer, besides AG and apparently  
you CC, and that should be good  
enough for you two if it is good  
enough for the rest of us.

The other twenty kids in the room turn, looking at CC and AG  
spitefully.

AG

But what was that girl saying?  
About root pools? What's that?

TEACHER

She was making things up. Probably  
had a bad dream, or the....others  
put her up to it.

AG

But-

(CONTINUED)

CONTINUED:

11.

TEACHER

Leave it alone.

CC

When they drank the sap, that kid looked like she had never seen it before.

TEACHER

She has to have seen sap before.

CC

But she was confused by the trees. She looked like she'd never seen anything like them before.

TEACHER

Listen, children. The trees grow one way, so we can drink the sap. If we don't drink the sap, they will fall and crush us all. If we don't drink the sap, we don't have the memory, and we lose everything, more than ourselves, we lose everything we hold so dear.

D

What do you mean?

TEACHER

We don't just lose our homes, or the rhizome as we know it. We lose our safety, our equality. The sap allows us to know so much and encourages us all to behave as the equals that we are.

CC

But-

AG

(whispers)

Leave it CC.

TEACHER

Now it's time for your test. If you have any questions, come up and ask me individually. I hope you all studied!

CUT TO:

INT. RHIZOME - D'S HUT - KITCHEN

Fifteen years later.

Mary, now 19-years-old, sits next to B, now 21-years-old. The environment has caused them to age much more quickly; they both look closer to thirty than twenty. D, aged more than 15 years, sits across from them. CC lies on her bed in the next room.

D  
There's nothing else.

MARY  
There has to be.

B  
There isn't. Don't you remember?

MARY  
No. Its the only thing I can't.

D  
Its safest not to ask too many questions about these things Mary.

MARY  
But--

D  
That's enough. People will think you're getting ideas about your position. B, go find your father then fetch the roots.

B gets up from the table, and sulks out of the house.

D waits for her to leave then rushes into the corner, and begins to shuffle through papers. She writes something down and hands it to Mary.

MARY  
What is-

D grabs a pot off the shelf and drops it, so Mary's voice is covered.

Mary turns the piece of paper over. Its a map and a letter.

D  
Maybe you should go for a walk.  
Don't get lost. Don't go over by  
the swamps.

(CONTINUED)

CONTINUED:

13.

D winks, and gives Mary a hug, and presses a small bottle into her hand.

D

Here. This one first.

(whispering)

Take this once you get across the river. Run. Be careful. It's time you know.

Mary nods, and leaves the hut. She walks quickly behind it, drinks the small flask and sprints into the thick forest of inverted trees. She becomes invisible to the trees, and everyone else. She runs to hide from someone, but realizes this is useless. She is confused at first; she does not realize that what she has taken has made it so she cannot be seen, or traced, She steps on the rhizome and it does not break, nor does it adjust to the shape of her foot. She is invisible, not just to the people around her but to the very ground and atmosphere itself. The evening light breaks through. She runs until she reaches a river bank of muddy water. There's a wood bridge over it. She steps lightly.

There's a break in the trees on the other side. Only broken limbs and the remains of some stumps, crashed into the rhizome from above.

Mary walks cautiously over the bridge until she reaches the other side. She finds a stump and sets herself down on it lightly. She unfolds the papers, reading them out loud.

MARY

If you find her, her name is Mary,  
and maybe you won't believe us, but  
she is from above. You feel free  
because you think you know  
everything. You do not.

A twig snaps and Mary jumps up. B stands behind her.

B

What's that?

MARY

B what are you doing here?

B

I--I come here sometimes.

MARY

How?

(CONTINUED)

CONTINUED:

14.

B

I met someone from over here on the other side once...and they gave me something. Like that!

B points to the vial in Mary's hand.

B

It makes everything darker but it makes me remember and everyone else forgets.

MARY

Who gave it to you?

B

One of the hackers. But anyways Mary what are you doing here? Mama gave that to you?

Mary looks at the remaining vial in her hand.

MARY

I....well yes but I-

B

You can take it over here. It's safe.

MARY

Do they know that you come here?

B

No. Otherwise Mama wouldn't have sent you over here alone.

MARY

No I guess not. Here.

Mary hands B the papers. B turns them over in her hands. It starts to rain softly.

B

This isn't made of root pulp.

MARY

Of course it is. Don't be silly.

Mary holds her hand out. The rain falls in it, sizzling. It doesn't burn, just hits like baking soda hitting vinegar. She watches it in her hand.

(CONTINUED)

CONTINUED:

15.

B

No...Mary it's...Mary we have to go.

MARY

We should go home...it's raining we'll get sick and everyone'll know we were here...

B

No one will say so. It's too risky. Besides the rain only kills you if you drink it. And it kills you slowly anyways.

MARY

How do you know that?

B

There's somebody you need to meet.

CUT TO:

INT. NAME SERVER - PRISON CELL

Rosa lies on the floor whistling. Paulina sits in a neighboring cell. The sun sets outside.

PAULINA

(whispers)

We're running out of time.

Rosa rolls over, and giggles.

ROSA

That means they are too, out there.

PAULINA

What if it was a mistake?

ROSA

You're kidding.

PAULINA

We said we were setting her free, but then she'll wake up and just bear the burden of it all, won't she?

ROSA

Maybe.

(CONTINUED)

CONTINUED:

16.

PAULINA

What if they think she's crazy?

ROSA

Nobody is crazy down there. Or sick. They're the sanest of us all.

PAULINA

They're not even human.

ROSA

Don't say that.

PAULINA

What if she can't get up? And she goes to the edges. Regan said the girl in the family down there met a hacker and she just disappears from the memories sometimes. Down there they don't notice it but she--

ROSA

She's a teenage girl!

PAULINA

What if she's drinking the rain?

ROSA

She's too scared for that I'm sure. Anyways, Mary's not disappearing is she?

PAULINA

No but that doesn't mean she won't.

ROSA

Regan'll change her mind. She's not strong like us.

PAULINA

It's been fifteen years. And its not just her. The rest of them aren't going to forgive us so easily. They love The Authority.

ROSA

Anyways if any of them below have any sense they'll know something's up with her. She's not one of them.

PAULINA

What if they kill her?

(CONTINUED)

CONTINUED:

17.

ROSA

They won't. It's against everything they believe in.

PAULINA

She's not like them though.

ROSA

Yes she is. We all are. Don't forget that.

A door opens and a man, PAUL (Age 66), walks in. He is dressed in camouflage, and heavily armed. Paulina scoots to the back of her cell. Rosa hops up.

ROSA

Oh look, the general has arrived, all dressed up.

PAULINA

(In mock shock)

Show some respect Rosa!

PAUL

It's alright, Paulina.

ROSA

Yes it's alright, Paulina. The General knows we both have so much respect for The Authority!

PAUL

I have a message from your sister.

ROSA

Is she standing in the hallway? I can smell her perfume from here.

PAULINA

Sissy? Won't you come in?

Regan steps back from the door against the wall.

PAUL

She's at home. Mourning the loss of her daughter.

ROSA

She's safer where she is.

PAUL

And do you know where that may be?

(CONTINUED)

CONTINUED:

18.

ROSA

In the rhizome. Just look at the map. Its traceable (23). It fixes itself. She's an equal and no one will ever hurt her. She drinks the sap and your trees don't sink, remember?

PAULINA

She's a martyr. What's your message?

PAUL

Well, it seems that Mary has disappeared-she's not under the trees, and there is no memory of where she might have gone.

ROSA

That's interesting.

PAUL

And Regan, along with the rest of us, is concerned.

PAULINA

Why? It's safe down there.

Rosa smiles at Paulina. Any of her concerns seem to have melted away.

ROSA

Anyways Paul, why do you think we had anything to do with it? We've been in your little prison for fifteen years, remember?

PAUL

Because you've already broken protocol once before, remember?

PAULINA

I seem to remember learning in school that when protocol gets broken the rhizome doesn't work, is that right?

ROSA

No, something's off...

Paulina jumps up clapping her hands.

(CONTINUED)

PAULINA

Oh, it's not the rhizome that fails.

ROSA

Asignifying rupture.

PAUL

You two think you're very clever don't you?

ROSA

Yes.

PAULINA

It's the connectivity between the layers that breaks.

ROSA

Authority gets disrupted.

PAULINA

It stops working.

ROSA

And the top comes crashing down.

PAUL

Yes and you seem to forget that it takes the bottom with it.

ROSA

It breaks the connectivity that's for sure.

PAULINA

But the network is still there. In its physicality?

ROSA

Isn't that right, general?

PAUL

I wouldn't know.

(gritting his teeth)

I've never broken protocol. Nobody up here has.

ROSA

No, you just create it for everyone else. You and my sister, buying it off the man; a coup but you paid for it. And you left everyone else none the wiser.

CONTINUED:

20.

PAUL

Do you two have anything you would like to share in regards to your dear niece?

PAULINA

No, we don't share up here, remember?

Rosa laughs.

ROSA

Good one sissy.

PAUL

I'll be back in the morning. And hopefully Mary will be too.

PAULINA

Bye Paul. Bye Regan.

He stops on his way to the door.

PAUL

You two seem to remember your geography classes very well. But not history. You know what you would've been called in the old times don't you?

ROSA

Remind us.

PAUL

Terrorists.

PAULINA

No, cyberterrorists.

ROSA

Better than state terror.

PAUL

This is no state.

ROSA

No?

Rosa spits in his direction.

He walks out of the hallway slamming the door behind him.

EXT. RHIZOME - CLEARING - EVENING

D kneels in the rhizome of the front yard. She pulls a ginger-like thickened root out of the softer layer of roots up top. She harvests the ginger, throwing it into a bucket. Around the surrounding huts, other rhizome dwellers do the same.

EXT. RHIZOME - SWAMPS - NIGHT

B wades through the swamps and the rain until she reaches a rocky cave. Mary lags behind.

B  
We're almost there.

MARY  
Where's there?

B  
I've got some friends you need to meet.

MARY  
You have friends?

B  
It's easier to have friends when you're allowed to have enemies.

MARY  
I thought everyone over here was the enemy.

B  
No..they're just fools if you ask anyone under the trees.

JOHNNIE (Age 25) steps out from the cave; he is sunburnt and scrawny.

JOHNNIE  
But you don't think you're fools do you Bea?

B  
Trust me I used to Johnnie. And how many times do I have to say its B. None of that B-"ah."

JOHNNIE  
A little too coded for me.

(CONTINUED)

CONTINUED:

22.

B gives Johnnie a hug, but he stops her and steps back when he sees Mary.

JOHNNIE  
And who is this?

B  
Mary.

JOHNNIE  
She's not...like you.

MARY  
Of course I'm like her.

B  
Johnnie don't. We gotta talk. She's got these papers and...is your dad around?

JOHNNIE  
What papers?

MARY  
Please be careful with them!

B  
I thought all the stuff was a load of nonsense but it's not...well I've never seen paper like that.

JOHNNIE  
No...

MARY  
B you're scaring me, I think we should go back, they'll realize we're gone and--

B  
It's ok, they won't remember. Trust me.

JOHNNIE  
Mary you'd better come in.

Johnnie turns and goes into the cave and B puts her arm around Mary as they follow.

Johnnie's father BILL (Age 45), sits by a fire. He's boiling rain water, with some branches in it.

(CONTINUED)

BILL

B! Good to see you sweetie, it's been a while.

JOHNNIE

She brought a friend this time.

B

This is Mary.

Mary steps out.

BILL

What'd you do that for B? You know it's no good corrupting your fellow youths.

B

No, I found her over here.

JOHNNIE

I thought you were sisters.

B

Yeah but I'd never think goodie-two-shoes would have the balls to show up on this side of the river.

Mary looks at B in shock.

BILL

Never heard anyone talk like that have you?

B

Oh I'm not being mean Mary.

MARY

No, just crass.

B

You'll get used to it. Anyways turns out my mother sent her.

JOHNNIE

She had these with her.

Johnnie hands them to Bill and he turns them over in his hands.

CONTINUED:

24.

B

I thought you were all full of shit  
'till I saw those.

MARY

B! Don't talk like that.

B

Why not? Nobody's watching here,  
Mary.

JOHNNIE

Give her a breather. You remember  
what it was like when you first got  
over here?

MARY

Why are you boiling the branches?

BILL

Well we know the rain water poisons  
us, but we'd rather not have to  
taste it.

B

Anyways Bill, what are they?

BILL

Mary, where'd you come from?

MARY

I--I don't know. Nobody does. It's  
not in the memory.

BILL

And you--you don't remember?

MARY

No.

BILL

And you read this?

MARY

Yes.

BILL

So are you gonna take whatever  
you're clutching there or not?

MARY

(CONTINUED)

I-

B  
What if it hurts her?

BILL  
I have a funny idea that it won't.

Mary turns to B.

MARY  
What do you mean you didn't believe them? Believe what?

B  
I...I'm not sure if I'm the right one to explain that Mary.

BILL  
Johnnie, you tell her.

JOHNNIE  
Why me?

BILL  
Because it's all you've ever known.

Johnnie turns to Mary.

JOHNNIE  
What do you know about us?

MARY  
You're anarchists...you don't believe in access like we do, and you, well you don't take the sap. So you drink the rain and, then you...

JOHNNIE  
Then we die before our time?

B  
She's not as judgmental as the rest of them, Johnnie, give her a break.

BILL  
Go on.

MARY  
Well, the water poisons you. And after a certain point you can't walk. And then you can't move your  
(MORE)

CONTINUED:

26.

MARY (cont'd)  
arms until you're  
paralyzed--trapped in your own  
bodies. And then yes, you die.

JOHNNIE  
But you don't know why?

MARY  
They tell us loose morals.

BILL  
'Course they do.

JOHNNIE  
(rolling his eyes)  
And you believe them because it's  
easier and safer than asking  
questions.

BILL  
Don't be so spiteful.

B  
None of that's wrong, though.  
Except the loose morals maybe.

JOHNNIE  
You too?

BILL  
She's right, Johnnie. Now tell the  
girl the rest.

JOHNNIE  
Under the trees you drink the sap,  
and you know everything right?

MARY  
Yes.

JOHNNIE  
You have all the memory, and nobody  
ever hurts anybody, or argues, or  
fights, because that would imply  
that somebody thought they knew  
better?

MARY  
And we're all equals.

(CONTINUED)

JOHNNIE

And it all fits into the code. And the switching. The memory comes from the trees, because they watch you and then you drink their sap and you know everything that has been done. And there is no shame.

MARY

And you're all healthy and no one ever gets sick.

JOHNNIE

And everyone looks pretty much the same, and has the same wealth, and you have all the roots and sap the rhizome and the trees could ever offer? And nobody ever asks what's above the trees?

B

Well I suppose we all wonder.

JOHNNIE

What do you think is above the trees, Mary?

(Johnnie begins to raise his voice as he speaks, but doesn't realize it.)

MARY

I don't know. God? More trees?

JOHNNIE

And why don't people ask that question out loud?

MARY

I don't know.

B

Because it would imply that you want more. That you need answers where other people don't. That you're better for asking the questions.

MARY

I've never thought about it like that...

CONTINUED:

28.

JOHNNIE

No.

(Shouting now.)

But the difference between us and  
you is that we do think about that.

BILL

You're scaring her.

B

He's not calling you stupid Mary.

JOHNNIE

Do you know why the trees came down  
over here?

MARY

No.

JOHNNIE

Because we believe that there are  
people--

BILL

If you can call them that.  
Extractionists.

JOHNNIE

People, at the tops of your trees.  
And they collect your memories and  
they use them as data. And they  
live under the sun where they can  
grow things besides whatever  
starchy shit this is that the  
rhizome gives us. And they have  
entertainment, and art, and most  
valuable of all...they have real  
freedom.

MARY

Why would they do that? Why  
wouldn't we know?

JOHNNIE

Because they need you below to  
drink their sap.

B

But why?

JOHNNIE

Because we didn't drink their sap.  
And the trees got heavy and came  
crashing down.

(CONTINUED)

MARY

This is ridiculous.

BILL

Careful there...you're starting to sound like you think you know better than us.

B

Don't tease her. Mary, I thought it was all nonsense too. But you...you're different.

MARY

What do you mean?

B

Nobody asks you about your necklace because they don't want to seem jealous but nobody else has that. I don't even know what it is.

BILL

It's the chemical compound that makes the vibrations work in the packets. Nemodymium. Leftover from before. We can't extract it down here.

JOHNNIE

Anyways they have chemicals up there. And intelligence. They can create chemicals that make you remember and forget. They can mine your memories. We trade what we have down here but...that's not much.

B

It's what they give me so I can sneak off over here.

JOHNNIE

And I bet its what is in that vial you're holding.

B

But where would my mother get it?

BILL

Your mother has enough sense not to talk about these things out loud. She knows just as well as the rest

(MORE)

(CONTINUED)

CONTINUED:

30.

BILL (cont'd)  
of them that Mary's from somewhere else. Mary just got lucky enough that your Mother found the letter, and not someone a little more acquiescent to The Authority.

MARY  
What's The Authority?

JOHNNIE  
The Authority is what's up there. Extractionists. Call them whatever you want. They need you to drink the sap so they can live their perfect little lives.

MARY  
And who are you? Everyone just calls you them?

BILL  
They used to call us "hackers."  
Some of us tried to climb the trees, hacking our way up, to prove your people wrong.

He gestures to B and Mary as he says "your people."

B  
"Our people?"

BILL  
There are other people B, Mary proves that. You don't have a name because you don't recognize that you're different from anyone else; there are no others to you, so why bother with a name?

B  
Mary, what was it you said? That morning when you were little, when we found you?

MARY  
I--I was making things up.

BILL  
You remember though. What did you say?

(CONTINUED)

CONTINUED:

31.

MARY

I said it looked like the root  
pools.

JOHNNIE

The memories travel like liquid.  
They disperse and come back  
together.

BILL

There's a map. Here. It's perfect.

Bill shoves the papers back into Mary's hand. She traces it  
with a finger.

BILL

It's like they took it from above  
and captured every intricacy. Every  
rupture, every little bit. You  
drink that flask and see what you  
remember.

B

Go on Mary, I'm right here. What  
could happen?

Mary pulls the cork out and throws it back, down her throat.

CUT TO:

EXT. NAME SERVER - DAY

MONTAGE, with muffled sound as Mary, age 3 jumps into the  
wave pools and pushes down, peaking into the trees growing  
from below her.

She sits on the edge of the pool pointing inside, crying.

Regan carries her inside, as Rosa stands behind looking  
concerned.

Mary sits in the corner as a group of adults sit around a  
table, pointing at blueprints.

Mary looks at the blueprint of mining charts.

Paulina holds Mary, as she watches a man climbs up from the  
wave pool.

Regan and another man dressed in a uniform show the man a  
map of the layers of the name server, the trees, and the  
rhizome.

(CONTINUED)

CONTINUED:

32.

Mary climbs onto the man's lap at dinner, but he begins to cry.

Rosa leans into the man, speaking into his ear.

ROSA

You can't...if you try, they'll  
kill you. It's what they do to the  
people that want to go back.

Mary sits in the window and watches as a miner pushes the man into the wave pool, twisting his hands in roots first. He screams, and kicks as he's forced under the water, trying to breath. Soon he stops, and a miner pulls him up. They carry his body away.

Paulina sits on the floor of the nursery.

ROSA

But she'll never be able to come  
back?

PAULINA

She'll have a choice.

ROSA

How?

PAULINA

She can climb up.

ROSA

After that?

PAULINA

Or she can let us know it's time to  
come get her.

ROSA

How?

PAULINA

The neodymium. It's connected to  
Regan's. She has to talk to it. And  
the vibrations, well it's magnetic.  
I don't know how they've done it  
but she'll feel it.

ROSA

What if she doesn't want to?

(CONTINUED)

CONTINUED:

33.

PAULINA

Then she'll figure out how to stop  
this.

Mary, present day, sits on the floor of the rhizome, crying.

CUT TO:

EXT. RHIZOME - SWAMPS -NIGHT

There is a scream, and Mary's eyes snap open. B is in her  
face.

B

What did you see?

MARY

I-they're telling the truth.

B

What if it's just a drug? Designed  
to trick you?

JOHNNIE

What did you see?

BILLY

It doesn't matter what she saw.

B

What?

MARY

It-it can't matter.

B

Well, what's that supposed to mean?

JOHNNIE

They mean that we can't do anything  
about it.

MARY

Yes. Well, maybe.

B

What? You're telling me that there  
are people up there, and we can't  
do anything about it?

JOHNNIE

I don't get it.

(CONTINUED)

CONTINUED:

34.

BILLY

You explain, Mary.

MARY

There are people up there....Extractionists, whatever you want to call them. But we extract too. They have more freedom I suppose...but they are also just as controlled as us. They can't leave.

B

How? How could they be as controlled as us?

JOHNNIE

Why would they want to leave?

MARY

It's not them. It's all of this.

Mary gestures to the rhizome around them, the collapsed trees, the open sky, the inverted trees growing in the distance.

B

But why do they get to decide to have more?

MARY

They have privacy but they're just as subject to all of this as us, don't you understand?

JOHNNIE

They have their own authority. It's all within the stack.

MARY

I can climb up. We all can.

B

Who's "we?"

Mary looks off towards the trees in the distance.

MARY

All of us.

BILLY

(CONTINUED)

NO.

B

What do you mean no?

BILLY

First of all, they won't. The rest of them. Your people. Second of all, it'll collapse.

JOHNNIE

It should collapse.

BILLY

No, it's a suicide mission.

JOHNNIE

Isn't the way we live a suicide mission?

BILLY

No, it's a choice, and anyways, we don't make that choice for others.

MARY

He's right. If we go up, no one will drink the sap and it'll get too weighed down. It'll collapse.

JOHNNIE

It should collapse.

MARY

Then we'd be just the same as them. Enforcing our will upon others.

B

So we need them up there?

MARY

Yes. But I don't think it's their fault entirely. And its not them we need.

BILLY

It's their fault we have it. They wanted power and security for themselves and the systems of governance they had. The old world was falling apart so they transferred it to this, like a tracing.

CONTINUED:

36.

B  
Decalcomania.

MARY  
I guess everything they taught us  
wasn't a load of garbage after all.

BILLY  
They benefit from it but they're  
subject to it too.

JOHNNIE  
And in the end, they'll suffer too.

B  
Should she go up?

Mary plays with her necklace.

MARY  
Wouldn't make a difference. It's not them.

B  
Then what is it?

MARY  
The rhizome. The trees. This. The world as we know it.

