EDITOR'S NOTE

I am pleased to present the Amherst College Law Review's sixth issue. I would like to thank the editorial team for their diligent work over the past semester, particularly as we adjust back to in-person activities. I would also like to thank the authors, for submitting fascinating articles on subjects ranging from laïcité in France to state attacks on civilian aircraft. We do hope that you enjoy this issue and welcome any comments, feedback, or submissions to aclawreview@amherst.edu.

Sincerely,

Phoenix Shaw Editor-in-Chief

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Attack on a Civilian Aircraft by a State: Imposing Obligations for Wrongful Actions

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Abstract

In January 2020, Iran attacked a civilian aircraft and later sought apologies for its 'mistake'. States hardly accept responsibility for their wrongful actions. In exceptional circumstances, ex gratia payments are made to avert international pressure. In an attack on civilian aircraft, the victims (or their legal representatives) left struggling for compensation and reparations.

The Montreal Convention imposes obligations on airline carriers to make reparations to the passengers regardless of the circumstance of the crash. Thus, the obligation lies upon the airline carrier even when it is not responsible for the accident. This article suggests imposition of strict liability upon the state which has allegedly shot down the aircraft. This would ensure early compensation to the victims, who are the most vulnerable in such situations. This liability shall be upon the alleged attacking state until the guilt is established. If the investigations hold some other party responsible, then this burden for reparations can be shifted upon the party found guilty. Hence, the guilty state would be unable to evade its punishment and minimum compensation would be secured to the victims at the earliest without any legal tussle.

Introduction

In an unexpected event, Ukraine International Airlines Flight 752 ["Flight 752"] was shot down shortly after take-off killing all 176 people on board. The flight was shot down by an Iranian missile and Iran claims that it was due to "human error" as the Civilian Aircraft had turned towards a "sensitive military center".[1] The Iranian Military apologized for the unintentional attack and promised to take efforts to prevent such "mistakes" from occurring in

[1] *Iran plane crash: Ukrainian jet was "unintentionally" shot down,* BBC NEWS, Jan.11 2020, available at: https://www.bbc.com/news/world-middle-east-51073621

the future.[2] This article will argue that an apology does not absolve Iran from its obligations under International Law.[3]

The U.N. Charter and several international conventions prohibit attacks on civilian aircrafts.[4] However, the past three decades have witnessed numerous attacks on Civilian Aircrafts. A few examples are Malaysia Airlines Flight 17, Siberia Airlines Flight 1812, and Iran Air Flight 655, which all lead to loss of life. In all these cases, the states rarely accepted responsibility for shooting down a Civilian Aircraft and made reparations for flight victims. Even a year after Flight 752's accident, no obligation has been imposed, and reparations for the victims are out of sight.[5] This essay shall explore a situation where a state shot down a civilian aircraft, and afterwards denied its legal obligation to make reparations. The essay is divided into three parts. First, this article will argue that shooting down a Civilian Aircraft qualifies as an Internationally Wrongful Act, and how such an act entails legal obligations. Second, the article will assess whether the lack of intention to attack the flight i.e., 'mistaken' attack makes any difference on a legal obligation. This part shall also analyze the argument of self-defense which is often raised by the wrongful state. And lastly, this article will analyze the appropriate scheme of reparations and compensation when such a wrongful act has been committed.

Internationally Wrongful Act – Legal Obligations on Shooting a Civilian Aircraft

[2] "*Disastrous mistake": Iran admits it shot down Ukrainian plane,* ALJAZEERA, Jan. 11, 2020, available at: https://www.aljazeera.com/news/2020/01/iran-admits-unintentionally-shot-ukrainian-plane-200111040653138.html

[3] Levon Sevunts*, Countries that lost citizens on Flight PS752 assemble to press Iran for "full reparations",* CBC, Jul. 03, 2020, available at: https://www.cbc.ca/news/politics/ps752-ukraine-iran-airline-crash-missile-1.5635555

[4] Chicago Convention of 1944; Montreal Convention of 1999; Beijing Convention of 2010

[5] Levon Sevunts*, Countries that lost citizens on Flight PS752 assemble to press Iran for "full reparations",* CBC, Jul. 03, 2020, available at: https://www.cbc.ca/news/politics/ps752-ukraine-iran-airline-crash-missile-1.5635555

The Chicago Convention of 1944 outlines requirements to ensure safe and orderly development of International Civil Aviation.[6] Flight 752 was a scheduled international flight from Tehran to Kyiv. Article 6 of the Chicago Convention provides that a scheduled international flight cannot operate over the territory of a nation without obtaining special permission of that state.[7] This clause is formed out of respect towards the exclusive sovereignty possessed by a nation over its airspace and it gives autonomy to each nation to regulate its airspace.[8] The Chicago Convention imposes various obligations upon States to prevent any attack upon civilian aircraft. If a state believes that the flight is a threat, the Chicago Convention only permits the state to intercept the flight without endangering the lives and safety of persons on board and the aircraft.[9]

Article 3*bis* of the Chicago Convention prohibits each state from using force against a civilian aircraft.[10] When a civilian aircraft is attacked by another state, the victim state can argue a violation of Article 3*bis.* Article 17 of the Chicago Convention provides that each aircraft has nationality determined by the state where it is registered.[11] Therefore, when a flight registered in Ukraine is shot down by Iran, Ukraine can claim that Article 3*bis* was violated by such an act. If two states have a disagreement on the interpretation of the Chicago Convention, then first they should try to negotiate to settle the disputes. If negotiations fail or it is otherwise impossible for the parties to negotiate, then the parties are required to approach the International Civil Aviation

[6] Preamble, Convention on International Civil Aviation, Dec. 7, 1944 (1994)15 U.N.T.S. 295 [hereinafter "Chicago Convention"]
[7] Chicago Convention, Article 6.
[8] Chicago Convention, Article 1.
[9] Chicago Convention, Article 3*bis*.
[10] Chicago Convention, Article 3*bis*.
[11] Chicago Convention, Article 17.

Organization (ICAO).[12] If either of the parties is not satisfied with the decision of the ICAO, then an appeal can be made to the International Court of Justice (ICJ).[13] The mechanism makes it clear that the International Court of Justice shall be an appellate body, which can adjudicate once the parties have approached the ICAO.

In *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation,* the International Court of Justice said that the ICAO has jurisdiction to maintain applications dealing with the interpretation of the Chicago Convention irrespective of the fact that the issue is involved in the context of a "broader dispute" between the parties.[14] Thus the most accepted legal opinion is that, when a civilian aircraft is attacked by another state, the first recourse available to the parties is to negotiate and settle the dispute. If this does not happen, the parties must reach ICAO for dispute settlement.

The Articles on State Responsibility imposes obligations upon a state for its 'Internationally Wrongful' acts.[15] An act becomes internationally wrongful when it satisfies two requirements, *firstly,* the act must be attributable to a state and *secondly,* the act must violate international obligations of the state.[16] An internationally wrongful act entails the legal obligation to make reparations to the suffering parties.

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[12] Chicago Convention, Article 84 "*shall*, on the application of any State concerned in the disagreement, be decided by the Council"

[13] Chicago Convention, Article 86; Statute of the International Court of Justice, Article 37, Apr. 18, 1946.

[14] Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation, (Bahrain, Egypt, Saudi Arabia and United Aram Emirates v. Qatar) [48] Jul. 14, 2020; United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), I.C.J. 1980, p. 20 Reports [37]; Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J Reports 2019 (I) p. 23 [36].

[15] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 1, November 2001, Supplement No. 10 (A/56/10) [hereinafter "ASRIWA"]

[16] ARISWA, Article 2.

The *first leg* requirement relating to attributability requires factual analysis of the wrongful act. This essay deals with the instances in which a state has shot down a civilian aircraft, and the investigations suggest the same. The act of downing Flight 752 can be attributed to Iran, as it has agreed that its military had shot down the flight, and the investigations suggest the same. However, the fact that the attack was unintentional would hardly make any difference in attributability.[17]

The *second leg* requires legal analysis of the various international obligations that are breached when a civilian aircraft is shot down. This article deals with the United Nations Charter, the Chicago Convention of 1944, and the Beijing Convention of 2010. Iran and Ukraine are signatories to the United Nations Charter, the Chicago Convention, and Montreal Convention. They have, however, yet become signatories of the Beijing Convention.

It is the purpose of the United Nations to maintain "peace and security" and prevent any "act of aggression".[18]Article 2(4) of the UN Charter refrains its members from using force against another state.[19] The General Assembly of the United Nations has adopted the definition of aggression as "the first use of armed force by a state" in any manner inconsistent with the purpose of the UN Charter.[20] The Chicago Convention gives each civilian aircraft nationality of the state where it is registered.[21] Moreover, the International Customs and Practices suggest that any attack on a civilian aircraft or air fleet registered in a state becomes an attack on that state itself.[22] For instance, when Iran Air Flight 655 was shot down by the US Navy, Iran claimed

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[17] Farnaz Fassihi, Iran Says It Unintentionally Shot Down the Ukrainian Airliner, N.Y. TIMES, Jan. 14, 2020, available at: https://www.nytimes.com/2020/01/10/world/middleeast/missile-iran-plane-crash.html

[18] Charter of the United Nations, Article 1, Oct. 24, 1945, 1 UNTS XVI [hereinafter "UN Charter"].

[19] UN Charter, Article 2(4).

[20] UNGA Res 3314(1974), "Definition of Aggression", Dec. 14, 1974, p. 143.

[21] Chicago Convention, Article 17.

[22] UNGA Res 3314(1974), Article 3(b), Article 3(d), "Definition of Aggression", Dec. 14, 1974, p. 143; Aerial Incident of 3 July 1988 (Iran v. United States of America), [1996] ICJ Rep 9, Feb. 22, 1996.

violation of the UN Charter and sought reparations from the United States.[23] The dispute was finally settled by the parties through negotiations. Hence, such illegal use of force against any Civilian Aircraft would entail the violation of Article 2(4) of the UN Charter, and this would be a reasonable argument by Ukraine if it decides to pursue legal recourse against Iran.[24]

Under the Chicago Convention, state parties have agreed "to ensure the safe and orderly development of International Civil Aviation".[25] Use of force against civilian aircraft has been prohibited under customary international law[26], and this prohibition was made explicit with the addition of Article 3*bis* in the Chicago Convention.[27]

The Chicago Convention, along with its annexures, establishes exhaustive guidelines to prevent any threat to civilian aircrafts. The Chicago Convention establishes procedural mechanisms that the state must follow — the state must attempt to communicate with the flight[28] and issue warnings to the flight[29] or may attempt to intercept the flight and make it land within its territory.[30] Moreover, the military services of each nation are required to coordinate with the air traffic services, through which the flight can be contacted and its identity can be established.[31] Attacking the flight is the last action, before which all attempts must be made to avert the attack

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[23] Aerial Incident of 3 July 1988 (Iran v. United States of America), Memorial by Iran, [1996] ICJ Rep 9, Jul.24 1990, p. 238, para 4.46.

[24] Kimberley Trapp, Uses of Force against Civil Aircraft, EJIL:Talk! Jun. 28, 2011) [hereinafter "Kimberley Trapp"]; Ruwantissa Abeyrante Convention on International Civil Aviation: A Commentary (Springler 2014) p. 262.

[25] Preamble, Chicago Convention.

[26] ICAO A25-Min. P/1; UN Res. S/RES/2166(2014) Jul. 21; Brian E. Foont, Shooting Down Civilian Aircraft: Is There an International Law? 72 J.Air L. & Com. 695 (2007) p.703; William Hughes, Aerial Intrusions by Civil Airliners and the Use of Force 45 J.Air L. & Com. 595 (1980) p.597.

[27] Chicago Convention, Article 3*bis.*

[28] Rule 2.23.1.2, Rule 2, 3.6.5.2, ICAO, Annex 11.

[29] ICAO, Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations Doc 9554-AN/932 Rule 8.2, 1999.

[30] Chicago Convention, Article 3*bis.*

[31] ICAO, Rule 2.17.1, Annex 11; Ruwantissa Abeyrante Convention on International Civil Aviation: A Commentary (Springler 2014) p. 262.

in all scenarios. While whether Iran adhered to these requirements or not is unknown, if a state in such a scenario fails to adhere to any of these obligations, it would entail legal consequences for violation of the Chicago Convention.

Another relevant convention is the Beijing Convention of 2010, which prohibits any unlawful act threatening the safety and security of persons in civil aviation.[32] The Beijing Convention applies to all international civil aircrafts of the state's parties to the Convention.[33] The Convention governs any action which "damages an aircraft" or which "endangers the safety" of an aircraft an 'offense', and thereafter it imposes an obligation upon each state which is a party to the Convention to punish these offenses with "severe penalties".[34]

The Beijing Convention prohibits "persons" from committing an offense and it does not expressly impose any obligation upon the States. This provision should be given a broad interpretation. In the *Bosnia Genocide Case,* the ICJ held that the obligation of a State to prevent and punish the commission of genocide in itself imposes an obligation to not commit genocide.[35] Similarly, in the *Aerial Incident of 3 July 1988* case, Iran claimed a violation of the Montreal Convention of 1971 by the USA when its flight was shot down.[36] The United States claimed violation of the Montreal Convention even when the convention provided that "person(s)" can commit the offenses provided under the convention. Following the interpretation adopted in the *Bosnia Genocide case,* it is universally agreed that the obligations under the Beijing Convention

[32] Beijing Convention 2010, Preamble.
[33] Beijing Convention 2010, Article 5(2).
[34] Beijing Convention 2010, Article 1(b), Article 3.
[35] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Counter Memorial of The Federal Republic of Nigeria, (Vol. I) (1996) ICJ Rep 595, May 1999, para 24.48, p. 645.
[36] Aerial Incident of 3 July 1988 (Iran v. United States of America), Memorial by Iran, [1996] ICJ Rep 9, Jul.24 1990, p. 171, para 3.53.

can be imposed upon the states even when the convention does not explicitly impose obligation upon the states.[37]

Mistake, Self-defense, and its impact on Legal Obligations

The Official Statement by Iran after shooting down the flight justified their actions and called it an unintentional act which occurred due to human error.[38] Irrespective of the supposed innocence of their mistake, it seems rather logical to claim their actions as mistaken to avoid their legal obligations. Moreover, on several instances in the past, this defense has been raised — such as when USS *Vincennes* shot down Iran Air Flight 655,[39] or when Nigeria claimed its presence on the territory of Cameroon as a reasonable mistake under honest belief.[40]

Under the Rome Statute, Article 32(1) provides that a mistake of fact excludes criminal responsibility provided that the required mental element is negated.[41] Under the International Humanitarian Law, an honest and reasonable mistake would be a valid defense[42]. For instance, although Humanitarian Law prohibits any attack on a civilian object but if this attack is caused due to honest and reasonable mistake then it would not impose any obligation under Humanitarian Law.[43] Meanwhile, it is interesting to note that none of the conventions or treaties

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[37] Ibid, Convention for The Suppression of Unlawful Acts Against the Safety of Civil Aviation, Article 1, 974 UNTS 177 Sept. 23, 1971

[38] "*Disastrous mistake": Iran admits it shot down Ukrainian plane,* ALJAZEERA, Jan. 11, 2020, available at: https://www.aljazeera.com/news/2020/01/iran-admits-unintentionally-shot-ukrainian-plane-200111040653138.html

[39] Aerial Incident of 3 July 1988 (Iran v. United States of America), Preliminary Objections by United States, [1996] ICJ Rep 9, Mar. 4, 1991, p. 71.

[40] Land and Maritime Boundary between Cameroon and Nigeria, Cameroon and Equatorial Guinea (intervening) v Nigeria, Judgment, Merits, [2002] ICJ Rep 303, Oct. 10, 2002.

[41] Rome Statute of International Criminal Court, Article 32(1), ISBN No. 92-9227-227-6, Jul. 17, 1998.

[42] Marko Milanovic, "*Mistake of fact when using lethal force in International law: Part I*", EJIL:Talk! Jan. 14, 2020, available at: https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/

[43] Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, Article 57(2)(a)(i), Article 51(5)(b), 1125 UNTS 3, Jun. 8, 1977 [hereinafter "Additional Protocol I"].

of international air law accepts mistake as a valid defense for using force against civilian aircraft. Moreover, it would be a mistaken approach to absolve a state from its obligations when it has threatened international air safety by attacking a civilian aircraft, thereby threatening the basic idea for the enactment of the Chicago Convention.

However, the issue is not as simple as it seems as international practices suggest otherwise. When Iranian Airlines' "Flight-655" was shot down by the US Military Warship *Vincennes*, the United States claimed that the incident occurred due to a mistake. This was accepted by several nations in the United Nations, who agreed that the incident occurred due to "tragedy or error".[44] The resolution adopted by the United Nations on this incident condemned the incident but there was no obligation to make reparations.[45] Later reparations were made on an ex-gratia basis (on moral obligation and not a legal obligation). In another instance, the United States claimed that it 'mistakenly' attacked the Chinese embassy in Serbia, supposedly due to outdated maps.[46] Again, legal obligations were not imposed, and reparations were made on an ex-gratia basis.

State practices such as these characterize the attempts made by states to escape the "legal obligations" arising from their wrongful acts. International courts, however, have rarely accepted mistake as a defense to allow a state to escape the obligations arising from its wrongs. In the *Legality of the Threat or Use of Nuclear Weapons case,* the International Court of Justice said

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[44] Argentina, S/PV.2819, 33; Italy, S/PV.2819, 21-25; Germany, S/PV.2819, 43-45; Senegal, S/PV.2819, 47; Japan, S/PV.2819, 39-40;Pakistan, S/PV.2820, 12; France, S/PV.2819, 26-28; India, S/PV.2820, 23-25; Brazil, S/PV.2820, 38; UK, S/PV.2819, 5-7: Marko Milanovik, "*Mistakes of Fact When Using Lethal Force in International Law: Part II*" Jan. 15, 2020) available at: https://www.ejiltalk.org/mistakes-of-fact-when-usinglethal- force-in-international-law-part-ii/

[45] UNSC Res S/RES/616/1988, Jul. 20, 1988.

[46] Sean D. Murphy, United States Practice in International Law: Volume 1, 1999-2001, (Cambridge University Press, 2002) p.100

that, while acting under self-defense, the only requirements are necessity and proportionality.[47] In the *Oil Platforms case*, the International Court of Justice did not agree with the United States' contention that reasonable and good faith discretion must be given to each state to protect their security interests.[48] And if a state, through its unilateral assessment of the situation commits a wrongful act, it should be held responsible for its obligations.[49] Courts have been rightly hesitant to include mistake as a defense when the treaties and conventions do not provide for it. In air law, accepting this would contradict the Chicago Convention, which does not provide the exception of "mistake".

On the practical aspect, several issues arise when a state claims that it had 'mistakenly' attacked a scheduled international flight registered in another State. First, Article 6 of the Chicago Convention provides that a scheduled international flight can operate over the territory of another state only after obtaining special permission from that State.[50] Each flight operates on the route designated to it by the permitting state, and the air traffic service of said state is mandated to stay in contact with the flight from the moment it enters their territory until the time it leaves their territory.[51] In such a situation, it becomes difficult to accept the idea that a civilian flight, operating on its designated route, on a specific schedule pre-determined after obtaining permission from the state, can be mistakenly perceived as a threat. Even if such an act was

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[47] Legality of the Threat or Use of nuclear weapons, Advisory Opinion, [1996] I.C.J Rep. 225, para. 41[hereinafter "Nuclear Weapons Case"]; Oil Platforms (Iran v. United States), Merits, [2003] ICJ Rep 161, Nov. 6, para 73, 76; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, Jun. 27, para. 170.

[48] Oil Platforms (Iran v. United States), Counter Memorial by the USA, [2003] ICJ Rep 161, Jun. 23, p. 124, para 3.38; Thomas Frank, Recourse to Force-State Actions against Threats and Armed Attacks, Cambridge University Press 2002, p. 98.

[49] International Law Commission, Commentary on Draft Articles on State Responsibility p.130 para. 3; Marko Milanovic, "Mistakes of Fact When Using Lethal Force in International Law: Part II", EJIL:Talk! Jan. 15, 2020, available at: https://www.ejiltalk.org/mistakes-offact-when-using-lethal-force-in-international-law-part-ii/

[50] Chicago Convention, Article 6.

[51] Chicago Convention, Article 6, 68.

genuinely a mistake, as Iran claimed when its civilian aircraft was shot down, such an attack would be a reckless and negligent act of highest order which must attract liability.[52] Under the Humanitarian Law, a state is held liable for its actions if it fails to maintain a distinction between civilian and military Objects.[53] Since an obligation to protect civilians exists at times of war (i.e. when Humanitarian Law applies), it would be unreasonable to waive such obligation at 'normal' times when no armed conflict exists between those states. Furthermore, it might set a worrying precedent and allow a situation where a hostile state attacks a civilian aircraft and later claims it as a 'mistake' to waive its obligations.

At times, states have argued that they had to attack a civilian aircraft as it was a necessary action taken in self-defense. The United States used this defense after Iran Air Flight 655 was shot down; the United States, through its first official statement, justified it as an act of self-defense taken to avert the threat posed by the flight. The United Nations Charter, under Article 51 grants each State the right to exercise self-defense.[54] Article 3*bis* of the Chicago Convention, which prohibits each state from attacking civilian aircraft, also provides under its second-part that it does not modify the rights and obligations created under the UN Charter.[55] A state which attacked a civilian aircraft can rightfully claim that attacking the flight was necessary and it was shot down while exercising its right to self-defense. This is crucial because Article 21 and Article 25 of the Articles on State Responsibility provide that an obligation of State does not arise if its actions were lawful acts of self-defense or if its actions were necessary.[56]

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[52] Aerial Incident of 3 July 1988 (Iran v. United States of America), Memorial by Iran, [1996] ICJ Rep 9, Jul.24 1990, p. 243, para 4.53.
[53] Additional Protocol I, Article 48.
[54] United Nations Charter.
[55] Chicago Convention, Article 3*bis.*
[56] ARISWA, Article 21, 25.

In the *Oil Platforms case,* the International Court of Justice reiterated its reasoning used in the Nuclear *weapons case* that valid self-defense arises when the act is both necessary and proportional.[57] This is the understanding of self-defense under customary international law.[58] The necessity of an act depends upon the possible resources available with the State which could avert the danger, and time available to exercise those resources.[59] The standard of necessity that the attacking State needs to prove would be very high, especially because it attacked a civilian object. The case depends upon the factual analysis of the situation to evaluate whether Iran acted out of necessity. Generally, if a state fails to issue warnings[60], communicate with the flight[61], intercept the flight,[62] or fails to follow other mandatory requirements of relevant convention, the incident hardly qualifies as a necessary action and the attacking state would be held liable for its actions. Secondly, an action is proportional if it is limited to avert the immediate danger and secure the rights of the threatened state.[63] Again, factual analysis of the situation is needed to determine proportionality. Iran's actions only have a faint chance to qualify as 'proportional'. If Iran had expected such a threat, they had the option to close their airspace to civilian airlines, which would have averted the attack.[64]

The shooting of Flight 752 would not qualify as an act of self-defense under Article 51 of the United Nations Charter either. Under Article 51, a nation can act under self-defense provided

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[57] Nuclear Weapons Case para. 41; Oil Platforms Case para. 76; Nicaragua Case para. 170.
[58] Judith Gardam, Necessity, Proportionality and the Use of Force by States, Cambridge University Press, 2004.
[59] Ibid para 148-149.
[60] ICAO, Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations Doc 9554-AN/932 Rule 8.2, 1999.
[61] Rule 2.23.1.2, Rule 2, 3.6.5.2, ICAO, Annex 11
[62] Chicago Convention, Article 3*bis.*
[63] Yoram Dinstein, War, Aggression and Self-Defense, 3rd ed. Cambridge University Press, 2000 para. 176.
[64] Marko Milanovik, "Mistakes of Fact When Using Lethal Force in International Law: Part III", Jan. 15, EJIL:Talk! Available at: https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-iii/

it has faced an attack, and it later exercises self-defense against a nation having nexus with the initial attack, exercised to avert any possible threat.[65] The US Strike on Soleimani just a few days before the attack on the flight might amount to an 'armed attack' under Article 51. However, the US Strike hardly has any nexus with Ukraine, against which the right to self-defense was exercised. Thus, the attack on the flight neither qualifies as self-defense under Customary International Law, nor satisfies the requirements under Article 51 of the United Nations Charter.[66]

To undo the Harm Caused – Reparation & Compensation

Articles on state responsibility impose an obligation upon the State to make full reparation for the injury caused due to its internationally wrongful act.[67] Unless shooting down the flight was an act of self-defense or an act of necessity, it would amount to an Internationally Wrongful Act for which reparations must be made by the State shooting the flight. The reparation must be made for not only material, but also moral loss caused.[68] A State which has committed an internationally wrongful act must re-establish the situation before the wrongful act occurred, and if that is not possible adequate compensation must be provided. If compensation is not an adequate remedy, then the wrong-doing state must provide adequate 'satisfaction' through an apology or otherwise.[69]

Satisfaction through gestures such as public apology creates a political statement among the states, however, these apologies rarely have any importance in the lives of those who have

[65] United Nations Charter, Article 51.
[66] Ibid.
[67] ILC, ARISWA, Article 31(1); Case Concerning Armed Activities on the Territory of Congo (Congo v. Uganda), Merits, [2005] I.C.J. Rep. 168, Dec. 19 para 259.
[68] ILC, ARISWA, Article 31(2).
[69] ILC, ARISWA, Article 35, 36, 37.

lost their loved ones. The victims' families are instead concerned with compensation, and monetary reparations since restitution is not possible when the accident has resulted in death or permanent injuries. The Montreal Convention of 1999 established a mechanism to provide compensation to the victims of the air accident.[70] This Convention aims to protect the interests of the consumers involved in all international carriages performed by the aircraft.[71] Article 17 of the Convention provides that an air carrier is liable to compensate if a passenger dies or suffers bodily injury due to an accident that occurred between embarking and disembarking.[72] The US Supreme Court interpreted the term "accident" as an "unusual or unexpected event or happening that is external to the passenger".[73] Shooting down a flight is an unusual or unexpected happening that would qualify as an accident under Article 17 of the Montreal Convention. This would impose strict liability upon the air carrier.[74]

The mechanism under the Montreal Convention is a parallel mechanism, which does not absolve the wrongful state from its obligation to make reparations. The mechanism under the Montreal Convention ensures monetary protection to the victims of the air accident, who would otherwise suffer while waiting for compensation from the wrongful state. Under international law, an obligation to make reparations arises on the commission of wrongful acts. Not too much surprise, it takes several years and efforts to impose upon a State its obligation to make reparations for its wrongful act. In several instances, the States who had shot down the flight made reparations to the victim state on *ex-gratia* basis.

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[70] Convention for the Unification of Certain Rules for International Carriage by Air 1999, Article 1, May 28, 1999. [hereinafter "Montreal Convention 1999"]

[71] Montreal Convention 1999, Preamble.

[72] Montreal Convention 1999, Article 17.

[73] US Supreme Court, (Air France v. Saks), 470 U.S. 392 (1985) Mar. 4, 1985; Court of Justice of European Union, Niki Luftfahrt case (GN v. ZU) C-532/18, ECLI:EU:C:2019:1127 Dec. 19, 2019, para. 35; High Court of Australia, Povey v. Qantas Airways and British Airways, [2005] HCA 33 Jun. 23, 2005.

[74] Vienna Convention on Law of Treaties, Article 31(1), May 23, 1969, UNTS Vol. 1155, p. 331.

An attack on civilian airlines threatens the basis of the Chicago Convention which attempts to ensure safe and secure air international civil aviation. The impact of such attacks is not limited to civilians; it also causes loss to the airline whose flight is shot down and the state where the flight is registered, *inter alia.* Loss caused due to an attack on a civilian aircraft is irrecoverable, which requires that the practice of making *ex-gratia* reparations must be discarded. It is problematic to find several states who have escaped their legal obligations after shooting down a flight or have delayed making compensation.

All attempts must be made to prevent any such incident from happening again. It must be well established that even in extreme situations such assumptions must be made which protect the civilian aircraft from any threat.[75] If a state has shot down a civilian aircraft, the legal obligation must be imposed upon the wrongful state to render an apology and to pay punitive damages at the earliest. These obligations must be imposed strictly, irrespective of the 'intention' of shooting down the flight. This would prevent the states from escaping their obligations and would ensure the victims of the accident receive the required compensation.

If the victim state seeks greater compensation, or the wrongful state believes that its action of shooting down the flight was reasonable, an option must be provided to the parties to negotiate or to reach an international legal forum. Such a strict liability regime would not only ensure compensation to the civilians and the victim state but would also prevent states from attacking a civilian aircraft negligently by imposing heavy burden upon it to justify its actions. This mechanism allows the wrongful state to prove its innocence by approaching ICAO or ICJ, or by negotiating with any third party responsible. Thus, the burden of compensation and

[75] Hungarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare, Cambridge University Press, 2013, Rule 59.

reparations can be shifted, but this mechanism ensures that the victims of the accident receive the compensation without delay.

Conclusion

Ukraine International Airline's flight 752's shooting raises several concerns regarding the safety of the passengers traveling in civilian airlines. The concerns seem genuine and raise several doubts on the international framework regulating civil aviation, especially when several nations have shot down civilian aircraft only to find out later that they posed no threat. Furthermore, these states have managed to justify their actions as lawful through the mistake defense. Incidents such as these are in direct violation of the Chicago Convention express prohibition on the 'use of weapons' on civilian aircraft, and the United Nations Charter prohibits 'use of force' on another State (considering the established jurisprudence that a civilian aircraft is part of the state where it is registered). This article suggests that the international air law must be adjusted to prevent such incidents from happening, and to prevent the creation of any loopholes through which the states might evade their obligations.

It is suggested that strict liability should be imposed upon the wrongful state which has shot down the flight – like the liability imposed upon the air carrier under the Montreal Convention of 1999 when an accident occurs between embarking or disembarking. This support is due to two reasons. Firstly, a regime that provides no scope for the state to escape its obligations would prevent the commission of such wrongful acts. Secondly, it would ensure timely reparations to those suffering losses. Consider Resolution 616 (1998) which was unanimously adopted by the United Nations Security Council after Iran Air Flight 655 was shot

down by the United States.[76] The resolution expressed distress over the attack on the flight, but no legal obligations were imposed. This is possible because the United States could have exercised its veto power against this resolution.[77] Thus, a strict liability regime is supported to prevent any such instance of a powerful state escaping its legal obligations, especially when it has shot down a Civilian Aircraft, causing the death of many. If further investigations absolve that state from its obligations, then compensation could be made to that state as determined by ICAO or ICJ or by establishing a mechanism for compensation in cases of deaths and accidents due to natural forces. Minimum legal obligations must be imposed at the very instant when one state has shot down a civilian airplane. This would ensure immediate compensation for those who suffered from the accident by imposing a burden upon the state responsible for the accident. Meanwhile, the state has the opportunity to prove its innocence by appealing before ICAO and ICJ.

[76] UNSC Res S/RES/616/1988, July 20, 1988.

[77] Marko Milanovik, "*Mistakes of Fact When Using Lethal Force in International Law: Part II*" Jan. 15, 2020, available at: https://www.ejiltalk.org/mistakes-of-fact-when-usinglethal- force-in-international-law-part-ii/

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From *Brown* to *Parents Involved*: The Court's Inconsistent, Temporal, and Post-Racial Approach to Race-Conscious Policies

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Abstract

The 14th and Fifth Amendments guarantee every person equality before state and federal laws, as well as the right to life, liberty, and property without due process of law. In the context of race-conscious policies, judicial interpretation of these doctrines has significant implications for practices like affirmative action and workplace diversity initiatives. This paper examines the constitutional foundations for affirmative action and scrutinizes the Supreme Court's treatment of race-conscious policies in educational institutions. From *Brown I* to 21st century cases, the Court's decisions illustrate a disregard for precedent and a highly inconsistent approach to affirmative action. They also expose the Court's fallacious *de jure/de facto* distinction and recurrent assumption of post-racial America. Educational diversity initiatives are a powerful tool to combat racism in America, but their potential will remain limited until the Court adheres to a consistent, progressive approach to race-conscious policies.

Introduction

In 2014, Students for Fair Admissions sued Harvard College for discriminating against Asian Americans in its undergraduate admission process. This case, which could head to the Supreme Court as soon as 2022,[78] inspired more than 60 Asian American groups to file a federal discrimination complaint and ignited the debate on race-conscious policies in schools.[79] This debate, however, is not new. It has a rich legal history that must be explored to achieve racial equality today. Dating back to *Brown v. Board of Education* in 1954, the Supreme Court ruled

[78] Howe, Amy. "Justices Request Government's Views on Harvard Affirmative-Action Dispute." *SCOTUSblog*, 14 June 2021, https://www.scotusblog.com/2021/06/justices-request-governments-views-on-harvard-affirmative-action-dispute/.

[79] Lorin, Janet. "Harvard Faces Bias Complaint from Asian-American Groups - The Boston Globe." *The Boston Globe*, 15 May 2015, https://www.bostonglobe.com/metro/2015/05/15/harvard-faces-admissions-bias-complaint-from-asian-americans/gILV3A3eWCxIGSNzMQUbZK/story.html.

that racial segregation in public facilities is an unconstitutional violation of the Equal Protection Clause of the 14th Amendment. For decades to follow, many schools fulfilled their legal duty to desegregate, and some even enacted voluntary diversity initiatives. The constitutional question then shifted from whether schools had a positive duty to desegregate to whether they could adopt race-conscious policies to improve diversity among their student bodies. This question, originally answered in *Regents of UC Davis v. Bakke*, is a contentious legal debate that affects the education of tens of millions of students in the United States. This paper will summarize the legal foundations for desegregation in schools and establish the constitutionality of race-conscious policies like affirmative action. It will then critique the Court's inconsistent treatment of educational diversity initiatives and illuminate its recurrent assumption of post-racial America.

There are two primary constitutional provisions relevant to the discussion of race-conscious policies in public facilities. The first is the 14th Amendment, which states that "No State shall… deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [80] The second is the Fifth Amendment, which likewise states that "No person shall be… deprived of life, liberty, or property, without due process of law." [81] This Amendment applies to the federal government and, per *Bolling v. Sharpe*, has been interpreted to include an equal protection component, although not as strong as that found in the 14th Amendment.[82] Taken together, these amendments mandate that federal and state governments must govern equally without creating demographic distinctions that are irrelevant to legitimate government interests. Per the State Action Doctrine, these constitutional mandates apply to public facilities such as offices of public

[80] *U.S. Constitution*. Amend. XIV, Sec. 1.
[81] *U.S. Constitution*. Amend. V, Sec. 1.
[82] Bolling v. Sharpe, 347 U.S. 497 (1954)

employment, and most notably, public K-12 schools and universities. Racial segregation in schools is thus unconstitutional because it unduly deprives life and liberty from racial minorities and does not provide equal treatment under the law.

***Brown*: Court-Ordered Desegregation**

These constitutional provisions were interpreted in the context of segregated schools in the *Brown v. Board of Education of Topeka* cases, known as *Brown I* (1954) and *Brown II* (1955). In *Brown I*, Chief Justice Earl Warren struck down the "separate but equal" doctrine from *Plessy v. Ferguson*, arguing that "Separate educational facilities are inherently unequal" and constitute a violation of equal protection, per the 14th Amendment. He contended that the sanctioned separation of schoolchildren "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."[83] In *Brown II*, Warren addressed remedies for segregated schools: "the courts will require that the defendants make a prompt and reasonable start toward full compliance with" the *Brown I* ruling.[84] Simply put, schools had a positive duty to execute a desegregation plan, although with the caveat of "all deliberate speed," which slowed these initiatives but did not stop them altogether.[85]

In both cases, Warren employed strict scrutiny, the highest standard of judicial review, which asks whether a statute is "narrowly tailored" to achieve a "compelling state interest." In both cases, the Court's answer was yes. These cases, therefore, demonstrate that desegregation plans are an effective means of achieving the compelling state interest of racially integrated

[83] Brown v. Board of Education of Topeka I, 347 U.S. 483, 490 (1954).
[84] Brown v. Board of Education of Topeka II, 349 US 294 (1955)
[85] Jim Chen, With All Deliberate Speed: Brown II and Desegregation's Children, 24(1) LAW & INEQ. 1 (2006). Available at: https://scholarship.law.umn.edu/lawineq/vol24/iss1/1

schools. Legal jargon aside, desegregated schools fulfill the constitutional mandate of equal protection but also actively improve education at every level of adolescence. Although the Court did not articulate this at the time, school segregation in both primary and higher education was a guise of white supremacy that subjugated Black students and perpetuated Jim Crow era systems of oppression. Courts and schools alike realized decades later that diversity in the classroom (not mere desegregation) is also a compelling state interest, as it improves exposure to, acceptance of, and the ability to collaborate in diverse environments, including schools, homes, social life, and workplaces. Despite the unanimous nature of these rulings and the numerous benefits of racially inclusive education, the *Brown* decisions were met with controversy and noncompliance from schools across the nation.

For example, the Governor and Legislature of Arkansas openly disobeyed the *Brown* decision, mandating an immediate reversal of state desegregation plans after witnessing the civil unrest that occurred when nine Black students enrolled in the formerly all-white Central high School.[86] In *Cooper v. Aaron*, the Court ruled that states could not resist court-ordered desegregation for the purpose of security. This led President Eisenhower to publicly denounce Arkansas' support for segregation and send in the National Guard to enforce desegregation at Central High School. [87] This ruling further reinforced judicial supremacy, stating that "Article VI of the Constitution makes the Constitution the 'supreme Law of the Land'... and 'the fundamental and paramount law of the nation.'"[88] From then on, the constitutional desegregation requirements set forth in *Brown*, as well as the Court's limits on race-conscious policies, were

[86] Cooper v. Aaron, 358 U.S. 1 (1958)
[87] "Civil Rights: The Little Rock School Integration Crisis." *Eisenhower Presidential Library*, The U.S. National Archives and Records Administration, https://www.eisenhowerlibrary.gov/research/online-documents/civil-rights-little-rock-school-integration-crisis.
[88] *U.S. Constitution*. Art. II, Sec. 2.

compulsory for all states, regardless of local laws that stated otherwise. Supreme Court rulings, therefore, had sweeping influence over diversity and inclusion initiatives in schools, workplaces, and cities across the nation.

***Bakke*: A Modern Precedent for Race-Conscious Policies**

Decades later, the desegregation mandates from *Brown* were taken even further: many K-12 schools and universities implemented voluntary race-conscious policies to improve diversity among their student bodies. These policies, however, were met with considerable criticism. Some argued that the Equal Protection Clause, which mandates the very desegregation required in *Brown*, also prohibits race-conscious diversity initiatives, as they treat individuals differently based on racial classifications. Chief Justice Roberts, for example, is a proponent of such "color-blind" policies. In *Parents Involved in Community Schools v. Seattle*, he criticized a voluntary student assignment plan that used racial classifications to improve diversity in schools.[89] In a plurality opinion, he argued that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." [90] Proponents of this color-blind ideology often see merit in desegregation plans that *retroactively* correct *de jure* segregation and underrepresentation, which is officially sanctioned through laws and policies. However, they challenge the constitutionality of policies that *preemptively* consider racial consequences, such as affirmative action and voluntary school attendance plans, on equal protection and due process grounds. *Regents of UC Davis v. Bakke*, *Grutter v. Bollinger*, and *Parents Involved in Community Schools v. Seattle* all involve Supreme Court decisions on such policies. A close examination of these rulings exposes

[89] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)
[90] Ibid.

the Court's overly restrictive, inconsistent, and temporal treatment of race-conscious policies that ultimately obstructed diversity and inclusion efforts in public schools.

In *Regents of UC Davis v. Bakke*, the Court defined a perfectly reasonable standard for constitutional affirmative action. This case, decided in 1978, involved a qualified white male who was not considered for the four remaining spots at the UC Davis Medical School. Under the school's affirmative action plan, these spots were explicitly reserved for minority applicants to improve racial diversity in the student body. Justice Powell, writing for the plurality of the Court, established that strict scrutiny should be used in all cases involving racial classifications and held that "the interest of diversity is compelling in the context of a university's admissions." [91] He stopped short of endorsing the program, though, contending that diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." [92] That is, the UC Davis admissions program was problematic because it involved racial quotas and precluded every applicant from being considered for every spot. Nonetheless, Powell endorsed using race as a "plus" in admissions and affirmed the importance of academic freedom in institutions of higher education, including the right to pursue a diverse student body.[93] This case set an important precedent that validated the use of race-conscious admissions and endorsed holistic, non-quota affirmative action practices.

The *Bakke* standard for race-conscious admissions is not only consistent with but reinforces the Equal Protection Clause, which requires equal protection of laws, as well as the Due Process Clause, which protects against undue deprivation of life, liberty, and property. Education, mandated by law under the California constitution, is provided by public universities

[91] Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).
[92] Ibid.
[93] Ibid.

like UC Davis and promotes the livelihood of state residents, as well as their liberty to pursue a fulfilling education and career. Some argue that all affirmative action programs violate equal protection because they disadvantage white applicants on the basis of race. The *Bakke* standard remedies this concern, as it specifically mandates non-quota admission programs that consider each applicant for each spot. Thus, they cannot deprive any applicant of their due process rights or violate equal protection. Moreover, seeing that diversity can take many forms— culture, race, religion, age, gender, sexual orientation, disability, and language, among many more— considering every applicant for every spot ensures that schools can take a well-rounded, diverse, and qualified class without limiting diversity to one dimension. The *Bakke* standard also complements the Civil Rights Act 1964 in its commitment to inclusion of minority citizens, which is reflective not only of the wishes of Congress but those of the American electorate.[94] Holistic race-conscious admission programs, as sanctioned in *Bakke*, are therefore a constitutional mechanism that advance the nation's commitment to diversity and inclusion.

Even more, affirmative action practices strengthen equal protection for discrete and insular minorities. They compensate for structural racism that precludes some minority applicants from access to extracurriculars, resources, and colleges that, in the *Bakke* case, assist with medical school admissions. In so doing, race-conscious admission improves equality of opportunity precisely *because* of its use of racial classifications. As Associate Justice Blackmun eloquently dissented, "In order to get beyond racism, we must first take account of race. There is no other way. And to treat some persons equally, we must treat them differently." [95] While this defense of affirmative action invites further controversy over racial classifications, it

[94] Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).
[95] Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).

demonstrates that race-conscious admission improves diversity for the entire student body and advances equal opportunity for otherwise underrepresented applicants.

***Grutter v. Bollinger*: A Temporal Approach to Affirmative Action**

While the decision in *Bakke* was consistent with constitutional mandates and federal legislation, the Court inconsistently applied its standard for race-conscious admissions in subsequent cases. Take *Grutter v. Bollinger*, for example. In this case, Barbara Gutter was denied entry to the University of Michigan Law School. She claimed that race was used as a predominant factor in admissions, amounting to a near-quota system. Michigan Law School denied the use of racial quotas and clarified their goal to admit a "critical mass" of racial and ethnic minorities, who they claim would not be represented in meaningful numbers without affirmative action.[96] O'Connor, consistent with the *Bakke* standard, reaffirmed the use of strict scrutiny, endorsed race-conscious admissions as a valid mechanism to improve diversity, and upheld the constitutionality of Michigan's flexible affirmative action program. However, she did so with a caveat: "race-conscious admissions policies must be limited in time… 25 years from now the use of racial preferences will no longer be necessary to further the use it is approved for today." [97] In addition to its mathematical guesswork, the Court's temporal treatment of race-conscious admissions deviates from the Court's commitment to academic freedom in *Bakke*. Further, it erroneously predicts a post-racial America where racial preference and prejudice suddenly cease to exist.