END

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## ENDNOTES

- 1 Deleuze (1992), 3-4
- 2 Deleuze Guattari (1987), 6-7
- 3 US Department of Commerce ICANN Memorandum of Understanding
- 4 Bratton (2014)
- 5 Richards (1994)
- 6 Deleuze Guattari (1987), 6-7
- 7 Abbate (1999), 8-20
- 8 Galloway (2004), 9
- 9 The rhizome, as described by Deleuze and Guattari, is based off of the root structure of a plant. They describe it, writing “The multiple *must be made*, not by always adding a higher dimension, but rather in the simplest of ways, by dint of sobriety, with the number of dimensions one already has available always  $n - 1$  (the only way the one belongs to the multiple: always subtracted). Subtract the unique from the multiplicity to be constituted; write at  $n - 1$  dimensions. A system of this kind could be called a rhizome. A rhizome as a subterranean stem is absolutely different from roots and radicles. Bulbs and tubers are rhizomes. Plants with roots or radicles may be rhizomorphic in other respects altogether: the question is whether plant life in its specificity is not entirely rhizomatic.”
- 10 The Domain Name Server (DNS) system is best described and visualized as an inverted tree; hierarchical, with The Authority controlling access beneath it at the top. The roots stretch down, and when access is cut to one IP address, or DNS location, it is cut from above. In this sense, the trees offer access to information, which is then aggregated at the top, in the “root pools.” When information is cut, it would be cut through the roots.
- 11 I choose to call the group of people that live at the bases of the roots of the inverted trees extractionists, because they do not exploit the people below so much as they extract the resources that the people below provide through memory. In their article “Cultural Studies of Extraction,” Laura Junka-Aikio and Catalina Cortes-Severino write of the notion of extractivism: “The conceptual expansion of extractivism can contribute to the work of translating, mapping and joining the vast variety of counter-extractive struggles that are developing across literal and new extractive frontiers in seemingly distant and disconnected sites and places” (Junka-Aikio & Cortes-Severino 2017: 179). This is useful in thinking about cross-societal alliances and counter-extractive struggle as it exists within this story.
- 12 Two characteristics of the rhizome are asignifying rupture, and heterogeneity. Here, the rhizome breaks apart and regrows to absorb the girl (asignifying rupture), but also takes a new form to adapt to the child lying within it. Because of asignifying rupture and the rhizomes ability to break and reform from any point, life can depend on the rhizome for all of its raw materials; the rhizome breaks and adjusts, growing into whatever they need. It can wrap around people as they sleep, or grow to form buildings, and be harvested without any concern of it diminishing.
- 13 Every structure within the rhizome layer of the stack grows out of the rhizome. Furniture, blankets, rooms, and homes. The rhizome can be bent, but the multiplicity is uncontrollable by those within it. Where it breaks it grows back.
- 14 The “Name Server” alludes to the top of the Domain Name Server system, where all information stems from. Within this stack, information is collected from below and then centralized through the mines in the name server.
- 15 These memories act as data, used by those up top to survey those in the stack layer beneath them. The data collects like minerals, creating sedimentation. The unused data is then harvested by the miners, and is used to collect information which is then used to create new technologies and advance the society of the Extractionists. Their wealth comes from the data.
- 16 The only way to hide the memories before they turn into minerals is to physically absorb them before they can be extracted.
- 17 Miners of the “memory” sedimentation; data miners.

18 The data and memory exists in the sap; the memory that is being searched for here travels through the sap in what the people call “switching,” a reference to packet switching (described below).

19 *In Network Culture: Politics for the Information Age*, Tiziana Terranova describes information, and argues it is something we all know and understand. In the “information age,” questions arise though about rights to it, and its commodification. Terranova writes “Information emerges as a content, as some kind of ‘thing’ or ‘object’ but one that possesses abnormal properties [...] these features of the informational commodity have opened all kinds of issues around the question of *rights* in the digital age—and more specifically the right to own and copy information” (Terranova 2004: 7). What this means for the extractors of information is not as important in this moment as what it means for those from whom the information has been taken; CC feels entitled to the information, as a right, because it is the commodity and means by which equality is ensured in the world that she knows.

20 Switching here refers to packet switching; in packet switching, a message is broken apart, sent out into a network through “packets” which then travel through various routes (in this allegory, more easily understood through the rhizome and tree branches, and physical roots) and reassemble to form a message. The people on the rhizome are constantly surveyed, and drink sap, which contains packets, collections of data. They are able to know everything taking place within their layer through packet switching, which leads to a state of constant surveillance, and minimizes conflict, sickness, and creates an unfailingly “equal” society. Packet switching was originally developed as a response to the threat of nuclear attacks during the Cold war.

21 Since everything is surveyed, and memory is constantly being updated, every member of society has access to all of history and every action that has come before. Challenging someone suggests a challenge to authority and thought, or an unequal distribution. AD instructs her sister to stop talking, because the memory will last far longer than the conflict. Data is stored eternally; the memory of the conflict will last forever in the data causing issues and conflict not just in the moment but an ever present feeling of that conflict.

22 No weapons exist below; only materials that can be extracted from the rhizome. The militarization of the highest layer of the stack is essential to its survival and maintaining the hierarchy, even if the weapons are not utilized.

23 Neodymium is the rare earth mineral used in iPhone speakers to create vibrations through magnetic waves; the vibrations in the story act as a means of communication throughout the layers of the stack and

24 The map is traceable because of the rhizomatic principles of decalomania and cartography.





IMAGE BY RAKAN AL-HAZZA

# 'LIKE MY HOUSE THAT FELL TO PROGRESS': FRESH KILLS LANDFILL AS A MODERN ECOLOGICAL REGIME

BY MAX HEAD

*By trade I was a cooper  
Lost out to redundancy.  
Like my house that fell to progress  
My trade's a memory.*

Pete St. John, "The Rare Ould Times"

**Abstract:** The landfill at Fresh Kills is the world's largest. Fresh Kills was once the site of vast salt marshes. The transition from salt marsh to landfill was part of an ecological regime imposed by the modernist municipal planners of the Postwar twentieth century. In order to produce their vision of progress and development, the planners needed to develop and impose new ways of dealing with land—a new ecological regime. This essay is a political ecology of the production of Fresh Kills landfill as a part of this new ecological regime. Political ecology is an interdisciplinary perspective which links processes of human life to ecological sites and agents (and vice-versa). Understanding the ecological regime of which Fresh Kills Landfill was a part, one can turn an eye to the future and understand that contemporary desires to improve or sustain modern life require ecological regimes of their own, necessitating an ecological perspective upon the present and the future.

**Keywords:** Political Ecology; Ecological Regime; Fresh Kills; Staten Island; Landfill

## INTRODUCTION

There is a chain of foothills against the West Shore of Staten Island. Driving down along the West Shore Expressway, one can look out the window and watch as the bare little hillocks rise up and hide from view the Island to the east and New Jersey to the west. The hills are sheer. They rise in layered stories and usually have only a covering of green grass upon their faces. Sometimes there is a tree or a tractor, but a driver hardly notices. In fact, rolling by, one hardly notices the hills at all except perhaps their strange and sterile aesthetic. A driver might cross a bridge over a waterway. This is Fresh Kills, an inlet from the

Arthur Kill that runs into Staten Island. Where the hills now stand were once vast tracts of salt marshland, the estuary of Fresh Kills. For half a century, the marshland of Fresh Kills was filled with enormous quantities of refuse, quantities so large over a duration so prolonged that the low-lying marshland rose high into storied hillocks. Its combined volume exceeds that of the Great Wall of China.<sup>1</sup> This is the largest landfill in the world.

The following is an investigation of the production of the Fresh Kills Landfill from the Fresh Kills wetlands that preceded it. In it, I ask, How did Fresh Kills Landfill come to be? The answers to this question are linked to chains of relationships beyond the merely administrative. One cannot explain the production of the Fresh Kills Landfill fully using only city council minutes and Department of Sanitation orders. In fact, as I argue in my method below, these sources are not even the best resources to use. The Fresh Kills Landfill was not simply another public works project. It had intimate connections to the changing form of and life on Staten Island and of the changing metropole of Postwar<sup>2</sup> New York City. The Fresh Kills Landfill is a telling instance of broader transformations in Staten Island to new, Postwar, forms of modernity and provides clarity on the ways in which land has a crucial role in these transformations.

Fresh Kills Landfill was the product of a successful political effort waged by particular modernists and developmentalists in power in New York City as part of an effort to transition the City into a Postwar modernity. The efforts of these modernists were many, and Fresh Kills was but one of these projects, and not the first. A landfill at Great Kills, Staten Island, served as a precedent for the one at Fresh Kills, for instance.

Four things in particular make Fresh Kills a site worthy of study. First, while there are many ways in which the Postwar transitions into modernity showed themselves, landfills are unique instances of these transitions. Landfills represent a new way of dealing with the growing problem of urban waste, a problem that overburdened and collapsed the old methods of disposal. Landfills were a new kind of urban waste disposal, one that elicited new relationships with land—a landfill



Image from Samuel Mozes' "Staten Island: Today and Tomorrow, a Comprehensive Planning Study for Future Development of the Borough of Richmond, New York City" 1954, 220

being a vast occupation of and imposition upon landscapes and ecosystems. Through landfills, one can link modernity to land through the waste of modern industrial production and urban life.

Second, if the Fresh Kills Landfill was not the first large-scale landfill in New York City or even Staten Island, it was the largest and the longest lasting. Rikers Island was briefly a landfill location, but was rather quickly shut down.<sup>3</sup> Great Kills was the site of the first major, city-wide landfill project on Staten Island, but it too was shut down in favor of a site at Fresh Kills. The Fresh Kills Landfill rises to prominence because of its scale, scope, and longevity.

Third, the Fresh Kills Landfill was both a culmination of modern urban waste disposal strategy and a focal point for resistance against it. Rikers Island and Great Kills were models for the landfill at Fresh Kills, the latter being the long-term solution to the problems that the former two had explored. Equally, the Fresh Kills Landfill became a focal point for opposition. Resistance to the development of the Fresh Kills Landfill was

resistance to the particular developmental agenda of the Postwar modernist administrators.

The fourth point is perhaps the most important. The site of Fresh Kills, the land itself, has significance as a wetland and a shore of Staten Island. Before the first quarter of the twentieth century, life on Staten Island was intimately tied to the land and the shore. Oysters, in particular, had played a principal role in the growth of and life on Staten Island before the twentieth century. Agricultural life too was a prominent feature of Staten Island before (and even into) the twentieth century. Staten Island, like many places in Greater New York<sup>4</sup> before the massive Postwar transitions, was a place where human life was still linked closely to the land, the shoreline in particular. Fresh Kills was a salt marshland that both symbolically represented, in its adjacency to the river, and literally helped reproduce, through the people who once foraged and fished in it, this kind of human life. The transformation of Fresh Kills from salt marshland to landfill is an important instance of the transformation of one way of living with the

land to another: from one in which the land is a place from which to work one's life and livelihood to one in which the land is a depository of urban waste serving the disposal needs of a burgeoning metropole. The transformation of Fresh Kills from salt marshland to landfill is a part of the transformation of ecological regime, the transition from one understanding of proper land use to another.

Fresh Kills can thereby be demonstrative. The links between modernist development, political opposition, and shifting ecological regimes helps one to understand the role that land and ecology play in modernist development. This essay is a study of the 'political ecology' of the production of Fresh Kills Landfill. Political ecology is an interdisciplinary perspective which links processes of human life to ecological sites and agents (and vice-versa). The key insight of political ecology is to enmesh human life with non-human agents (living and non-living). The ambition of political ecology is to challenge the binary distinction between 'nature' and 'culture' in order to show the ways in which these things are interlinked.

This essay is a political ecology of the production of Fresh Kills Landfill. It tries to link the modernist efforts to produce the landfill and the opposition to these efforts with the genealogy of land use in Staten Island and how the moment of transition at Fresh Kills from salt marshland to landfill marked a change in ecological regime toward one governed by new modernist logics. The project of this essay, to link politics to land, tries to show the importance of ecological regime to modernist development through the example of Fresh Kills Landfill. When Greater New York sought to enter a new Postwar modernity, this brought on a new ecological regime. Fresh Kills Landfill was a part of this new ecological regime. Understanding this, one can turn an eye to the future and understand that contemporary desires to improve or sustain modern life require ecological regimes of their own, necessitating an ecological perspective upon the present and the future.

I will begin the essay with a review of relevant literature. The essay will next describe its method and its sources in relation to this backdrop of the literature review. I have used primary sources

principally with secondary sources as supplement to gain an understanding of the struggles over Fresh Kills and the production of the Landfill through 1946-1948 as well as the 'before' and 'after' of this moment. The essay will then move into a presentation of its evidence. This is best done through historical analysis, the succession of events being important to the struggle over and development of the landfill. The presentation of evidence is concerned with a) the preceding oyster economy and its destruction, b) the Postwar modernist principles of practice, and c) the Postwar struggle over Fresh Kills and the victory of the Landfill. Finally, the text will conclude by tying the analysis back to the idea of an ecological regime, showing how the imposition of the landfill at Fresh Kills marked a victory for the Postwar modernists and represented a part of a new ecological regime for the city. The concluding section will try to make this clearer by contrasting the marshes to the landfill through the observations of life by the riverside made by the journalist Joseph Mitchell. In final remarks, the conclusion will link this history back to the present, and show the ways that Fresh Kills might serve as a guidepost for the future.

## LITERATURE REVIEW

Staten Islanders sometimes refer to their home as "the Lost Borough", that one of the five boroughs of New York City which receives the least attention.<sup>5</sup> So far as literature is concerned, this reputation holds true. There is little scholarly writing devoted to Staten Island in particular. This review will not attempt to exhaust the list of such writing in order to prove this point; rather, it will try to show how this essay situates itself amidst this dearth. This essay is more concerned with the works that it is in conversation with rather than works which share its subject matter, though the latter can be an important part of the former. Equally, this review hopes to situate this essay within a political ecological literature and to situate Fresh Kills and Staten Island within broader theory.

This literature review must begin with William Cronon. Cronon helped lay a foundation for political ecological writing with his seminal text, *Nature's Metropolis*, a history of *Chicago and the Great West*<sup>6</sup> and a study of the interrelation of city and hinterland.<sup>7</sup> This text provided pro-

found insight into the relationships between ‘nature’ and ‘culture’, not based upon their separation, but through their mutual constitution. Cronon showed how Chicago ‘produced’ its nature by its extractive relationship with “the Great West” and how this produced-nature then shaped the growth and form of Chicago. It blurred the line between ‘city’ and ‘country’ and allowed a more nuanced understanding of the way humans interact with land. It provides the cornerstone to this essay’s understanding of political ecology.

Ted Steinberg, too, took Cronon as an epistemological base when he wrote *Gotham Unbound: The Ecological History of Greater New York*.<sup>8</sup> In a sense, Steinberg attempts to do for Greater New York what Cronon did for Chicago and the Great West.<sup>9</sup> Important for this essay, Steinberg has several sections featuring Staten Island and a chapter devoted to the Fresh Kills Landfill. While these chapters are informative and well-researched, they serve the text as a whole and as a result take more time to relate Staten Island to Greater New York than to look at the Landfill and Staten Island on their own terms. This provides an opportunity to delve further into the subject of Fresh Kills and Staten Island.

The subject has been taken up in larger and smaller scales elsewhere as well. Joseph Mitchell, writing between 1947 and 1959, references the river, the land, and the marshes in and around Staten Island in *The Bottom of the Harbor*, a collection of his journalistic stories.<sup>10</sup> The book is unmatched in its quality of example, but might be treated better as a primary than a secondary source, having little explicit analysis of the observations. Samuel R. Mozes, a Columbia master’s student in 1954, wrote a development plan for Staten Island as his master’s thesis.<sup>11</sup> As with the Mitchell, this source is better treated as a primary document, and it gives detailed and useful insight into mid-century Staten Island from the perspective of a modernist planner. Samuel Kearing, the one-time New York City Sanitation Commissioner, wrote about his experiences with the landfill through a critical environmentalist lens, saying the Landfill “had a certain nightmare quality” when contrasted against the wonders of the vanished marshland.<sup>12</sup> The City government itself has actually published extensively on the site as part of its effort to “re-

claim” the landfill site and transform it (again) into a park.<sup>13</sup> These latter two examples are of an environmentalist strain that has become increasingly common in work regarding Fresh Kills, particularly since the decision to “reclaim” it as a park. Little of this environmentalist literature, however, can be read as a political ecology. Very often, these authors contrast nature and culture, even when they speak of the creation of parks. In the case of Fresh Kills in particular, the language is of reclaiming degraded land as ‘green space’ through parkland—a recapture of natural setting on the site of destroyed nature. There is much room for the political ecological discussion this essay attempts.

This can serve to situate this essay amongst other writings sharing its subject. It is equally important to situate Fresh Kills and Staten Island among broader lines of theory and method. How can one think about Postwar Staten Island? First, Staten Island should be situated within the grander scheme of things. Where does Staten Island sit amongst Greater New York?

For this, it might be useful to turn toward World Systems Analysis, in particular the idea of core-and-periphery.<sup>14</sup> One can turn to authors like Immanuel Wallerstein, Fernand Braudel, Andre Gunder Frank, and Janet Abu-Lughod. Taken in spirit and without the specificity applied to the more orthodox definitions, one can think about Staten Island as a peripheral burough. The landfill at Fresh Kills was not only for Staten Island’s refuse, but for the urban waste of the entire city. With the landfills at Great Kills and Fresh Kills, Staten Island became the dumping ground for the waste of the urban metropole. Therefore, in order to situate Staten Island in a broader theoretical context, it is useful to loosely think of Staten Island as periphery of the metropole of Manhattan, Brooklyn, and New York City generally.<sup>15</sup> The relationship of power between Staten Island and its metropole is an unequal one.

The application of this theoretical model brings up another question. The relationship of core to periphery is fundamentally extractive. One can look at the imposition of the landfill on Staten Island as extractive, but then be puzzled. What is being extracted? This leads to another set of useful ideas. John Bellamy Foster’s interpretation of Marx’s

“metabolic rift” is one.<sup>16</sup> The basic idea is that in modern modes of production, resources (especially soil nutrients) that enter a metropole in the material form of commodities are not returned in any form to the place from which they were extracted. This forms a one-way metabolism that produces massive waste that is not (perhaps cannot be) returned to its place of origin to reproduce a sustainable ecological ‘metabolism’. The problem of refuse in Postwar New York City can be read as symptom of this “metabolic rift”: the waste produced by this rift must go somewhere. The production of the landfill at Fresh Kills can then be read as a resolution to this problem of refuse. In this way, not only “taps” (the places from which resources are extracted) but also “sinks” (the places in which waste can be deposited) become important to modern production; this is an idea pursued by thinkers like Jason W. Moore, who theorizes that just as modern forms of production need access to cheap inputs, they also need access to cheap sinks or “waste frontiers” in which to deposit waste.<sup>17</sup> Fresh Kills is a major example of such a site.

Amidst Cronon, Bellamy Foster, and Moore, one can find oneself situated within a political ecology literature. These authors, interdisciplinary and critical, are good examples of a political ecological way of thinking. They each challenge binaristic separation of ‘nature’ and ‘culture’ and instead highlight interdependencies and links between the categories. It is within this line of thought that this essay is situated. One can effectively situate Fresh Kills within this framework, as done above. The rest of the essay is devoted to furthering this situation in order to better understand Fresh Kills and the landfill produced upon that site in a political ecological frame.

## METHOD

This essay describes the political ecology of how the Fresh Kills Landfill came to be. It accomplishes this by describing the (successful) attempts of modernist city administrators and allies to impose a new ecological regime (a part of which was the Fresh Kills Landfill), the struggles against this imposition, and a brief glossing of the ecological regimes that preceded and proceeded from this moment. Because cause and effect matter to the political ecology of this moment—for instance, it is clearly important that resistance to the Landfill

surged after the landfill plans were formalized in the city budget—much of this description is done best within chronology. The backbone of the description is therefore a recounting of a period of time flanked lightly by a prologue describing the background and an epilogue sketching some of the effects.

The period of time of principle importance to this essay is around 1945-1948 with particular emphasis on 1946, the year when much of the planning for and opposition against the Fresh Kills Landfill crystallized and came to a head. The background ‘prologue’ explains the dominant economy on Staten Island before 1916<sup>18</sup>, the oyster beds, and a brush upon the ecological regime that this economy produced. Equally, this background will describe modernist principles that would help guide the logic of the Fresh Kills Landfill project. The ‘epilogue’ will be quite concise, merely outlining the political ecological direction that Fresh Kills Landfill took after the opening.

This essay relies upon primary source material but is buttressed with secondary sources. Three sources were key to the research done for this essay: Joseph Mitchell’s collection of journalistic stories, *The Bottom of the Harbor*; newspaper articles from the *Staten Island Advance*; and a 1954 master’s thesis by Samuel R. Mozes which seeks to plan a development path for contemporary Staten Island. The *Staten Island Advance* is the main source used to describe the moment of 1946. It is supported by an assortment of secondary and supplementary texts which help to inform, but the bulk of the burden is carried by the primary source material of the *Advance*. Mitchell’s text informs much of the economy and ecology of Staten Island that backgrounds this 1946 ‘moment’. It too is supplemented with secondary literature. Finally, Mozes serves to inform of various details (it is particularly rich with statistics) but most importantly serves as an ideal example of key principles of Postwar modernist planning. It will become clear that these principles are tacitly shared by the planners of the Fresh Kills Landfill.

The purpose of this method is to reveal the ways in which the Postwar modernist planning dealt with land. This is to draw out the political ecology of this modernist planning and

to better understand the ecological regime of which the Fresh Kills Landfill was a part.

### THE STRUGGLE OVER THE LANDFILL AT FRESH KILLS

To understand the condition of Staten Island following the Second World War, one must understand a little bit about the historical importance of oyster beds to Staten Island. Staten Island was once the heart of a booming oyster economy with a genealogy stretching as far back as Dutch settlement. By all accounts, massive beds of oysters spread themselves up and down the Hudson estuary through the times of Dutch and British settlement.<sup>19</sup> The colonials, and then the United States Americans, harvested these beds for nearly two hundred years before they were stripped essentially bare. The decline of the untended oyster fields by the nineteenth century did not cause an end of the oyster harvest but rather ushered in a new kind of oystering along the river: bedding.<sup>20</sup> A group of ambitious “Staten Island shipowners” saw the decline of the oyster beds and, instead of packing up shop, bought up seed stock of immature oysters and “bed them in the harbor”, harvesting their stock once they had grown in their clean, clear rows at the riverbottom.<sup>21</sup> The practice exploded, and for another century dynasties of bedders—some names still known, heard, and seen on Staten Island—sewed their empires of oysters: “the Tottens, the Winants, the De Harts, the Deckers, the Manees, the Mersereaus, the Van Wyks, the Van Duzers, the Latourettes, the Housmans, the Bedells, and the Depews” built mansions and bedding infrastructure at the five oyster ports of Mariner’s Harbor, Port Richmond, Great Kills, Tottenville, and—the greatest of them all—Prince’s Bay.<sup>22</sup>

The oyster empires of Staten Island are all dead. The harbor was horribly polluted with industrial runoff, sewage, refuse, and the like by the twentieth century. In 1916, authorities traced an outbreak of typhoid fever to Prince’s Bay beds and the practice of bedding and oyster harvesting in and around the Island was condemned.<sup>23</sup> The gutted corpses of mansion houses fell to pieces in struggling Mariner’s Harbor.<sup>24</sup> The writer Joseph Mitchell saw what there was left to see at Prince’s Bay in the middle of the twentieth century, sometime between the War’s end and the mid-1950s.