Indeed, O'Connor's time limit on affirmative action assumes that pervasive racial inequities and structural systems of oppression will disappear in 25 years' time. Eight years from

[96] Grutter v. Bollinger, 539 U.S. 306 (2003)
[97] Ibid.

that benchmark, post-racial America is nowhere in sight. Racial minorities continue to face comparatively worse employment levels, household income, access to health care, criminal justice, and education, among many other inequities.[98] Furthermore, *Regents of UC Davis v. Bakke*, the clear precedent in this case, has no mention of temporary race-conscious admissions. Rather, it affirms the academic freedom of public universities to pursue racially diverse student bodies for the sake of diverse representation. O'Connor, on the other hand, treats affirmative action as a remedial measure that will not be necessary in post-racial America. This undermines the right of universities to pursue diversity for diversity's sake. Even in a society free of racial preference, prejudice, and discrimination, diversity of applicants is not a guarantee. For example, Southern Texas could have a higher concentration of immigrant applicants than the northern portion of the state. Even in absence of racial or ethnic prejudice, a university in Dallas might have a compelling interest in racial, linguistic, and cultural diversity, and should therefore be permitted to favor underrepresented foreign-born applicants. This non-remedial interest in diversity is further supported by the sheer quantity of amicus briefs filed in favor of Michigan's affirmative action program, in which corporations, universities, and military leaders testified that students from diverse schools performed better in the workforce.[99] Despite its illusion of progress, the *Bollinger* decision departs from *Bakke* rationale, assumes overly ambitious racial progress, *and* demonstrates inconsistent treatment of affirmative action policies by the Court.

***Parents Involved*: *De Jure* vs. *De Facto* Segregation Distinction**

[98] Gal, Shayanne, et al. "26 Simple Charts to Show Friends and Family Who Aren't Convinced Racism Is Still a Problem in America." *Business Insider*, 8 July 2020, https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6.

[99] Grutter v. Bollinger, 539 U.S. 306 (2003)

In *Parents Involved in Community Schools v. Seattle*, the Court continues to abandon its traditional acceptance of race-conscious policies as indicated by *Brown* and *Bakke*. After Reagan appointed three Supreme Court justices and elevated Rehnquist to Chief Justice, the Court embraced a more conservative approach.[100] Indeed, the Court began to assume that segregation in schools was a product of *de facto* neighborhood composition, not a product of former *de jure* segregationist policies. As such, schools were released from court-ordered desegregation, but Seattle nonetheless instituted voluntary school attendance plans. In 2007, the Court struck down their program, which mandated that no school could have more than 60% white students. In *Parents Involved*, consistent with *Brown*, Chief Justice Roberts applies strict scrutiny and acknowledges remedying *de jure* segregation as a compelling state interest. However, he claims that this "interest is not involved… because the Seattle schools were never segregated by law nor subject to court-ordered desegregation." [101] In other words, he distinguishes this case from those affected by *Brown*-era desegregation plans because Seattle schools experienced *de facto* segregation that was never sanctioned by law. He also distinguishes this case from *Bakke* because it involves K-12 schools with mechanical assignment plans that fail to promote holistic diversity.[102] According to Roberts, such assignment would be unconstitutional not only because it seeks to reverse *de facto* segregation but because it relies on binary white/non-white racial classification as the predominant factor in school assignment. Roberts' critique of Seattle's attendance plan is valid: it is distinct from universities that pursue diverse student bodies because of its mechanical, binary conception of integration. However, his attempt to distinguish Seattle's

[100] "Ronald Reagan's Big Impact on the Supreme Court." *National Constitution Center*, 6 Feb. 2017, https://constitutioncenter.org/blog/ronald-reagans-big-impact-on-the-supreme-court.
[101] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)
[102] Ibid.

de facto segregation from *Brown*-era *de jure* segregation reveals the Court's fundamental misunderstanding of the nature of racial segregation in America.

Indeed, Roberts' distinction between *de facto* and *de jure* segregation overlooks the influence of Jim Crow laws and reduces desegregation to a matter of mere policy reversal. As Justice Breyer eloquently dissents, "*de facto* segregation (caused, *e.g.*, by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction." [103] Given the causal relationship between state-sanctioned segregationist policies and neighborhood composition, Seattle school segregation is hardly distinct from *de jure* segregation. The "*de facto*" segregation in this case resulted from the residence of minority communities— but residence is often not a choice. From housing prices to redlining to urban proximity, residence— and by extension, school district— is often a function of socioeconomic status and racist housing policies dating back to the early 1900s. *De facto* segregation is not incidental; it is a product of a long history of racial oppression and a mere extension of *de jure* segregation. This *de facto / de jure* distinction, endorsed by five justices, further highlights the Court's assumption of post-racial America and its inconsistent treatment of race-conscious policies in schools.

Conclusion

From *Brown to Bakke*, the Supreme Court rulings extend far beyond the courtroom; they have tangible consequences on diversity, segregation, and education in the United States. For example, after the Court's ruling in *Parents Involved*, many K-12 institutions became hesitant to adopt voluntary school attendance plans and desegregation policies. In fact, A 2019 UCLA study

[103] Ibid.

found that desegregation enforcement slowed after a series of Supreme Court rulings against race-conscious school policies, and now the effects of many integration efforts following *Brown* have largely disappeared. For example, "Since 1988, the share of intensely segregated minority schools—schools that enroll 90-100% non-white students, has more than tripled," primarily because of residential segregation.[104] As the Supreme Court realized in 1896, residential segregation, largely influenced by property taxes, cannot possibly result in "equal" conditions. While "separate but equal" is no longer written into law, judicial resistance to race-conscious policies and post-racial rhetoric have contributed to segregation in public facilities and undermined the very principles set forth in *Brown*.

Just as they were in 1954, race-conscious policies have a clear constitutional basis and are necessary to produce healthy diversity in public facilities. Race-conscious policies, like the affirmative action standard established in *Bakke* and desegregation mandates created in *Brown*, are consistent with the Equal Protection and Due Process Clauses of the 14th and Fifth Amendments. Indeed, policies that improve diversity provide clear benefits to students and workers alike, while also compensating for the structural barriers that deny racial minorities equal protection of life and liberty. From *Brown* to *Bakke*, the Court formerly embraced such race-conscious policies. More recently, however, it has deviated from precedent and demonstrated an inconsistent approach to diversity initiatives in schools. *Parents Involved*, with its *de facto / de jure* distinction, and *Bollinger*, with its temporary approval of affirmative action, deviate from the Court's formerly receptive view of race-conscious policies expressed in *Bakke* and *Brown*. These restrictive rulings underscore the Court's facile view of segregation and its

[104] Lockhart, P.R. "65 Years after Brown v. Board of Education, School Segregation Is Getting Worse." Vox, Vox, 10 May 2019, www.vox.com/identities/2019/5/10/18566052/school-segregation-brown-board-education-report.

color-blind presumption of post-racial America. While policies that involve racial quotas and binary racial categories are inevitably trickier, diversity is as important today as it was 70 years ago. With schools still dramatically segregated and inevitably unequal, race-conscious policies are not only constitutional but essential to achieving an egalitarian society that can overcome persistent racial inequities.

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U.S. Constitution. Amend. XIV, Sec. 1.

U.S. Constitution. Art. II, Sec. 2.

Laïcité: A Flawed Secularity in France

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Abstract

France holds dear a unique principle in its Republican values: *Laïcité*. Scholars have struggled to find a precise translation for it in the English language. However, the term closely translates to the term "secularity" and not "secularism".[106] Secularism implies a state of godlessness, even hostility towards religion which is expressed through the term "*Laïcisme*". Recent events of religious extremism in France, such as the tragic death of Samuel Paty in 2020, have highlighted the need for a re-evaluation of laïcité. As opposed to secularism, secularity (Laïcité) articulates the French aspiration of a religiously neutral public sphere astutely. *Laïcité* excludes religion and religions of the state; it prohibits the state from collaborating or cooperating with one religion, either in directing its organization or its functioning or in allowing its clerics to meddle in public affairs.[107] This paper will compare France with two other secular societies, the United States and India, and will gain chief takeaways from both, enabling us to propose proper revisions or recommendations to improve the way in which laïcité functions in contemporary French society.

Introduction

The concept of laïcité has roots in the French Revolution which witnessed the revocation of the clergy's privilege and the King's divine rights. Article 10 of The Rights of Man and Citizen states this aspiration of *Laïcité* as:

> "No man may be harassed for his opinions, even religious opinions, provided their expression does not disturb the public order established by the law."[108]

[105] Priyanka Preet, final year law student pursuing B.A. LL.B. (Hons.) at National Law University, Lucknow. The author is thankful to Mr. Shashank Pandey and Mr. Arbaz Khan for their insights. Any errors in the paper are the author's own.
[106] ROBERT O'BRIEN AND B. STASI, THE STASI REPORT (Hein & Co., 2005).
[107] Elisabeth Zoller, *Laïcité in the United States or The Separation of Church and State in Pluralist Society* 13(2) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 561, 562 (2006).
[108] The Declaration of the Rights of Man and of the Citizen of 1789, art. 10.

Prior to the French Revolution, a powerful monarchy was working in tandem with the influential Catholic clergy to oppress the commoners. The Church was heavily involved in socio-political affairs, owned vast amounts of land, collected sizable taxes, rents, and tithes, often from the parishioners and exercised control over children's education.[109] The Revolution was an expression of a desire to reform the clergy and to 'desacralize' and 'dechristianize' the State and its citizens.[110] Therefore, *Laïcité* became a foundational Republican value and was incorporated in the Declaration of Rights of Man and Citizen, the Preamble to the Constitution, 1946 and the 1958 Constitution, as well. The principle of *Laïcité* also targeted the Church in the 1905 legislation titled "The Law Concerning Separation of Church and State" which mandated the transfer of Church property to the State with the State undertaking all the expenses emanating from such property. The Church could continue using the property, play its role with its internal rules while being away from the public gaze with no interference from the State.

An integral component of the aspiration of *Laïcité* is the secularization of education.[111] The State is of the view that strong democratic and republican values, model conduct of citizenship and shared values of the French society can be instilled in children while they are young. This system includes teachers who are public employees and representatives of the State and are obligated to set their religious affiliations aside to hold public positions. Religion holds little value in the public education system and is viewed as interference for impressionable minds.

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[109] MG Sutherland, *Peasants, Lords, and Leviathan: Winners and Losers from the Abolition of French Feudalism, 1780-1820*, 62(1) THE JOURNAL OF ECONOMIC HISTORY 1(2002).
[110] DALE K. VAN KLEY, THE RELIGIOUS ORIGINS OF THE FRENCH REVOLUTION: FROM CALVIN TO THE CIVIL CONSTITUTION, 1560-1791(Yale University Press, 2008).
[111] Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54(2) THE AMERICAN JOURNAL OF COMPARATIVE LAW 337 (2006).

Robin Chand argues that *Laïcité* molds the French society as a monolithic environment seeks to tear the State away from religion as opposed to the multicultural and plurality-embracing nature of the American or the Canadian State, for instance.[112] The restrictiveness of the French model is corroborated through the promulgation of "The Law of Secularity and Conspicuous Religious Symbols", 2004[113] which prohibited the donning of Islamic headscarves, Jewish yarmulkes, Sikh turbans, large Christian crosses, and other "ostentatious" religious symbols in a public area. Scholars and activists largely concur that the law intended to strike the freedom of public expression of the French Muslim population which is the largest in all of Europe.[114] The 2004 Law was soon followed by the controversial "Veil Ban" of 2010[115] which prohibited women from wearing a full-face veil in public. The third legislation which will target the religious freedoms of the Muslims more severely is the "Confirming Respect for the Principles of the Republic"[116] Bill or the Bill "Reinforcing Republican Principles" which has been passed by the French National Assembly and the Senate with a majority in April 2021. The introduction of the Bill is also marked by sharp political rhetoric, civil society anguish and diverse international reactions to Samuel Paty's murder in October 2020. The attack on Paty by a young Islamic fundamentalist for displaying caricatures of Prophet Muhammad further polarized France's society on issues of secularism, freedom of speech and immigration.[117] It is in this

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[112] Robin K. Chand, *Understanding the Role of Faith in Government: A Comparative Analysis of the Separation of Church and State between the United States and France*,11 HOLY CROSS J.L. & PUB. POL'Y 5 (2007).
[113] The Law of Secularity and Conspicuous Religious Symbols of 2004.
[114] *See* Jordan Elizabeth Pahl, *Violence Implicit in Hijab Suppression Laws in Uzbekistan, Tajikistan, and France under the Cedaw Framework,* 28 WASH INT'L L.J. 727(2019); Raed Abilmouna, *Reconciling the Hijab within Laicite France,* 13 J. ISLAMIC L & CULTURE 117(2011); Sofie G Syed, *Liberte, Egalite, Vie Privee: The Implications of France's Anti-Veil Laws for Privacy and Autonomy*, 40 HARV WOMEN'S L.J. 301(2017).
[115] Act Prohibiting the Concealing of the Face in Public of 2010.
[116] Confirming Respect for the Principles of the Republic Bill National Assembly of 2021.
[117] Survey, *The View of The French On The Terrorist Threat And Islamism*, INSTITUT FRANÇAIS D'OPINION PUBLIQUE, (Nov. 7, 2021, 6:00 PM), https://www.ifop.com/publication/le-regard-des-francais-sur-la-menace-terroriste-et-lislamisme/.

acrimonious atmosphere that President Macron opined that there is a need to curb Islamic separatism such that Muslims should not "supplant" France's civil code with private religious codes, while introducing the 2021 Bill.[118] The tragic killing of Paty, the ensuing vitriolic debate and the controversial 2021 Bill call for fresh academic discourse on France's unique model of secularity and its relationship with minorities.

French *Laïcité* cannot be understood unless it is juxtaposed with certain popular models of secularism followed across various States. The second section of the paper intends to contrast the French model of secularism with that of the United States of America and India. All three States consider secularism, albeit with varying interpretations, an integral feature of their polity. Further, the States are diverse and hold a large Muslim population. The comparison is not only aimed at deciphering *Laïcité* better but also determine those aspects of American and Indian secularism which can benefit France's minorities. The third section will examine the various legislations to establish that French *Laïcité* bears a threat to religious rights and liberties. The fourth segment is a concluding paragraph.

Neutrality versus Plurality: A Comparative Analysis

France

France and the United States played an integral role in the framing of the Universal Declaration of Human Rights. Both countries endorse a high standard of human rights and liberties for the welfare of their citizens. However, in the sphere of freedom of religion and the Separation of the Church and the State, they do not see eye to eye.

[118] Alice Tidey, *Here's all You Need to Know About France's Controversial Separatism Law*, EURO NEWS (May 18, 2021, 8:00 PM), https://www.euronews.com/2021/02/16/here-s-what-you-need-to-know-about-france-s-controversial-separatism-law.

France's discord with religion goes back to the 19th century where a feud arose between the "modern" Liberals and the Catholics across European nations. The mid-19th century witnessed a popular mobilization of Catholicism, an increase in membership of the Catholic Church, increasing piety with relics, plaster saints, public rituals and so on.[119] There were concerns that the Catholics were unmodernized, backward, superstitious, believe in ostentatious worship and are marginalized in the public schools and trade and profession.[120] This conflict with Catholicism in Germany found ground in France during the Revolution, as well. The contempt for rigidity in religious practices combined with the anger against the socio-economic oppression perpetrated by the clergy led to the Church crumbling before the powerful French National Assembly. The conflict between the Church and the State was later settled in 1905 in the legislation titled, "The Law Concerning Separation of Church and State". This legislation makes an artful distinction between the freedom of religion and the freedom of conscience by placing the latter above the former. To the American or the Indian society, both terms will be synonymous- however, to the French the freedom of conscience implies "the freedom from[121] the moral authority of a dominant religion."[122] Hence, Article 1 of the legislation reads:

> "The Republic ensures freedom of conscience. It guarantees freedom of worship limited only by the following rules in the interest of public order."[123]

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[119] Robert A. Kahn, *Are Muslims the New Catholics – Europe's Headscarf Laws in Comparative Historical Perspective* 21 DUKE J. COMP. & INT'L L. 567(2011).
[120] *Id.* at 575.
[121] emphasis added.
[122] Dominique Decherf, *French Views of Religious Freedom*, https://www.brookings.edu/articles/french-views-of-religious-freedom/ BROOKINGS (May 15, 2021, 12:00 PM), https://www.brookings.edu/articles/french-views-of-religious-freedom/.
[123] The French Law on the Separation of the Churches and State of 1905 cl. 11.

However, that is not to say that *Laïcité* does not accommodate the freedom of religion. Religious codes such as *Maghrebian* laws[124] which are based on Islamic principles and govern marriage and other familial matters are still applied in France. But this accommodation occurs only in the private domain of the citizens. Similarly, there are 'denominational squares' within cemeteries for Muslims, but the establishment of solely Muslim cemeteries is not permitted. [125]

Further, Article 2 envisages the intention of the Separation of Church and the State in unambiguous terms:

> "The Republic neither acknowledges, nor pays for nor subsidizes any form of worship. Consequently, from 1 January on, after the present law has been publicized, all spending related to worship will be eliminated from the budgets of the State and localities."[126]

However, chaplaincies can be maintained from the State budget to ensure the free exercise of religion in public facilities such as schools, asylums, and prisons.

Article 19 of the same legislation mandates the formation of "Working Associations" of the Church which would use, handle, and maintain the properties overtaken by the State. The associations would comprise of "seven people in communities of less than 1,000 people, fifteen people, in communities of 1,000-20,000 people and twenty-five mature people who are domiciled or resident in religious districts with more than 20,000."[127] The State will thus engage only with these associations and not the Church, itself.

Another provision worth noting is Article 31 which sets out criminal proceedings for an individual "who, by assault, violence or threats against an individual or by making him afraid of

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[124] The Maghreb region of Northern Africa consists of Morocco, Algeria, Tunisia, and Libya. More than two and a half million Maghrebian immigrants live in France.

[125] Mohammad Mazher Idriss, *Laicite and the Banning of the 'Hijab' in France*, 25(2) LEGAL STUDIES 260, 268(2006).

[126] The French Law on the Separation of the Churches and State of 1905 cl. 2.

[127] The French Law on the Separation of the Churches and State of 1905 cl. 19.

losing his job or damaging his family or his wealth prevents another person from practicing or contributing to a religious organization." The same holds for any person forcing another to participate in or contribute to any religious organization.[128]

Thus, the freedom to profess, practice and propagate one's religion which is intrinsic to the right of freedom of religion in the United States of America and India, earns lower tolerance by the French State. This is because religion is viewed as a private affair of the citizen and any overt display of religious symbols in the public sphere will be deemed as an infringement of the right to a neutral, non-proselytizing public space of other citizens.[129] A Muslim woman's *Hijab* or a Sikh man's turban is deemed as a form of propagation of religion stands poorly against the superior freedom of conscience in French society.

In the United States and India, the constitution-makers intended to protect religion from the State. Here, the right to freedom of religion carries a higher degree of protection than the freedom of conscience which is so significant for the French citizens. Further, the concept of "shared values"[130] in France is replaced by individual rights and liberties in America and India. Therefore, the citizen is at liberty to bring religion from one's private sphere to the public glare.

United States of America

The American perspective towards freedom can be understood through the Establishment Clause and the Free Exercise Clause. The Establishment Clause or the First Amendment states:

[128] The French Law on the Separation of the Churches and State of 1905 cl. 31.
[129] Fiona Deshmukh, *Legal Secularism in France and Freedom of Religion in the United States: A Comparison and Iraq as a Cautionary Tale* (2007) 30 HOUS. J. INT'L L. 111.
[130] *Ibid.*

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."[131]

It contains negative language to restrict the State from participating in the religious affairs of citizens. It is the scope and the limits prescribed by the Establishment Clause which were brought into inquiry in the celebrated *Lemon v. Kurtzman* case. The case is most known for laying down the three-pronged litmus "Lemon test" which enumerates the kinds of activities prohibited for a secular institution such as the American State which is still employed by American courts.[132] The case also combined past analysis of the Separation of Church and State doctrine and provided a comprehensive scrutiny into the State's entanglement with religious institutions.[133] Here, the US Supreme Court was confronted with the question that whether the State granting funds to a non-public, non-secular school violates the Establishment Clause. This question had arisen from the states of Pennsylvania and Rhode Island which had adopted legislation that permitted the State to fund certain aspects of non-public and non-secular schools. The Supreme Court held that the legislation violated the Establishment Clause because of the "excessive entanglement" of the State in religious activity. Justice Brennan stated, "Such an entanglement would subvert religious liberty and the strength of a system of secular government."[134] The Judge also enumerated the three kinds of involvement which are prohibited for a secular institution under the Establishment Clause- a) serve the essentially religious activities of religious institutions, b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means

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[131] Bill of Rights of 1791, amendment 1 cl. 1.
[132] *Donald J. Trump, President of the United States et al v. Hawaii*, 138 S. Ct. 2392 (2018).
[133] Geoffrey McGovern, *Lemon v. Kurtzman I (1971)*, THE FIRST AMENDMENT ENCYCLOPEDIA (Nov. 5, 2021, 7:02 PM), https://www.mtsu.edu/first-amendment/article/437/lemon-v-kurtzman-i.
[134] *Lemon v. Kurtzman*, 403 US 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 at 643 (1971).

would suffice. Further, the judgement introduced a litmus test for legislations in a secular State: The Law cannot have a) a sole religious purpose, b) primary religious effect or c) government entanglement in religious affairs. The *Lemon* case settled the meaning and the elements of the Establishment clause and continued to be cited as a precedent in subsequent cases.

The Free Exercise Clause,[135] on the other hand, works in tandem with the Establishment Clause. It states:

> "Congress shall make no law …abridging the freedom of speech, press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The rights granted by the Free Exercise Clause enjoy a high degree of protection from the State and are often upheld by the judiciary.[136] The American perspective towards a finetuned distinction between the Establishment Clause and the Free Exercise Clause was elaborated in two contrasting judgements with seemingly similar facts- *The Ten Commandments Case* and the *McReary County Case*.

In the first case, a monolith inscribed with the Ten Commandments was erected in the Texan State Capitol. The monument was gifted to the State by the Fraternal Order of Eagles- a national social, civic, and patriotic organization[137] and thereafter, the State erected this monolith on the Capitol premises with a few recommendations. The Petitioner, Mr. Van Orden, a frequent visitor of the Capitol premises approached the Court seeking a declaration that such a monolith violated the Establishment Clause. The District Court and the Fifth Circuit affirmed that the construction had a valid, secular purpose to recognize and value the efforts of the Eagles which

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[135] Bill of Rights of 1791, amendment 1 cl. 2.
[136] Fiona Deshmukh, *Legal Secularism in France and Freedom of Religion in the United States: A Comparison and Iraq as a Cautionary Tale*, 30 HOUS J. INT'L L. 111(2007).
[137] *Van Orden v. Perry* 545 US 677 (2004).

was a patriotic organization, and any reasonable observer aware of their history and contribution would not regard the monolith as a religious construction. The US Supreme Court affirmed this view. Justice Rehnquist opined that the American Founding Fathers were devoted to God and therefore, America presupposed the existence of God and religion. He further stated that "religion has been closely identified with our history and government" and that "man is inseparable from religion."[138] The Judges also felt that the Ten Commandments monument not only has a religious significance but a historical one too and its presence was "passive". Justice Scalia, in his concurring judgement found nothing wrong in the State acknowledging religion or God "in a non-proselytizing manner."[139] Justice Breyer, on the other hand, while concurring with Justice Rehnquist, emphasized that the erection had gone unchallenged for the last 40 years and therefore, could not now be regarded as unsecular. The judgment thus relied overwhelmingly on the purpose and the impact of the monument in the public sphere.

In the *McReary County v. American Civil Liberties of Union* case, the same Ten Commandments were the cause of grievance for the American Civil Liberties Union. Two Kentucky Counties had passed a resolution to acknowledge the Ten Commandments as the "precedent legal code" and Jesus Christ as the "Prince of Ethics". Further, the halls of one of the Counties was decked with the original displays of the abridged copy of King James version of the Ten Commandments, including a citation to the Book of Exodus in large, gold frames. The second County also unveiled these displays with a large ceremony where a Judge gave an inaugural speech with religious connotations. Justice Souter in the majority judgement relied on the test laid down by the *Lemon* case and agreed that scrutinizing the purpose of such displays is

[138] *Van Orden v. Perry*, 545 US 677 at 8 (2004).
[139] *Van Orden v. Perry* 545 US 677 at 1 (2005).

a practical solution. He acknowledged the influence of the Ten Commandments over civil law or secular law, but agreed that to an "objective observer", the original text viewed in entirety is "unmistakably religious."[140] Therefore, when the Government made an overt display of the Commandments' text in the halls of the Counties in full public view, "a religious object is unmistakable."[141]

While there are contradictions in the two judgements, the American courts seem to be relying more on the facts of the case than on the tests laid down by the precedents or the jurisprudence of the doctrine of Separation of the Church and the State. Further, both America and France are concerned about the proselytizing nature of religion in the public sphere, but the degree of concern varies- the United States seeks to balance the Establishment Clause with the Free Exercise Clause, while France upholds the Republican ideal of a provocation-free public zone, sometimes at the expense of the individual liberty of exercising religion. Thus, the precise import of secularism and church-state relations varies throughout States. The United States is "exceptional" because despite claiming secularity, it possesses a "vibrant church participation"[142] and the citizen need not hesitate in "wearing their religion"[143] in public. Meanwhile, France has pursued exclusionary and restrictive practices towards religion, particularly in schools.[144] France's secularism has sought to confine religion to the individual's conscience, thereby interpreting *Laïcité* as "exclusive of proselytism."[145] This interpretation was echoed by the

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[140] *McCreary County v. ACLU of Kentucky*, 545 US 844 at 21 (2005).
[141] *Ibid.*
[142] AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARDS RELIGION: THE UNITED STATES, FRANCE AND TURKEY (Cambridge University Press, 2009).
[143] Robin K. Chand, *Understanding the Role of Faith in Government: A Comparative Analysis of the Separation of Church and State between the United States and France*,11 HOLY CROSS JL. & PUB. POL'Y 5 (2007).
[144] AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARDS RELIGION: THE UNITED STATES, FRANCE AND TURKEY (Cambridge University Press, 2009).
[145] Stéphanie Hennette Vauchez, *Is French laïcité Still Liberal? The Republican Project under Pressure (2004-15)*, 17 HUMAN RIGHTS L. REV. (2017).

European Court of Human Rights in *Dahlab v. Switzerland* where a primary school teacher began donning the Islamic Headscarf which was considered to be in violation of Section 6 of the Geneva Public Education Act. This provision mandated the public education system to respect the religious beliefs of pupils and parents. The Court upheld the prohibition of the donning of the Headscarf on the ground:

> The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality, and non-discrimination that all teachers in a democratic society must convey to their pupils.[146]

Hence, the model of secularism that France ascribes to is wary of ostentatious displays of religious symbols since they are perceived to have a proselytizing effect on society which in turn disrespects the religious beliefs of other citizens.

India

The Indian model of secularism is far more complex compared to France's *Laïcité* and differs greatly from western secularism, in general. India, much like France, considers secularism as a part of its national identity and has deemed it a basic, non-derogable feature of the

[146] *Dahlab v. Switzerland*, E.G.M.R. 423, 939.

Constitution in the landmark case of *Keshavananda Bharati v. Union of India.*[147] The Keshavananda Court, *inter alia*, was confronted with the obscure question of the extent to which the Indian Parliament could amend the Indian Constitution under Article 368 of the Constitution. To address this question, the Court propounded the "Basic Structure Doctrine" which delineated certain fundamental and essential features of the Constitution as not amenable to Parliament's amendment-making powers. These ideals include the supremacy of the Constitution, the democratic way of life, a free and independent judiciary and so forth. Amongst these features which constitute the hallmark and cornerstone of the Indian Constitution is the "secular character of the State which shall not discriminate against any citizen on the ground of religion and cannot likewise be done away with."[148]

The 1994 case of *SR Bommai v. Union of India* in dealing with the extent of power vested in the Union Government to impose President's Rule on states, further elaborated the nature of Indian polity, its democratic, socialist, and secular framework and the power-sharing envisioned between the Union and the states in the Indian Constitution. While developing a link between plurality, federalism and the multi-party system, Justice Ahmadi opined that even though the term "Secular" was added to the Preamble of the Constitution in 1976 through the Forty-Second Amendment, it was embedded in the "constitutional philosophy"[149] of the country. But he did not venture to define the term because the term is "elastic" and incapable of definition. In 1945, the first Prime Minister of India and freedom fighter Jawaharlal Nehru wrote:

[147] *Keshavananda Bharati v. Union of India*, (1973) 4 SCC 225.
[148] *Keshavananda Bharati v. Union of India*, (1973) 4 SCC 225.
[149] *SR Bommai v. Union of India*, [1994] 2 SCR 644.

> "I am convinced that the future government of free India must be secular in the sense that government will not associate itself directly with any religious faith but will give freedom to all religious functions."[150]

Mahatma Gandhi made his views on secularism unambiguous by saying:

> If I were a dictator, religion and state would be separate. I swear by my religion. I will die for it. But it is my personal affair. The state has nothing to do with it. The state would look after your secular welfare, health, communications, foreign relations, currency and so on, but not your or my religion. That is everybody's personal concern![151]

However, the stringent separation of the Church and the State encouraged by France and the United States is not envisaged in Indian Constitution. While the separation of State and religion was desirable to the founding fathers of the country, State interference in matters of religion has also been considered necessary to rectify deep-rooted inequalities in Indian society. For instance, Article 25(b) of the Constitution directs the opening of the Hindu religious institutions to all classes and sections of Hindus which were earlier restricted for the backward castes and women.[152] Similarly, the Indian courts frequently adjudicate on religious practices to maintain constitutional morality which is deemed synonymous to "morality" mentioned in Article 25 and Article 26. The *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors*, for instance, opened the entry of women into the *Sabarimala* Temple which was earlier prohibited for women in the menstruating ages of 10-50 on the ground that the deity was a celibate. While

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[150] AM Rajasekhariah, *Jawaharlal Nehru's Contribution to Secular India: An Estimate*, 48(2) THE INDIAN JOURNAL OF POLITICAL SCIENCE 212 (1987).
[151] Staff, *Mohandas Gandhi on Communal Harmony*, BERKLEY CENTER FOR RELIGION, PEACE & WORLD AFFAIRS (May 16, 2021, 1:00 PM), https://berkleycenter.georgetown.edu/quotes/mohandas-gandhi-on-communal-harmony.
[152] INDIA CONST. 1950, art. 25(b).

striking down the lower court's judgement upholding this practice, Justice Chandrachud stated, "such exclusionary practices go against constitutional morality and the courts must not grant constitutional legitimacy to such religious practices which derogate the dignity of women."[153]

In India, there is a cooperative approach to accommodate religion on the condition that the State cannot have an established religion. Hinduism is not the *de jure* official religion of the country but a *de facto* one because it is practiced by a major part of the country.[154] The Constitution also permits the State to partially fund religious schools, universities, and other institutions. Further, the Constitution actively guards minority cultural and educational rights through Articles 29 and 30 such that minorities can administer their own institutions and participate in practices which preserve their language, culture, and script. The State can partially fund these institutions with the corollary that such institutions cannot deny admission to citizens based on race, caste, creed, religion, or language.

Owing to these peculiar features, Indian secularism has come to be criticized as "pseudo-secularism" because of the consistent entanglement of the Indian State with religious affairs. The practice of providing *Haj* subsidies to Muslim citizens was only recently done away with considering that no other pilgrims from different religions are awarded such a benefit.[155] However, the State continues to partially fund several religious buildings, provide special trains to and from religious sites and provide tax exemptions to religious trusts. Such practices would be strongly disapproved of by the French State and its citizens in pursuit of their ideal of *Laïcité.*

Laïcité **and Islamophobia**

[153] *Indian Young Lawyers Association & Ors v. The State of Kerala & Ors,* (2019) 11 SCC 1.
[154] Robin K. Chand, *Understanding the Role of Faith in Government: A Comparative Analysis of the Separation of Church and State between the United States and France*, 11 HOLY CROSS JL & PUB. POL'Y 5 (2007).
[155] *Union Of India & Ors v. Rafique Shaikh Bhikan & Anr* Special Leave Petition (Civil) No. 28609 OF 2011.

Many scholars and civil liberties activists object to the use of the term 'Islamophobia' which refers to an irrational fear towards the adherents of Islam and results in discrimination or attacks towards such adherents or their institutions.[156] In reality, it is not an irrational fear towards the Muslim population but rather social hostility which has led to a slew of restrictive legislation in the pursuit of *Laïcité.* Professor Robert Kahn[157] presents a detailed argument that Muslims have become the new Catholics of Europe because of the increasing repression of Muslim public expression. The repression is not only through legislation but also through routine societal contempt and hostility towards the Muslim population in the form of offensive cartoons from newspapers such as Charlie Hebdo, to display a cultural battle between the European and Islamic values. The comparison of Muslims with Catholics is legitimate because the accusations levelled against Islam by the French conservatives and liberals are identical to the ones against the 19th century Catholics-Muslim political leaders are "fascists" or "totalitarian", the Muslim headscarf is oppressive, they have a high birth-rate and the crime-rate amongst immigrants is high.[158] The French contend that the lack of integration, failure of assimilation in the French culture, incompatibility of values and national security[159] are substantial reasons for an anti-Islam rhetoric and the repression of Muslim expression in the public space.

The Hijab as an "Ostentoire" Symbol

[156] Yasser Louati, *L'Exception Francaise: From Irrational Fear of Muslims to their Social Death Sentence*, 3(1) ISLAMOPHOBIA STUDIES JOURNAL 91 (2015).
[157] Robert A. Kahn, *Are Muslims the New Catholics – Europe's Headscarf Laws in Comparative Historical Perspective*, 21 DUKE J. COMP. & INT'L L 567 (2011).
[158] *Ibid*.
[159] Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54(2) THE AMERICAN JOURNAL OF COMPARATIVE LAW 337 (2006).

After 1962 when Algeria had gained independence from France, many from the *Maghrib* region sought employment in Europe, particularly France. The rapid increase in the Muslim population in France caused an expansion of Muslim presence in public facilities such as schools and hospitals.[160] This also resulted in conflicts between the Muslim identity and the cultural values of *Laïcité*. In 1989, three Muslim girls in the *Gabriel-Havez* School in Creil were suspended for insisting upon wearing the Islamic headscarf. This incident stirred several debates and controversies amongst the French citizens for years to come. Due to repeated conflicts of this nature with the school administration, the Minister of Education was compelled to issue a circular in 1994:

> In France, the national project and the republican project have merged with a certain idea of the citizen. This French idea of the nation and the Republic is, naturally, respectful of all beliefs, in particular, religious and political convictions and cultural traditions. …But ostentatious symbols, which constitute in themselves elements of proselytism or of discrimination, are forbidden. Provocative behavior, failure to fulfil obligations of conscientiousness and safety, acts susceptible of being construed as pressure on other students, interfering with involvement in activities, or disrupting the order of the institution are forbidden.[161]

Post 9/11 and the Iranian Revolution, several European States applied restrictive measures on the practice of Islam in the public sphere.[162] France, which had been grappling with the growing Muslim identity in its public sphere since the 1980s, conducted a study on the impact of

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[160] ROBERT O'BRIEN, THE STASI REPORT: THE REPORT OF THE COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC (William S. Hein & Co. Inc. 2005).
[161] ROBERT O'BRIEN, THE STASI REPORT: THE REPORT OF THE COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC (William S. Hein & Co. Inc. 2005).
[162] Neil Chakraborti and Irene Zempi, *Criminalising Oppression or Reinforcing Oppression: The Implications of Veil Ban Laws for Muslim Women in the West*, 64 N. IR. LEGAL Q 63 (2013).

ostentatious religious symbols such as the Islamic headscarves on the environs of a public school. This study, known as the Stasi report, expressed *Laïcité*'s goal as:

> Our political philosophy was founded on the defense of the unity of the social body. This concern with uniformity dominated over any expression of difference which was perceived as a threat...*Laïcité* today is facing the challenge of forging unity while respecting the diversity of society.[163]

The Stasi Report made several recommendations to the National Assembly of France to enforce *Laïcité* in public spaces such as schools, universities, and workplaces. Some of these suggestions were that the State should enhance the freedom of religion and equality between religions in the neutral public sphere, introduce the public holidays of Yom Kippur and the Eid-al-Adha, teach non-state languages such as Kurdish and rehabilitate ghettos which could breed Islamic fundamentalism.[164] Yet, only the recommendation for legislating against religious symbols was accepted by the French National Assembly. In 2004, the Assembly passed the legislation titled "The Law in Application of The Principle of Secularism, The Port of Signs or Clothing Manifesting a Religious Affiliation in The Schools and Public Colleges" or simply, the "Law on Secularity and Conspicuous Religious Symbols in Schools." The French Education Code added the following article:

> In public elementary schools, middle schools and high schools, the donning of signs or dresses by which the students ostensibly [ostensiblement] manifest a

[163] Murat Akan, *Laïcité and Multiculturalism: The Stasi Report in Context*, 60(2) BRITISH JOURNAL OF SOCIOLOGY 237 (2009).
[164] Mohammad Mazher Idriss, *Laicite and the Banning of the 'Hijab' in France*, 25(2) LEGAL STUDIES 260, 277 (2006).

> religious adherence are banned. The school regulation reminds that a dialogue with the student precedes the start of a disciplinary procedure.[165]

While the legislation's target appeared to be the Islamic headscarf, other minority religious groups such as the Jews and Sikhs are equally affected. Minority religions in France, as opposed to the majority Catholic religion require manifestations of faith[166] and the 2004 Law impacts the minority religions, disproportionately despite carrying a neutral language. The Law also draws undue attention to the student's religious identity, causes isolation, disadvantages them within the environs of the classroom and contributes to religious compartmentalization.[167]

However, the 2004 Law applied only to public schools. To further restrict religious expression, the 2010 Law on Prohibiting the Concealing of the Face in Public was enacted to debar the use of an ostentatious religious symbol, namely, the Islamic veil in public. Article 1 of the law states: "No one shall, in any public space, wear clothing designed to conceal the face."[168]

Any woman who conceals her face with a veil is subjected to a fine of 150 euros in addition to a citizenship course. Additionally, if she is compelled to wear the veil by another person, the person will be liable for a fine of €30,000- and one-year's imprisonment. If the offence is committed against a minor, the punishment will be up to two-year's imprisonment and a fine of €60,000.[169]

France's objection to the Islamic veil seemed twofold- *first*, the veil represented Islamic fundamentalism because a veiled face could pose a threat to public safety. Further, this assertion

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[165] Murat Akan, *Laïcité and Multiculturalism: The Stasi Report in Context*, 60(2) BRITISH JOURNAL OF SOCIOLOGY 237 (2009).
[166] United Nations Human Rights Committee Report 111th session, *When Discrimination Masquerades as Equality: The Impact of France's Ban of Religious Attire in Public Schools*, https://tbinternet.ohchr.org/Treaties/CCPR/SharedDocuments/FRA/INT_CCPR_ICO_FRA_17451_E.pdf, 2014.
[167] *Ibid.*
[168] Act Prohibiting the Concealing of the Face in Public of 2010, art. 1.
[169] Act Prohibiting the Concealing of the Face in Public of 2010, art. 4.

of Muslim identity or culture in the 'neutral' public sphere emphasized the "otherness" of Muslims in a foreign land.[170] It exacerbated the Islam versus the West binary such that Islamic values are incompatible with the Western or French values. The *second* objection to the veil was that it symbolized the oppression of women and disassociation from the Western idea of female emancipation.[171] This perspective towards the Islamic veil aligns with then-President Nikolas Sarkozy's[172] remarks in 2011:

> I do not want a society where communities coexist side by side ... France will not welcome people who do not agree to melt into a single community. We have been too busy with the identity of those who arrived and not enough with the identity of the country that accepted them.

Wearers of the veil or the headscarf agree that the choice to don this piece of clothing is not as much a result of Islamic fundamentalism as it is of affirming the Muslim identity in a non-Muslim land or a desire to express individuality or one's religious convictions.[173] France's *Laïcité*, thus, appears to be a "narrow articulation"[174] of secularity which does not cede space to composite identities such as the French Muslim identity. In a bid to attain uniformity, there is an insistence of "integration" and "assimilation" such that a veiled Muslim woman is viewed as a "failure of integration into the French society" and can therefore be denied French citizenship.[175]

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[170] Neil Chakraborti and Irene Zempi, *Criminalising Oppression or Reinforcing Oppression: The Implications of Veil Ban Laws for Muslim Women in the West*, 64 N. IR. LEGAL Q 63 (2013).
[171] *Ibid.*
[172] Jennifer Heider, *Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction Of The Right To Freedom Of Religion And The European Court Of Human Rights*, 22(1) IND. INT'L & COMP. L. REV. 93,99 (2012).
[173] Neil Chakraborti and Irene Zempi, *Criminalising Oppression or Reinforcing Oppression: The Implications of Veil Ban Laws for Muslim Women in the West*, 64 N. IR. LEGAL Q 63 (2013).
[174] Sofie G. Syed, *Liberte, Egalite, Vie Privee: The Implications of France's Anti-Veil Laws for Privacy and Autonomy*, 40 HARV. WOMEN'S L.J. 301 (2017).
[175] Jennifer Heider, *Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction Of The Right To Freedom Of Religion And The European Court Of Human Rights*, 22(1) IND. INT'L & COMP. L. REV. 93,99 (2012).

This "failure of integration" then reflects in the education, employment, health, housing, and participation of the Muslim community in politics where they face immense discrimination and ostracization.

The Bill Consolidating Republican Values

In April 2021, the French National Assembly passed the Bill on "Consolidating the Republican Principles" with a ratio of 208-109 in the Upper-House. The purpose of the Bill, as outlined by President Macron in his October speech on the brutal killing of the teacher for showing caricatures of Prophet Muhammad in the class, is to "free Islam in France from foreign influences."[176] Prime Minister Castex also issued a clarification that "this legislation is not legislation against religions, nor the Muslim religion in particular. It is a law of emancipation in the face of religious fanaticism."[177] The text of the Bill does not indicate any religion but the nature of the provisions and the background in which this Bill has been passed are sufficient to conclude that Islam is the intended recipient, as will be established ahead.