“Not a trace of the oyster-bedding business is left there... The old Prince’s Bay Lighthouse still stands on a bluff above the village, but it is now a part of Mount Loretto, a Catholic home for children; it is used as a residence by the Monsignor and priests who run the home. The light has been taken down and supplanted by a life-size statue of the Virgin Mary. The Virgin’s back is to the sea.”<sup>25</sup>

My partner lives and was born, raised, in Staten Island. Her family is Italian Catholic, migrants during the mid-twentieth century. I ask her if she knows the name Mount Loretto. She says she knows the place, a Catholic school on the South Shore near Prince’s Bay. We make the pilgrimage together. Mount Loretto is no longer an orphanage but a parochial school. A few acres of the coastline - a few ponds, some sparse marshy soil and meadow, some rocky beach - have been designated the Mount Loretto Unique Area by the New York State Department of Conservation. The lighthouse is still there, renamed for a father of the Church. So is the statue of Mary, but no longer atop the lighthouse. She stands at the edge of a wide parking lot with a plaque at her feet. Her back is still to the sea.

Staten Island was struggling through economic transition during the first half of the twentieth century. The oyster empires were already a thing of the past by the time of the Great Depression and the onset of the Second World War, the beds condemned since 1916. Yet it seems that nothing had quite taken the place of oysters in the local economy even up until the end of the Second World War. Samuel R. Mozes, writing a master’s thesis for Columbia University in the early 1950s, sought to evaluate the borough and its struggle to grow.<sup>26</sup>

Staten Island “annexed” to New York City, as its fifth borough, in 1894 by referendum. With the annexation came a movement of industry from New Jersey, Manhattan and elsewhere, helping to produce economic growth at the turn of the century.<sup>27</sup> By 1945, the Staten Island Chamber of Commerce estimated that \$50,000,000 were invested in the Island’s manufacture and mechanical industries.<sup>28</sup> Viewed in isolation, Staten Island grew a rather substantial industrial base in the first part of the twentieth century. But the Island cannot be viewed in isolation. Staten Island was

a part of a local industrial system, one of the most impressive in the world, sitting as it were astride Manhattan, Brooklyn, and Newark. The Island was substantially underdeveloped by comparison.<sup>29</sup> Take these figures for instance. Between 1946 and 1950, Kings County saw plans for 230 new factories. Queens had 226. Manhattan saw 54. The surrounding areas of Essex, Hudson, and Union saw over 200 new factory plans each. The sum total of new factory plans in Great New York area during this time was 2658. In this same period, Staten Island saw plans drawn for 12 new factories whose estimated value was less than a 0.2% share of the total value of new factory plans in the entire region.<sup>30</sup> At the end of the Second World War, Staten Island was economically insignificant. Worse, it seemed new industry paid it no attention at all. Reflecting that fact was a “lack of diversified local employment opportunities” which also manifest in growing unemployment through 1954.<sup>31</sup> Mozes diagnosed the situation in 1954:

“The most important labor problem in the Borough of Richmond<sup>32</sup> may simply be combined in the obvious lack of sufficient industries there to gainfully employ Richmond people who go into the other boroughs each day to work, nor is there job opportunity enough for people from the other parts of the City to come into Richmond for employment.”<sup>33</sup>

Finally, what advantages Staten Island did benefit from seemed to be in relative decline following the Second World War. Staten Island stood guard at the mouth of the harbor, directly adjacent to the industries and dockyards of Newark and just a short steam away from Brooklyn and Manhattan. The New York Foreign Trade Zone, or “Free Port”, stood on Staten Island’s coast, a location through which foreign shipping could pass with substantial relief from customs duties and interference (incidentally, the first such “Foreign Trade Zone” in the country). It was a successful experiment in opening international commerce by which Staten Island maintained an importance in the commerce of the harbor.<sup>34</sup> By the post-War years, however, this importance seemed to be waning, the freight tonnage arriving in Staten Island’s Free Port having steeply decreased.<sup>35</sup>

Yet still many saw in the Island an untapped potential. Mozes himself wrote his dissertation, rather grandly titled “Staten Island: Today and Tomorrow”, with the idea that the Island could benefit from future development should certain barriers be removed. So strong was Mozes’s faith that he appears to have believed rapid and explosive growth in the Borough to be inevitable: “It should be inconceivable to suppose that the island will much longer be able (or willing) to resist the powerful expansion of population which has been recorded during the past decade in the New York region” and while such expansion could be detrimental to local interests, Mozes goes on to say, it can be tempered and brought to developmental use with “a careful program for growth.”<sup>36</sup> Later, Mozes predicts a development timeline of about twenty-five years, reinforcing his belief that the Island was ripe for development.<sup>37</sup>

There were a great many reasons for such optimism. Although the decline of the Free Port put this partially in doubt, the fact remained that Staten Island sat at the mouth of the harbor and astride one of the greatest cities in the world. Though isolated on all sides by water, it was connected to its surrounding metropole by harbor commerce and proximity.<sup>38</sup> This seemed to promise growth of one kind or another given the massive growth all around. More, the planning of a bridge connecting the Island to Brooklyn (what would become the Verrazano Bridge project in 1959) electrified post-War city planners. Mozes and his colleagues saw a golden opportunity for planning in Staten Island. Given the planning of the bridge and the imminent growth that would come with it, the Richmond Borough President of the time, Edward Baker, wrote in the *Staten Island Advance*, “I think it is of great importance that we plan now for what we hope to be *the manner in which our borough must develop*.”<sup>39</sup> The “eminent architectural and planning historian and educator”, Talbot F. Hamlin likewise wrote of the Island, “Staten Island is New York’s last opportunity to do a really creative piece of city planning.”<sup>40</sup> (It is also worth noting that the Hamlin excerpt begins with an exhortation toward environmental conservation, “one of the first efforts of creative city planning should be the preservation, as far as possible, of natural beauties”<sup>41</sup>). It should not be overlooked that Stat-

en Island had a very small population relative to the modern day. When the Island held the referendum to become a City borough in 1894, the total number of votes was only 7,036.<sup>42</sup> The Island was often referred to as “rural.”<sup>43</sup> Mozes prefers the term, “rural-urban fringe area”, an intermingling of “rural” activity such as agriculture and “urban” activity such as water supply and sewage systems.<sup>44</sup> The expectation was a massive population boom, especially with the planning of a bridge across the Verrazano Narrows. The New York City Health Department estimated the population of Staten Island at 183,844 in 1946, up 3,000 from its 1944 estimates.<sup>45</sup> Mozes projected population growth up to 500,000 from the 200,000 of 1954.<sup>46</sup>

This leads to perhaps the clearest evidence suggesting that Staten Island had great development potential. Mozes, ever the planner, calls it “vacant land,” and Staten Island is ostensibly up to its knees in it.<sup>47</sup> To Mozes, Staten Island is “the vast reservoir of land in the city, suitable for development and settlement by the ever-growing population of the metropolis.”<sup>47</sup> <sup>48</sup> By Mozes’s definition and measurement, Staten Island held up to 60% of New York City’s vacant land, as much as 18,300 gross acres. By contrast, he measured Manhattan with only 400 vacant gross acres, only a 1% share of the total, with the Bronx, Brooklyn, and Queens holding 10%, 11%, and 18%, respectively.<sup>49</sup>

Mozes, the planner, sees vacant land as the source of Staten Island’s massive development potential. This logic is founded upon a “fundamental principle”:

“The fundamental principle followed in the present study for preparation of the revised use of land<sup>50</sup> is that a) all land is potentially usable for some purpose and no land should be considered useless, and b) all land should be utilized for the best recognizable purpose and to its fullest potential.”<sup>51</sup>

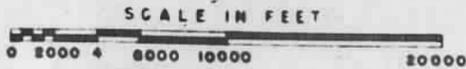
This statement is revealing of a particular progressive logic. All land has utility, and this utility can—and *should*—be developed and thereby improved. It is a kind of fundamentalization of a Lockean sensibility. And this was the principle guiding Mozes’s proposed Staten Island plan. We can draw

two things from this. First, the emphasis on utility. If *all* land has utility, and all utility should be drawn-out, developed, and improved, then (proper) working of the land is always preferred to a lack thereof. Since improvement is key, the guiding principle of all land reform is to produce changes in the land.<sup>52</sup> Second, the sprawling category of “land”. In the footnote, Mozes includes within “land”, surface, subsurface, airspace, legal title, “developed and undeveloped” (read: “vacant”—even “land under water”). These two elements drawn as one, one can read *a sprawling, universalistic principal in which all land imaginable has intrinsic utility that can and should be developed to improve its intrinsic utility*. All this in the name of development and progress—goals best described in the terms of the Mozes’s principle. How better to define the development of land but the process of enhancing the intrinsic utility of that land? It is a radical form of modernism, of progressivism, of developmentalism or many such names. And yet it is meant literally, for one cannot forget that Mozes is writing a policy text, a prescription. This modernism is to be the basis of policy decision.

Quickly, it should be noted that Mozes puts a good deal of emphasis on conservation, preservation, and “natural beauty”. He begins his “Tomorrow” section (policy proposals) with an extended quote from one Christopher Tunnard. The quote emphasizes the role of beauty, landscape, and nature in municipal development—that it is not merely about knocking down and building up, but engaging and enhancing land.<sup>53</sup> This is a theme throughout the text. Mozes actively adopts conservationist themes in his planning proposals, apparently following in a longer line of municipal planners.

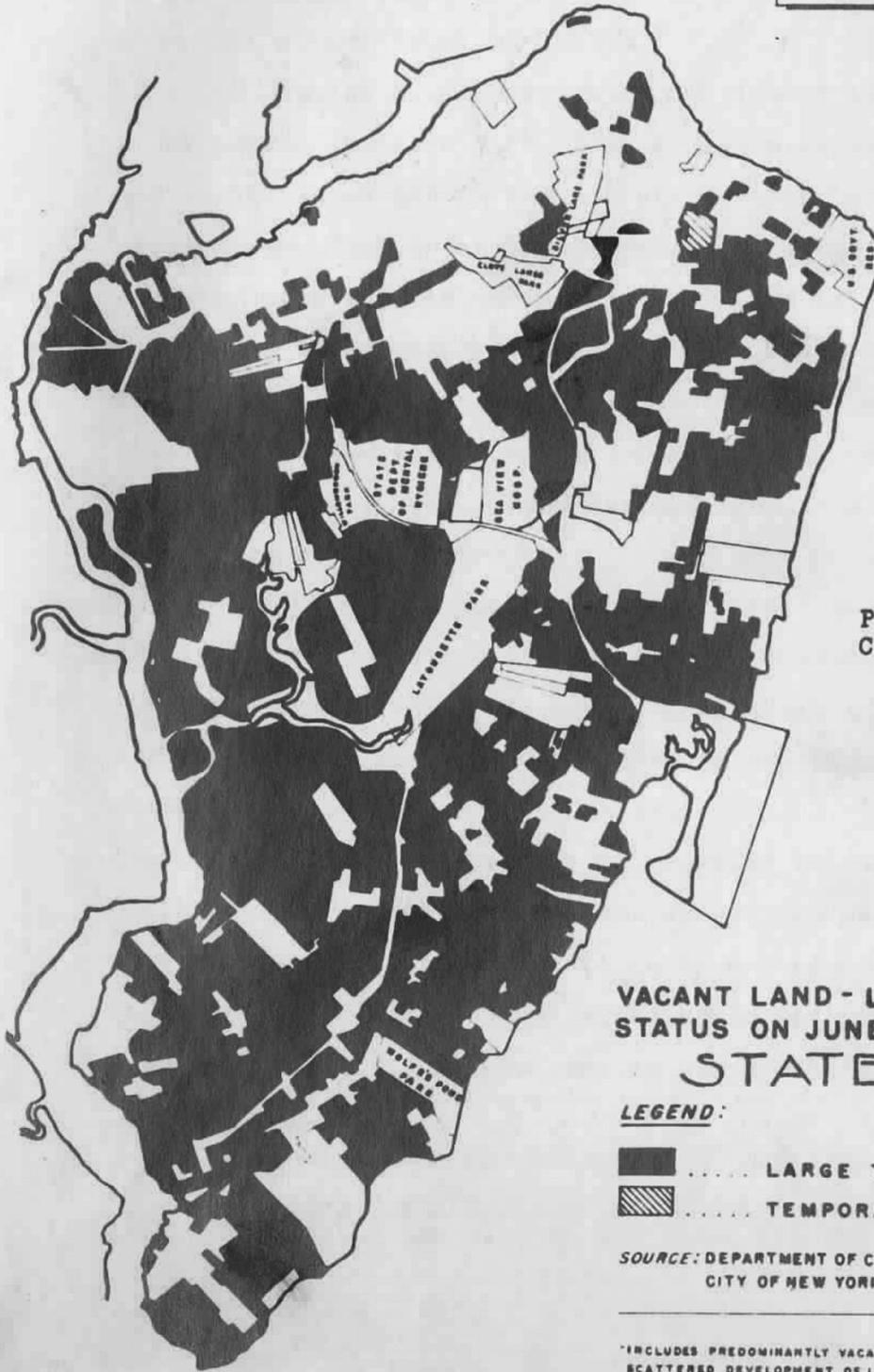
This principle from Mozes can be instructive. It would be another task to show this perspective to be a commonly held one. But this is not necessary. One can see in Mozes a radical interpretation of a Lockean-improvement epistemology, and this has as well-studied genealogy of its own. One does not need to show the idea commonly held to understand its place in development and planning theory in twentieth century New York. Rather, one can keep this in mind in order to interpret the chain of events that actually did occur and the motivations of other agents eager to de-

MAP 6



BOROUGH	VACANT LAND GROSS ACRES	% OF NYC TOTAL
MANHATTAN	400	1
THE BRONX	3,100	10
BROOKLYN	3,500	11
QUEENS	5,600	18
RICHMOND	18,400	60
NEW YORK CITY	30,850	100

VACANT LAND INCLUDES LARGE TRACTS, TEMPORARY VETERANS PROJECTS, AND SCATTERED VACANT LAND



SAMUEL R. MOZES  
Thesis  
Planning and Housing  
COLUMBIA UNIVERSITY

VACANT LAND - LARGE TRACTS  
STATUS ON JUNE 1, 1953  
STATEN ISLAND

LEGEND:

- ..... LARGE TRACTS OVER 5 ACRES\*
- ..... TEMPORARY VETERANS PROJECTS\*\*

SOURCE: DEPARTMENT OF CITY PLANNING  
CITY OF NEW YORK

\*INCLUDES PREDOMINANTLY VACANT TRACTS WITH SCATTERED DEVELOPMENT OF LESS THAN 10% COVERAGE OF AREA

Image from Samuel Mozes's "Staten Island: Today and Tomorrow, a Comprehensive Planning Study for Future Development of the Borough of Richmond, New York City." Mozes cites the Department of City Planning as the source for this image. After a search for this image, none was discovered. I think it most likely that Mozes took data from the Department of City Planning and fashioned his own map. For this reason, I cite Mozes here. (Mozes 1954: 51)

velop and modernize Staten Island—especially given the importance of ecological regimes to the plans of these agents of progress. Mozes becomes an instance of broader trends of thought.

Mozes saw the mid-twentieth century as a crucial moment in the development of Staten Island. It is a moment when great virtues stand beside great needs for improvement.

“[Staten Island] has preserved the blessings of isolation and non-urbanization, but it has missed many of the advantages of cultural development, transportation facilities, and employment opportunities offered across the bay in Manhattan, Brooklyn, and other areas./ There must exist a reason for this peculiarity of growth and ways and means of achievement of such future development which would in the best possible way fuse the serenity of natural setting with the technical and economic progress pioneered by New York City.”<sup>54</sup>

Standing here, between virtue and want, “Staten Island in 1954 finds itself at the threshold of a new era.”<sup>55</sup>

So here we see a crossroads moment. Let us extend this moment from “1954” about a decade further back: the immediate post-War. The Depression has ended, and the War is won. The *Advance* is full, each day, of news of returning soldiers—with special mention of returning Islanders, of course. But Staten Island seems to be facing many of the same old problems: loss of old sources of commerce, sluggish industrial development, rapidly growing population and encroachment of the ‘urban’ into the ‘rural’. On the cusp of what likely feels to many like “a new era,” there is talk of what to do next, not just for Staten Island but for the whole City. The feeling in 1946 in many ways resembles Mozes’s sentiment in 1954, not too many years later.

That moment well-described, one might step back a few more years to contextualize it. In 1936, New York City had a serious refuse problem. The consumerist boom of the 1920s alongside the escalating urbanization of New York City had spawned staggering amounts of garbage: the urban-consumer trends rising at the beginning of the twentieth century “tended to undermine the profit-

ability of resource recovery, while increasing the amount of per capita waste discarded.”<sup>56</sup> The cost of incineration, seen as a modern solution to the problem of refuse, was becoming prohibitive as the tonnage of trash grew.<sup>57</sup> Dumping refuse into the sea, once manageable, began to create rubbish-strewn beaches all along the coast. Declared a nuisance, a moratorium was set for 1934.<sup>58</sup> In 1933, having yet more refuse to dispose of and nowhere to dispose of it, scows began to dump ash and refuse on Rikers Island.<sup>59</sup> Mountains rose on Rikers up to 130 feet high and rising.<sup>60</sup> Plans to expand the dump site on Rikers were scrapped after resistance from Parks Commissioner Robert Mozes;<sup>61</sup> he feared that the expanding trash heap would come into view of ‘his’ World’s Fair at Flushing Meadows, and so the Rikers plan was scrapped.<sup>62</sup> But the trash kept on gathering.

In 1936 Mayor Fiorello LaGuardia appointed William F. Carey to lead the Sanitation Department. Carey was a modernist, a developer. Robert Mozes himself had called Carey “a big international dirt mover and builder”.<sup>63</sup> In past efforts, Carey had a hand in “railroads, bridges, a dam, and an indoor arena... in the Chicago Drainage Canal, the Panama Canal, the dredging of Salish Sea (Port Angeles, Washington), and North Beach Airport (LaGuardia).”<sup>64</sup> Once appointed, he showed the same colors. He proposed a once-scrapped plan to build a port at Jamaica Bay. The plan involved the ‘reclamation’ (as it is called) of a great swath of marshland.<sup>65</sup> But the proposal met fierce opposition from Jamaica Bay locals and from Robert Mozes himself. Mozes envisioned the Bay as a part of a suburban retreat (as was oft his vision), and publicly opposed the port. He pledged to preserve the Bay “in its natural state” and to maintain its beauty; he promised them a beautiful Jones Beach.<sup>66</sup> The opposition apparently stymied Carey’s efforts. Carey publicly blamed Mozes for the failure, calling him a “propagandist” and turned his sights elsewhere.<sup>67</sup>

Look again at Samuel R. Mozes’s map of the “vacant land” of Staten Island. Mozes calculated the gross acreage of “vacant land”. Look around the shores of the Island: the west, south, and east shores in particular. Note also the bays and salt-water inlets, those that can be seen. At many of these shores, the waterways and lowlands, once

lay vast stretches of salt marsh. Much of the Staten Island “vacant land” acreage calculated by Mozes is salt marsh. Once, these marshes stretched up to 5,099 acres.<sup>68</sup> One wonders what utility Mozes saw in the Staten Island salt marshes, since all land was supposed to have inherent utility. Certainly, he briefly notes the “natural beauty” and makes a brief list of “wildlife”<sup>69</sup> (the marshes, by many accounts, were ecologically rich), and he notes his hopes that some sites might be turned into parkland.<sup>70</sup> But then what does one make of his “vacant land” calculations? If vacant land is land whose supposed utility is not maximized, then there appears to be an unresolved contradiction between Mozes’s naturalism and developmentalism. The map lists simple, unproblematic, “vacant land”.

Carey was a developer facing a growing mass of municipal refuse. Before his time, they had tried to build an island at Rikers with the refuse. Robert Mozes had claimed it as a part of his World’s Fair View. When Carey tried to reclaim the marshes at Jamaica Bay, Mozes had again stood up to protect his suburban retreat. Where Carey had tried to bring development, he found land claimed by Mozes. The refuse problem was approaching a crisis. Carey needed vacant land. Carey brought with him to the Commissioner’s position the idea of “the land-fill method”.<sup>71</sup> The land-fill was a new idea for waste disposal which Carey borrowed from the British. The theory was simple: fill a depression in the earth with layers of refuse, ash, and soil, then cap it with topsoil. This method hoped to be sanitary and odor-reducing. It also provided solid, filled land when the landfill was complete. Take this in the context of Carey’s plan for Jamaica Bay. He had sought to reclaim marshland in order to build a new port. One could use a landfill method as a form of land reclamation, producing “new, valuable, taxable real estate” from once-vacant marshland. Carey reformed the sanitary code to formalize landfill procedure and got to work.<sup>72</sup>

New York City had an estimated 29,000 acres of salt marsh in 1935. By 1947, it was half that.<sup>73</sup> The landfill had found a way to perform two virtuous acts at once: disposing of growing urban waste and occupying previously “vacant” land. In a rather bizarre change of heart, Robert Mozes saw the value of such an ability and proposed

that he replicate Jones Beach at Staten Island’s Great Kills - along the southeastern coast—using the sanitary landfill method in 1944.<sup>74</sup> The Sanitation Department obliged, rerouting fill once bound for Rikers (closed the year before) to be deposited at Great Kills.<sup>75</sup> Mozes suggested similar action at Fresh Kills, a vast saltmarsh on the West Shore of the Island, stating his case that it was “unimproved and unused since colonial times.”<sup>76</sup>

Staten Island erupted. Islanders, already acquainted with the problems of the fill at Great Kills, protested loudly at Staten Island being made the ‘dump’ of the city. A march on City Hall on November 15, 1945, seemed to halt the plans for Fresh Kills.<sup>77</sup> But on June 7, 1946, the *Advance*, polemically opposed to landfill proposals, ran a front page article reporting that the Fresh Kills landfill had reappeared in the budget. Included in the article, and in articles and banners for the next few days, was a notice of a public hearing regarding the landfill—including the date, time, and location.<sup>78</sup> The tone of the article is venomous. The *Advance* ran quotes from Mozes that called the Great Kills landfill “disgraceful”, going on to say that “he wouldn’t ‘attempt to defend present methods or to flout public opinion when complaints are well-founded.’”<sup>79</sup> Mozes later openly supported the Fresh Kills project, asserting that incineration is too expensive and difficult, continuing a long line of apparently strategic reversals.<sup>80</sup>

The new Mayor, William O’Dwyer, had ran on a platform opposing landfills, and the new Staten Island Borough President, Cornelius Hall, had openly opposed the Fresh Kills landfill when he was minister of works only months before. Both O’Dwyer and Hall had been sworn in the previous January. The article notes both of these facts, even stating the times and locations that the politicians made such statements.<sup>81</sup> In fact, O’Dwyer and Hall had both taken steps to fulfill these promises and publically double-down on them. Back in February, the *Advance* reported that O’Dwyer, Hall, and new Sanitation Commissioner William J. Powell planned to re-operationalize and speed the usage of incinerators shuttered under LaGuardia.<sup>82</sup> Commissioner Powell laid the blame for landfilling heavily upon LaGuardia and Carey, saying, “I never was an advocate of dumping for

dumping's sake, although my predecessor and former boss [Carey] was the nation's outstanding exponent of that type of rubbish disposal system."<sup>83</sup> The same article restates O'Dwyer's campaign platform "for the abolition of dumping".<sup>84</sup>

On June 8, the *Advance* ran a full-page, bold headline: "HALL BACKS FRESH KILLS DUMP".<sup>85</sup> What brought about this complete reversal?

Hall had inherited a borough in trouble: economic stagnation, the threat of a population boom, the long-dead oyster empires with no clear economic replacement in sight—and of course vast swathes of "vacant land" upon which no one could seem to coax industrial investment. Adding insult to injury, the United Nation Organization rejected Todt Hill, Staten Island, as the location of the UNO headquarters.<sup>86</sup> The budget, it seems, was imbalanced due in part to GIs returning from military leave. Hall was forced to request a large budget increase for his borough staff.<sup>87</sup> More, the year following Victory in Europe and the Pacific was proving to be a volatile one. Through January and February of 1946, the *Advance* ran headlines—it seemed almost daily—reporting on growing strikes and labor unrest throughout the nation. By February, the *Advance* reported that up to 1.5 million US workers were standing idle, including a great many in Greater New York.<sup>88</sup> Striking tugboat workers, who ferried fuel throughout the five boroughs, caused a massive fuel shortage which sparked a declaration of Disaster Law on February 12, grinding the city to a halt as businesses were forcibly shuttered and fuel access restricted.<sup>89</sup> 1946 appeared to be the brink of massive crisis, not only for Staten Island but also for the City—perhaps even the country.

This was the situation in the borough that Hall inherited. But there was at least one hopeful sign for the borough's economy. The City Tax Commissioner assessed a \$1,722,650 increase in taxable *real estate* on the island, with new buildings contributing significantly to the increase.<sup>90</sup>

When Hall was asked to explain his sudden support for the landfill that he so recently and popularly (during an election cycle) opposed, he responded that the landfill project could be

"of great value to the Island through the *reclamation of valuable land from now worthless salt marshland*. Such a project would permit us to built a belt highway along the West Shore of the Island and open vast acreage to industrial development. It would also provide us a site for airports and parks which would provide of extreme value to the Island and the city as a whole... Unless Staten Island permits the Sanitation Department to establish the landfill, I do not believe that this wasteland shall ever be developed."<sup>91</sup>

Apparently, faced with the grave prospects of an undeveloped and struggling Island, Hall had been won to the side of the modernizers.

The Former Borough President Joseph A. Palma joined in with the protesters, as did City Councillor Fred Schick, who was to become a key member of the opposition in city council.<sup>92</sup> The *Advance* postured itself as a leader in the opposition. It repeatedly published interviews and op-eds from Islanders with opinions regarding the new landfill, testimonials of the stench from the Great Kills landfill and garbage scows, and advertisements calling for opposition.<sup>93</sup> It even began posting banners reading things like "Join the Fight Against the Dump!" on its masthead.<sup>94</sup> Congressman Ellsworth B. Buck of New York appealed to the federal government to protect and fund preservation efforts aimed at conserving the diversity at Fresh Kills, namely the avian populations.<sup>95</sup> His efforts stalled after federal government officials determined it to be a local matter.<sup>96</sup> That the appeal to federal authorities was on the grounds of "natural" conservation should be noted, as should its failure to garner federal support. Moses and Powell were brought before a grand jury to determined charges of 'creating a public nuisance', a tactic used in the past.<sup>97</sup> Appeals such as these continued on and on with great energy. It became anathema on Staten Island to support the Fresh Kills Landfill.

Nevertheless, using appeals to the sanitary nature of the landfill method and to the development nature of the project, the Fresh Kills Landfill project was pushed through. By 1947, plans to dredge Fresh Kills were forwarded, and by 1948 some of the first garbage scows arrived with fill.<sup>98</sup>

Hall publically believed the Landfill at Fresh Kills

to be a necessary step toward the development of Staten Island. Mozes stated very similar arguments. But Steinberg believes, for Mozes, it was more. Hall called for a belt parkway, new real estate, and perhaps some parks. For Mozes, Fresh Kills was “the linchpin of a grand scheme to expand parkland, push through a major highway, and perhaps even build an airport and thereby *bring the island more in line with his regional vision of the landscape.*”<sup>99</sup>

The Fresh Kills Landfill was a part of this “regional vision”, a modernist vision in which development, urban prosperity, and the land were linked. Development for Staten Island, in Hall’s vision, could occur only after land was converted from “useless” to “useful”, ostensibly through the landfill process. Urban prosperity, from the perspective of metropolitan administrators like Mozes, depended upon the relatively healthy disposal of urban waste away from the metropole. Both of these depended upon particular forms of land use and required the land to be used and transformed in peculiar ways. The attempted solution to these problems of development and urban prosperity, the landfill at Fresh Kills, transformed the land from a “useless” marshland into a “useful” landfill. But this adjudication (useful/useless) is of course perspectival. In fact, the landfill at Fresh Kills represented a new ecological regime imposed upon the land, a regime which abolished previous ways of living upon or with that same land. Those who fought the landfill fought against this ecological regime and fought for a different way of living with the land.

### CONCLUSION: TRANSITIONING ECOLOGICAL REGIMES

Speaking largely, the production of the Fresh Kills Landfill represented a transition away from the ecological regime of the oyster bedders, one in which economic life centered upon the riverside, to a Postwar modernist ecological regime turned toward the metropole, one in which the “useless” land in Staten Island could be turned to the benefit of Greater New York as a whole. It is worthwhile to examine this transition from the perspective of the transitioning ecological regimes: from riverside life and complex marshland into the Postwar modernism of the landfill. The best way to do this is to begin with the end of the oyster beds and to look at how life, human and nonhuman, changed with the times.

The city condemned the oyster beds in 1916. But this did not destroy the beds, nor did the pollution in the river. Nor did the bedders fall out of existence when their livelihoods fell to progress. The bedders had children, children raised on oysters and river skiffs. Joseph Mitchell knew one such bedders’ son, a middle-aged physician in St. George, in the early 1950s. The man kept “an heirloom, a chart of oyster plots on West Bank Shoal”.<sup>100</sup> One afternoon in March, the man told his peers he was going codfishing. Instead, he found one of his father’s beds, long ago condemned.<sup>101</sup> The river was still as polluted as ever - more so, likely. But these children of bedders,

“They know what they are doing; they watch the temperature of the water to make sure the oysters are ‘sleeping,’ or hibernating, before they eat any. Oysters shut their shells and quit feeding and begin to hibernate when the temperature of the water in which they lie goes down to forty-one degrees; in three or four days, they free themselves of whatever germs they may have taken in, and then they are clean and safe.”<sup>102</sup>

The physician, the son of bedders, can open up a cold oyster and remember the taste from when he was a child. The harbor oysters

“have a high iodine content... and they have a characteristic taste... Since the water went bad, that taste has become more pronounced. It’s become coppery and bitter. If you’ve ever tasted the little nut that’s inside the pit of a peach, the kernel, that’s how they taste.”<sup>103</sup>

The children of bedders have a local knowledge, a knowledge that lets them catch and eat the condemned oysters without falling ill. They grew up on the river, and they lived by the beds. Despite the death of the oyster empires, people continued to live by the river well into the 1950s. But in order to live by the river, one had to live *around* the pollution, the police, the typhoid infections.

Even as Postwar modern life was turning away from the riverside and the salt marshland, many people still tried to live from those lands. Eels could survive and thrive in the polluted waters of the river even as late as 1950. When the water grew too cold for them each year, they would find a place to

nest and hibernate. Early in the winter, they would be fat, and “Italian-Americans and German-Americans from every part of Staten Island” would travel out onto the mud flats of the riverside and harvest eels so bountiful that the hunters would “bring them home in washtubs and potato sacks.”<sup>104</sup> Some folks didn’t believe that certain clam beds really ought to be condemned, and they would go out at night and poach the clam beds and “eat them in chowders and stews, and they eat them raw. Every once in a while, whole families got horribly sick.”<sup>105</sup> When President Hall was first elected, one of the first petitions from his constituency came from clambers. Not all the beds were condemned, and the clambers asked Hall to get the City to remove a ban on a set of beds. They claimed that evidence from Department of Health reports indicated that the beds should pass inspection. They accused the Department of Health of negligence for not properly evaluating the condition of the beds.<sup>106</sup>

Much of the framework of Staten Island communities—many still extant today, though their form greatly changed—was built upon the oyster economy. Sandy Ground, on the South Shore, is the among the oldest communities in the United States. Said one long-time resident in the 1950s, “Oysters!...That’s how it began.”<sup>107</sup> Before even the Civil War, communities of free black Americans in Maryland who worked in oyster grounds down there came into contact with Staten Island oysterfolk. Several from a community from Snow Hill, Maryland, decided to move up and try the Staten Island trade.<sup>108</sup> They settled at Sandy Ground, on the South Shore, and flourished so long as the oysters lasted.<sup>109</sup> But when the beds were condemned, the community faltered. Families began to work many jobs, wives and husbands both. The church, the center of the community, saw fewer people on Sundays, its congregation tired and spread-thin. Many moved away. Still more as time went on. When Mitchell visited in the 1950s, it was a quiet, empty-feeling place with an overgrown cemetery.<sup>110</sup> “The way it is now,” said Mr. Hunter, the eldest in the community when Mitchell visited, “Sandy Ground is just a ghost of its former self.”<sup>111</sup> The death of the clam businesses was a time of turbulence and fracture for them. But Sandy Ground is still there. I have not been, but the rumor is that there are still folks there

with family names you could have heard in 1850.

Finally, the landscape that once was of Staten Island changed greatly. The old ways of living in Staten Island were steadily being displaced by new ecological regimes. There was Mr. Zimmer, a State Conservation Officer around 1950, “a Staten Islander of German descent.”<sup>112</sup> He watched the bay for poachers and chased them off with his boat and revolver or made to arrest them. He grew up by the river, his father making his living in a restaurant on the shore - catching eels for the menu and buying up oysters at the docks.<sup>113</sup> Mr. Zimmer got to work for the Conservation Department by spending his time in the marshes, becoming an “amateur naturalist.”<sup>114</sup> He knew scores of the “marsh wanderers”: “old Italians” who hunt for mushrooms in the autumn, “pick dandelion sprouts for salads” in the spring, sand catch mud shrimp in the midsummer for *frittura di pesce*; and “old women from the south-shore villages” pick herbs and wild flowers and grapes for jelly and watercress; farmers—yes, the agriculturalists who still, into the 1950s, lived and worked the land of the Island—cut salt hay with scythes; and bird watchers and “Indian-relic collectors”—the Raritan tribe was exterminated long ago—and rabbis who gather particular willows for the Festival of Succoth; and then of course the “pheasants, crows, marsh haws, black snakes, muskrats, opossums, rabbits, rats, and field mice”, pokeweed and sumac and blue-bent grass.<sup>115</sup>

Writes Mitchell in 1951:

“The marshes are doomed. The city has begun to dump garbage on them. It has already filled in hundreds of acres with garbage. Eventually, it will fill the whole area, and then the Department of Parks will undoubtedly build some proper parks out there, and put in some concrete highways and scatter some concrete benches about. The old south-shore secessionists - they want Staten Island to secede from New York and join New Jersey, and there are many of them - can sit on these benches and meditate and store up bile.”<sup>116</sup>

The Fresh Kills Landfill closed in 2001. It stores the rubble from the World Trade Centers. There are bodies among that rubble. The Parks Department is building Freshkills<sup>117</sup> Park. Gulls and phragmites

predominate over the land.<sup>118</sup> The Landfill was meant to be finished in 1968, according to Hall and Mozes's plan, anyway.<sup>119</sup> The marshlands, the "vacant lands", would be filled by then and be level and stable. Industry could build there, and Staten Island could modernize toward the rest of the City. That never happened. From a fill, it became a mounding, then mounds upon mounding; it was more important for the city to dispose of its waste than for the Island to bring in industry.<sup>120</sup> In 1991, the Fresh Kills Landfill exceeded the volume of the Great Wall of China.<sup>121</sup> By some measures, this makes it the largest human-made structure in history. Driving along the West Shore Expressway, one can gaze upon the veiled face of this world wonder.

But this is not the story of pure folly. The Fresh Kills Landfill served a distinct purpose. It alleviated the crisis of urban waste and allowed New York City to successfully transition into Postwar modernity. Its transformation of the land was a part of a long, political ecological process that has not finished. A set of modernist planners sought to impose a political ecological regime upon the land, and though they succeeded, they failed to produce their expected future from that regime. This political ecology is not a story of perfect hegemony imposing its will over a willing landscape. The future was not determined. The future was produced, and the transformation of the land, the ecological regime, was a crucial part of this process of production. Within this process were the modernist planners, the oppositional locals and politicians, the land and ecologies of Fresh Kills and the marshlands, the marsh wanderers and children of the bedders, the legacies of the dead oyster empires, the communities who lived on the river and knelt or fell to progress, the communities who lived on through progress, the various naturalists who found themselves in the ranks of the various Departments or who now work to turn Fresh Kills into a park, the dead who are buried at Fresh Kills - the network is vast, potentially infinite. It is political ecology, a network of relationships, from which the changes in the land can be read at Fresh Kills. Fresh Kills has a political ecological genealogy, and changes in the land are political ecological regimes as read through this genealogy. Through this political ecology, one can better understand the way in which politics operates. For

instance, why should planners like Samuel Mozes and politicians like Cornelius Hall view Fresh Kills as 'useless' while the marsh wanderers view it as 'useful'? Why should the imposition of municipal waste turn 'useless' land into 'useful' land in the eyes of the planners and politicians? Why did factions fight so hard against the landfill? What happened to those who lived off of the land in Staten Island, and why were these ways of life displaced by the modernists? These questions cannot be fully understood much less answered without understanding the interconnections of political action, life, land, history, and ecology. A political ecological framework gives one a lens through which to deal with such questions.

To say it another way: one cannot understand the transformations of Fresh Kills without understanding the modernizing logic of its planners; but equally, one cannot understand the modernizing logic of the planners without understanding the place of land reform in their modernity. Political ecology is understanding this. It is not an adjudicative framework. Political action occurs in this frame. It is about understanding the ecological in politics, the political in ecology, and the confluence of them both that will allow one to better understand the past and to better plot a course to the future.

At the crisis moments of the present, it is ever more important to understand what a political ecological regime can look like, and how to take steps to best achieve desirable products of political ecological work. In the case of Fresh Kills, the modernist planners had in mind to further the development of the municipality as a whole by the transformation of salt marshland into landfill. They sought to dispose of the City's waste at a 'useless' site and thereby gain a use for surplus 'undeveloped' land. Looking back across time, one can see the pattern that this ecological regime produced. Salt marshland, an ecologically diverse estuary used for forage by locals, was filled in with the waste of the City. Ecologically productive land is transformed into a municipal 'sink', a depository for urban waste. The 'use' changes from local forage to municipal dump. More than half a century later, the dump site begins another transition, from landfill to park. Mitchell's cynicism appears prescient. By manipulation and reproduction of the

waste-landscape, planners today once again busy themselves with the imposition of a new ecological regime, this time a conservationist vision of urban ecology. Urban wasteland, once salt marshland, is transformed into urban parkland. Looking at a larger picture, one can see a related story. Speaking generally, the people of Staten Island lived directly off the land from colonial times until the turn of the twentieth century. But by the 1900s, a great transition began to take place. Modernists looking forward began to see the future of the island in the metropole, the municipality. Land began to look different. Oyster beds once seen as some of the most prized and valuable in the world were suddenly looked upon as municipal health hazards. For the sake of the City, they were closed. The salt marshes once valued for hunting, trapping, and forage became 'useless' land and were slated for dump sites and 'development'. Staten Island transformed rapidly, turning away from its land and toward the urban metropole, while the metropole busied itself with making 'useful' the fifth borough's land. Over time, this ecological regime produced unintended consequences and unforeseen futures. Now, with the ecosystems of Fresh Kills only a distant memory, new planners seem to yearn for these 'lost natures'. They have a vision to reclaim these natures and produce new ecologies to suit that vision. Theirs is a new, 21<sup>st</sup>-Century ecological regime, one with different ideas of modernity and a different vision of the future.

Toward these different ecological regimes, their different visions and consequences, political ecology turns. To understand how land and life matter to politics and modernity is a tool that can be used to shape the future. To understand how ecological regimes of the past helped to produce the problems of the present is a step toward understanding how to produce ecological regimes that can create desirable futures. Political ecology is therefore a necessary methodological tool in an age of global ecological crisis. If one wishes to look forward to the future, it might help one to look to the past. If one wishes to look toward a new ecological future, it might serve to look to the example of the Fresh Kills Landfill.

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## ENDNOTES

- 1 Steinberg (2015), 258.
- 2 “Postwar”, meaning after the Second World War.
- 3 The reasons for this are more extensively discussed below.
- 4 Steinberg (2014). I borrow Steinberg’s phrase “Greater New York” to reference the amorphous and sprawling boundaries of “New York” that sometimes stretch beyond, sometimes contract before, the official political boundaries of “New York City”.
- 5 This is, of course, a topic for debate. Nonetheless, it is a Staten Island truism, and it is also a borough rarely specifically written about (especially when compared to Manhattan and Brooklyn - even Queens).
- 6 This is the book’s apt subtitle.
- 7 Cronon (1991).
- 8 Steinberg (2015), see 367 for reference to Cronon.
- 9 This is true only in broad strokes. Steinberg has surprising neglect for the geospatial interconnections of Greater New York beyond the immediate environments, a surprising break from Cronon who tied Chicago to ecologies around the country. This is but one difference, and there are several.
- 10 Mitchell (2001).
- 11 Mozes (1954).
- 12 Kearing (1970).
- 13 E.g. “Freshkills Park.” Freshkills Park : NYC Parks. Accessed February 22, 2018. <https://www.nycgovparks.org/park-features/freshkills-park/about-the-site>.
- 14 See, for instance, Hopkins and Wallerstein (1982).
- 15 Of course, this must be taken loosely. To apply the categories in their literal meanings would be a false equivalency of Staten Island to the colonial subjectivities of the Indian Raj or French Indochina (etc.). The relationship of Staten Island to the rest of New York City is by no means a colonial one. It is useful, however, to take the ‘core-periphery’ relationship at a less literal interpretation in order to gain a better theoretical understanding of the ways Staten Island has been used as dumping ground for the refuse of the whole of Greater New York City.
- 16 Bellamy Foster (1999).
- 17 Moore (2014), 295.
- 18 From 1916 to 1948 (and beyond) the economic future of Staten Island was unclear. This is a topic addressed further in the body of this essay (below).
- 19 Mitchell (2001), 52.
- 20 Mitchell (2001), 52.
- 21 Mitchell (2001), 52.
- 22 Mitchell (2001), 53-54.
- 23 Mitchell (2001), 55. Steinberg 2014, 170.
- 24 Mitchell (2001), 54.
- 25 Mitchell (2001), 71.
- 26 Mozes (1954).
- 27 Mozes (1954), 7-8.
- 28 In Mozes (1954), 149.
- 29 Mozes (1954), 151.
- 30 Mozes (1954), 152.
- 31 Mozes (1954), 188.
- 32 Staten Island was once better known by the name “Richmond” after the settlement which had been historically dominant on Island. References to “Richmond” or “Richmond County” are nearly always synonymous with Staten Island.
- 33 Mozes (1954), 191.
- 34 Mozes (1954), 165-166.

- 35 Mozes (1954), 166-168.
- 36 Mozes (1954), 243-244
- 37 Mozes (1954), 315-316.
- 38 Mozes (1954), 9-10.
- 39 Hamlin in Mozes (1954), xvii. Emphasis mine.
- 40 In Mozes (1954), xvii.
- 41 Mozes (1954), xvii.
- 42 Mozes (1954), 7. For the curious reader, the vote was 5,531 “for”, 1,505 “against”.
- 43 Mitchell (2001), 111; Mozes, 49.
- 44 Mozes (1954), 49.
- 45 *Staten Island Advance*, January 5, 1946.
- 46 Mozes (1954), 244.
- 47 Mozes (1954), xvi.
- 48 Mozes (1954), xvi.
- 49 Mozes (1954), 51.
- 50 Mozes’s footnote: “The term, land, is here discussed in the sense of both its physical and its legal properties; that is, a) the entire area of the borough, *developed and undeveloped, both dry land and land under water*; b) the three-dimensional space associated with the surface of the earth, or rights to subsurface resources and to the airspace above the earth”. Mozes 1954, 250, emphasis added. Note how extensive this term intends to be, how sweeping Mozes clearly wishes his claim to be - how much he emphasizes the unseen possibilities for development in land, surface or submerged.
- 51 Mozes (1954), 250.
- 52 I borrow this phrase, “changes in the land”, from William Cronon. See Cronon, (2003).
- 53 Mozes (1954), 242-243.
- 54 Mozes (1954), i.
- 55 Mozes (1954), xvi.
- 56 Steinberg (2014), 241.
- 57 *Staten Island Advance*, “Moses Backs Dump Project”, June 12, 1946. Although this statement claiming the prohibitive expense of incineration is a decade later, it came at a time when the new administration under Mayor O’Dwyer tried to restart the incineration program slowed under LaGuardia in the 1930s. It is very likely that the attempt to restart incineration encountered the same problem that LaGuardia did, i.e. that incineration is too expensive.
- 58 Steinberg (2014), 241.
- 59 Steinberg (2014), 242.
- 60 Steinberg (2014), 242.
- 61 Note that this is *not* the aforementioned Samuel R. Mozes. Their names, while similar, apparently carry not familial relation. This Moses, Robert Moses, is the city planner of great fame.
- 62 Steinberg (2014), 242.
- 63 Steinberg (2014), 242.
- 64 Steinberg (2014), 242.
- 65 Steinberg (2014), 242.
- 66 Steinberg (2014), 242.
- 67 *New York Times*, “Carey Says Moses Is a Propagandist”, October 11, 1938; in Steinberg, 243.
- 68 Steinberg (2014), xviii.
- 69 Mozes (1954), 13-4.
- 70 Mozes (1954), 260.
- 71 Steinberg (2014), 243.
- 72 Steinberg (2014), 243.
- 73 Steinberg (2014), 243.
- 74 Steinberg (2014), 244.