The 2004 Law on Ostentatious Symbols had extended the prohibition of conspicuous religious symbols from public schools to the public sphere. However, Article 1 of the Bill on Republican Values now extends the requirement of refraining from expressing opinions and religious convictions to even contractual employees in public service such as public bus drivers.[178] The Law also extends to governmental bodies to ensure that they provide public service while complying with the principles of *Laïcité* and neutrality.[179] This provision affects

[176] Alice Tidey, *Here's all You Need to Know About France's Controversial Separatism Law*, EURO NEWS (May 18, 2021, 8:00 PM), https://www.euronews.com/2021/02/16/here-s-what-you-need-to-know-about-france-s-controversial-separatism-law.
[177] *Ibid.*
[178] Consolidating the Republican Principles Bill of 2021, art. 1.
[179] Consolidating the Republican Principles Bill of 2021, art. 2.

the employment of minority individuals disproportionately since they require manifestation of their faiths. They are unfairly compelled to choose between their employment and their religious convictions which further inhibits their inclusion and financial growth in a foreign land.

The Bill also adds substantial vagueness and arbitrariness for religious associations. Article 6 states that associations which apply for a grant from any administrative body must maintain a "contract of Republican commitment" to respect the "principles of the Republic", in particular, freedom, dignity, equality, and fraternity.[180] The association cannot question the secular character of the Republic or disrupt public order. In the instance that such association's object or activity is unlawful or incompatible with the commitment in the contract, the administrative body can withdraw further grants and even enjoin the association to return the previous grant.[181] The text of the legislation does not explain the precise meaning of "republican values" and is likely to be abused by authorities to repress freedom of expression and association.[182] The proponents of the Bill suggest that such a provision has been introduced to curb the spread of 'radical Islam' and rectify the "crisis in Islam" but civilians and scholars argue that radicalization is an ill-defined term[183] and that Islam is in no crisis or is in as much crisis as all the other religions.[184]

Further, in consonance with President Macron's intention of freeing Islam from foreign influence, the text has placed restrictions on foreign funding of religious institutions. The Bill

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[180] Consolidating the Republican Principles Bill of 2021, art. 6(7).
[181] Consolidating the Republican Principles Bill of 2021, art. 6(9).
[182] Marco Perolini, *France: 'Republican values' Law Risks Discrimination*, AMNESTY INTERNATIONAL (May 20, 2021, 12:00 PM), https://www.amnesty.org/en/latest/news/2021/03/france-republican-values-law-risks-discrimination/.
[183] *Ibid.*
[184] Yasmine Salam, *Bill Aims To Tackle Rising Extremism In France Some Say It's An Infringement Of Rights*, NBC NEWS (May 20, 2021, 5:00 PM), https://www.nbcnews.com/news/world/bill-aims-tackle-rising-extremism-france-some-say-it-s-n1262247.

clarifies that the disclosure of foreign donations is required "only for the purpose of preventing an attack on public order and security and resources paid in cash."[185] This provision applies to any religious body which receives foreign donations over 10,000 euros over an accounting period. The State will also have the right to examine the accounts of such organizations. As established earlier, France's *Laïcité* is significantly hinged on the Separation of the State and the Church and the freedom of religious institutions to conduct their affairs without interference. Yet, it is peculiar that this provision encourages State entanglement with religious affairs and is thus, counter-intuitive to the Republican value of religious neutrality that the State seeks to consolidate amongst its citizens. Despite this aberration of State interference, the Bill then goes on to severely criminalize the act of organizing French or political elections in premises where religion is practiced with a fine of 15000 euros and one year's imprisonment.[186] The contradictory nature of the provisions of the Bill and the convenient deviation from the Separation of the Church and the State in certain provisions evinces the French State's *prima facie* intention to regulate and control minority religions, in particular, Islam.

The French police also earn wide-spanning powers of closing places of worship which provoke discrimination, incite hate or violence towards a group or a person.[187] Additionally, persons convicted of offences under 421-8 of the French criminal code, that is, terror activities, are prohibited from administering or directing a place of worship for ten years from the date on which the conviction became final.[188] These provisions not only cause severe criminalization of activities pertaining to religion but also indicate that the State may resort to surveillance of

[185] Consolidating the Republican Principles Bill of 2021, art. 31.
[186] Consolidating the Republican Principles Bill of 2021, art. 40(5).
[187] Consolidating the Republican Principles Bill of 2021, art. 44(3).
[188] Consolidating the Republican Principles Bill of 2021, art. 43(2).

places of worship to monitor and regulate such activities. The far left and Muslim leaders have opined that the legislation will "fabricate a new halo of suspicion around all Muslim associations"[189] and cause arbitrary closures of associations due to excessive State interference and policing powers.

As expressed earlier, an essential component of *Laïcité* is the secularization of public education. Though the change introduced by the Republican Values Bill is not substantial, homeschooling or family instruction of children provisions have become even more stringent than earlier. The French Education Code states that the parents must provide an annual declaration to the mayor and the state authority competent in education that they will grant instruction in the family to their child.[190] They will also have to provide a coherent reason for deviating from public or private schooling and will affirm whether the child is given education compatible with the conditions of the family.[191] However, now the competent authority can summon the parents or guardians of the child and assess the situation of the family and the child and verify the nature of education being granted. The authority is obligated to conduct consistent follow-ups[192] with the family and take cognizance of any "worrying information."[193] These measures are in light of Education Minister Blanquer's remarks: "In a number of cases, it (homeschooling) conceals clandestine Salafist structures. We want to face up to this sociological reality. That's why we will set up a homeschooling authorization system."[194]

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[189] Noemie Bisserbe, *France's Macron Wins National Assembly Backing for 'Islamist Separatism' Bill*, WALL STREET JOURNAL (May 22, 2021, 3:00 PM), https://www.wsj.com/articles/frances-macron-wins-national-assembly-backing-for-islamist-separatism-bill-11613501154.

[190] The French Education Code of 2003, art. 131-5.

[191] The French Education Code of 2003, art. 131-10.

[192] Consolidating the Republican Principles Bill of 2021, art. 21a H.

[193] Consolidating the Republican Principles Bill of 2021, art. 21a B.

[194] Alice Tidey, *Here's all You Need to Know About France's Controversial Separatism Law*, EURO NEWS (May 18, 2021, 8:00 PM) https://www.euronews.com/2021/02/16/here-s-what-you-need-to-know-about-france-s-controversial-separatism-law.

Conclusion

The Bill Reinforcing Republican Values now awaits examination by a Special Commission. Till now, the Bill has received 2,650 amendments and has witnessed controversial rhetoric across party lines. While the far-left contends that the Bill will nurture the already hostile climate against Islam[195], the far-right party leaders, such as Marine Le Pen, say that the Bill does not name Islam and so, does not go far enough to control the spread of "Islamist ideologies."[196]

Regardless of the political rhetoric, it is the unwavering and incontestable faith in the French ideal of *Laïcité* which is a cause of concern for the minorities in France. For the past many years, *Laïcité*'s promise of religious neutrality has led to the invisibility and delegitimization of minority presence in the public sphere of France. This delegitimization has continued for so long that the State is now attempting to interfere in the private sphere of its citizen's life to inflict its ideas of integration on them and disproportionately so. These legislations indubitably hold dangerous repercussions for the civil liberties of minority associations in a foreign land. Contrary to conjectures that such provisions will lead to the assimilation of Islam in France, the State will encourage secessionism, ghettoization, and criminalization of the already disadvantaged Muslim population. Further, it may even cause an increased assertion of identity, such as Muslim women wearing the headscarf in defiance of the State which may also result in physical attacks by passers-by, as has been experienced

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[195] Hakim El Karoui, *The French Brief - Reinforcing the Principles of the Republic: A French Paradox?*, INSTITUT MONTAIGNE, (May 24, 2021, 6:00 PM), https://www.institutmontaigne.org/en/blog/french-brief-reinforcing-principles-republic-french-paradox.

[196] Cailey Griffin, *Why Has France's Islamist Separatism Bill Caused Such Controversy?*, FOREIGN POLICY (May 24, 2021, 10:00 AM), https://foreignpolicy.com/2021/02/23/why-france-islamist-separatism-bill-controversy-extremism/.

frequently.[197] Another grave ramification has been the criminalization of the Islamic headscarves across European territories owing to the soft power of France[198] under the garb of promoting secularism and the equality of sexes.

The turmoil that the principle of *Laïcité* has caused requires introspection. Scholars have contended that this model of exclusive *Laïcité* was not intended by the French revolutionaries and nation-builders.[199] Interestingly, one of the mechanisms to confront and resolve this turmoil was devised during the right-wing regime of President Nicolas Sarkozy. Sarkozy, though desirous of control over Islam, postulated in his book "La République, Les Religions, L'espérance" that France must increase its engagement with Islam.[200] He capitulated this aspiration as creating an "*Islam de France*" (French Islam) as opposed to "*Islam en France*" (Islam in France) by assimilating Muslims within the French culture.[201] In pursuance of this ideal, Sarkozy played the lead role in establishing the *Conseil Français du Culte Musulman* (French Council for the Muslim Faith) which represented 60% of France's mosques by 2002. The French State, thereafter, engaged with the Council on a multitude of affairs such as construction of mosques, validation of *Halal* meat and more.[202]

Legislators and civil society members must also turn to the Stasi Commission Report for resolving conflicts even though the Report has been credited with recommending the prohibition

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[197] Neil Chakraborti and Irene Zempi, *Criminalising Oppression or Reinforcing Oppression: The Implications of Veil Ban Laws for Muslim Women in the West* 64 N. IR. LEGAL Q. 63(2013).
[198] Robert A. Kahn, *Are Muslims the New Catholics – Europe's Headscarf Laws in Comparative Historical Perspective*, 21 DUKE J. COMP. & INT'L L. 567 (2011).
[199] Murat Akan, *Laïcité and Multiculturalism: The Stasi Report in Context*, 60(2) BRITISH JOURNAL OF SOCIOLOGY 237(2009).
[200] Jennifer C. Grady, *Islam and the French Republic: Approaches to Laïcité in the Era of Jacques Chirac and Nicolas Sarkozy*, 1558 SCRIPPS SENIOR THESES (2020).
[201] AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARDS RELIGION: THE UNITED STATES, FRANCE AND TURKEY (Cambridge University Press, 2009).
[202] *Ibid*.

of ostentatious display of religious symbols. The Report encourages the State to take cognizance of religious and spiritual activities by the "reasonable accommodation" of religious practices. The Report suggested the State to reduce obstacles in the creation of places of worship, develop communal premises for celebrating festivals of *Yom Kippur* and *Eid-el-Kebir*, grant leave to students and employees on these occasions, provide for diverse menus catering to varied dietary requirements and continue teaching religious facts in subjects of humanities. Therefore, to truly accommodate its minorities without foisting abstract notions of Republican values, France must scrutinize the original intent and import of Laïcité, contrast its model of secularity with that of other States which encourage multiculturalism and engage with religious institutions while maintaining the Separation of the Church and the State.

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Legitimacy in Law: A Study of the U.S. Constitution and Sharia

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Abstract

The way we define legitimacy in law, politics, and society has long been the focus of scholars in attempting to provide a clearer rationale for why legal systems evolve in the way they do. Fallon, Harvard Law professor and constitutional legal scholar, explores three concepts of legitimacy - legal, sociological, and moral - that can be analyzed in the context of both American constitutionalism and Sharia law. Drawing mainly from the research of Mohammad Fadel, specialist in the Law and Economics of Islamic Law at the University of Toronto, the idea of political and legal legitimacy in Sharia can be traced back to a historical foundation of contracts as the base of Islamic constitutional theory. With respect to the American Constitution, research by Fallon and Balkin, among others, points towards understanding the merits of democratic constitutionalism and how there is no true distinction between social, political, and purely legal influences on changes to law.

Introduction

The question of legitimacy - what it is, the boundaries of it, the role it plays in expanding or contracting the law, and how it changes over time - has been widely contested over the course of history. The interpretation of the U.S. constitution, a 'living' and 'breathing' document that evolves in tandem with the social landscape, has been debated with respect to the role of courts in upholding the popular will of society. Though legislative change often occurs removed from social contexts, attitudes and movements certainly influence the direction of the law. While evoking criticism from those who view this role of the court as overly involved and influenced by political opinion, many academics stand in defense of democratic constitutionalism and the manner in which the law responds to society to provide a better understanding of Constitutional protections and liberties. The idea of legitimacy in Sharia law, the "revealed divine law in the

Qu'ran and *Sunna*,"[203] is also multifaceted. Islamic law, derived from the Quran and other forms of religious texts, has drastic variation in the manner and degree to which it is implemented across Muslim societies. As the foundation for other, more substantive forms of law, the legitimacy of a legal system based on revelation and social acceptance often comes under scrutiny. Ultimately, the idea of legitimizing law through widespread social acceptance seems to be a commonality in both legal systems, emphasizing the unavoidable intersection of the Courts with social values.

Islamism as a Politically Legitimate Legal Practice

Also known as Contemporary Political Islam, Islamism is widely viewed as a "movement that seeks to apply the Sharia as the basic law of Muslim states."[204] Generally, Islamism connotes that political legitimacy in Sharia-governed countries amounts to the degree of conformity a political coalition expresses to the predetermined rules as outlined through prior divine revelation. Sharia law thus generates significant backlash from the international legal community for its appearingly 'undemocratic' principles due to the lack of accommodation for self-government; if a law is in accordance with Sharia, then it is redundant in its role as anarchically 'self-governing'. However, Professor of Law at the University of Toronto, Mohammad Fadel argues that Islamic constitutional theory and political thought both provide ample grounds for self-government due to a shift towards agency of the state rather than full conformity to substantive norms. He further argues that, due to the integral nature of self-

[203] Mahmoud El-Gamal, *Islamic Finance: Law, Economics, and Practice*, Cambridge University Press. xvii (2006).
[204] Mohammed Fadel, *Political Legitimacy, Democracy and Islamic Law: The Place of Self-Government in Islamic Political Thought,* Journal of Islamic Ethics. 59 (2018).

government to political legitimacy, Sharia can be used as a foundation for the expansion of public law as a collective decision[205].

As Fadel outlines, both political and legislative legitimacy are based on whether the principle authorizing the agent, or the public authorizing the government, can be reasonably interpreted as approving of the conduct in question. Notably in Sunni political thoughts, he refutes the conventional claim that Sunni jurists contributed to the consolidation of "*post hoc* justifications of the status quo," in order to "accord *de jure* legitimacy to whoever held power."[206] Alternatively, moments of significance in Muslim history - the original caliphate, Uthman's assassins, and the actions and fate of the Prophet's companions - all served as notable precedents and fixed reference points to determine a standardized and widely-accepted standard of legitimacy.

The question of legitimacy in Islamic history was first significantly addressed during the shift in leadership during the post-Prophetic era. The criteria for a 'legitimate' leader across some Sunni and Shia sub-groups included qualities such as charismatic authority, virtue, and avoidance of 'sinful' conduct (as the sole means of deposing an elected leader)[207]. This is mildly indicative of the American democratic process, in which the election of an individual with the authority to inform legislative change, is partially dependent on his or her character, and partially on his or her actions. This early form of political theology is resemblant, crudely, of the checks to power structures we see in democratic societies today. With respect to discussion of obedience as a moral obligation, in the field of Islamic law, the question of who can be identified as a

[205] *Id*. at 59
[206] *Id*. at 60
[207] *Id*. at 62

legitimate commander of obedience can be answered with discussions dating back to historic scholarship. This outlines four key, normative criteria:

1. The creation of a political order/entity is a collective social obligation.
2. The terms of this social and political contract are binding to both the party in power and the people it commands, however it must meet a reasonable standard of benefit to the contracting parties.
3. A political authority can exclusively come into existence through the formation of a contract.
4. The contract is of a fiduciary character, indicating that it holds legal or ethical trust with one or more involved parties.[208]

In this, the historic origins of standards for legitimate leadership in Sharia depict the governing parties as agents, leading to the concept of the inalienable right to hold the government up to a level of accountability.

Despite the existence of a stringent framework for legal authority in Sharia, a key shortcoming of Sharia law is the absence of a formal system for maintaining this accountability, leading to a concern regarding the standards to which political leaders are held in responding to their actions. In the modern era, where past methods of addressing this concern are fallible, certain governments have overcome this issue through the implementation of public measures of accountability, such as regular elections. Thus, Fadel highlights that "accountability of public officials before the law is crucial for creating and sustaining the legitimacy of the public order,"[209] while supplementing this with effective systems for self-government under positive,

[208] *Id*. at 64-67
[209] *Id.* at 72

rather than traditionally negative laws. The standard towards which Sharia-governed countries should idealistically converge is one that emphasizes the principal-agent relationship, in which laws that are implemented to further the public interest should be deliberated with the public to a reasonable, yet practical extent. Thus, in Sharia law, as derived directly from the Quran, mutual deliberation is a legitimate process of creating and influencing legislative change[210].

Fallon's Three Concepts of Legitimacy

In this section of the article, I will be discussing Fallon's three concepts of legal legitimacy with respect to constitutional law and discussing them in the context of Sharia.

Legal Concept

Legal legitimacy is largely synonymous with lawful: though there are distinctions between substantive and authoritative legitimacy, "a law that is constitutionally invalid or illegitimate possesses no authority to bind."[211]

Sociological Concept

The sociological measurement of a regime, government, or legislative body is proportional to the extent to which the general public accepts it as appropriate or interest-serving. This "active belief"[212], in turn, leads to obedience and respect for laws that are rooted in reasons that extend beyond self interest. Due to the division of most societies, democratic or otherwise,

[210] *Id.* at 72
[211] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, Harvard L. R. 1794 (2005) with reference to *Marbury v. Madison*, 5 U.S. (I Cranch) 137 (1803).
[212] *Id. at 1795*

on most legal and political issues, sociological legitimacy is seldom unanimous with respect to any issue, leading to the treatment of it as a variable rather than a constant.

Moral Concept

Moral justifiability and respect worthiness are the two criteria that are addressed when viewing legitimacy from its moral sense. The rivalling theories of moral legitimacy are ideal (the notions of consent, the social contract, and coercion) versus minimal (that the need for governance equates to a moral duty to accept any reasonable legal regime) theories of moral legitimacy.[213]

Fallon's Concepts Discussed in the Context of Sharia

With respect to Sharia, countries that have constructed a constitutional legal system with principles derived from the original revealed document and its religious principles is seen in its circles as an extensively legitimate means of developing law. With reference to the Islamic Human Rights Declaration of Cairo (1990), Akhtar mentions how in marrying the concepts of 'enforceable rights', religion, and human rights, the Islamic HRD "is a proclamation of natural rights under the notion of a religious inspiration that derives its source from the Sharia principles."[214] In evaluation of Fadel's research, the concept of legitimacy in Sharia law and regimes is largely based on an ideal theory of moral legitimacy, with respect to the creation of a binding social contract and an ultimate standard of justice.

[213] *Id. at 1797-1798*

[214] Zia Akhtar, *Constitutional legitimacy: Sharia Law, Secularism and the Social Compact,* 2 Indonesia L. R. 124 (2011).

Political Legitimacy, Faith, and The Law

An unconventional take on legitimacy within legal and political contexts is explored in Jack Balkin's book, *Constitutional Redemption*. Balkin, Professor of Constitutional Law and the First Amendment at Yale University and American legal scholar, looks at legitimacy as a "property of an entire political and legal system judged as a whole,"[215] asking the important question of the conditions under which a government is justified in using its coercive powers to enforce seemingly unjust laws. He suggests that it is 'respect-worthiness', or the ability of a government to meet people's moral and practical standards of governance, that garner society's belief in the legitimacy of a state. Balkin outlines an array of qualities that translate to legitimacy, including: "public acceptance, procedural regularity, justice, popular accountability, and responsiveness."[216] As opposed to the idea that legitimacy exists alone in the legal domain, he contends that constitutions and the courts serve as tools to control the state's exercise of power and thus promote legitimacy.

On the other side of the same argument, a constitution can be viewed as failing in its role to uphold the soundness of political institutions if its contents are viewed as flawed. Finally, one of the central arguments is that knowledge is a key precursor to a social group's affirmation to, and belief in, laws or a government. This highlights the paradox of the American Constitution - without full knowledge of what it entails, belief in the Constitution is undermined, however expanding, and solidifying the meaning of every nuance would perhaps restrict more liberties than it creates, considering it will no longer be able to account for changes to society, politics, and the economy. With law such as Sharia, as discussed above within the context of self-

[215] Jack M. Balkin, *Constitutional Redemption*, Harvard University Press. 33 (2011)
[216] *Id*. at 35

governance (or the lack thereof), laws are either Sharia-compliant and thus conventional, or Sharia non-compliant and thus illegitimate, outlining and expanding with clarity even that which is not explicitly stated in the original text of the law. With the Constitution, however, the idea of 'constitutional construction'[217], that is, building upon the original text and meaning of the Constitution and filling in the gaps over time will lead to eventual dispute over the substantive matters of the law as well as judicial interpretation.

The Democratic Constitutionalism Debate

The debate surrounding the legitimacy of legislative change informed or influenced by social movements is greatly polarized. Individuals such as American Constitutional law scholar Ronald Dworkin posits that courts should serve as "the form of principle."[218] This is to say that even while their role encompasses addressing questions of social justice, equal rights, or constitutional meaning, the development should be prompted intrinsically and based on more substantive legal grounds than sustained social movements. Most of the criticism stems from the power given to "cultural and political influences, the national political process, political mobilization, and partisan entrenchment."[219] However, Balkin notes this "false dichotomy"[220] that permits us to believe that social movements and informed legislative change are mutually exclusive and not, in fact, incredibly interdependent and co-informed. Constitutional change occurs concurrently with shifts in both the political and social spheres. Though not always, courts have been historically spurred into acting by the mobilization and sustained lobbying of

[217] *Id.* at 38. Reference to Keith Whittington's concept of 'constitutional construction'.
[218] Jack M. Balkin, *Living Originalism*, Harvard University Press. 321 (2011).
[219] *Id*. at 320
[220] *Id*. at 321

social and political interest groups that employ a combination of litigation and socio-political arguments. Significant periods in U.S. constitutional history have occurred during the peaks of social movements - whether it be women's suffrage, civil rights, the New Deal revolution, or more recently, gay rights.