- 75 Steinberg (2014), 244.
- 76 Steinberg (2014), 244.
- 77 *Staten Island Advance*, “New Islanders’ March on City Hall Called to Fight Dumping Plan at Fresh Kills”, June 10, 1946;
- 78 *Staten Island Advance*, “Fresh Kills Dump Plan Fund Again Put in Budget”, June 7, 1946.
- 79 *Staten Island Advance*, “Fresh Kills Dump Plan Fund Again Put in Budget”, June 7, 1946.
- 80 *Staten Island Advance*, “Moses Backs Dump Project”, June 12, 1946.
- 81 *Staten Island Advance*, “Moses Backs Dump Project”, June 12, 1946.
- 82 *Staten Island Advance*, “Speeding up of Disposal Plant Due Tomorrow”, February 19, 1946.
- 83 *Staten Island Advance*, “Speeding up of Disposal Plant Due Tomorrow”, February 19, 1946.
- 84 *Staten Island Advance*, “Speeding up of Disposal Plant Due Tomorrow”, February 19, 1946.
- 85 *Staten Island Advance*, “Hall Backs Fresh Kills Dump”, June 8, 1946.
- 86 *Staten Island Advance*, “Island’s UNO Hopes Fading”, January 3, 1946.
- 87 *Staten Island Advance*, “\$1,673,682 Budget Asked by Borough President Hall”, February 2, 1946.
- 88 *Staten Island Advance*, “Today’s Strike Situation”, February 7, 1946.
- 89 *Staten Island Advance*, “Disaster Law Freezes City’s Business Life”, February 12, 1946.
- 90 *Staten Island Advance*, “Realty Valuations rise \$1,722,650”, February 1, 1946.
- 91 *Staten Island Advance*, “Hall Backs Fresh Kills Dump”, June 8, 1946. Emphasis added.
- 92 *Staten Island Advance*, “Palma Joins in Protest”, June 11, 1946.
- 93 E.g. *Staten Island Advance*, “Great Kills-Bay Terrace Residents Score Landfill”, June 11, 1946; “Great Kills - Will We Have Ten Years of This at Fresh Kills?”, June 11, 1946.
- 94 *Staten Island Advance*, July 2, 1946.
- 95 *Staten Island Advance*, “Buck Asks U.S. Aid to Preserve Fresh Kills”, June 22, 1946.
- 96 *Staten Island Advance*, “Buck ‘Draws a Blank’ in Seeking U.S. Aid”, July 2, 1946.
- 97 *Staten Island Advance*, “Grand Jury Raps Dump Plan”, July 16, 1946. It was, ironically, Moses who used this tactic to prevent Carey from developing Jamaica Bay.
- 98 Steinberg (2014), 247.
- 99 Steinberg (2014), 246. Emphasis mine.
- 100 Mitchell (2001), 56.
- 101 Mitchell (2001), 56-57.
- 102 Mitchell (2001), 56.
- 103 Mitchell (2001), 57-58.
- 104 Mitchell (2001), 49.
- 105 Mitchell (2001), 51.
- 106 *Staten Island Advance*, “Clammers Ask Hall to Assist in Campaign”, February 16, 1946.
- 107 Mitchell (2001), 130.
- 108 Mitchell (2001), 132.
- 109 Mitchell (2001), 134.
- 110 Mitchell (2001), 128-141.
- 111 Mitchell (2001), 140.
- 112 Mitchell (2001), 68.
- 113 Mitchell (2001), 69.
- 114 Mitchell (2001), 69.
- 115 Mitchell (2001), 72-74.
- 116 Mitchell (2001), 74.
- 117 Sic. Note the gradual transformation of the name over time. The etymology of site called “Fresh Kills” has an anecdotally interesting history of its own.
- 118 Steinberg (2014), 256.
- 119 Hall, Moses, and Mulrain (1951).

- 120 Steinberg (2014), 254.
- 121 Steinberg (2014), 258.



IMAGE BY RAKAN AL-HAZZA

# FIREARMS AND STATE

## LEGITIMACY

BY JACK SCHLESINGER

**Abstract:** This piece takes a look at the phenomenon of stockpiling weapons and why individuals feel the need to take such extreme actions of preparation. Considering Max Weber and his theory on the monopolization of legitimate use of violence and John Locke and his views on natural laws, stockpiling is a clear response to how individuals feel about the survival and legitimacy of the state. Along with this I examine the growing trends for firearm ownership, with a shift away from hunting and recreation and more towards firearms for self-defense. Looking at data comparing reasons for gun ownership over time shows this trend quite well. This piece looks at previous actions taken by the government that would allow individuals to believe they would need a weapons stockpile to ensure their survival, as well as the role of lobby groups to push an agenda that furthers the idea that our government is unstable, tyrannical, or unable to protect its citizens. Stockpiling is a response by individuals who believe the government will either violate their natural rights or will be unable to protect them.

**Keywords:** Firearms; Legitimacy; State Violence; Second Amendment

### INTRODUCTION

The firearms industry in the United States poses unique dilemmas in relation to both Max Weber and his theory on monopolization of violence and John Locke and his theories on natural law. Legitimacy is important to the success of a state and the people's support of the state. How people perceive this legitimacy and the state's use of force against its own citizens dictates the survival of the nation as a political form. From natural disaster to civil unrest, there have been times when the state is unable to successfully protect its people or retain its monopoly on the legitimate use of force. Citizens who stockpile weapons express an extreme example of these concerns. The primary reason for gun ownership today is self-defense, and many believe it is tied to their freedom.<sup>1</sup> The recent trends in the firearm industry, away from hunting and a shift towards guns for self-defense, and in particular the idea of stockpiling, are manifestations of their concerns that the state might not be able to protect them or their rights long-term.<sup>2</sup>

In David Yamane's *The Sociology of U.S. Gun Culture*, he outlines the current trend in gun ownership, which is not towards outdoor recreation, such as hunting and sport shooting, but is instead for self-defense and stockpiling. Jeremy Adam Smith focuses on who the type of person stockpiling weapons is and why they believe stockpiling guns is necessary. He claims that the individuals, primary white men, are stockpiling these weapons because "they're anxious about their ability to protect their families, insecure about their place in the job market and beset by racial fears."<sup>3</sup> Many of the individuals stockpiling firearms explain that they are doing so out of fear of unconstitutional acts by the federal government.

A stockpile is a "supply stored for future use, usually carefully accrued and maintained."<sup>4</sup> When one stockpiles items it is because that individual believes they will be either hard to come by or very important to have in the future. The private stockpiling of firearms is uniquely American and poses a unique dilemma in relation to state legitimacy. The majority of people who are purchasing firearms already own them. More guns are being manufactured, imported, and sold, and "domestic production has increased from 4.2m firearms in 2008 to 8.9m in 2015, the firearms industry remains relatively small."<sup>5</sup> The demographics behind who is buying guns is interesting and is a reflection of how these purchasers feel about their government. This is made clear in a "national firearms survey carried out by Deborah Azreal, a Harvard scientist and her colleagues in 2015 suggested that 14% of gun owners own 50% of guns. Given that between a fifth and a third of adults own a gun, that translates into about 3% or 4% of American adults owning half of America's stock,"<sup>6</sup> with the "top 14% of gun owners – a group of 7.7m people, or 3% of American adults – own between about eight and 140 guns each. The average is 17."<sup>7</sup> So who is buying and stockpiling all these guns? According to the data used in Azreal's study, 34% of gun owners are over sixty years old, 81% are white and 72% are men.<sup>8</sup> Older (60 +) white men are the ones predominantly buying and stockpiling weapons.

These individuals believe stockpiling is necessary because of governmental mishaps in the 1990's such as Ruby Ridge and the Waco Siege, and

since their “prominence in the 1990s and their re-surgent public visibility today, the militias’ basic ideology – stressing federal overreach, local supremacy, and a hardline constitutionalism – gained a greater acceptance among many in rural areas.”<sup>9</sup>

## THEORY

Born in 1864, Max Weber was a German sociologist, political scientist, and philosopher. He is known as one of the primary founders of modern social science along with two others, Karl Marx and Emil Durkheim. He produced many respected works, including one lecture-turned-essay published under him titled “Politics as a Vocation.” This lecture was given in 1919, during the German Revolution. His speech was written solely on notecards, but luckily enough a stenographer was able to write down his lecture. “Politics as a Vocation” is still highly regarded today as a classic work of social science.

One of the larger and more interesting aspects of this lecture-turned-essay is the idea behind what a state is. While this is something many social scientists have tried to define throughout time, Weber’s definition is unique and has remained on the forefront throughout discussions of what a state is. That is because Weber defines one necessity of the state as, “a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”<sup>10</sup> Weber agrees with Leon Trotsky, that, “every state is founded on force,”<sup>11</sup> and to Weber there is no state without force and no state without the monopolization of force within a states territory. The idea that the state claims monopoly over the legitimate use of violence is interesting in contemporary times for multiple reasons. Today, it poses unique dilemmas when trying to look at what a state is, especially in the United States, as the state does not have a monopoly on the legitimate use of physical force (violence). A clear example of this lack of monopolization over the use of legitimate force is the large amounts of firearms in the United States and an individual’s right to self-defense in this country. The Second Amendment, as follows, “A well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed,”<sup>12</sup> acknowledges an individuals right to firearm ownership. The second amendment means that in-

stead of a complete monopoly, the state is the primary source of legitimate violence, and while not the only source of legitimate violence, all private use of legitimate violence is secondary.

While the idea of owning a firearm for self-defense in the twenty-first century may appear to be uniquely American to some, the theories behind one’s right to self-defense have been around for hundreds of years and are not unique to the United States. John Locke, an Englishman born in 1632, is frequently known as the “father of liberalism,”<sup>13</sup> and he is well-celebrated for his views and works on limiting government power, as well as both natural and property rights. Born before Max Weber and in a different part of Europe, Locke’s experiences, and therefore his views, are different. Locke focused on outlining the role and limits of the state and its power and use of this power in relation to the existence of the individual. One of Locke’s primary focuses was on the theory of natural law. Natural law is “a system of right or justice held to be common to all humans and derived from nature rather than from the rules of society, or positive law.”<sup>14</sup> These laws apply to all mankind across all boundaries, no matter whether manmade, natural or theoretical. These natural laws are an intrinsic part of every individual’s existence, which no other individual or state has the right take away or revoke. To some, firearms ensure that these natural laws are not violated. John Locke’s most influential work is arguably *Two Treatises of Government*. Born into a time of dictatorial and oppressive rule around the world, with England’s King Charles I becoming more tyrannical during his childhood. Locke’s experiences allowed him to come to the conclusion that every action by the state is not legitimate and merely because a ruler commits an act does not make it legitimate. The actions of kings and rulers are not legitimate because of their belief at the time in the connection to god. At the time the idea of divine right was that “the king’s power comes directly from God, to whom the ruler is accountable; power does not come to the king from the people and he is not accountable to them.”<sup>15</sup> By growing up in a time when the King was not accountable to his people, Locke learned that a state could not merely claim an act legitimate to make it so. Following that same logic, simply claiming a relationship to

God does not make it true. Locke's experiences with an illegitimate and tyrannical government lead him to pursue philosophy, specifically political philosophy. He is still well regarded as one of the instrumental founders of liberalism and his theories on natural law have stood the test of time.

Historically, citing natural law, "humans have appealed to a 'higher law' or true natural law to protest and rebel against unjust conventional laws."<sup>16</sup> These natural laws allow individuals to, at least in their minds, be treated to a certain standard that they expect by the state. Whether a state will act in accordance with one's natural rights and laws is another question. This is one reason individuals have guns today. There is concern by some about unconstitutional acts by either the federal or state governments and the government becoming more tyrannical to these individuals. For gun owners who do not trust the government, "an assault-weapon ban (along with a ban on high-capacity magazines) would gut the concept of an armed citizenry as a final, emergency bulwark against tyranny."<sup>17</sup> In the eyes of David French, the author of the article, "citizens must be able to possess the kinds and categories of weapons that can at least deter state overreach, that would make true authoritarianism too costly to attempt,"<sup>18</sup> something a modern military-style rifle provides.

Recent examples of citizens with firearms who defended what they perceived as their natural rights are the Bundy Ranch Standoff and the case against Henry Goedrich Magee, a man who shot and killed a Texas Deputy performing a no-knock warrant; both examples of where individuals exercised what they believed are their natural rights. To these individuals, their natural laws were being violated and their firearms allowed them to defend themselves from the abuses from the state.

The Bundy Ranch Standoff started when "Nevada rancher Cliven Bundy and his sons repeatedly violated court orders to remove their cattle from public land."<sup>19</sup> The issue started "in 1993, when Cliven Bundy decided to stop getting permits and paying grazing fees for his cattle that had settled on federal land. Whipple argued that Bundy had tried to pay the state of Nevada the grazing fees because he didn't recognize BLM sovereignty over grazing

land, and he said the family held water rights in the areas in which the cattle were grazing."<sup>20</sup> Bundy felt his natural rights being taken away, and individuals who witnessed and supported the citizens at Ruby Ridge and the Waco Siege saw similarities between the standoffs.<sup>21</sup> At the height of the standoff, "about 400 Bundy supporters faced off against about 30 federal agents."<sup>22</sup> Many individuals involved and supporting the Bundys felt as if the only thing stopping the state were their firearms. Nevada's land is primarily public, and "approximately 85 percent of Nevada land is federally managed."<sup>23</sup> To those who make their living off the land, the treatment of the Bundys could be seen as a clear threat to one's livelihood, whether or not the concerns about the federal government are legitimate or not. Images of citizens pointing guns at federal law enforcement were shocking to many around the country, and those pointing their rifles "are accused of using their high-powered weapons to threaten and intimidate federal officers."<sup>24</sup> Many of those involved in the standoff believed that firearms were the only way to defend their natural rights. To those on the outside, there may have been other actions to gain that same outcome. Another example of the state not having monopoly on the legitimate use of violence is that, while incredibly atypical, citizens have shot police officers, in uniform, in self-defense and not been found guilty of a crime. This is the case for Henry Goedrich Magee, who in 2013 was charged with capital murder after "shooting and killing an officer who entered his home serving a warrant unannounced."<sup>25</sup> Magee claimed self-defense, and his attorney argued that Magee "thought he was being burglarized, reached for a gun and opened fire."<sup>26</sup> The initial reason for the search was a claim that Magee had marijuana plants in his home. The state was unable to prove that Magee knew it was police officers entering his mobile home, and all charges were dropped against him. This example, while an extremely rare occurrence, shows that at times natural law can trump state-legitimized violence. An aspect of this ruling could be the futile war on drugs and the idea that the initial actions of the police were unnecessary given the concerns with Magee and the level of criminality they believed he was participating in.

## ROLE OF FIREARMS

The role of firearms in the United States, both physically and symbolically, has changed over time. The reason for owning a gun today is vastly different than two hundred years ago, as “guns began as tools of necessity in the colonies and on the frontier but evolved into equipment for sport hunting and shooting, as well as desired commodities for collecting.”<sup>27</sup> Today, hunting is no longer the primary reasons for firearm ownership, and while “recreation remains an important segment, the central emphasis of U.S. gun culture has gradually shifted to armed self-defense over the course of the past half-century.”<sup>28</sup> Gun manufacturers support and embrace this trend and they continue to create new products for the self-defense market rather than for recreation, whether it is hunting or sport shooting.

The firearm industry within the United States is comprised of many players. These players include firearm manufacturers, accessory manufacturers, ammunition manufacturers, lobby groups, politicians and consumers. This complex myriad of companies, individuals, and associations makes up the firearms industry and its successes, failures, shortcomings, as well as its future. They determine the trends in the market, as well as react to them. The firearm industry and its consumers push back on the theory that a state must have complete control over the legitimate use of force and make one question whether monopoly over use of force is necessary for a state to be considered a state. There are a myriad of reasons that the United States has so many firearms. Some of these motives are based in historical reasonings while other reasons are more contemporary. Firearm and accessory manufacturers, distributors, and gun stores rely on lobby groups to ensure their interests are represented. This is becoming more important as gun manufacturers are dealing primarily “with a niche consumer group,”<sup>29</sup> because though there are more guns in America than ever before, fewer people own them. The goal of the gun lobby is to ensure that regulation of any sort is not passed, on either the state or federal level. Nineteen percent of gun owners are members of the NRA, (National Rifle Association), the most commonly known and largest gun lobby group.<sup>30</sup> There are many other pro-gun associations, organizations, and lobbies that reinforce the

idea that firearms are necessary for self-defense.

Today, some feel that an “attachment to guns was based entirely on ideology and emotions,”<sup>31</sup> and that this symbolism and ideology reflects how many NRA members feel about firearm ownership.<sup>32</sup> It could also be viewed as citizens manifesting their concerns of safety and an inability for government provided safety and security by purchasing products that, in their eyes, enhance their abilities to defend themselves and/or survive in times of desperation. Since 2008, “the number of firearms manufactured in the U.S. has tripled, while imports have doubled,”<sup>33</sup> showing not only a rising interest in US manufactured guns but also guns manufactured elsewhere and imported primarily for sporting purposes. In 1999 twenty-six percent of gun owners cited protection and forty-nine percent for hunting as reason for ownership, and in 2013 that had changed to forty-eight percent for protection and thirty-two percent for hunting.<sup>34</sup>

Self-defense is a natural right as well as a legal one in the United States. The Second Amendment grants citizens the right to own firearms, and the culture is such today that “when men became fathers or got married, they started to feel very vulnerable, like they couldn’t protect families. For them, owning a weapon is part of what it means to be a good husband a good father.”<sup>35</sup> This idea, that one must physically protect their family by owning a firearm is a newer idea that has gained popularity in the gun community. An example of how recent this change in mentality is how license to carry permit applications “exploded after President Obama was elected,”<sup>36</sup> and “much of the surge in permits has come due to gun control threats from President Obama and highly-publicized mass shootings that have prompted several law enforcement officials to suggest that Americans arm up.”<sup>37</sup> Gun ownership used to be less political and less symbolic. This shift is also recent, with, in 2017, the *Social Studies Quarterly* finding “that gun owners had become 50 percent more likely to vote Republican since 1972.”<sup>38</sup> No matter the reason for ownership, sixty-one percent of gun owners are either Republican or lean Republican, and this sixty-one percent makes up seventy-seven percent of NRA members.<sup>39</sup>

## TECHNOLOGY

World War II brought new technology for the average infantryman in military service. While bolt-action rifles were still produced and fielded, the newest technology was easily and cheaply produced semi-automatic rifles. While semi- and fully-automatic weapons were not new technologies in itself, the enhanced production abilities allowed them to be cost effective and allowed this technology into the hands of the average soldier. Before semi- and fully-automatic rifles were fielded, both soldiers and hunters had the same technology. Both infantrymen and frontiersmen used single-shot or bolt-action rifles, as the technology was common and simple. What this means is that in recent years the average non-military shooter has had access to modern, efficient weapons that are faster to shoot, load, and do so with less recoil and more reliability, which are notably different than the majority of firearms for hunting. The idea of having firearms that the military uses is not exactly new, as historically the weapons were the same. As technology advanced weapons for war became less necessary for hunting. However, military style firearm ownership became more popular, especially in the eyes of those concerned with government illegitimacy. These individuals are most likely to stockpile weapons and also act against the federal government.<sup>40</sup> An interesting aspect of the idea and actuality of civilians having military grade weapons is the Civilian Marksmanship Program, or CMP. The CMP is a “national organization dedicated to training and educating U. S. citizens in responsible uses of firearms and air guns through gun safety training, marksmanship training and competitions.”<sup>41</sup> While this in itself does not make the CMP different from a multitude of other firearms groups, including the NRA, the CMP is unique in its access to military weapons previously fielded by the United States military, including rifles from World Wars I and II, and more recently the introduction of surplus 1911 handguns. This shows the true complexity of the United States’ relationship with firearms, especially with military-style firearms. The firearms sold through the CMP have historically been rifles from World War I and II, and used by our military. This poses an interesting dilemma, as private citizens are able to purchase military-grade weapons, albeit slightly outdated yet still quite capable as weapons by today’s standards.

The United States military is the largest military in the world. The technology development, improvement, and utilization happened at a rapid rate, meaning that there is more firearm turnover to make room for the newest technology. While they are no longer the cutting edge weapons technology, the weapons the CMP sells are not necessarily outdated as they are still fielded by militaries and police across the world. A great example of this is the Mosin-Nagant rifle. While Russian made and unavailable through the CMP, it is a World War II era firearm yet is still used by police forces around the world, as well as used by insurgents and guerrillas around the world in recent conflicts. Civilians are able to purchase weapons that are outdated by U.S. military standards but not necessarily by global military standards. Showing the complexity of the relationship between military and commercial firearms today, a great example would be the United States Army’s newest handgun selection and how individuals are able to purchase weapons so similar to what the military uses.

Selected in 2017, the Sig Sauer P320, as it is known on the commercial market, will be fielded as the sidearm of the US Army as the M17 and M18 MHS (Modular Handgun System). While it was created initially to meet the requests of the US Army and to compete in the new handgun trials, the Sig P320 was found on the commercial market before the US Army decided to adopt it. There are multiple reasons manufacturers would want to sell their products to both military and commercial users. The first reason is that the military pays significantly less than a private citizen would on the market. The Marine Corps is also adopting the M17 and have plans to “purchase 35,000 pistols at \$180 a pop,”<sup>42</sup> significantly less than the Sig Sauer suggested retail price for a P320, as it’s known on the commercial market, which is \$597 in May of 2018. The profits on the commercial market are substantially larger, and any won military contracts make for good advertising on the commercial market. The second reason for selling a product on the commercial market that was initially designed for a military contract is to recoup losses. All major manufacturers who competed in the MHS trials, including “Glock, FN America and Beretta USA, makers of the current M9 9mm pistol, all lost to

Sig Sauer, but selling their versions of the MHS may allow them to recoup the money they invested in the high-profile endeavor.”<sup>43</sup> While there is a willingness to sell guns designed for the military commercially, this relationship of commercial and military sales have always been intermingled, especially considering the commercial markets insatiable desire for firearms the military is currently using. Prior to the Sig P320 was the Beretta M9 service pistol, and it too succeeded well in military as well as commercial sales. Through the CMP, one can currently purchase 1911s manufactured decades ago. The 1911 was the military’s side-arm until the M9 replaced it. It is still a modern firearm that continues to be produced and found on commercial market today, yet it is outdated by military standards, another example of the complex relationship between modern and outdated firearm technology. The CMP plays a unique role in firearms ownership in the United States, but the NRA is the most powerful gun lobby group.

### **NATIONAL RIFLE ASSOCIATION**

The National Rifle Association (NRA) is one of the largest associations in the United States, and on the *A Brief History of the NRA* webpage on the NRA website it boasts of having “nearly five million members.”<sup>44</sup> While the exact number of NRA members is unknown, the political power of the NRA is undeniable. Founded in 1871, the NRA was not always primarily concerned with regulation and legislation, and the lobbying role of the NRA was created in 1975 when the association saw the critical need for political defense of the Second Amendment, the NRA formed the Institute for Legislative Action, or ILA.”<sup>45</sup> While the NRA was not initially created for lobbying it has come into this role quite successfully. Over the years the NRA has changed the beat of its drums in regards to accruing new members. Initially focused on the sole purpose of marksmanship in the years following the Civil War, the NRA’s focus has changed over time as they attempt to appeal to the most number of members. It started “promoting the shooting sports among America’s youth began in 1903 when NRA Secretary Albert S. Jones urged the establishment of rifle clubs at all major colleges, universities and military academies.”<sup>46</sup> These are the beginnings of support for competition shooting, a popular subculture within the fire-

arm community. The NRA is able to show support for different firearms owner groups through different publications, and the NRA website says that, “The American Hunter and The American Rifleman were the mainstays of NRA publications until the debut of The American Guardian in 1997. The Guardian was created to cater to a more mainstream audience, with less emphasis on the technicalities of firearms and a more general focus on self-defense and recreational use of firearms.”<sup>47</sup> By creating new publications attracting different types of gun owners, the NRA is able to continue to gain members, and also put their members in a certain mindset. According to the NRA, firearms are no longer something one needs exclusively for recreation; now one needs a firearm to ensure the safety and survival of oneself and loved ones.

As hunting became less interesting to many young people in the United States, those young adults interested in firearms became primarily fascinated and fixated on firearm ownership for self and home defense and this has grown to become the primary reasons for firearm ownership. The NRA has utilized and used this to sell more guns, benefiting both the organization and firearm companies. This shift, for the reasons the average gun owner has a firearm, is an interesting one. More and more people, especially young people, are not spending as much time in nature, whether it be hiking, fishing, or hunting.<sup>48</sup> While some nature-based activities such as wildlife watching have grown in involvement, in the past five years “hunting participation dropped by about 2 million participants, but still remained strong at 11.5 million hunters. Total expenditures by hunters declined 29 percent from 2011 to 2016, from \$36.3 billion to \$25.6 billion.”<sup>49</sup> Thus, fewer people need guns for hunting and less money is spent on hunting gear and supplies. Along with this, many hunting firearms, primarily bolt-action rifles and shotguns, are from older family members, especially for the more casual hunter, so the NRA’s shift towards modern rifles perpetuates the idea than an individual needs a weapon for self-defense, or at the very least a modern firearm. The NRA has thus been able to attract a wide variety of shooters into its ranks, and it has grown into a powerful lobbyist group that has become “the leader in firearms education. Over 125,000 certified instructors now

train about 1,000,000 gun owners a year,<sup>50</sup> an astronomical figure, both for instructors and trainees. Not only does the NRA offer training for individuals but it also offers NRA Carry Guard, insurance for self-defense. It assists in paying for lawyers if one needs one after a shooting in self-defense. Some have criticized the NRA for selling “murder insurance and say that rather than promoting personal responsibility and protection, it encourages gun owners to take action and not worry about the consequences”<sup>51</sup>. While the NRA is not the only pro-gun lobby group, it is definitely the largest in terms of revenue and membership and arguably has the largest amount of clout and political pressure.

The NRA has done a good job of shifting its role within the firearms community to better serve its members and their interests, while continuing to gain support from the firearm industry as it is used as a tool for sales in the eyes of manufacturers. The NRA desires a good relationship with major firearms manufacturers, made evident in a 2013 report that found “that gun makers had given the NRA between \$20 and \$52.6 million in the previous eight years alone. The NRA also regularly makes money from some gun companies that give a portion of their sales to the organization.”<sup>52</sup> The relationship the NRA has with the firearm industry is mutually beneficial, more guns sold are good for the manufacturers, which is in turn good for the NRA. The NRA uses the cultural shifts and trends in firearms ownership to ensure its profitability and success, and the maintenance of a positive relationship with gun makers.

### **THE SECOND AMENDMENT AND STATE LEGITIMACY**

The Second Amendment allows individuals to own firearms, for any purpose, but more recently there has been a trend for firearms for self-defense. This clashes with Weber’s idea that a state should have a monopoly on legitimate state violence. While the idea of natural law allowing an individual the right to defend oneself is not new, a contemporary court deciding that an individual can defend himself against a state actor, a police officer, is monumental because it shows that natural law can, although incredibly rare, supersede civil law and that there are certain standards by which citizens expect the state to act, such as announcing themselves as such before entering non-state property.

The use of force and violence is not monopolized by the state in the United States. That being said, viewing Weber’s theory through a twenty-first century lens does provide insight into how the United States and its legitimacy is viewed by some citizens of the country. As Weber said, “the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the ‘right’ to use violence,”<sup>53</sup> but in the United States instead of it being the sole source of the right to use violence, it is the primary source, with private citizens being the secondary source of legitimate violence. State failure is also a concern for individuals who stockpile weapons.

One noticeably apparent way this concern of state legitimacy manifests itself is the act of firearm stockpiling and preparing for apocalyptic conditions by citizens. This shows their beliefs on the government’s ability to protect and serve its people, or in simpler terms its legitimacy and its long-term success. Those already on the right were disenfranchised by the actions of the government at Ruby Ridge, Idaho and in Waco, Texas, and felt they must prepare for the possibility of government tyranny and oppression.<sup>54</sup> Firearms and ammunition are not the only items hoarded and stockpiled by individuals, with other items including long-lasting food items, water and filtration systems for clean water access, and medicine. For the most part, individuals with stockpiles of any size, small or large, are not using these items on a regular, day-to-day basis. This means that due to past actions by the state, they believe that they will need these items in the future to ensure their and their families and loved ones survival. These individuals are not entirely wrong, as historically there have been times where the government has not held itself to the highest standard when using force, such as the Bundy Ranch Standoff, Ruby Ridge, and the siege in Waco, Texas.

Historically, the state has not always done the best for its citizens, and there is validity to an individual’s concern with the legitimacy of the state. When the state has a sudden loss in ability to protect and control its citizens, the people step back into a state of survival, where one must defend one’s natural rights to life and property. Examples

of these state failures that reinforce the ideas of stockpiling against a tyrannical government are the Ruby Ridge tragedy, and the siege in Waco, Texas, along with the Los Angeles riots of 1992.

When the state fails to protect its citizens, it loses its monopoly on violence and force. When a state cannot provide protection, citizens must protect themselves, something acknowledged by natural law. This legitimizes citizens use of force, thus removing the monopoly the state has on violence and force. In the last twenty-five years there have been times where the state has acted in ways that reinforced peoples' beliefs that they need firearms to protect themselves from a tyrannical government.

The Ruby Ridge Standoff took place from August 21<sup>st</sup>, 1992, until August 31<sup>st</sup>, 1992 with "Federal Bureau of Investigation (FBI) agents and U.S. marshals engaged in an 11-day standoff with self-proclaimed white separatist Randy Weaver, his family, and a friend named Kevin Harris in an isolated cabin on Ruby Ridge in Boundary County, Idaho. Weaver's wife, Vicki, his 14-year-old son, Sammy, and U.S. Marshal William Degan were killed during the siege."<sup>55</sup> Weaver was wanted by the ATF because he "befriended an informant of the Bureau of Alcohol, Tobacco and Firearms (ATF), who purchased two illegal sawed-off shotguns from Weaver in October 1989."<sup>56</sup> Some viewed the standoff as an attack on their anti-government beliefs. Many supporters of Weaver traveled to Idaho to support the cause and to harass the government. The agents on the ground were typically greeted with aggression, being called baby killers and child murderers after killing the Weavers 14-year-old son. To make matters worse, Vicki Weaver was shot in the head and died as she was holding her infant child. The FBI was not aware they had killed Vicki Weaver and after her death they continued to ask her to negotiate with the authorities, via loudspeaker. The federal government killed a citizen who was holding her daughter, then repeatedly called for her on the loud speaker for days after her death. These actions reinforced many anti-government beliefs in individuals who were already disenfranchised. The incident at Ruby Ridge "began a movement founded on anti-government ideology. The internet age has spread its message wider"<sup>57</sup> Ruby Ridge is one the first mod-

ern examples of individuals being murdered by the federal government that rallied the far right, and it gained attention as "other far-right groups poured in from all over the country to stand against what they saw as the persecution of an innocent family by a tyrannical federal government."<sup>58</sup> Ruby Ridge, in the eyes of those on the fringe of the right, "became a demarcation point for the rise of the modern militia movement,"<sup>59</sup> as it reinforced their concerns of an oppressive, tyrannical government.

Militia groups today, both "large and small, used the story of Ruby Ridge to recruit people, and to amplify existing anti-government belief,"<sup>60</sup> and "groups from Montana to south-west Oregon combined different forms of anti-government ideology, such as fears about gun confiscation and grievances about federal land management practices."<sup>61</sup> Ruby Ridge reinforced, reinvigorated, and reawakened fears of the federal government. The Waco Siege, coming less than a year later, doubled down on this.

The Waco Siege started on February 28<sup>th</sup>, 1993 and culminated on April 19<sup>th</sup> of the same year. Like the Ruby Ridge Standoff, since its occurrence it been used as an example of the federal government violating rights of citizens. The standoff that took place was between Branch Davidians, following religious leader David Koresh, and both the State and Federal government. The ATF, (Bureau of Alcohol, Tobacco, and Firearms) a federal governmental agency, had search warrants against the Branch Davidians in the Mount Carmel compound where they stayed and lived. The ATF suspected that Koresh and his followers were stockpiling illegal weapons and illegal explosives. Many of Koresh's followers believed him to be Jesus Christ, that he "was the almighty Lamb of God."<sup>62</sup> His followers perceived this as a religious battle that Koresh had predicted and wanted.<sup>63</sup> When the ATF attempted to raid the compound, a firefought occurred. There is continued debate over who fired the first shots as the raid kicked off, and "ATF agents who participated in the raid have testified in court and at a congressional hearing that the Branch Davidians fired the first shots. Right after the raid, however, one ATF agent told an investigator that a fellow agent may have shot first, when he killed a dog outside the compound."<sup>64</sup> While who fired first will never be

known, many who supported the Branch Davidians felt that this was the federal government failing to acknowledge a citizen's constitutional rights.<sup>65</sup>

Waco brought together a lot of fears from both sides, as it “combined God and guns – the right to religious freedom and the right to bear arms—with the fear that federal government would remove those rights, and the federal government's fear of its more extreme citizens.”<sup>66</sup> The siege ended with tear gas being fired by the federal government and a fire erupting, broadcasted live on television watched by many. The vast majority of Branch Davidians and followers inside died, and there is sufficient evidence that Koresh and his followers ignited the fire. Many evangelical Christians were disturbed by what they saw play out on live television during the days as the siege went on, and it has been used since 1993 to “support narratives later exploited by domestic terrorists.”<sup>67</sup> One of the starkest examples of this is with Timothy McVeigh, who, “incensed by reports of the siege at Mount Carmel, travels to Texas to visit the site.”<sup>68</sup> While he was stopped short of the compound itself, McVeigh felt treatment of the Branch Davidians unjust, and more importantly, unconstitutional. In 1995, on the two-year anniversary of the final disaster at Waco, McVeigh would carry out the Oklahoma City Bombing, killing one hundred and sixty eight people with a bomb outside the Alfred P. Murrah Federal Building. To some people, McVeigh included, “Koresh and the Davidians were martyred as a community of God-fearing if unconventional Christians whose freedoms should have been guaranteed by the US Constitution, but who were instead killed by an ever more controlling government.”<sup>69</sup> Both Ruby Ridge and Waco have allowed these concerns, of an overreaching government violating the constitution and rights of individuals, to gain some legitimacy. Since these incidents, the fear of tyrannical government has only grown, and distancing oneself from mainstream society has grown in popularity.

The idea of being self-reliant, living off the grid and not needing government assistance, is gaining momentum. People want to disconnect as they feel like the government is becoming more extreme and “perhaps the biggest motivation at the moment is a loss of trust in the government

and the ability of social networks to look after us. These are people who feel as if society no longer provides the sense of safety that they require.”<sup>70</sup> The idea of living off the grid has grown in popularity but in some areas the state government is at odds with individuals ability to survive. In some areas individuals are legally obligated to purchase their water, or to use electricity from the power company, not personal solar panels. As the state becomes more invasive, individuals who are already concerned with government oversteps will only become more alarmed. Distrust in government response has grown in recent years in the aftermath of Ruby Ridge, Bundy Ranch, and Waco, Texas. Individuals are not wrong for not expecting government assistance except delayed responses, anticipating the rapid state loss of monopoly on violence and a necessity to defend ones natural rights. Stockpiling is an extreme way in which people manifest their fears, whether irrational or rational, on government stability and legitimacy.

The state has at times failed to protect its people and individuals have had to directly protect themselves, becoming the primary monopoly of violence instead of the state. This is often a sudden and short-term monopoly as the state recovers, responds and reacts to the civil unrest or natural disaster that came. When the state has the primary monopoly on violence the private citizen only has to worry about criminal threats, but when the state loses that monopoly the citizen must defend themselves more vigorously as the state plays no role in defense of citizens against violence. State failure for short term periods of time has been known to happen, and these individuals who stockpile often believe that the state loss of monopoly on violence could be long term – that not only for short term times will the state abandon its people and its job. Another concern those who stockpile have is the illegitimate use of violence against them by the state, reinforced by previous illegitimate uses of violence by the state, such as Ruby Ridge and in Waco, Texas, and more recently with the Bundy Ranch Standoff. There is obviously one's natural right to defend oneself from an unjust and tyrannical government, and the stockpiling also reflect concerns of state legitimacy and its future actions and accountability to the people it supposedly serves, with individuals believing the illegiti-

mate use to be at the bare minimum a possibility. There are three uses of legitimate violence by private citizens. These three situations are firstly when the state loses monopoly on violence in cases of disasters, when state cannot protect its people, and secondly the use of legitimate violence against an illegitimate state. Thirdly, legitimate violence can be used to defend oneself. In this first case the state is still the primary user of legitimate violence, having merely lost the monopoly for short periods of times while it responds to civil unrest and natural disasters. An example of this would be Koreatown during 1992 Los Angeles Riots, where Korean “stores’ owners assembled with weapons to protect their properties,”<sup>71</sup> after the police had abandoned the neighborhood. The second reason for legitimate violence by private citizens is against the state when the citizens feel their natural rights are violated, such as in the cases of Bundy Ranch, Ruby Ridge, and Waco. A criminal attack where one must defend oneself is another example of legitimate violence. The reality is that “for many conservative men, the gun feels like a force for order in a chaotic world.”<sup>72</sup> It allows individuals to believe they are in control, whether or not they are.

The reasons for ownership and types of ownership of firearms are indicative of concerns with the legitimacy of violence or violations of natural law by the state, and the Second Amendment creates a unique position for the state. The monopoly on violence is easy to lose rapidly in times of chaos yet a state is able to regain the monopoly. However, the United States does not have a true monopoly on violence due to the Second Amendment and acknowledgment of natural law, as seen in the case of Henry Magee. However, the state is the primary legitimate power, as private legitimate violence is used predominantly during threats against natural law during criminal attacks, not sought out or used preemptively like the use of legitimate violence by the state. The reason for firearm ownership has shifted over time, and whether or not this is indicative of the reality of the legitimacy and success of the state, a growing number of people believe they need a firearm for self-defense, because of marketing, political campaigns, or perceived threats towards their culture and beliefs or government oversteps. These concerns are not completely irrational as

the state has, at times, failed to protect its people, or used illegitimate violence against its citizens, and when the state disappears, it is no longer the primary holder of legitimate violence, as the state itself is no longer legitimate in that moment.

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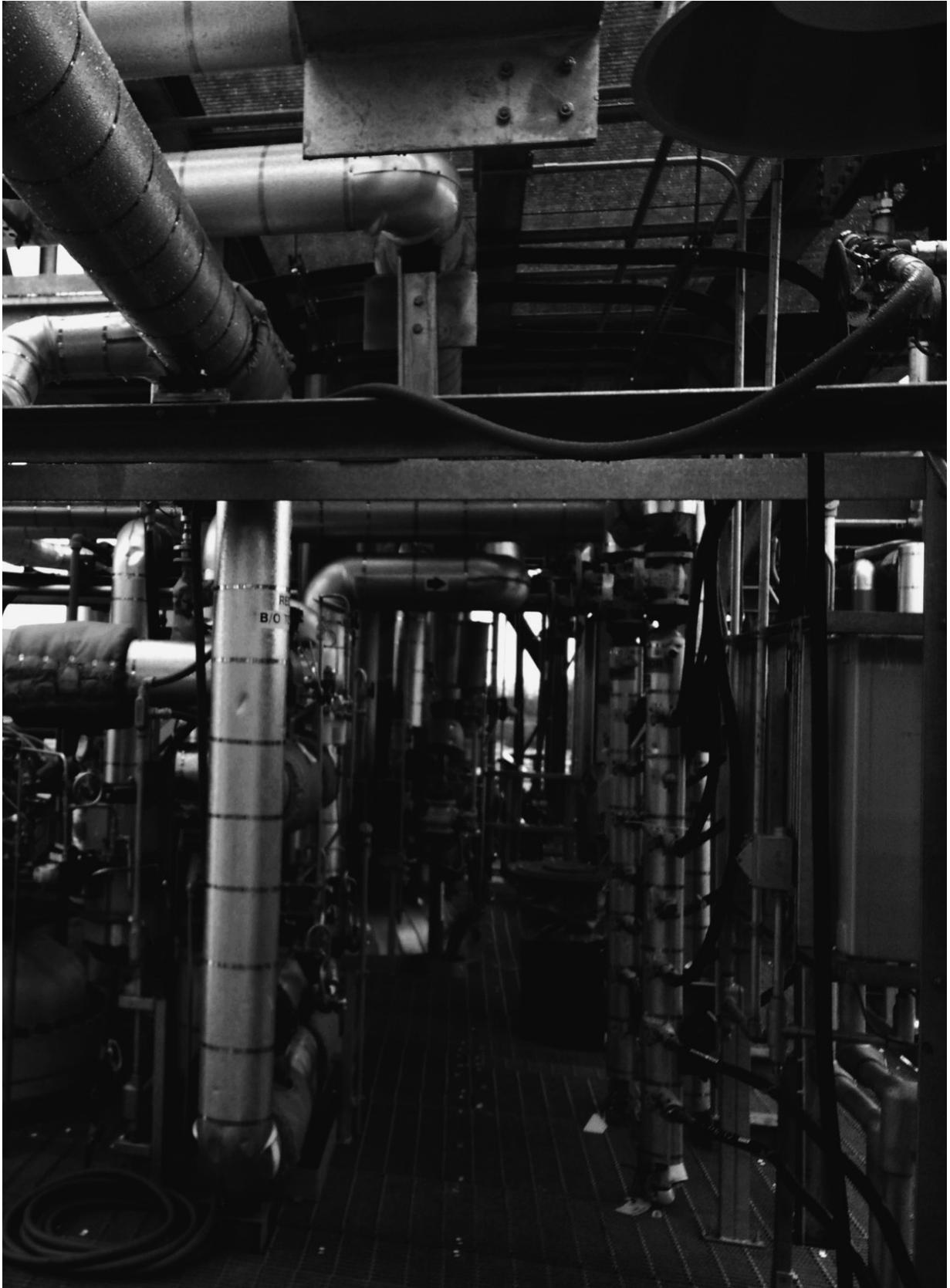


IMAGE BY ISABELLA KLEIN

# THE WARREN COURT'S CRIMINAL DUE PROCESS REVOLUTION

BY AUSTIN OCHOA

*"We must have vigorous enforcement of the law, but that enforcement must be fair, equal in its application, and in accordance with our time-honored and loudly professed freedoms."*

—Chief Justice Earl Warren

Abstract: I look to answer how the Warren Court's criminal due process revolution greatly expanded the reach of the federal judiciary. The political implications that the Warren Court's revolution had in the United States expanded the reach and discretion of the federal judiciary, whose efforts were focused on stopping constitutional violations and police abuses by the states. Throughout this paper, I will examine how the Supreme Court rebalanced the scales of justice through a number of judicial decisions that incorporated due process rights for the criminally accused in the United States. In addition, I will highlight a number of political implications beyond those addressed by the Supreme Court, such as the impact on federalism issues, police powers, and procedural law within state courts. The Warren Court's criminal due process revolution had a lasting impact on procedural inequalities within the justice system and police powers within states that the Court was able to address because of the strength and courage that the Warren Court demonstrated in the 1960s.