A second argument against living constitutionalism is that it undermines the strength of the political process. It is argued that if the Supreme Court remains sensitive and responsive to public opinion and political configuration, scholars ask, "why not eliminate the middleman and dispense with judicial review entirely?"[221]. While the concern that social and political debate has the potential to recklessly shape constitutional culture, this interaction is necessary for the progression of the legal system as socially aware and 'living'. Without the cyclical nature of the relationship between courts and society, minority social groups relevant to the context of the time would be deprived of the attention they deserve until the courts were able to address their concerns at a potentially much later date. The nature of democratic constitutionalism is such that of the snowball effect: 'unfair' laws lead to disparate and unequal treatment of different social groups, creating widespread unrest and sparking protest and outrage, eventually leading to lobbying at both social and political levels for legislative change that will hopefully reform some areas of unequal treatment. Eventually, increasing attention will be directed towards the decision of the courts, and the cycle once again begins with the polarization of interest groups based on the distribution of gains and losses from the legislative change.

In the concise words of Jack Balkin, "popular constitutionalism and partisan entrenchment drive doctrinal development." Though this response is not immediate, due to the lag of the legislature with comparison to the flow of information and ideas in contemporary

[221] *Id*. at 320

social contexts, doctrinal developments and distinctions influence the nuances of social movements. Legislative change opens channels of communication, creates new opportunities for legal claims, facilitates a platform for debate and rebuttal, and dictates the general direction in which the facts and outcomes of a widely disputed issue should be read. While the courts may appear to be the enactors and enforcers of the will of a vocal public, the courts still play an essential role as conservators of a particular political ideology or status quo, serving their role as the veto point of the American democratic system. In this sense, the idea that the Constitution looks for meaning in the social context of different periods of history can be defended as a profound backbone of legitimacy in interpretation of law.

The Interest Convergence Dilemma and *Brown v. Board*

Next, I will be discussing the phenomenon of Interest Convergence, which broadly refers to the attainment of legal goals only when interests of two opposing parties converge at a specific point in time. I will evaluate the significance of this phenomenon in light of a landmark Supreme Court case that changed the socio-political landscape in terms of racial equality in the mid 1950s, as well as discuss backlash surrounding the broad social conditions which facilitated these legal proceedings. *Brown v. Board of Education* was a civil rights case from the mid 1950s that marked a pivotal movement in the American Civil Rights movement. Overturning the 'separate but equal' doctrine established in the Supreme Court's ruling from the 1896 case *Plessy v. Ferguson*, the Warren Court in *Brown* called for the gradual desegregation of public schools.

It is indisputable that *Brown v. Board of Education* was the fruition of decades of civil rights activism alongside countless and sporadic Supreme Court decisions. However, political factors also played a significant role in the decision of *Brown*. Starting as early as 1950,

President Truman firmly advocated for the overturning of *Plessy* and expressed his ardent support for civil rights. This, coupled with the end of World War II and notable change in state legislatures in the North all contributed to the pressures mounting on the Supreme Court[222]. *Brown*, however, also conveniently came at a time where international tensions between the Communist bloc and the U.S. were rising. Even federal communications of the time indicate that Soviet media coverage and propaganda gave impetus to the government and courts. As outlined in Derrick Bell's *Interest Convergence*, "*Brown*… will come as a timely re-assertion of the basic American principle that 'all men are created equal'."[223] While *Brown* was undoubtedly an American effort to 'save face' in the international community by restoring some semblance of social equality, remedies under *Brown* were a reflection of the converging interests of various different social groups that would be able to "reap the benefits from a concerted effort towards achieving racial equality,"[224] from white policymakers, to civil rights groups, to civilians.

The role of the court as social justice warriors is highly contentious in debate on *Brown*, particularly due to its timing with one of America's most historically significant social movements. The Opinion notes, "We must look instead to the effect of segregation itself on public education,"[225] and that, "Today, education is perhaps the most important function of state and local governments."[226] Perhaps it is these sentiments that cause the greatest polarization in academic debate: is an argument that primarily considers cultural values, social responsibilities, and psychological factors as legally defensible as other claims? However, in defense of the Court's legal stance, two notable lines from the Opinion are, "a common legal question justifies

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[222] Jack M. Balkin, *Living Originalism*, Harvard University Press. 321 (2011).
[223] Derrick A. Bell, Jr. *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harvard L. R. 524 (1980)
[224] *Id.* at 528
[225] *Brown v. Board of Education*, 347 U.S. 483, 492 (1954)
[226] *Id.* at 493

their consideration together in this consolidated opinion,"[227] and, "American courts have since labored with the doctrine for over half a century."[228] Though garnering backlash for being seemingly rooted in sociological and social science principles, the decision made in *Brown* is undoubtedly also the result of arduous decades of litigation conflict surrounding the appropriate interpretation of the 14th Amendment and Equal Protection Clause. As earlier discussed, politics, social change, and the law all exist to support and induce change in one-another's spheres. Rather than the Court exclusively taking a moral or political stance, the decision also serves the highly legitimate purpose of extending, or clarifying the language used in the Constitution and the degree to which it extends to the rights of racial minorities.

Conclusion

Democratic constitutionalism, as a theory of the constitution as living and constantly changing, deserves less backlash than it receives. Although Dworkin brings to light valid concerns surrounding the false dichotomy of social movements and legal action, constant reinterpretation of the Constitution in the light of social change enables us to derive meaning from an otherwise largely abstract document by gradually reducing ambiguity in the text and creating interpretations applicable to the current socio-political context. It also balances the will of the public, courts, and political branches, and facilitates the creation of new institutions in order to delegate administrative responsibility as a product of the legislative process. Ultimately, Fallon's three concepts of legitimacy exist simultaneously within the American legal system, but it is evident that sociological legitimacy is viewed as incredibly important in determining the

[227] *Id.* at 486
[228] *Id.* at 491

stance of the judiciary during a certain period of history. In Sharia, however, the legitimacy of the law is less flexible, but with the benefit of behaving and expanding in a more explicit and comprehensible manner. Academics in the field discuss contracts and revelation as the two key foundations of Sharia based governance, which appear to be different from democratic societies on the surface but are based on the same core principles and values of self-government and public legitimacy.

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Redefining the Term "Vicious Dog" in Rhode Island Law

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Abstract

According to the Rhode Island "vicious dog" statute, there are only two categories used to define dogs: good and vicious. Other states have multiple definitions; in Massachusetts, there are two groupings for misbehaving dogs, dangerous and nuisance. Labeling a dog as vicious could lead to the dog being euthanized after two strikes, and dozens of dogs are deemed vicious every year in Rhode Island. This article will explore a change in the definition of the term "vicious dog." Under the current statute, a dog can be labeled "vicious" if they are perceived as a threat. A threat could be anything from lunging at someone, to barking and growling in a threatening manner. Rhode Island's legal definition of a "vicious dog" has not been updated in three decades. This article will argue in favor of modifying the statute to include more than one definition for a misbehaving dog, as well as lessening the severity of punishment for vicious dogs and their owners.

Introduction

In the state of Rhode Island, there are only two categories of dogs: good and vicious.[229] If a dog gets into trouble, it will be sorted into one of these categories in a legal hearing.[230] Unlike other states, the "vicious dog" title is the only designation that exists for dogs that misbehave. Massachusetts, for example, has two classifications for a problematic dog: dangerous and nuisance. The second, less severe term for dogs supplies a more precise title that does not have the same consequences as being a "vicious dog." Under current Rhode Island law, a dog can be labeled "vicious" if they are perceived as a threat. A threat could mean anything from barking and growling in a threatening manner, to lunging at a human or another animal. Considering that

[229]Sacharcyzk, Tamara, NBC 10 NEWS. "Legislative Commission Reviewing RI Vicious Dog Statute." WJAR, 11 Nov.2019, https://turnto10.com/politics/legislative-commission-reviewing-ri-vicious-dog-statute.
[230] Borg, Linda, https://www.providencejournal.com/news/20191010/senate-commission-weighs-amending-vicious-dog-statutes (last visited October 25, 2021).

this law has not been updated in three decades,[231] the definition of "vicious dog" is ready for reform.

The first law that resulted in dog-related fines occurred as far back as 847 AD.[232] It stated, "if a dog tear or bite a man, for the first misdeed let six shillings be paid," and the fine would increase for each offense thereafter.[233] The 1839 Metropolitan Police Act fined Victorian Londoners if they let their dog loose in any public street and the dog was deemed dangerous and not on a lead. The first piece of legislation giving the authorities power to seize a dog was passed a quarter of a century later. The 1871 Dogs Act was described by the governments as, "an act to provide further protection against dogs."[234] This law gave a police chief the power to take a dog from its owner and either put it down or sell it. Finally, in 1991, six-year-old Rucksana Khan was playing in a park near her home in Bradford when she was attacked by a pit bull terrier resulting in critical head and chest injuries. The attack prompted the passing of a bill that banned four types of dogs and made it an offense for any owner to allow their dog to be "dangerously out of control." This law was the first to pass that resembles the "vicious dog" statute that we have today.

The most important reason to advocate for change in dog laws is that animals cannot argue for their own rights; humans must advocate for them.[235] After a dog is labeled "vicious," the animal only needs one other strike against them before euthanasia is a possible consequence

[231] Robert E. Craven & Associates. "Rhode Island Legislators to Reform the State's 'Vicious Dog' Laws." *Robert E. Craven & Associates*, 11 Dec. 2019, https://www.robertecravenlaw.com/rhode-island-legislators-to-reform-the-states-vicious-dog-laws/.
[232] Clare, Sean. "Dangerous Dog Laws: A History." *BBC News*, BBC, 22 May 2012, https://www.bbc.com/news/uk-politics-18114406.
[233] Ibid
[234] Ibid
[235] Walden, Charlotte. "Brief Overview of Dangerous Dog Laws." *Animal Law Legal Center*, 1 Jan. 1970, https://www.animallaw.info/article/brief-overview-dangerous-dog-laws.

under current Rhode Island law. However, roughly 4 to 5 million Americans are bit by a dog each year, hence a need for the vicious dog statute in the first place. Dog attacks and injuries by dogs are within a State's public health, safety and welfare police power standard. 39 states currently have statutes and ordinances that regulate dogs believed to exhibit violent behavior. Finally, we can use canine law to apply to broad legal theory about the distinctions in punishment, such as decriminalizing certain behaviors rather than generalizing all behaviors into a category that can affect someone for their whole life (e.g. drug possession charges, or being labeled a sex offender).

Background

Rhode Island Statute 4-13-1-(12) provides five definitions for a "vicious dog."[236] The first definition emphasizes an attack occurring in a public space: "any dog that, when unprovoked, in a vicious or terrorizing manner, approaches any person in apparent attitude of attack upon the streets, sidewalks, or any public grounds or places."[237] The second definition focuses on "any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to otherwise endanger the safety of human beings or domestic animals."[238] This subsequent definition pinpoints dogs with a history of violence. A vicious dog can also be defined as "any dog that bites, inflicts injury, assaults, or otherwise attacks a human being or domestic animal without provocation on public or private property."[239] This third definition prioritizes the harm done to the person or animal by the dangerous dog. The fourth definition describes a dog "owned or harbored primarily or in part for the purpose of dog fighting or any

[236] 4 R.I. GEN. LAWS § 4-13-1.2 (1985).
[237] Ibid
[238] Ibid
[239] Ibid

dog trained for dog fighting that is deemed vicious after it has been properly assessed by the Rhode Island Society for the Prevention of Cruelty to Animals."[240] This definition centers around the so-called sport of dog fighting, an inhumane blood sport in which dogs who have been bred, conditioned ,and trained to fight are placed in a pit to fight each other for entertainment and profit. The final definition reads:

> No dog may be declared vicious if an injury or damage was sustained by a domestic animal which, at the time that injury or damage was sustained, was teasing, tormenting, provoking, abusing, or assaulting the dog. No dog may be declared vicious if the dog was protecting or defending a human being within the immediate vicinity of the dog from an unjustified attack or assault.[241]

The final definition explains that no dog can be categorized as vicious if the animal was provoked in some way into reacting violently. All five of these definitions lead to the same result if applied to your dog: a dangerous dog hearing at which the three-person panel decides which penalties the dog and the owner will receive.

There are several costs and restrictions placed on a dog deemed "vicious." Vicious dog owners are required to get liability insurance with a minimum policy of $100,000, maintained for as long as the dog is kept.[242] The owner of a vicious dog must also get his or her dog's license numbers — identification numbers — tattooed on the dog's body by a qualified professional, usually a veterinarian. The owner must also display a sign on the property warning that there is a vicious dog on the premises. If a vicious dog is off the owner's property, or even outside on the property but not in an enclosure, it must be on a leash and/or muzzled. The police are permitted

[240] 4 R.I. GEN. LAWS § 4-13-1.2 (1985).
[241] Ibid.
[242] Jones, Jackson. "Rhode Island Dog Bite Law: What Is the Rhode Island Vicious Dog Law?" *The Law Office of M. Jackson Jones, P.C.*, 20 Mar. 2019, http://attorneyjacksonjones.com/rhode-island-vicious-dog-law-1/.

to show up for random checks whenever they deem necessary to make sure that the owner is complying with the laws for vicious dogs. If the owner is found to be breaking the rules, the dog will be removed and impounded. A vicious dog must be spayed or neutered, unless the procedure could threaten the animal's life. An owner cannot sell or give away any vicious dog, and if the owner is moving, he or she must notify the dog officer of the city from which he or she is moving, as well as the dog officer of the city to which he or she is moving. Finally, the owner of a vicious dog must sign a statement swearing: 1) Not to cancel the liability insurance unless the vicious dog is no longer in the home; 2) to keep a locked enclosure for the vicious dog on the property where the dog will be kept; and 3) to notify the police if the dog is on the loose, unconfined, has attacked another animal, attacked another human, or died.[243]

If a dog has been declared vicious and the owner does not comply with all of these demands, he or she could pay several fines and fees. The fine for the first violation of the Rhode Island "Vicious Dog" Statute is $500, which is then increased to $1000 for any subsequent violations.[244] In addition to these fines, the dog could be impounded or even euthanized by the animal shelter. Additionally, the owner would have to pay the costs for both the keeping of the animal while impounded and the euthanasia. The owner could also face these financial penalties if: "1. when unprovoked, [the dog] kills, wounds, or worries or assists in killing or wounding any animal or 2. when unprovoked, [the dog] attacks, assaults, wounds, bites, or otherwise injures, kills or seriously injures a human being."[245] Due to the possibility of facing such serious penalties, we must be more specific in defining exactly what a "vicious dog" is, and avoid classifying dogs that are simply misbehaving as "vicious."

[243] Jones, Jackson. "Rhode Island Dog Bite Law: What Is the Rhode Island Vicious Dog Law?" *The Law Office of M. Jackson Jones, P.C.*, 20 Mar. 2019, http://attorneyjacksonjones.com/rhode-island-vicious-dog-law-1/.
[244] Ibid
[245] Ibid

Analysis:

Dozens of dogs in Rhode Island earn the title of "vicious dog" every year.[246] After receiving this harsh label, the dog is subject to euthanization after only two offenses, or instances of violence or misbehavior.[247] The designation of "vicious dog" is applied after an investigation by an animal cruelty officer and a dangerous dog hearing in front of a three-person panel consisting of the chief of police or his designee, the executive director of the Society for the Prevention of Cruelty to Animals (SPCA), and a third person chosen by the chief of police and the executive director of the SPCA.[248] This hearing must take place within five to ten days from when the owner receives notice that the animal cruelty officer thinks the dog may be vicious.[249] Euthanasia is rare and requires a unanimous vote by all three panel members.[250]

If a dog is deemed vicious by the panel, and the owner believes that accusation is false, the appeal must be made within five days of the decision. The appeal has to be filed in the district court of the city or town in which the dog is owned or kept, and the district court judge will then decide if your dog is vicious. The owner of a vicious dog has to perform several actions before getting his or her dog back, such as enrolling the dog in a behavior reform class and purchasing "Beware of Vicious Dog" signs for the house, and an appeal must be made within the five days of the decision. Even if he or she performs these actions, there is still a possibility that the dog will be euthanized. The dog could also stay impounded during this entire time and the

[246] Sacharcyzk, Tamara, NBC 10 NEWS. "Legislative Commission Reviewing RI Vicious Dog Statute." WJAR, 11 Nov.2019, https://turnto10.com/politics/legislative-commission-reviewing-ri-vicious-dog-statute; Robert E. Craven & Associates. "Rhode Island Legislators to Reform the State's 'Vicious Dog' Laws." *Robert E. Craven & Associates*, 11 Dec. 2019, https://www.robertecravenlaw.com/rhode-island-legislators-to-reform-the-states-vicious-dog-laws/.
[247] Damon, Laura, https://www.newportri.com/news/20191017/panel-finds-portsmouth-dog-is-vicious (last visited October 25, 2021)
[248] Sacharczyk (2019)
[249] Ibid
[250] Jones, Jackson. "Rhode Island Dog Bite Law: What Is the Rhode Island Vicious Dog Law?" *The Law Office of M. Jackson Jones, P.C.*, 20 Mar. 2019, http://attorneyjacksonjones.com/rhode-island-vicious-dog-law-1/.

owner would be responsible for "the costs and expenses of keeping the dog."[251] Finally, the owner will have to put his or her dog in a locked enclosure on the property, and the dog will only be removed from the enclosure for veterinary care or if the dog is complying with a command from the dog officer. When the dog is removed from the enclosure, it will need to wear a muzzle and leash at all times.

In a *Providence Journal* article titled "Panel Finds Portsmouth Dog is Vicious," Laura Damon tells the story of Helen Gallagher and her dog Penny.[252] While the two were out walking one September morning, another dog, Nina, leaped out of her owner's vehicle and attacked Penny. "She needed surgery because it was so deep in the muscle," Gallagher shared about her dog's injuries before the vicious dog hearing panel at Town Hall.[253] She had four veterinarian visits, and a fifth scheduled; the attack was both costly for Gallagher and traumatic for Penny. Benjamin Viera, the owner of Nina, was a witness to this incident, and he shared that his other dog was attacked by Nina in 2017. Nina's vicious dog hearing panel consisted of the Portsmouth Police Deputy Chief, Michael Arnold; RISPCA Officer, Earl Newman; and Julie Sweeney, Newport animal control officer. After hearing testimonies and reviewing police reports, they ultimately burdened Nina with the title "vicious dog."

In another article, "Legislative Commission Reviewing RI Vicious Dog Statute," Tamara Sacharzyk provides another example of a dog that has received the label "vicious dog."[254] Steven Pina of Providence shared the story of his pitbull named Crystal. She was deemed vicious after

[251] Jones, Jackson. "Rhode Island Dog Bite Law: What Is the Rhode Island Vicious Dog Law?" *The Law Office of M. Jackson Jones, P.C.*, 20 Mar. 2019, http://attorneyjacksonjones.com/rhode-island-vicious-dog-law-1/.
[252] Damon, Laura https://www.newportri.com/news/20191017/panel-finds-portsmouth-dog-is-vicious (last visited October 25, 2021)
[253] Ibid
[254] Sacharcyzk, Tamara, NBC 10 NEWS. "Legislative Commission Reviewing RI Vicious Dog Statute." WJAR, 11 Nov.2019, https://turnto10.com/politics/legislative-commission-reviewing-ri-vicious-dog-statute.

she escaped through a window in her house and attacked two small dogs.[255] "I don't entirely know what happened between his dog and my dog," Steven shared, "he says she went straight after them, I was told that there was barking involved of some sort, and then she bit one dog on the throat."[256] Both of the dogs were injured but survived, and Crystal went to a dangerous dog hearing, at which the panel deemed her "vicious," a stamp that will follow her for the rest of her life.

Crystal eventually landed at the Rhode Island Society for the Prevention of Cruelty to Animals (RISPCA), which was where she was previously adopted by her current owner, therefore her history is known there. Sacharzyk interviewed RISPCA President Joe Warzycha, who confirmed that Crystal had no history of aggression with people or animals, and she had previously lived with another dog.[257] He went on to share that all dogs at the RISPCA have to pass a behavioral evaluation before being put up for adoption, and that Crystal passed this test with no issues and no signs of animal aggression. Crystal has since been enrolled in Outbound Hounds in Cranston, where she works successfully with a Certified Dog Behavioral Consultant. Warzycha and Pina agree that due to Crystal's history and her current behavior, she deserves to be placed in a category that is not as severe as vicious.[258] "It's [a] very strong term. . .. people immediately come to a conclusion," Pina said, "It's the same sense as when you see a dog with a muzzle, you kind of get weary and you're frightened by it."[259]

There is some leeway for dogs that are not a public threat. Once the dog is classified as vicious by the three-person panel, they then vote on which restrictions to place on the dog.

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[255] Sacharcyzk, Tamara, NBC 10 NEWS. "Legislative Commission Reviewing RI Vicious Dog Statute." WJAR, 11 Nov.2019, https://turnto10.com/politics/legislative-commission-reviewing-ri-vicious-dog-statute.
[256] Ibid
[257] Ibid
[258] Ibid
[259] Sacharcyzk, Tamara, NBC 10 NEWS. "Legislative Commission Reviewing RI Vicious Dog Statute." WJAR, 11 Nov.2019, https://turnto10.com/politics/legislative-commission-reviewing-ri-vicious-dog-statute.