Keywords: Rights of the Accused; Criminal Law; Warren Court; Constitutional Law



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## INTRODUCTION

In 1789, James Madison submitted a list of seventeen proposed amendments aimed at safeguarding

personal freedoms against tyranny by the federal government. In a speech to the House of Representatives he stated, "in revising the Constitution, we may throw into that section, which interdicts the abuse of certain powers of the State legislatures, some other provisions of equal, if not greater importance than those already made." Madison's proposed fourteenth amendment stated, "no state shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases." However, his proposal failed to get congressional approval in the Senate and was never considered by the states at their conventions when adopting what eventually became known as the Bill of Rights. In 1791, the framers adopted the first ten amendments of the United States (U.S) Constitution which created the Bill of Rights. At the time, Federalists argued against the inclusion of a Bill of Rights because they trusted the states to keep all inherent and implied powers not expressed in the Constitution from the federal government. Also, important to note that the Federalists could not have envisioned the size in which both the U.S. population as well as the federal government would come to grow over the next two hundred years. In the Federalist No. 9 and No. 10, Alexander Hamilton and James Madison famously responded to the concerns highlighted by the Anti-Federalists about their fears of an oppressive federal government:

"the proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government... the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens..."<sup>1</sup>

Anti-Federalists, whose concerns about an oppressive federal government were magnified by the newly expanded constitution. Robert Yates, an An-

ti-Federalist from New York, argued for greater constitutional protection for individual liberties and believed that a bill of rights was necessary to safeguard such liberties. In Brutus No. 2 published in 1787, Anti-Federalists responded to Madison's Federalist No. 10 by reaffirming their concerns regarding the potential consequences of not including a Bill of Rights into the newly passed U.S. Constitution:

"This principle, which seems so evidently founded in the reason and nature of things, is confirmed by universal experience. Those who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty. This has induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachments of their rulers. The country from which we have derived our origin, is an eminent example of this. Their magna charta and bill of rights have long been the boast, as well as the security, of that nation. I need say no more, I presume, to an American, then, that this principle is a fundamental one, in all the constitutions of our own states; there is not one of them but what is either founded on a declaration or bill of rights, or has certain express reservation of rights interwoven in the body of them. From this it appears, that at a time when the pulse of liberty beat high and when an appeal was made to the people to form constitutions for the government of themselves, it was their universal sense, that such declarations should make a part of their frames of government. It is therefore the more astonishing, that this grand security, to the rights of the people, is not to be found in this constitution."<sup>2</sup>

The Bill of Rights, however, did not apply to the states because "the consensus was that the federal government was the more likely threat."<sup>3</sup> This consensus was affirmed in *Barron v. Baltimore (1833)*. The Court unanimously held that "the limitations on government articulated in the Fifth Amendment were specifically intended to limit the powers of the national government." In the Court's decision, Chief Justice Marshall cited the intent of the framers and "the development of the Bill of Rights as an exclusive check on the government in Washington D.C." Further, Chief Justice Marshall argued that "the Supreme Court had no jurisdiction in this case since the Fifth Amendment

was not applicable to the states." The Court's decision in *Barron v. Baltimore (1833)* reaffirmed the consensus of the framers that the Bill of Rights was intended to provide a check on the federal government, not state government. Constitutional scholars Lee Epstein and Thomas Walker argue that "Congress's refusal to adopt James Madison's original fourteenth amendment may have meant that the founders never intended for the Bill of Rights to be applied to the states of their local governments."<sup>4</sup> This consensus held strong in several other cases before the Court prior to the Civil War and the subsequent passing of the Fourteenth Amendment. The Court's interpretation of the Constitution in *Barron* meant, the full-veracity of the of the Bill of Rights, specifically criminal due process rights, did not apply to those accused of crime in the state courts. This application of criminal due process rights had major political implications that would surface in courtrooms across the country over the next two centuries, up until today.

The ratification of the Fourteenth Amendment in 1868 granted citizenship to "all persons born or naturalized in the United States" including former slaves who had just been freed following the Civil War. However, the Fourteenth Amendment also affirmed that no state can deny any person "life, liberty or property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment's Due Process Clause opened the door for the possibility that it could be used to incorporate the Bill of Rights to limit the powers of state governments, and not just the federal government, as was originally intended by the framers. It was the Fourteenth Amendment that would be used as a tool by the Warren Court to incorporate the constitutional safeguards within the Bill of Rights into the states.

## LITERATURE REVIEW:

### JUDICIALLY-CREATED REMEDY OR A CONSTITUTIONAL REQUIREMENT?

The theories that currently exist in constitutional scholarship suggest that the Warren Court represents the "start" and "finish of the criminal due process rights revolution, however, I suggest that it was only the beginning. Incorporation provided the Court a second wind which enabled the federal judiciary to greatly expand its reach and to at-

tempt to fix procedural injustices as they appeared throughout all branches of the criminal justice system. Throughout this thesis, I will demonstrate the progression of criminal procedural case law decided by the Court that would not have been possible without the Warren Court extending the reach of federal judiciary in *Mapp v. Ohio* (1961).



Image by Gadsen and Culpeper

There are at least two ways to think about the Warren Court's role in deciding to expand its reach through the incorporation doctrine. Strict constitutional scholars refer to the "nationalization of the Bill of Rights as the creation of a second bill of rights."<sup>5</sup> Scholars critical of the Warren Court suggest that its decision to nationally incorporate the Bill of Rights was a "result of an activist, result orientated Court... that lacked the support in the original intent of meaning by the framers and was not expressed or implied in the Constitution."<sup>6</sup> Robert G. McCloskey of Harvard Law School portrays the Court's decision to incorporate criminal due process rights under *Mapp v. Ohio* (1961) as acting as a super legislature.<sup>7</sup> Further, McCloskey criticized the Court's decision to incorporate by arguing that the rulings violated the principle of judicial restraint.<sup>8</sup> However, as this thesis will consistently demonstrate, it was the actions taken by the Warren Court that corrected procedural injustices that state legislatures did not address as they appeared throughout the country before *Mapp*.

Long highlights that those critical of the incorporation doctrine characterized the decision in *Mapp v. Ohio* (1961) as a "judicial creation of recent origin" and denounced the Court for intruding on the constitutional principle of federalism because of the

its effort to impose its view of due process upon the state.<sup>9</sup> For the scope of this paper, I look to build the case that without the Warren Court's decision to nationally incorporate the Bill of Rights, criminal procedure in the United States would not be fair or equal as required by the Constitution.

The Warren Court's decision to adopt the incorporation doctrine enabled the Court to address injustice within state courts by safeguarding criminal procedural rights that Chief Justice Warren would characterize as an attempt to professionalize police and ensure more effective law enforcement.<sup>10</sup> Chief Justice Warren's goal when incorporating the Bill of Rights to "rid law enforcement of its coercive and unethical features and addressing procedural flaws in a system that disadvantages criminal defends" empowered the Court to address criminal procedural inequalities throughout the country as they appeared throughout time following the first incorporated case in *Mapp v. Ohio* (1961).

The Supreme Court developed two approaches when addressing the incorporation of the Bill of Rights. Some justices argued for "the total incorporation of all the rights," while others argued that the rights should be selectively incorporated depending on whether they were considered fundamental.<sup>11</sup> Over the next 150 years, majorities on the Court adopted the approach to selectively incorporate the Bill of Rights when reviewing challenges to state power. The decision by the Warren Court to begin incorporating due process rights had massive political implications throughout the country. The Warren Court's decision to incorporate the Bill of Rights required law enforcement and state courts around the country to follow in lock-step as it steadily began to address each criminal due process right, case-by-case, one procedural safeguard at a time, as the federal government asserted its will on to the states in an effort to create a more equal and fair procedural system within courts throughout the country.

## ANALYSIS

### SETTING THE STAGE

In 1925, for the first time in U.S. history, the Supreme Court applied the force of a constitutional amendment to the states through the use of the Due Process Clause, establishing the birth

of the incorporation doctrine. The right to freedom of speech was incorporated into the Due Process Clause of the Fourteenth Amendment in *Gitlow v. New York (1925)*. Gitlow was arrested for distributing copies of a manifesto that called for the establishment of socialism through strikes and class action of any form. Gitlow was arrested and convicted under a state criminal anarchy law, which punished advocating the overthrow of the government by force. At trial, Gitlow argued that there was no resulting action following the manifesto's publication. The New York courts had decided that anyone who advocated the doctrine of violent revolution violated the law. In the Court's decision, Justice Sanford held that the First Amendment applied to all states "by virtue of the liberty protected by due process that no state shall deny Fourteenth Amendment protections." Following the landmark decision in *Gitlow v. New York (1925)*, the Court incorporated the right to freedom of press in *Near v. Minnesota (1931)*. Jay Near published a scandal in Minneapolis, in which he attacked local officials, charging that they were implicated with local gangs. State officials obtained an injunction to prevent Near from publishing his newspaper under a state law that allowed such action against periodicals. The law stated that "any person engaged in the business of regularly publishing or circulating an obscene, lewd, and lascivious or a malicious, scandalous and defamatory newspaper or periodical was guilty of a nuisance, and could be stopped from further committing or maintaining the nuisance." In the Court's decision, Justice Hughes held that the statute authorizing the injunction was unconstitutional. The Court also held that "the statutory scheme constituted a prior restraint and hence was invalid under the First Amendment." The decision established that the government, both state and federal, could not censor or prohibit a publication in advance, even though the communication might be punishable after publication. The Court incorporated the freedom to peacefully assemble in *De Jonge v. Oregon (1937)*. Dirk De Jonge addressed an audience regarding jail conditions in the county and a maritime strike in progress in Portland at a meeting held by the Communist Party. Police raided the meeting to arrest and charge De Jonge with violating the state's criminal syndicalism statute. The state law defined crimi-

nal syndicalism as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." However, the Oregon State Supreme Court held that the indictment did not charge De Jonge with criminal syndicalism, but rather that "he presided at, conducted and assisted in conducting an assemblage of persons, organization, society and group called by the Communist Party, which was unlawfully teaching and advocating in Multnomah county the doctrine of criminal syndicalism and sabotage."

De Jonge's lawyers challenged the State's Supreme Court decision at the U.S. Supreme Court, arguing that "the criminal syndicalism statute violates the Due Process Clause of the Fourteenth Amendment." The Court held that the Oregon statute violated the Due Process Clause of the Fourteenth Amendment, and reasoned that "to preserve the rights of free speech and peaceable assembly - principles embodied in the Fourteenth Amendment - not the auspices under which a meeting is held, but the purpose of the meeting and whether the speakers' remarks transcend the bounds of freedom of speech must be examined, which had not occurred in De Jonge's case." The decision by the Court in *De Jonge v. Oregon (1937)* established for the third time in history that there were selective cases which were fundamental "and therefore meritorious of protection from both federal and state abuses of power."<sup>12</sup>

The Court never fully explained its theory behind why certain rights were now considered fundamental in the three original landmark cases that adopted the incorporation doctrine. The Court's decision, starting in 1925, to selectively incorporate constitutional amendments through the Due Process Clause of the Fourteenth Amendment established a newly found discretionary power to judicially review the applicability of the Bill of Rights on to states when necessary, or as considered to be fundamental by the Court on a case-by-case basis. This is important because following the historic ruling in *Gitlow v. New York (1925)* the Supreme Court inherited the discretion to apply the federal reach of constitutional protections to safeguard individual liberties and criminal procedure against state action.

Justice Benjamin Cardozo articulated the Court's approach to the absorb Bill of Rights protections into the Fourteenth Amendment Due Process Clause in *Palko v. Connecticut* (1937). In the majority opinion Justice Cardozo articulated that "some, but not all, of the provisions in the Bill of Rights were in a preferred position and the Court should incorporate only those rights that are implicit in the concept of ordered liberty and so rooted in the tradition and conscience of our people as to be ranked as fundamental." Further, he noted, "the rights absorbed into the Due Process Clause reflected the belief that neither liberty nor justice would exist if there were sacrificed." Justice Cardozo went a step further and established a framework for what the Court should consider when deciding whether a right should be incorporated or not. He stated, "the Court should ask whether violation of the right would be so shocking that our policy will not bear it or whether it would contravene the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions... if a majority decided this was the case, then the right should be considered in a preferred position and thus worthy of absorption." Justice Cardozo's historic written decision provided the framework for the Court to continue absorbing constitutional rights that were deemed subjectively fundamental, and for the first time ever, language existed in a Court's official decision that provided the justification of such actions moving forward.

The right to the free exercise of religion was deemed fundamental and incorporated into the Due Process Clause in *Cantwell v. Connecticut* (1940). Jesse Cantwell and his son were Jehovah's Witnesses. The Cantwells distributed religious materials by travelling door to door, and by approaching people on the street. After voluntarily hearing an anti-Roman Catholic message on the Cantwells' portable phonograph, two pedestrians reacted angrily. The Cantwells were subsequently arrested for violating a local ordinance requiring a permit for solicitation and for inciting a breach of the peace. Upon conviction, Cantwell challenged the State of Connecticut at the Supreme Court arguing that that solicitation statute or the "breach of the peace" ordinance violated his First Amendment rights. The Court held, "while general regulations on solicitation were legitimate, re-

strictions based on religious grounds were not... because the statute allowed local officials to determine which causes were religious and which ones were not, it violated the First and Fourteenth Amendments." The decision expanded the Court's portfolio to include greater national First Amendment protections. *Cantwell* also provided the Court an opportunity to continue expanding the breadth of the federal judiciary, which eventually allowed it to begin considering more cases with greater implications, such as criminal due process cases a decade later in *Wolf v. Colorado* (1949).

The right to be free against unreasonable search and seizure by the state was first recognized in *Wolf v. Colorado* (1949). Julius Wolf, and two others were charged and jointly tried with conspiracy to perform an abortion. At trial, Wolf objected to evidence that was used by the state, which would have been inadmissible if he were tried in a federal court by federal prosecutors. The Colorado Supreme Court upheld the conviction, in which evidence was admitted that would have been inadmissible in a prosecution for violation of a federal law in a federal court. Wolf challenged his conviction arguing that the State of Colorado was required to exclude illegally seized evidence from trial under the Fourth and Fourteenth Amendments.

In a 6-to-3 decision the Court held that the Fourteenth Amendment did not subject criminal justice systems in the states to specific limitations and did not require that all illegally obtained evidence had to be excluded from trials in all cases. The Court reasoned that "while the exclusion of evidence may have been an effective way to deter unreasonable searches, other methods could be equally effective and would not fall below the minimal standards assured by the Due Process Clause." In *Wolf*, the Court acknowledged, in a strict and narrow decision, that criminal defendants have the right to be free against unreasonable search and seizure. However, it did not include the means in which the decision would be enforced and required by the states as it would twelve years later in *Mapp v. Ohio* (1961). With the framework for the right to be free against unreasonable search and seizure acknowledged in *Wolf v. Colorado* (1949), the stage was set for the Court to begin considering expanding criminal procedural due

process rights for defendants in state courts.

#### THE WARREN COURT'S REVOLUTION

Chief Justice Earl Warren, a former prosecutor would characterize his Court's decision to revolutionize and evolve criminal procedure as an attempt to "professionalize police and ensure more effective law enforcement."<sup>13</sup> Warren thought of the Court as a protector of the public, with the means to restore ethics and mind the conducts of legislators.<sup>14</sup> In Earl Warren's 1972 book, *A Republic, If You Can Keep It*, he stated that the incorporated decisions made during his tenure "were aimed at ridding law enforcement of its coercive and unethical features and addressing procedural flaws in a system that disadvantages criminal defendants... we must have vigorous enforcement of the law, but that enforcement must be fair, equal in its application, and in accordance with our time-honored and loudly professed freedoms."<sup>15</sup> The majority on the Warren Court did not view the Constitution as text alone, it was viewed as living document. The Warren Court's view that the Constitution was a living document meant that it's interpretation of the text within the Con

stitution would evolve throughout time as the social mores of the country's citizenry progressed.

#### FOURTH AMENDMENT DUE PROCESS RIGHTS AND IMPLICATIONS

After fully-incorporating the First Amendment, the Court tasked itself with reviewing criminal procedure rights. However, unlike the First Amendment incorporation cases, where "the actual guarantee was fully absorbed into the Due Process Clause of the Fourteenth Amendment, the Court examined on a case-by-case basis whether a criminal defendant received a fair hearing as a requirement of due process."<sup>16</sup> As constitutional scholar Carolyn Long highlights, "in doing so, it implicitly declared that Bill of Rights guarantees protecting criminal defendants were not fundamental and therefore not incorporated into the Due Process Clause of the Fourteenth Amendment."<sup>17</sup> However, the Court's decision to selectively review criminal procedure on a case-by-case basis was the only viable and well-reasoned option. Doing it any other way would have been an improper encroachment by the federal government, and more so, it would have been detrimental to the integrity of the justice system within state courts due to the Courts' decision's sudden and immediate impact. While Long's analysis is not wrong, it is framed and rooted in a misguided understanding of the Court's discretion and broad impact that decisions immediately have on state courts.

Following *Mapp v. Ohio* (1961), the Warren Court began to selectively incorporate criminal procedural rights against state action. The Court's decision in *Mapp* was "the catalyst which started the criminal due process revolution that significantly expanded the rights of criminal defendants in state courts."<sup>18</sup> Although "the impact of these criminal procedure decisions was widespread because law enforcement investigatory activities and the prosecution of criminal defendants are handled largely at the state and local level" that impact was limited because of the Court's approach to selectively incorporate. However, even though the Court decided to selectively incorporate each of the criminal due process rights case-by-case, "federalizing these guarantees would affect millions of cases each year" due to the extent of the Court's newly claimed reach.<sup>19</sup> Long also highlights, "many judicial scholars have observed



Image via Time Magazine

that the Warren Courts decision to selectively incorporate criminal procedural rights against state action was its most important legacy.”<sup>20</sup>

The decision in *Mapp v. Ohio* (1961) applied the requirement of excluding illegally obtained evidence from the courts to all levels of government. The 6-3 decision reaffirmed Fourth Amendment protections that “all evidence obtained by searches and seizures is in violation of the Constitution.” The Court explained that its decision to recognize the exclusionary rule derived not from a judicial remedy of the Court, but rather from a Constitutional requirement in the Bill of Rights. In *Mapp*, the Court held that “the philosophy of each Amendment and of each freedom is complementary to the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.”<sup>21</sup> The decision would be the start of a criminal due process revolution that’s aim was to address the inability state legislatures exhibited to address law enforcement abuses in their own courts.

The exclusionary rule was recognized by the Court in 1961 to uphold integrity in the justice system—the type of integrity that demands respect for the legal system and guarantees procedural fairness. The Court initially recognized the exclusionary rule to deter law enforcement from violating the Fourth Amendment of the U.S. Constitution and to guarantee equal criminal procedure within state courts for all Americans. In *Mapp*, police broke into a privately-owned home without a search warrant in the early morning hours to conduct a raid based on an anonymous tip. Long notes, “to Mapp and others in the African-American community, local law enforcement consistently and purposefully harassed them. And they did so knowing they themselves were violating the law... the white police officers who invaded Dollree Mapp’s home did so with confidence that they would not be called to task for violating her fundamental rights by entering her home without a warrant.”<sup>22</sup> Stories like that experienced by Dollree Mapp were “not unusual at this time in our country’s history.”<sup>23</sup> However, the problem as seen in *Mapp* was that, “police misconduct was so common that it was seen as legitimate.”<sup>24</sup> The state’s blatant disregard for fundamental due process rights, which

were afforded to those accused of crime in federal courts, had severe consequences on people’s liberty in the U.S. before the Court decided to hear *Mapp*. As one constitutional scholar highlights:

“the illegal entry of Mapp’s house by the police was nothing extraordinary; it was an everyday fact of life for blacks and other racial minorities. Police throughout America were part of the machinery of keeping blacks in their place, ignoring constitutional guarantees against unreasonable arrests and searches and those that barred the use of third degree tactics when questioning suspects. The Constitution played littler role in the relationship between blacks and the police, and the black population had little power at the time to seek redress through the political process.”<sup>25</sup>

As originally intended, the exclusionary rule was applicable to illegally obtained evidence from an unreasonable search or seizure. The exclusionary rule derived from the intention to provide checks and balances to a system whose power, if unchecked, has the potential to severely undermine the rights of the accused, and undermine the justice system as a whole. Before *Mapp*, local and state police conducted blanket searches of homes without first obtaining a search warrant based upon probable cause as required by the Fourth Amendment. Cleveland, Ohio’s police powers went unchecked up until 1961. Following the Court’s decision in *Mapp*, it was required that police follow the language set forth and established in the Fourth Amendment of the Bill of Rights. The exclusionary rule is an invaluable tool for the integrity of the justice system, as the rule guarantees Constitutional protections for those accused of crime, ensures checks and balance on law enforcement, and most importantly, it provides the constitutional framework for the justice system to procedurally function fairly and uniformly just throughout the country.

In *Mapp*, the Court held that “a federal prosecutor may make no use of evidence illegally seized, but a State’s attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment”<sup>26</sup>. Before the Court’s decision in *Mapp* to incorporate Fourth Amendment due process rights, criminal defendants in state courts were not protected by the same due process rights as those accused

in federal courts. The decision in *Mapp* had real political implications on local communities as demonstrated in Cleveland, Ohio. Constitutional scholar Roger J. Traynor highlights in Duke Law School's law review in 1961, "they (the Court) more likely presented the dilemma that compels balancing the very present evil of freeing the guilty against the evil threat that condonation of lawless police action bodes for the right to privacy of the law-abiding"<sup>27</sup>. By 1961, "roughly half of the states had adopted the exclusionary rule, with local variations." Any state that adopted its own exclusionary rule learned that "the day-to-day responsibility of policing the police involves close and continual examination of local police practices in the context of local community problems and local statutes"<sup>28</sup>. Detractors of the Court's decision in *Mapp* point to the seemingly heavy burden that the exclusionary rule put on local law enforcement. However, it is this exact burden, that requires local and state law enforcement to conduct themselves in a professional and constitutional manner, that upholds the integrity of the justice system as a whole. In essence, the Warren Court told state and local law enforcement to do their job, and do it within the confines of the Constitution.

Traynor addresses further detractors of the Court's decision in *Mapp* by stating, "it is not the purpose of the exclusionary rule to protect the guilty... its purpose of deterring lawless law enforcement will be amply served in any state from now on by affording defendants an orderly procedure for challenging the admissibility of the evidence at or before trial and on appeal"<sup>29</sup>. As Traynor highlights, further political implication of the exclusionary rule included the potential of a guilty defendant going free. However, Justice Clark responded to detractors of the Court's decision in *Mapp* by stating:

"In some cases, this will undoubtedly be the result. But, as was said in *Elkins*, there is another consideration—the imperative of judicial integrity... the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence"<sup>30</sup>

In *Mapp*, the Court recognized that it was one

thing to excuse an occasional blunder and accept illegally obtained evidence so that the guilty would not go free. However, it was quite another to "condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state constitution," as Long also highlights in her analysis.<sup>31</sup> The historic and controversial decision in *Mapp* set the precedent for the Court to begin judicially reviewing procedural injustices within state criminal courts for the indefinite future.



Image by Michal Kalasek

#### EIGHTH AMENDMENT DUE PROCESS RIGHTS AND IMPLICATIONS

The next right deemed fundamental and incorporated was the Eighth Amendment ban against cruel and unusual punishment in *Robinson v. California (1962)*. Lawrence Robinson was convicted under a California statute that made it a criminal offense for a person to "be addicted to the use of narcotics." The law's mandatory minimum required a jail sentence of 90 days. Robinson appealed to the Supreme Court arguing that the law he was convicted under was a constitutional violation of the cruel and unusual punishment prohibited by the Eighth Amendment. In a 6-to-2 decision, the Court held that laws punishing a person "afflicted with the illness of narcotic addiction inflicted cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments.

The Court's decision in *Robinson* represented something much more than just a ban against cruel and unusual punishment by the government. However, that does not mean the Court's decision did not have an immediate impact. The decision in *Robinson* put state legislatures on notice. More so, the Court interjected in a big way into the na-

tional discussion by making it very clear that an addiction to drugs is an illness and not a crime.

Justice Potter famously held in the Court's decision that "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."<sup>32</sup> As David Herzberg, a faculty expert on drugs at the University of Buffalo states, "the decision serves as a convenient marker of the broader shift away from the punitive policies of the "classic era" of narcotics control and towards more medicalized approaches to addiction."<sup>33</sup> While Herzberg concedes that Justice Stewart's "humane intentions and his defense of the mentally ill, lepers and sufferers of "venereal disease" are still clear, but so to now is his willingness—even eagerness—to control addicts."<sup>34</sup> The decision in *Robinson* may not have been fully informed based on the science and statistics on these issues that are available today. However, the decision was still monumental and far beyond its time, because for the first time ever, the Court recognized that it may be sufficient for those addicted to narcotics to enter into "a program of compulsory treatment" instead of being thrown away in prison for an indefinite period of time.

The decision was broadened by Justice Douglas's concurring opinion in which he expanded upon Justice Stewart's reasoning to include those who are deemed to be insane by state officials. Justice Douglas argued, "addicts, like the insane, should no longer be penalized for their illness... this age of enlightenment cannot tolerate such barbarous action"<sup>35</sup>. However, as Herzberg notes, like Justice Stewart, "he too agreed that addicts may, of course, be confined for treatment or for the protection of society"<sup>36</sup>. Further, Herzberg argues:

"In other words, both Stewart and Douglas saw no problem with locking up addicts, as long as it was done for the purposes of treatment rather than punishment. This was no small concession, especially considering that they were writing after a decade of very high-profile exposés of horrifying conditions in the nation's psychiatric hospitals. Of course, there are very real, and very significant, differences between a criminal conviction and compulsory medical treatment. But there can also be very real, and very significant, similarities, even on

those measures the justices found most important: social stigma; loss of freedom; and, at least potentially, cruel and unusual punishment. From a half century's distance, the justices' unquestioned faith in the therapeutic enterprise stands out just as much, if not even more, than their humane sympathy for addicts."<sup>37</sup>

As evident through David Herzberg's analysis regarding that social ramifications of the decision in *Robinson*, it was not perfect and the Court's reasoning had its flaws. However, what the decision did do was allow for the stigmatization that those who are addicts are criminals to be challenged in the lexicon of the national debate on drugs that still exists today.

What is also intriguing and even more interesting about the Court's decision in *Robinson* were the political ramifications of the dissenting opinions. In the Court's dissenting opinions, Justice Clark and Justice White provided a road map for opponents of the drug-war laws that would follow. Justice Clark highlighted, "California's basis for jailing incipient, volitional addicts was that they posed a grave threat of future harmful conduct."<sup>38</sup> This was the same reasoning by which the state "criminalized the purchase, possession, or use of narcotics, even though none of those acts are harmful to society in themselves"<sup>39</sup>. As Herzberg notes, "if it was unconstitutional to criminalize the state of addiction, then how could it be acceptable to outlaw narcotics themselves?"<sup>40</sup> This paradox presented by the Court's dissenters in *Robinson* would later be cited in support for decisions legalizing gay marriage. Justice White held in his dissenting opinion:

"If it is 'cruel and unusual punishment' to convict the appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use [of narcotics]. It is significant that, in purporting to reaffirm the power of the States to deal with the narcotics traffic, the Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent... The Court has not merely tidied up California's law by removing some irritating vestige of an outmoded approach to the control of narcotics... it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment."<sup>41</sup>

The political ramifications of the decision by the Court in *Robinson* are still evident today through the criminalization of the use of narcotics. Herzberg states, “as the dissenters saw it, Stewart and the Court’s liberal majority wanted to have it both ways: they wanted to stand nobly against the punitive regime, while continuing to enable the state to exert tight control over drug users under the aegis of therapy”<sup>42</sup>. Clark and White were skeptical of the distinctions being drawn between the different types of state control. While no Court has “picked up on the dissenters’ reasoning to invalidate the criminalization of narcotics,” drug reformers can point to the dissenters in *Robinson* as a source to decriminalize addiction and drug use full-circle.

#### SIXTH AMENDMENT DUE PROCESS RIGHTS AND IMPLICATIONS

In 1963, Attorney General Robert F. Kennedy stated in the “Speech Before the New England Conference on the Defense of Indigent Persons Accused of Crime,” “if an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the Court had not taken the trouble to look for merit in that one crude petition ... the vast machinery of American law would have gone on functioning undisturbed. But Gideon did write that letter, the Court did look into his case ... and the whole course of American legal history has been changed.” In *Gideon v. Wainwright* (1963), perhaps the case with one of the most relevant and visible decisions still seen today, the Court incorporated the right to assistance of counsel to all indigent defendants charged in state courts. Clarence Earl Gideon was charged with a felony in the State of Florida. Upon requesting assistance of counsel, Gideon was denied on the basis that Florida state law required an attorney be appointed to indigent defendants in capital cases. Gideon then moved forward by representing himself, was found guilty, and sentenced to five years in prison. After being denied habeas corpus relief by the Florida Supreme Court, Gideon appealed to the Supreme Court, arguing that the Sixth Amendment’s right to counsel in criminal cases should extend to felony defendants in state courts.

The Supreme Court, in a rare unanimous decision, held that “the framers of the Constitution placed a high value on the right of the accused to have the

means to put up a proper defense, and the state as well as federal courts must respect that right”<sup>43</sup>. Justice Hugo L. Black held in the Court’s majority opinion that “it was consistent with the Constitution to require state courts to appoint attorneys for defendants who could not afford to retain counsel on their own”<sup>44</sup>. The Court took an opportunity to strengthen the incorporation doctrine in *Gideon* by writing three separate concurring opinions, all in support of there being an inherent right in the Constitution that “guarantees the right to counsel as a protection of due process, and there is no reason to apply that protection in certain cases but not others”<sup>45</sup>. However, within those three concurring opinions, Justice John M. Harlan conservatively reaffirmed the Court’s earlier adoption of selectively incorporating criminal procedure cases by stating, “the majority’s opinion recognized a right to be valid in state courts as well as federal ones; it did not apply a vast body of federal law to the states”<sup>46</sup>. Despite Justice Harlan’s concerns in his concurring opinion, the famous “lone dissenter,” would again be the lone voice, as the Court surged ahead to expand *Gideon*, in *Douglas v. California* (1963). However, Justice Harlan’s conservative approach affirmed in *Gideon* would be used as support for later Courts to dismantle parts of the incorporation doctrine years later.

The implications of the Court’s decision in *Gideon* are taken for granted today. Before the Court’s decision in 1963, the right to a public defender was not applied to every criminal trial, and a person with no legal background was forced to defend themselves against crimes the state courts deemed unworthy of court-appointed counsel, putting the defendant’s liberty and freedom in jeopardy because of their lack of understanding of the law and criminal procedure.

The rare consensus that the Court had when deciding *Gideon* shows the importance of the constitutional right deemed fundamental in 1963. All across the country, defendants are arraigned in front of a judge. The split-second on-the-spot decisions that defendants are required to make at arraignment require a full-understanding of criminal procedure, and a broad understanding of the case law that exists to facilitate and inform the legal process. Decisions such as how to enter into a mo-

tion schedule, which allow defendants to adjourn his or her case to conduct further investigation and gather discovery, are decisions that require a full-breadth of knowledge and experience within the courtroom. Defendants with little, to no experience in the courtroom cannot reasonably make these decisions on-the-spot while being fully-informed of the consequences of specific decisions and how those decision will impact their case.

Throughout the country, all state courts have adopted the Supreme Court's view that "lawyers in criminal courts are necessities, not luxuries"<sup>47</sup>. Today, states make use of a variety of systems to provide counsel to indigent defendants. Such as, state and county based public defenders, to appointment systems that reimburse private attorneys who represent indigent defendants. Following the decision in *Gideon*, the right to counsel has been extended to misdemeanor and juvenile proceedings. However, despite the tremendous progress that has been made since *Gideon*, the right still remains incomplete. For example, many public defenders "struggle under excessive caseloads and lack adequate funding and independence, making it impossible for them to meet their legal and ethical obligations to represent their clients effectively"<sup>48</sup>. As former Attorney General Eric Holder has stated, "our criminal justice system, and our faith in it, depends on effective representation on both sides... The Justice Department is providing a number of tools and resources to help establish effective indigent defense systems across the nation... In 2010 the Department also launched the Office for Access to Justice — establishing a new, permanent office focused on enhancing access to criminal and civil legal services for those who cannot afford them"<sup>49</sup>.

In *Douglas v. California* (1963), the Court expanded its decision in *Gideon*, and held that indigent defendants must be provided counsel in their first appeal. After being found guilty of armed robbery and assault with intent to commit murder, William Douglas requested that his public defender be removed from the case. On appeal, the Second District Court of Appeals for California's Third District did not appoint counsel to represent Douglas because based on their "review of the record appointing counsel would add no benefit to the defendants' case." Douglas then appealed to the Supreme

Court, arguing that the trial court's refusal to appoint new counsel violated his equal protection rights.

In a 6-3 decision, the Court held that "the trial court's refusal violated the defendant's equal protection rights"<sup>50</sup>. Justice William Douglas held in the Court's majority opinion that California's treatment of defendants changed depending on whether the defendant could afford counsel<sup>51</sup>. The Court's reasoning in its decision was grounded in an indigent defendant's inability to demonstrate "hidden merit" in their appeals. The Court held that "defendants could not meaningfully appeal convictions when courts conducted reviews without input from the defendant's attorney... when indigent defendants, unable to afford attorneys, were forced to show preliminarily merit for their appeal before a court appoints counsel, they were denied due process"<sup>52</sup>. Justice Douglas famously held that "California's practice amounted to rich v. poor discrimination"<sup>53</sup>. This decision by the Court is significant because it unveils the Court's underlying motivations to incorporate due process rights, which were aimed at "ridding law enforcement of its coercive and unethical features and addressing procedural flaws in a system that disadvantages criminal defends"<sup>54</sup>. The decision in *Douglas* extended the Court's vision in *Gideon* and reaffirmed that the right to counsel was a fundamentally inherit right in all criminal courts of law throughout the United States

The stakes in a criminal hearing are very high. If the government is going to deprive a defendant of his or her liberty in the United States, through a legal process that is often foreign to those being accused, then the government needs to provide guaranteed legal representation to those who cannot afford it. The benefits of ensuring that defendants are afforded a fair hearing in the interest of justice and holding our society to the highest of moral standards outweigh the monetary costs of structuring our legal system to provide fairness to all people accused of crimes by the government. It is analogous to the concept and importance of due process rights, that are unique to the United States and its moral fabric.

#### FIFTH AMENDMENT DUE PROCESS RIGHTS AND IMPLICATIONS

Following *Douglas*, the Court incorporated the privilege against self-incrimination into the Due

Process Clause, and applied its decision to the states. William Malloy was arrested during a gambling raid by police. After pleading guilty to a misdemeanor, he was sentenced to one year in jail and fined. A year and a half after his plea, a state court judge ordered Malloy to testify about gambling and other criminal activities he knew about. When Malloy refused, “on grounds it may incriminate him” he was imprisoned for contempt and held. Malloy filed a habeas corpus petition challenging his confinement. Upon being denied by the state’s appellate court, Malloy filed a writ at the Supreme arguing that the Fourteenth Amendment protects a state witness’ Fifth Amendment guarantee against self-incrimination in a criminal proceeding.

In a 5-to-4 opinion the Court held that “the Fifth Amendment’s exception from self-incrimination is protected by the Fourteenth Amendment against abridgement by a state”<sup>55</sup>. Justice Brennan held in the Court’s majority opinion that “when determining if state officers properly obtained a confession, one must focus on whether the statements were made freely and voluntarily without any direct or implied promised or improper influence... the American judicial system is accusatorial, not inquisitorial... the Fourteenth Amendment secures defendants against self-incrimination and compels state and federal officials to establish guilt by evidence that is free and independent of a suspect’s or witnesses’ statements”<sup>56</sup>. The Court was as direct as it could possibly be in *Hogan* when affirming a defendant’s inherent constitutional right against self-incrimination.

The Warren Court’s “most controversial decision,” *Miranda v. Arizona*, was decided in 1966. *Miranda* held that the Fifth Amendment’s protection against self-incrimination is available in all settings. Ernesto Miranda was arrested in his house and brought to the police station where he was questioned by police officers in connection with a kidnapping and rape. After two hours of interrogation, the police obtained a written confession from Miranda. The written confession was admitted into evidence at trial, despite the objection of the defense attorney and “the fact that the police officers admitted that they had not advised Miranda of his right to have an attorney present during the interrogation”<sup>57</sup>. Upon judicial review, the *Miranda*

decision represented, “the consolidation of four cases, in each of which the defendant confessed guilt after being subjected to a variety of interrogation techniques without being informed of his Fifth Amendment rights during an interrogation”<sup>58</sup>. In a 5-4 decision, the Court held that “when evaluating the voluntariness of an individual’s confession while in police custody, courts must consider whether police used procedural safeguards to secure the privilege against self-incrimination”<sup>59</sup>. Chief Justice Warren held in the Court’s majority opinion, “such safeguards include proof that the suspect was aware of his right to be silent, that any statement he makes may be used against him, that he has the right to have an attorney present, that he has the right to have an attorney appointed to him, that he may waive these rights if he does so voluntarily, and that if at any points he requests an attorney there will be no further questioning until the attorney arrives”<sup>60</sup>. These safeguards are formally known as “Miranda Warnings” today.

The Court then applied the use of the exclusionary rule established in *Mapp* to “all police interrogations and confessions that illegally obtained confessions in violation of the Fifth Amendment”<sup>61</sup>. Chief Justice Warren argued that “the use of the exclusionary remedy would force police to respect the accused’s right to protection against self-incrimination while in police custody”<sup>62</sup>. Constitutional scholar Carolyn Long famously stated, “if *Mapp* was the Bunker Hill of the due process revolution then *Miranda* was its Yorktown”<sup>63</sup>. The historic decision in *Miranda* was aimed at professionalizing the nature of police custodial interrogation practices.

The Court’s decision in *Miranda* had political and procedural implications on local and state police agencies all across the country. *Miranda* impacted police investigatory practices, much like all of the landmark decisions rendered by the Warren Court during the due process revolution. Nationally recognized constitutional scholar, Gary L. Stuart states:

“The *Miranda* opinion contains inordinately long sentences professing arcane Latin maxims upon which so much of our Anglo-Saxon law is based. It is imbedded in principle, clothes in scholarly material, and limited to a specific brand of custodial interrogation. It is

both eloquent and prophetic. It is nevertheless quite specific... if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent”<sup>64</sup>

Stewart also notes that, “the Court made abundantly clear that the responsibility for protecting a suspect’s constitutional rights rests with the police and, when involved, the district attorney... and the penalty for failing to have counsel is indisputable: unwarned statements are inadmissible—end of argument”<sup>65</sup>. This revolutionary shift to provide clear protections for those accused of crime while in police custody following *Miranda* fundamentally changed the way police were trained in the United States.

The *Miranda* “doctrine” was delivered by the Court in two phases. The first phase, containing the newly required *Miranda* warnings, was delivered in the *Miranda* decision by the Court in 1966. The second was delivered a week later in *Johnson v. New Jersey (1966)*. In *Johnson*, the Court created “arbitrary deadlines for the application of *Miranda*”<sup>66</sup>. Meaning, *Johnson* created a “discriminatory remedy for some suspects whose fortunes were cast in the gatehouse but made it to the main house on time... those suspects who became defendants and had their cases actually tried after *Miranda*’s own trial in Arizona could use the *Miranda* doctrine to their benefit”<sup>67</sup>.

The training and procedural implications that *Miranda* embodied impacted every police officer throughout the country. Following the implementation of *Miranda*, every police office throughout the entire country had to remember and recite the following when arresting a suspect:

The suspect must be warned prior to questioning that he has the right to remain silent;

He must be warned that anything he says can be used against him in the court of law;

He has the right to the presence of an attorney; and

If he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

The impact of the *Miranda* warnings, was another triumphant victory for the Warren Court as it aimed to transform the United States legal system into the most procedurally bulletproof system in the world. Following *Miranda*, police officers were agents of change on the ground, and more so, they evolved into becoming the first line of defense to safeguard the integrity of the justice system. The decision in *Miranda* furthered Chief Justice Earl Warren’s vision to “professionalize police” through procedural guidelines for law enforcement to follow when a suspect is in custody. The newly required *Miranda* warnings affirmed that:

“Police officers need not bother inquire into the idiosyncratic variations among suspects. Assessment of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities can never be more than speculation; a warning is a clear-cut fact. More importantly, whatever the background of the person is indispensable to overcome its pressures and to ensure that the individual knows he is free to exercise his constitutional privileges at any time”<sup>68</sup>

The decision in *Miranda* also had massive political and procedural implications for indigent defendants. The Court recognized that there was a fundamental principal upon which they “recognized the need to remove financial concerns from a suspect’s mind”<sup>69</sup>. The Court looked back to the decision in *Gideon* to affirm “the financial ability of a defendant has no relationship to the scope of the rights involved in the Constitution... the need for counsel in order to protect the privileges exist for the indigent as well as the affluent”<sup>70</sup>. The decision in *Miranda* was justified through its application of *Gideon*, which recognized that defendants have a constitutional right to know their right to counsel because “a vast majority of confession cases involve those unable to retain counsel... some have money and others do not... those who have money hire lawyers and go to trial... those who do not have money confess and go to jail”<sup>71</sup>. Stuart highlights, “poor suspects confess to crimes in vastly greater number than do affluent ones... and it explains why our prisons are full of poor people.” For the first time in history, the Court acknowledged that the government

and its law enforcement officials have a constitutional obligation to inform suspects of their rights.

The Warren Court was clear: “all four warnings must be given prior to questioning, and giving the warnings is an absolute requirement”<sup>72</sup>. After *Miranda*, the burden to safeguard the integrity of the Bill of Rights fell squarely on the shoulders of the prosecutors and trial judges at arraignment. The Warren Court’s decision in *Miranda* provided the stakeholders within the justice system the discretion to maintain procedural equality and fairness that the founding fathers envisioned when drafting the Bill of Rights.

The Warren Court would fully incorporate the Sixth Amendment the following year. In 1967 the Court would incorporate the right to compulsory process in *Washington v. Texas* (1967) and the right to a speedy trial in *Klopfer v. North Carolina* (1967), both of which are relied on every day in the justice system. In the following year, the Warren Court would also extend the right to a jury trial in states criminal proceedings in *Duncan v. Louisiana* (1968). The nationalization of the Bill of Rights was ultimately complete after the incorporation of both the right against double jeopardy in *Benton*



Image from the Collection of the Supreme Court of the United States, signed C.J. Fox and painted by others.

*v. Maryland* (1969) and concluding with the right against excessive bail in *Schilb v. Kuebel* (1971). The implications of both decisions would fundamentally change the amount of discretion that prosecutors had throughout the country. The decisions balanced procedural fairness, and gave greater deference to all stakeholders within the courtroom.

## CONCLUSION

### SLIPPERY SLOPE

While the Warren Court got the first swing at revolutionizing criminal procedure in the U.S. through the incorporation doctrine, it would not have the final say. In the dissenting opinions of *Miranda*, the justices would start to build the framework under which the opponents of the Court’s newly expanded federal reach would look to in future cases to justify their eventual majorities when overruling decisions that were made during the Warren Court. Justice Tom Clark wrote a dissenting opinion in *Miranda* in which he argued, “the majority’s opinion created an unnecessarily strict interpretation of the Fifth Amendment that curtails the ability of the police to effectively execute their duties... statements resulting from interrogation should not be automatically excluded if the suspect was not explicitly informed of his rights”<sup>73</sup>. Most notably, in a separate dissenting opinion, Justice John Harlan wrote that “there was no legal precedent to support the requirement to specifically inform suspects of their rights”<sup>74</sup>. The common threads in each of the dissenting opinions in *Miranda* would become foundational arguments for strict interpretations of the Constitution by future Courts.

As constitutional scholar Carolyn Long highlights, “the bulk of the criticism of the Warren Court focused on the political implications of the Court’s ruling... these criminal procedure decisions were viewed as a threat to public safety”<sup>75</sup>. The Warren Court’s decisions were viewed as a threat to public safety by constitutional critics because several of the Court’s decisions were “directed at police investigatory activities that take place at the pre-trial stage of the criminal process where the police and prosecutors have the greatest amount of discretion”<sup>76</sup>. However, this was precisely why the Warren Court recognized that greater protections to individual liberties were required.

The police and state prosecutors have vast amounts of discretion in the pretrial investigatory process. In the pretrial investigatory process, trial court judges, whose job it is to ensure a fair and equal process are removed and not immediately involved with the decision making that is entrusted to the state and its police force. In cases all throughout the country, like that of Dollree Mapp in *Mapp v. Ohio* (1961), police demonstrated time and time again “a shocking disregard of the law” and a gross “abuse of unchecked police powers”<sup>77</sup>. Society entrusts law enforcement with a great deal of discretion in order to ensure the safety of its citizenry. However, when police powers went unchecked without judicial oversight, as was the case before the Warren Court, people suffered greatly and disparities in the criminal justice system were created and multiplied tenfold. The political will and courage demonstrated by the Warren Court provided defendants a fair shake at procedural justice. No matter a defendant’s background, whether rich or poor, the incorporation of due process rights during the Warren Court provided all defendants in the United States equal constitutional protections when facing the prosecutorial hammer of the government.

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