Crystal's restrictions include wearing a muzzle, microchip, and leash whenever she is outside of the house; Pina was also required to get liability insurance. This extra cost is only one of many incurred by the owners of dogs deemed vicious.[260]

Nina's owner already had a "Beware of Dog" sign on his property, and she was restrained when outside.[261] Nina is microchipped, vaccinated, and insured, and her owner is planning to install a fence around the yard to keep her further enclosed. The committee at the hearing decided Viera must obtain liability insurance in the amount of at least $100,000, and place more specific warning signs on his property. If Nina gets loose, Viera has to notify the police immediately. Anytime Nina is off Viera's property, she must be leashed and muzzled, even in a car. "You cannot tie the dog up on the property," Newman instructed Viera.[262] Nina must now be kept in a fenced-in area, which Viera was told needs to reach specific requirements, such as height. "Should you move, you must notify the town," Newman added. Finally, Viera cannot give away or sell Nina.[263]

Under the current law, a dog can be labeled vicious if they are "perceived as a threat." A threat could be a violent act, such as attempting to bite a person, or nonviolent misbehavior, such as barking or growling loudly. For dogs that already have one strike against them, that could count as their second strike. Warzycha, president of the RISPCA, believes that is why a third category should be added to the Rhode Island statute. In an interview with NBC, he shares, "We've had cases like that where dogs have been deemed vicious, just because someone perceived them as a threat. Then you have the complete opposite end of the spectrum, where you

[260] Jones, Jackson. "Rhode Island Dog Bite Law: What Is the Rhode Island Vicious Dog Law?" *The Law Office of M. Jackson Jones, P.C.*, 20 Mar. 2019, http://attorneyjacksonjones.com/rhode-island-vicious-dog-law-1/.
[261] Damon, Laura https://www.newportri.com/news/20191017/panel-finds-portsmouth-dog-is-vicious (last visited October 25, 2021)
[262] Ibid
[263] Ibid

know dogs have killed other dogs or seriously injured people and other dogs, and they've been deemed vicious."[264] Several states have already adopted a middle designation for dogs.

Ohio, New Hampshire and Massachusetts have a lesser classification than "vicious dog" in their dangerous dog statutes; they provide another term for dogs that are not strictly "vicious," but cause mild disturbances or a small amount of destruction. In Massachusetts, a dog can either be classified as a dangerous dog, or a nuisance dog. A dangerous dog is defined as "a dog that attacks another person or domestic animal without justification, or a dog whose behavior would lead a 'reasonable person' to believe the animal poses an imminent threat of physical injury or death." A nuisance dog, however, is a dog "that is a disturbance or annoyance due to excessive barking, or has threatened or attacked livestock, a domestic animal or a person, but such threat or attack was not a grossly disproportionate reaction under the circumstances." That is one of the reasons why Rhode Island lawmakers have recently created a legislative commission, tasked with making changes to the current vicious dog statute. One of those potential changes would add this third category to the statute, to represent dogs that have misbehaved or exhibited threatening behavior, but are not necessarily a danger to the public. This article argues for the third category of "nuisance dog" as the correct next path for the law to take.

Under the Rhode Island Dog Bite Law, a victim can receive pain-and-suffering damages, lost wages, and the reimbursement of any medical bills due to a dog bite.[265] This law also provides a right to recover damages for any property damage caused by another person's dog. A person can file a claim if a dog causes damage to any of his or her personal property such as clothing, furniture, fence, car, etc. or for injuries to a pet or other animal owned by the person.

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[264] Damon, Laura https://www.newportri.com/news/20191017/panel-finds-portsmouth-dog-is-vicious (last visited October 25, 2021)

[265] Jones, Jackson. "Rhode Island Dog Bite Law: What Is the Rhode Island Vicious Dog Law?" *The Law Office of M. Jackson Jones, P.C.*, 20 Mar. 2019, http://attorneyjacksonjones.com/rhode-island-vicious-dog-law-1/.

The dog bite laws in Rhode Island offer opportunities for restitution for the victims, but the "vicious dog" statute punishes dangerous dogs and their owners to an exceedingly harsh degree.

In the Rhode Island justice system, there are only two categories of canines: good dogs and vicious dogs.[266] Some experts believe lawmakers should add a third category of dangerous dogs, which behave in a threatening manner but are not quite vicious. The statute was finally discussed in the fall of 2019 at a commission on vicious dog statutes, with a report back to the full Senate in the winter. In a *Providence Journal* article titled "Senate Commission Weighs Amending Vicious Dog Statutes," Linda Borg interviewed Chief Richard St. Sauveur Jr., the executive director of the Rhode Island Police Chiefs' Association.[267] He told her "the number of vicious-dog hearings — about 50 a year — places a burden on smaller departments, which have to schedule and staff the hearings, along with someone from the Rhode Island Society for the Prevention of Cruelty to Animals."[268] He also suggested that the laws be rewritten to include a category of less-violent behavior among aggressive dogs. East Providence, for example, has a "dangerous-dog ordinance," and they have noted significantly fewer vicious dog hearings as a result. Borg also interviewed Scott Marshall, the state veterinarian, who worries that Rhode Island will end up with 39 different dangerous-dog ordinances, and he suggests that the state establish a definition of dangerous behavior instead.

Others have also expressed concern about potentially long delays between the notification of a vicious dog hearing and the actual hearing taking place. Dogs that are seized by animal control should spend as little time in confinement as possible. According to Borg, "one dog spent a year in a local pound waiting for a hearing. The consensus [of the commission] was

[266] Borg, Linda, https://www.providencejournal.com/news/20191010/senate-commission-weighs-amending-vicious-dog-statutes (last visited October 25, 2021).
[267] Ibid
[268] Ibid

that seven to ten days was a reasonable amount of time to schedule a hearing and alert all parties."[269] There are several other considerations that lawmakers should review when reforming the vicious dog statute.

Conclusion

Rhode Island lawmakers already have a commission working towards refining the "vicious dog" law, and very recently the statute has been repealed. However, in my opinion this area of the law is an extremely important one to stay updated on and keep revising. Canine law concerns vulnerable animals that are not able to speak for themselves in the legal system. Rhode Island should unequivocally introduce the nuisance dog category, following the lead of states such as Massachusetts. By only having two strict categories, violent dogs and nonviolent dogs, all misbehaving dogs face the same consequences. A "vicious dog" has to live with that title for the rest of his or her life, similar to the way a sex offender is labeled. A second "violent" offense, which could be anything from barking too aggressively at the mailman to breaking through a glass window in order to chase a person, results in the chance that the dog could be euthanized.[270] Although this outcome is rare, any dog owner would fear forcibly losing the life of his or her dog. The owner also faces additional costs and regulations placed on his or her dog after being labeled "vicious;" some owners may not be willing or able to afford these extra costs or rules, but on the other hand, an owner is not allowed to simply release a "vicious dog."[271] There are approximately 50 dangerous dog hearings in Rhode Island each year, and the process

[269] Borg, Linda, https://www.providencejournal.com/news/20191010/senate-commission-weighs-amending-vicious-dog-statutes (last visited October 25, 2021).
[270] Sacharcyzk, Tamara, NBC 10 NEWS. "Legislative Commission Reviewing RI Vicious Dog Statute." WJAR, 11 Nov.2019, https://turnto10.com/politics/legislative-commission-reviewing-ri-vicious-dog-statute.
[271] Jones, Jackson. "Rhode Island Dog Bite Law: What Is the Rhode Island Vicious Dog Law?" *The Law Office of M. Jackson Jones, P.C.*, 20 Mar. 2019, http://attorneyjacksonjones.com/rhode-island-vicious-dog-law-1/.

is time consuming and expensive.[272] There is a simple solution to the over-frequency of Rhode Island's population of "vicious dogs." The lawmakers should define a third term for dogs, in the middle of non-violent and violent, as other states have laid out as precedent. This third category, usually referred to as "nuisance dogs," would hopefully result in less "vicious dogs" and dangerous dog hearings and allow the animal cruelty officers to continue investigating actual canine threats.

[272] Borg, Linda, https://www.providencejournal.com/news/20191010/senate-commission-weighs-amending-vicious-dog-statutes (last visited October 25, 2021).

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Revisiting Dworkin-Mackinnon Approach for The Censorship of Pornography in 2021: Why A Pro-Censorship Stance on Pornography Remains Beneficial for Women

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Abstract

Should pornography be censored? Would any attempt to censor pornography pose a substantial risk to free speech? This paper offers a pro-censorship stance that builds on Catherine MacKinnon's and Andrea Dworkin's influential ideas underlying their Antipornography Civil Rights Ordinance (1984); specifically, pornography is the act of sex discrimination, and it should be censored because it harms women. Building on their analysis, I will argue that pornography should be censored because it harms women's free speech and inhibits women's ability to use free expression for self-fulfillment (i.e., creating and defining their identity). The scope of exploration is limited to cisgender heteronormative pornography. Pornography can be defined as explicitly depicting the subjugation of women in a violent and sexual way. The definition can be refined by including additional categories of sexually explicit material – erotic and educational – to understand what pornography is not. I reconsider what censorship could look like by proposing a multi-layered approach. Although pornography should still be accessible, users should have to navigate several regulated layers to do so. Censorship is important to protect women's free speech and validate the harm pornography causes them.

Introduction

The pro-censorship movement of pornography garnered attention following the Dworkin-MacKinnon Antipornography Civil Rights Ordinance, proposed to the city of Indianapolis in 1984. Underlying the Ordinance was Andrea Dworkin's and Catherine MacKinnon's proposal that pornography is the practice of "sex discrimination," and as such, it harms women. The Ordinance claimed that because of the way in which pornography harms women, pornography could and should be censored using the precedent of prior restraint.[273] The Ordinance challenged

[273] Prior restraint allows for judicial review and suppression of materials prior to publishing or broadcasting on the grounds that it is libelous or harmful.

the traditional defense that pornography is protected under the First Amendment as it is simply freedom of expression. The Dworkin-MacKinnon approach also shifted away from the traditional legal perspective of Obscenity Law[274] which provides the standard for censorship of sexually explicit materials. They believe Obscenity Law to be an abstract concept imposed from the male viewpoint and thus unable to recognize or censor pornography's concrete harm to women. However, the Ordinance was overturned in the landmark case *American Booksellers Assn' v. Hudnut* (1985)[275] on the grounds that it was unconstitutional under the First Amendment. Despite the failure of the Ordinance to become law, Dworkin-MacKinnon's approach remains a polarizing position that has inspired responses from both pro and anti-censorship supporters.

Censorship of pornography remains an important issue as the pornography industry continues to grow exponentially. In 2020, revenue from online streaming alone generated more than $775 million in the USA.[276] In recent years, exposés such as *The New York Times'* "The Children of Pornhub"[277] have uncovered the rape and assault that plagues the industry. The consumption of materials depicting the rape, assault and abuse of women is growing, and it is important to question whether allowing this to continue in the name of free speech is at all beneficial to women. Dworkin and MacKinnon are right in arguing that it must be clearly acknowledged that the industry is built on the harm of women, and a free speech position has been insufficient to combat the systemic harm of pornography.

[274] *Miller v. California,* 413 U.S. 15 (1973)
[275] *Hudnut v. American Booksellers Ass'n,*771 F.2d 323 (7th Cir. 1985).
[276] "Adult and Pornographic Websites in the US," IBIS World, October 19, 2020, https://www.ibisworld.com/industry-statistics/market-size/adult-pornographic-websites-united-states/
[277] Nicholas Kristof, "The Children of Pornhub," The New York Times, December 4, 2020, https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html

This essay proposes a pro-censorship stance as censorship is the only effective means to combat pornography's substantial and myriad harms to women. The scope of exploration is limited to cisgender heteronormative pornography, however, it is important to acknowledge that censorship would also have consequences for sex workers, as well as non-binary people and members of the LGBTQ+ community. This pro-censorship stance builds on the Dworkin-MacKinnon approach that pornography is a system that causes collective harm to women. More specifically, it reconsiders the reasons for censorship, arguing that it is because pornography harms the validity of women's free speech and prevents individual self-fulfillment[278] that it qualifies for censorship. Of course, a pro-censorship stance must inevitably tackle the definition of pornography. Pornography is best defined as explicitly depicting the subjugation of women in a violent and sexual way. The definition can be refined through additional categories of sexually explicit material – erotic and educational – to understand what pornography is not. It also reconsiders what censorship of pornography should look like by proposing multi-layered censorship. Multi-layered censorship could still allow access to pornographic materials, but consumers should have to go through several 'layers' to do so. Finally, censorship effectively acknowledges pornography's substantial harms; this legal recognition strengthens women's voices and can make women's free speech a more powerful tool.

Dworkin-MacKinnon Approach

Traditionally, the censorship of pornography has been treated under Obscenity Law. First adopted into Federal Law in 1873, Obscenity Law limits the distribution of obscene materials.

[278] A women's individual self-fulfillment is her ability to define herself. Pornography's harm is that it prevents women from creating a definition free from objectification.

Most recently, obscenity has been determined by the Miller test established in *Miller v. California* (1973). To be deemed obscene:

> "the average person applying contemporary community standards would find that, . . . taken as a whole, appeals to the prurient interest . . . [which] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [which], taken as a whole, lacks serious literary, artistic, political, or scientific value."[279]

However, the Dworkin-MacKinnon approach rejects Obscenity Law as the standard for censorship of pornography because it is an "ideational and abstract" system based on moral judgements.[280] Instead, pornography is a "concrete and substantive" system[281] that consists of real people and real impacts. Dworkin and MacKinnon posit that it is impossible for an abstract system to be the judge of a concrete one. Obscenity Law cannot recognize the harm pornography causes women, as it only recognizes that which offends our sensibilities and not that which harms in reality. Whether pornography harms women is not some abstract question. Women suffering from sex discrimination as a result of pornography is a reality, a real harm, for so many women.

Dworkin and MacKinnon also criticize Obscenity Law, as the "community standards" cited in the law are representative of the male standard. MacKinnon supports their claim through her example of Justice Stewart's famous view on obscenity – "I know it when I see it." [282] In this quote, Justice Stewart is providing a statement of epistemology – he knows through seeing – and thus his seeing will determine what obscenity is.[283] Justice Stewart's view is accepted because of

[279] *Miller v. California,* 413 U.S. 15 (1973)
[280] MacKinnon, "Francis Biddle's Sister", 175.
[281] Ibid.
[282] Ibid.
[283] Ibid., 164.

his position of power. Hence, epistemology and power, as represented in a patriarchal legal system, converge to give Obscenity Law its inherently male perspective. In short, because both pornography and Obscenity Law are built on the male viewpoint; the harm that pornography causes to women is rendered invisible and this is what necessitates the Dworkin-MacKinnon Ordinance.

The 1984 Dworkin-MacKinnon Antipornography Civil Rights Ordinance calls for the censorship of pornography. It states that:

> *Pornography* is the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; or (vi) women's body parts-including but not limited to vaginas, breasts, or buttocks- are exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.[284]

[284] Andrea Dworkin and Catherine MacKinnon, "Appendix A" in *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis, Min: Organising against Pornography, 1988) 101.

The Dworkin-MacKinnon Ordinance is rooted in the definition of pornography as "sex discrimination."[285] Dworkin and MacKinnon define pornography as "sex discrimination" to demonstrate that pornography is an *act* rather than speech. Pornography is not the expression of sexist attitudes, but an *act* of harm to women. In order to understand such a definition of pornography, a definition of "sex-discrimination" is also necessary. According to MacKinnon, sex discrimination is a "substantive system" that involves "real people with real social labels."[286] Given that sex discrimination, and accordingly pornography, involves real people, it follows that it has a tangible impact on our daily lives. The Dworkin-MacKinnon approach believes that this impact is constructing the "social reality of gender;"[287] specifically, a construction of woman which "institutionalizes the sexuality of male supremacy."[288] Male supremacy is institutionalized because pornography creates a standard against which women are viewed as men's inferior. This influences the way women are viewed in society; if men believe women to be lesser, they will treat them in such a way.

The Dworkin-MacKinnon approach further illustrates the harm of pornography by discrediting the view that pornography is simply a tool to explore sexuality and personal fantasies. The Dworkin-MacKinnon approach credits pornography with the "violence and discrimination which define the treatment and status of half the population."[289] Pornography legitimizes this violence and discrimination because it is only in pornography that rape, battery, sexual harassment, prostitution and child sex abuse are called something else: "sex, sex, sex, sex, and sex, respectively".[290] Pornography transforms fantasy into a harmful reality because it

[285] Catherine A. MacKinnon. "Francis Biddle's Sister: Pornography, Civil Rights, and Speech." In *Feminism Unmodified, Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1994), 163.
[286] MacKinnon, "Francis Biddle's Sister", 164.
[287] Ibid., 166.
[288] Ibid., 172.
[289] Catherine A. MacKinnon, "Not a Moral Issue." *Yale Law & Policy Review 2*, no. 2 (1984): 324.
[290] MacKinnon, "Francis Biddle's Sister", 171.

depicts the abuse of women in a 'legitimate' setting, therefore legitimizing such acts. The profits collected from the depictions of abuse act to further legitimize them. Indeed, pornography causes harm not because it is the dangerous fantasy of female subjugation, but because it "is the power and the act" of it.[291] Pornography is action – it is the action of normalizing acts of inequality and perpetuating harmful attitudes towards women. As pornography is harm and action, the Dworkin-MacKinnon approach deems that under the principle of prior restraint, pornography may be exempt from First Amendment protection.

The Dworkin-MacKinnon approach also challenges the First Amendment's definition of 'harm' to qualify pornography for censorship. They argue that pornography causes a collective harm[292] that can only be recognized as being caused by pornography when looking at the whole of the harmed group. However, collective harm cannot be recognized by the linear causality of harm the First Amendment upholds. MacKinnon posits that for the First Amendment to recognize pornography's harm, it "must cause harm like negligence causes car accidents."[293] Pornography, however, does not harm the individual in such a way. As Dworkin contends, "the name of the next victim is unknown but everything else [the harm] is known."[294] Furthermore, there is again the issue of approaching harm from the male perspective. When attempting to decode pornography's harm, courts have approached it from the powerful male viewpoint. As a result, courts have failed to identify the harm that pornography causes because it harms women, the powerless. Thus, to promote equality and prevent the continuing systematic harm of women, censorship is demanded to stop the powerful from normalizing such inequality and harm.

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[291] Andrea Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality." *Harvard Women's Law Journal,* no. 8 (1985): 11.
[292] Ibid., 339.
[293] Ibid., 338.
[294] Dworkin, "Against the Male Flood," 11.

The Dworkin-MacKinnon approach also challenges the assumption that freedom of speech, including pornography, helps discover the truth. MacKinnon first notes that in a society where gender inequality prevails, "the speech of the powerful impresses its view on the world."[295] This harks back to her observation that Justice Stewart's power, and his status as male, allowed what he viewed as obscenity (and what should not be viewed as an obscenity) to be taken as fact. Allowing pornography as a form of free speech lets it "invent women" [296] because it represents the voice of the powerful – namely men. Certainly, granting pornography First Amendment protection allows for the dangerous spread of misinformation. In the case of pornography, the First Amendment is supporting the claim (and act) that women are inferior. The 'truth' that pornography reveals is no 'truth' at all; it is only a falsehood perceived as a 'truth' that promotes the subjugation of women.

Finally, the Dworkin-MacKinnon approach challenges the common belief that free speech helps those who seek change, as not all speech is actually 'free'. MacKinnon contests the First Amendment's assumption that "whole groups of the population are not systematically silenced prior to government action."[297] For MacKinnon, the First Amendment fails to acknowledge that we live in a hierarchical society where, even if all are free to speak, not all voices will be heard or deemed important. Pornography exemplifies this hierarchical society and its practice of sex discrimination, where women are viewed as lesser than men. As Dworkin notes, "silence is not speech."[298] Pornography silences women, and by allowing the substantive system that is pornography to continue, women are consistently and systematically being silenced.

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[295] MacKinnon, "Not a Moral Issue," 336.
[296] Ibid., 337.
[297] MacKinnon, "Not a Moral Issue," 340
[298] Dworkin, "Against the Male Flood," 11.

Dworkin and MacKinnon conclude that censorship is the best path for equality. Pornography undermines women's speech as it constructs women as the lesser. Free speech cannot further women's equality because the voices of women are systematically silenced through pornography. For Dworkin and MacKinnon, the First Amendment has failed women, and thus affirmative action, in terms of censorship, is necessary to further the fight for equality.[299] Censorship of pornography does not aim to silence voices; instead, as Dworkin argues, censorship has to do with prohibiting harmful acts.[300] Censorship can aid women in combating the substantive and substantial harms caused by the system and act of pornography.

Responses to the Dworkin-MacKinnon Approach

Feminists and First Amendment theorists have composed the two principal responses to the Dworkin-MacKinnon approach. The foundation of both these responses is the same, as they advocate that a pro-censorship stance is more harmful to women's quest for equality than the free distribution of pornography. Both groups concur that any censorship scheme, especially one proposed under as broad a definition as by Dworkin and MacKinnon, would outlaw many important works of literature, including Henry Miller's *Tropic of Cancer*, William Faulkner's *Sanctuary*, as well as much of Shakespeare and Greek mythology.[301] Moreover, it would inevitably result in work valuable to feminists and the feminist cause being censored, including some of MacKinnon's and Dworkin's own writings. Dworkin and MacKinnon have both acknowledged this criticism and deemed it a worthwhile price.[302] However, banning depictions

[299] MacKinnon, "Francis Biddle's Sister," 195.
[300] Dworkin, "Against the Male Flood," 2.
[301] Thomas I. Emerson, "Pornography and the First Amendment: A Reply to Professor MacKinnon." *Yale Law & Policy Review 3,* no.2 (1984): 132.
[302] Nadine Strossen, "A Feminist Critique of "the" Feminist Critique of Pornography." *Virginia Law Review* 79, no. 5 (1993): 1142

of the subordination of women could prevent women from sharing their own lived experiences of subordination and its harm. Censorship risks silencing women, the very thing which the Dworkin-MacKinnon model is trying to prevent and inhibits any further discussion on pornography and its harm. Censorship does not stop subordination's harm but rather erases it from the public conscience.

Additionally, both feminist and First Amendment anti-censorship supporters concur that censoring pornography would undermine free speech, consequently depriving women of a powerful tool for furthering their equality. Although Emerson acknowledges the concerns of the Dworkin-MacKinnon model—that free speech only amplifies the voice of the powerful and silences the voice of the dissenting—he maintains that "a fully balanced equality of speech among all groups and individuals is probably unattainable" without compromising the freedom of the system.[303] Even if speech is not equally heard, Free Speech ensures everyone's equal right to speech. Anti-censorship supporters uphold that it is this right that has allowed for the progression of women thus far. Indeed, it is the very right that has enabled Dworkin and MacKinnon to express their pro-censorship stance and openly criticize patriarchal society. Moreover, feminists contend that pornography is not a unique way in which women are exploited or subordinated. As it is non-unique, censoring pornography would not end the exploitation or sexist portrayal of women; thus, it is not worth the risk of jeopardizing the powerful tool of free speech which can combat the exploitation. Censorship would be harmful on the grounds that it would undermine women's speech, and it would be ineffective as women would continue to be exploited in other ways.

[303]Emerson, "Pornography and the First Amendment," 140.

While First Amendment theorists and feminists concur on the key issues of censorship, their reasoning differs. First Amendment theorists hold that Dworkin-MacKinnon's definition of pornography and subsequent argument for pro-censorship are unconstitutional as they violate the First Amendment. A key issue lies in the Dworkin-MacKinnon definition of pornography as "sex discrimination." Critics view this as an attempt to define pornography as action rather than speech, allowing them to bypass the First Amendment. *Hudnut v. American Booksellers Assn'* (1985) is a key case supporting this line of response. In the case, the plaintiff successfully argued to overturn the Dworkin-MacKinnon ordinance, arguing that defining pornography as 'discrimination' is "no more than a play on words" as "pornography is speech or expression, as those terms are used in the first amendment approach."[304] Furthermore, the Dworkin-MacKinnon Ordinance states that pornography is the "sexually graphic depiction" through images or words,[305] yet, according to the First Amendment, images and words constitute expression. Ergo, to argue for the censorship of pornography is to argue for the censorship of speech.

While critics acknowledge that pornography can promote harmful attitudes, it does not explicitly call on people to harm women and therefore cannot be censored under prior restraint. As reasoned in *American Booksellers Ass'n v. Hudnut* (1985), a depiction of subordination is not the act of subordination itself.[306] Thus, if the government chooses to censor pornography, they are censoring it because of the attitudes it promotes and not the harm it inflicts. As such, this would be content-based censorship, which is unconstitutional under the First Amendment. It is not the government's role or right to implement "thought control"[307] and determine which belief is morally right. If the government only deems legal that which depicts women as equals, and

[304] *Hudnut v. American Booksellers Ass'n,*771 F.2d 323 (7th Cir. 1985).
[305] Dworkin and MacKinnon, "Appendix A" 101.
[306] *American Booksellers Ass'n, Inc. v. Hudnut*
[307] Ibid.

anything which depicts them otherwise as illegal, it would also violate the First Amendment (yet this is exactly what Dworkin and MacKinnon supposedly argue for). Emerson further demonstrates the unconstitutionality of such censorship through the absence of any precedent. He notes that laws combatting racism, which he believes is the closest parallel to gender equality, do not address the "expression of discriminatory beliefs, opinions, ideas or attitudes."[308] A lack of precedent for such sweeping censorship or even any censorship of discriminatory speech would make any censorship unconstitutional, meaning pornography should remain as protected speech.

For feminists, however, concerns are rooted in the fear that censorship will be imposed in a paternalistic way; accordingly, censorship would further subjugate women. Indeed, the Dworkin-MacKinnon approach has argued that the law is often enacted from a male-viewpoint, but it has failed to address how censorship would not be enacted in such a way. Feminists believe that a paternalistic enforcement of censorship could prevent further discussion of pornography's harm and inhibit women's ability to share their own experiences of its harm. Strossen notes that there have been examples throughout history of how "censorship efforts often have linked the suppression of sexually oriented material with the suppression of material important to women's rights."[309] She specifically cites the Comstock Act which banned materials containing any sexually oriented material and material relating to contraception or abortion,[310] which damaged women's ability to learn about and discuss their sexual health. The censorship of pornography, especially as defined by the Dworkin-MacKinnon Ordinance, could easily extend to women speaking up against discrimination and abuse, as well as sharing their own stories about rape and

[308] Emerson, "Pornography and the First Amendment," 140.
[309] Strossen, "A Feminist Critique," 1169.
[310] Ibid.

sexual assault. For anti-censorship feminists, censorship does not erase discrimination and abuse but merely silences it, as it becomes harder for women to speak up against it and share their experiences.

Feminists also believe that the paternalistic censorship will further perpetuate sexist stereotypes, specifically regarding sexuality. Many feminists equate Dworkin-MacKinnon with an anti-sex position, as it suggests an incompatibility between a woman's freedom and her participation in sexual relations.[311] Paradoxically, the Dworkin-MacKinnon model is attempting to free women of sexism and the ensuing stereotypes by imposing a sexist stereotype on women. Carlin Meyer eloquently articulates this stereotype, stating that censorship "reinforces the very sin=sex=woman nexus that has for centuries undergirded women's oppression."[312] Censorship will not stop the male-viewpoint from constructing sexuality and gender but actually strengthen its power to do so. Arguably, women will endure even less control in defining their sexuality and gender as any attempt to do so fulfils the notion of "sex=sin=women." Free speech, it is argued, is a more powerful tool for women to explore their sexuality since it does not impose sexist stereotypes on them. Free speech means women are free to explore and express themselves in any way they choose, without fear of censorship.

Why Remain Pro-Censorship in 2021?

I still maintain that a pro-censorship stance on pornography is the most beneficial to women in 2021. Censorship minimizes the extent to which pornography systemically harms the validity of women's free speech and enables women to achieve individual self-fulfillment (i.e.,

[311] Ibid., 1148.
[312] Meyer, Carlin. "Sex, Sin, and Women's Liberation: Against Porn-Suppression." *New York Law School: Faculty Scholarship* (1994): 1100, accessed 10 Nov., https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1672&context=fac_articles_chapters

construct their sense of self) free from objectification. Indeed, the Dworkin-MacKinnon approach acknowledges the systemic nature of pornography's harm through their definition of pornography as the practice of "sex discrimination;" however, they do not go far enough in acknowledging its consequences. Alisa L. Carse, a pro-censorship thinker, examines the consequences of pornography's systemic harm and determines that it is its harm to women's constitutionally protected liberty that qualifies pornography for censorship. Carse defines this constitutionally protected liberty as "the status of all persons as independent and equal rather than subservient;"[313] additionally, she posits that it is the goal of free speech to protect our liberty – namely, our equality. Therefore, only speech that upholds and protects equality, fulfilling the goal of free speech, can be considered such and be afforded protection under the First Amendment.

Therefore, the basis for censorship should be the harm pornography causes to the liberty of free speech. As the Dworkin-MacKinnon approach states, pornography constructs the social reality of gender. [314] This reality is one in which women are always defined in relation to and as inferior to men. If the definition of women relies on the existence of men, it follows that woman, by their very definition, cannot be free from men. It then follows that their life in practice cannot be free – including their speech. That is, their free speech, like their gender, is always defined in relation to men's free speech. Women's free speech is conditional on the free speech of men and its status as inferior to men's, and thus it is not free in its own right. A women's free speech is abridged in the sense that it is defined and relies on the free speech of another entity; their free speech is further abridged by being defined as lesser to men's. While pornography harms women in many ways, including their status as equals, it is pornography's harm to free speech that

[313] Carse, "An Uncivil Liberty?" 173.
[314]MacKinnon, "Not a Moral Issue," 327.

qualifies it for censorship. In their inaction, the government allows pornography to abridge free speech.

Pornography's harm to women's free speech extends to limiting their free expression; specifically, their free expression of self-fulfillment. Self-fulfilment is one of the values served by protecting free speech. That is, individuals can use free speech to create and express their own identity. Pornography does not necessarily limit an individual from defining themselves; however, it does limit a class of people – women – from attaining self-fulfillment. Pornography restricts women from self-fulfillment by establishing the filter through which any woman's expression of identity is interpreted. This filter is pornography's construction of women in relation to men as their inferior and acts to calibrate any expression of identity to fit pornography's construction of women. Pornography's 'filter' is detrimental to equality because this filter renders it impossible to produce a definition of women where they are equal to men.

Pornography's filter inhibits women from using their freedom of expression to identify as non-consenting. Their identity is always under the lens of objectification; pornography fixes women's identity as sexual objects with a desire to be subjugated. Examples of how pornography's filter serves to calibrate women's free speech include marital rape laws and "no means no" laws. Marital rape only became illegal across the USA in 1993, and many state laws still contain loopholes that make it extremely difficult to prosecute.[315] The delay in legal action and the continued difficulty to prosecute marital rape illustrates how pornography's filter allows men to understand women's words through a different filter. Men do not hear women's speech when they said "no" or "stop," as men understand women's speech through the filter of women

[315] Karen Zraik. "Inside One Woman's Fight to Rewrite the Law on Marital Rape." The New York Times. April 13, 2019. Accessed 7 Jan. 2021. https://www.nytimes.com/2019/04/13/us/marital-rape-law-minnesota.html#:~:text=While marital rape has been,cases, according to data compiled.

as sexual objects that are meant to be subjugated. Pornography inhibits women from defining themselves as non-consenting. "No means no" laws have further proven how pornography's benchmark inhibits women's free speech. Until 2017, Maryland did not recognize rape unless a woman fought back.[316] This interpretation of the law disempowered women's free speech as her identification as a non-consenting individual through her free expression was meaningless. Instead, her speech was once again calibrated against the concept that women are objects that are meant to be subjugated. Under pornography's construction of women, women cannot even identify themselves as non-consenting.

A New Approach to Censorship

In order to censor pornography, it is, of course, necessary to define it. There is no doubt that pornography is a system which subjugates women. Alisa L Carse highlights that pornography's role in subjugation is evident even in its etymology: pornography is derived from the Greek words *pone*, meaning "sexual slave," and *graphos*, meaning "depiction of."[317] Within its name – *graphos* – pornography identifies itself as speech. Accordingly, critics are correct in arguing that pornography is a form of expression, especially in the sense determined by the First Amendment. However, Dworkin-MacKinnon's supposition that pornography is an act also holds merit. Certainly, pornography must constitute a "substantive system"[318] as its message – the subordination of women – is consistent in each work. So, individual instances of pornography – videos, images, words that depict the subjugation, discrimination and abuse of women – can be

[316] Pat Warren. "'No Means No Law' Redefines Rape in Maryland." CBS Baltimore. April 12, 2017. Accessed 6 Jan 2021. https://baltimore.cbslocal.com/2017/04/12/no-means-no-law-redefines-rape-in-maryland/.

[317] Alisa L. Carse, "Pornography: An Uncivil Liberty?" *Hypathia vol.10,* no. 1 (1995): 158.
[318] MacKinnon, "Francis Biddle's Sister," 164.

classified as forms of expression. However, pornography, as a whole, is a system which does not simply depict subjugation, but clearly *acts* to subjugate women. The harm pornography causes cannot be seen or understood in isolation; instead, the individual instances must be assessed in the context of the whole system for the harm to become visible. Accordingly, by assessing instances in the context of the whole system and whether they contribute to the harm enacted by it, censorship becomes harm-based and not unconstitutionally, content-based.

Nevertheless, pro-censorship stances such as the Dworkin-MacKinnon approach have struggled because the definition of pornography is broad and invites issues such as the 'slippery slope." To understand what pornography is, it is easier to define what is not pornography. To show what pornography is not, three categories of sexually explicit material should be established: erotic, educational and pornographic. Both erotic and educational materials should be exempt from censorship. Erotica is an expression of sexuality that features no subjugation of or violence towards women. Educational materials relate to women's sexual and reproductive health. Pornographic materials will not contain any of the characteristics of educational and erotic materials. Additionally, pornography will always feature the subjugation of women and has no further value. In determining which category, a work falls into, the work should be assessed as a whole.

To further appease 'slippery slope' critics, Carl R. Sunstein's approach should also be incorporated. Sunstein proposes that such a 'slippery slope' can be avoided by establishing a narrower scope of pornography that is eligible for censorship. He suggests that only visual material with the explicit depiction of rape and subjugation can be censored.[319] Additionally, pieces that do not explicitly depict rape but that contain a rape 'theme' are not subject to

[319] Cass R. Sunstein, "Pornography and the First Amendment." *Duke Law Journal* vol. 5, no. 4 (1986): 625.

censorship. This then protects, for example, pieces of classical literature from censorship. By limiting the broad conception of pornography through tangible measures, Sunstein clearly establishes what can be censored and prevents an 'imaginative' interpretation of censorship, thus addressing the 'slippery slope' concern. Although a narrower scope of censorship will not attack the whole system of pornography, it can still lessen its harm by limiting the extent of its exposure.

While the educational category is quite distinct from pornography, distinguishing erotica and pornography poses more of a challenge. The categorization of erotica versus pornography is not unique to this argument. It is generally accepted that erotica is an artful expression of sexuality that does not correlate sexuality with violence or male domination. Conversely, pornography explicitly depicts the subjugation of women in a violent and sexual way. Of course, making such a distinction can involve bias and once again invite the 'slippery slope' argument. In order to diminish bias and ensure *only* pornography is being censored, each work should be considered within the context of the whole system of pornography. Again, it is only when viewing the whole system that the harm of pornography becomes evident; therefore, the harm of a single work will only be elucidated when evaluated within the context of the whole system. In this way, even though the legislation censors instances of pornography, it still acknowledges that the harm is caused by the system as a whole.

Additionally, the erotica category is intended to address concerns of feminist critics that censorship of pornography harms women's sexuality. A pro-censorship stance is not intended to be, as posited by Strossen, an "anti-sex" stance. [320] The fight for equality includes women's rights to construct their own sexuality which is significantly limited by the prevalence of

[320] Strossen, "A Feminist Critique," 1147.

pornography. Pornography limits women's free expression of their sexuality: indeed, its construction of women in relation to men as their inferior means that every aspect of a women's life is also defined in relation to men, including their sexuality.

By contrast, erotic materials empower women's freedom of expression, particularly in relation to their sexuality. Erotica does not uphold the construction of women as sexual objects to be subjugated. In distinguishing the two, erotica can be seen as liberating free expression of sexuality and pornography as inhibiting. Of course, pornography is not mind control, and women are not forced to accept pornography's construction of sexuality. However, the prevalence of pornography significantly limits the freedom women have to explore their sexuality independent of men. It also limits the places in which women can express a 'women-constructed' sexuality, reflecting the limitations pornography imposes on women's free speech.[321]

Accordingly, MacKinnon's and Dworkin's proposal for censorship should be reconsidered and replaced with multi-layered censorship. Multi-layered censorship means content can still be accessed, but the consumer must go through 'several layers' to view it. These layers suppress access to materials by limiting distribution and imposing requirements for consumption. For pornography, these layers could include only being able to obtain pornography from government-licensed retailers or websites and having to provide personal information (name, date of birth, social security number, etc.) to gain access. Multi-layered censorship could also require warnings on any pornographic material about the harms it causes women. Imposing censorship in this way also helps to strengthen the system of categorization, as even if borderline cases of erotica are incorrectly classified as pornography, they can still be accessed.

[321] The proposal can still be successful even if the categories are blurred on the edges. The main target of censorship is hardcore pornography which does not lie on the edge of erotica and pornography.

There is precedent for the multi-layered restriction of pornography. The Supreme Court upheld the *United States, et al. v. American Libraries Association, et al.*, ruling that libraries are required to install filters so that both minors and adults cannot access 'obscene' materials online; however, adult patrons could request that the filter be disabled.[322] Building on this precedent, this proposal would see multi-layered censorship extend beyond government funded buildings and Wi-Fi. Government regulation should extend to private consumption of pornography, with requirements being introduced on all premises selling pornographic material and pornographic websites.

In American democracy, liberty and equality must "operate side by side."[323] Multi-layered censorship offers a compromise between the two, allowing both to co-exist. Multi-layered censorship serves liberty by still allowing the consumer to access the material, even though they must go through several layers to do so. Multi-layered censorship also serves equality as it minimizes and regulates pornography's harms. Ultimately, it is the law that helps us construct 'community norms' and thus what is considered normal. As long as pornography remains uncensored, the harms it causes women – including inequality – are normalized. However, when the law imposes filters and warnings on pornographic content, it is warning the public about pornography's harms to women. Multi-layered censorship supports equality by reshaping 'community norms' so that the public no longer consider pornography and its harms normal.

Responding to Anti-Censorship Arguments

[322] Rehnquist, William H, and Supreme Court of The United States. U.S. Reports: *United States et al. v. American Library Association, Inc., et al., 539 U.S. 194. 2002*. Periodical. https://www.loc.gov/item/usrep539194/.
[323] Richard Delgado, "About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties," *Harvard Civil Rights-Civil Liberties Law Review vol. 39,* no.1 (2004): 244.

When proposing censorship, it is always necessary to consider whether the harm pornography causes is more dangerous than the risk censorship poses to free speech. Censoring pornography poses a low risk to free speech because of the nature of its content. Following the argument of Carl R. Sunstein, pornography is low-value speech as it neither communicates a substantive message nor does so in a "cognitive way."[324] It does not have an educational purpose; it does not have an artistic purpose – its only purpose is to construct a sexual reality that subjugates women. He posits that to believe censoring the low-value speech that is pornography could somehow harm free speech is an "overvaluation of harm."[325] The censorship of pornography poses minimal risk to free speech because it has no value or purpose beyond building a sexuality founded on the harm of women. It is censorship – and not free speech – that can stop pornography from constructing sexuality in this way.

Censorship is also more beneficial than outright free speech because it offers a legal means to address and prevent the harm of pornography. Anti-censorship groups retreat to the response that free speech itself has afforded the censorship debate to emerge and, as Strossen argues, raise the American consciousness. [326] While this is true, it is only when legal measures have been discussed, such as the Dworkin-MacKinnon Ordinance, that the debate has garnered any attention. Moreover, as MacKinnon has noted, free speech does not mean equal speech.[327] Despite having free speech in name, women are amongst those who are often silenced. While it is not within the power of the government to ensure all voices are heard equally, enforcing this harm-based censorship on pornography can empower and amplify women's voices.

[324] Sunstein, "Pornography and the First Amendment," 606.
[325] Ibid., 627.
[326] Strossen, "A Feminist Critique," 1168.
[327] MacKinnon, "Francis Biddle's Sister," 193.

Strengthening for women to tackle these issues. Ironically, in the case of pornography, it is censorship – and not free speech – that allows women to fight for equality.

Feminists have often countered censorship by arguing that women can 'reclaim' pornography. However, it is unlikely that attempts to produce feminist pornography will be sufficient to overthrow the multi-million-dollar mainstream pornography industry which is built on the subjugation of women by powerful men. Pornography produces what the consumer wants (or what powerful men want or perceive as normal or acceptable). Without action to change attitudes – such as censoring images of women being raped, assaulted and abused – the consumer will continue to want pornography that depicts the subjugation of women.

Allowing for erotica, as well as exempting written pieces of pornography, still gives people ample opportunity to explore their sexuality without the construct of sex discrimination. Censorship intends to free women from the construct of sex-discrimination to discover their own sexuality independent of men. Censoring pornography does not proliferate an anti-sex stance, but rather establishes a clear anti-degradation stance.

A credible and important objection to the proposed categories, and censorship in general, is that it will be imposed in a paternalistic way. However, in deciding categorization and censorship of each instance in reference to the whole system of pornography, the risk of a paternalistic implementation can be minimized. This is because it forces the evaluation to be conducted not against one's own viewpoint, but the system of pornography and its harm to free speech. The categories, in a sense, elevate the discussion and analysis to the collective and systematic level, where real harms can be discussed and analyzed. For example, the question of harm shifts from whether pornography expresses a harmful attitude toward, or about, women, to an assessment of whether pornography is harmful to the free speech of women. Does it, as a

whole, limit their speech? Does it silence women? Once the legal discussion of the real harms is elevated to these kinds of harms caused by pornography, women can then have a voice about these harms and have legal standing to bring claims that actually show instances of the harms that pornography causes.

Conclusion

Though the Ordinance failed in 1984, the Dworkin-MacKinnon approach has stood the test of time because sexism has also stood the test of time. Their approach remains important because it has amplified the voices of women and illuminated the harm they have suffered because of pornography. Although their approach presents weaknesses to be challenged and discussed, it is correct in its fundamental claims. Pornography is a system that harms women because of how it constrains women's free speech and their ability to define themselves free from objectification, and it is this harm that renders pornography suitable for censorship. While critics have posed valid responses to their proposed Ordinance, time has ultimately proved that free speech is not a more powerful tool to remedy the inequality and inferiority promoted by pornography. Free speech has failed to combat pornography's harm, and the industry continues to grow and profit.

A pro-censorship stance is a pro-equality stance. It is a stance that legally recognizes the harm pornography has caused women and helps to prevent further discrimination. Paradoxically, censorship bolsters free speech and amplifies women's voices –it allows women's voices to be heard. Censorship has done more for women, even just through its proposal, than outright free speech. The mere mention of 'censorship' sparks ongoing debate and has seen more people become cognizant of pornography's harm. The law, including censorship, can be used to

challenge ‘community norms’ and create legal remedies for pornography’s harms. While it is free speech that enables women to voice the harms, it is ultimately legal action - specifically censorship – that will legitimize their voices in the world.

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