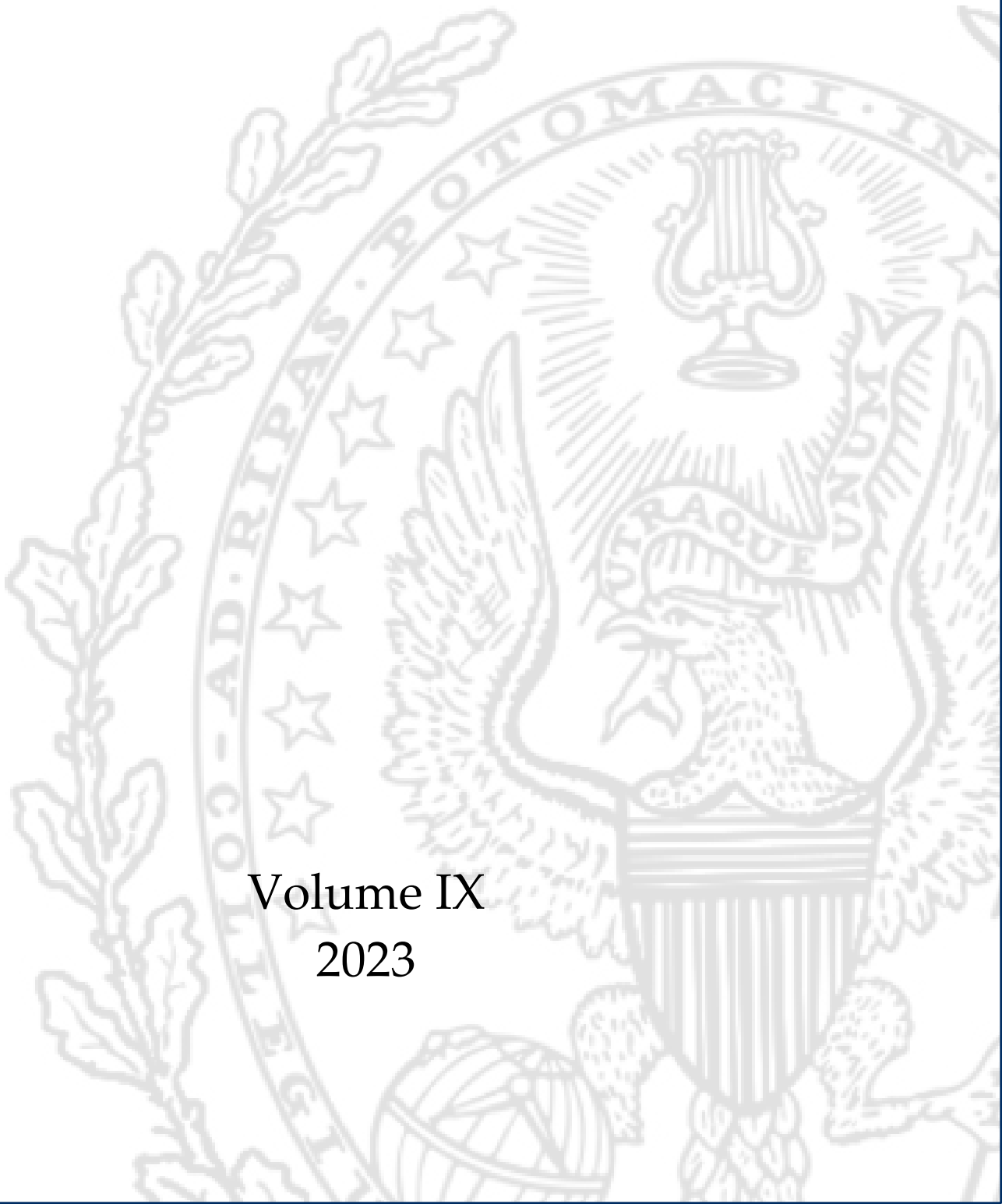
Georgetown University Undergraduate Law Review



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Letter from the Editors

Dear Reader,

We are delighted to present Volume IX of the Georgetown University Undergraduate Law Review (GUULR), the culmination of an extensive editorial process that rigorously reviewed both graduate and undergraduate submissions.

Our commitment to fostering diverse perspectives is evident in this edition, where we explore a wide array of subject areas. Articles in this edition critically examine timely and important domestic issues such as American campaign finance reform and drug policy. Other articles tackle complex Constitutional interpretation including analyzing the First Amendment from historical and feminist perspectives, as well as delving into complicated questions of statutory interpretation. Finally, articles in Volume IX examine critical matters in International Law, including nuanced discussions of the legality of the Taliban and the elusive struggle for gendered justice on the international stage.

We are incredibly thankful to the authors for sharing with us their contributions and are grateful for their tireless dedication throughout the editing process. We also owe much gratitude to each of our editors, who have invested countless hours in preparing the volume for publication—the volume is chiefly the product of your hard work.

We invite you to immerse yourself in the thought-provoking content of Volume IX. We trust that the diverse perspectives, critical analyses, and insightful discussions contained within will be both engaging and enlightening. Your feedback is invaluable to us, and we encourage you to share your thoughts by reaching out to us at guundergraduatelawreview@gmail.com. We eagerly anticipate hearing from you and value your input as we continue to strive for excellence.

Sincerely,

Paris Nguyen, Lindsey Gradowski, and Keerat Singh
Managing Editors

Georgetown University Undergraduate Law Review

Volume IX, Issue I

Table of Contents

Democracy for Sale: *The Philosophical, Legal, and Social Arguments for Campaign Finance Reform*

Ben Ward

Georgetown University

Abstract

Over the last fifty years, campaign finance law has devolved significantly despite the efforts of legislators on both sides of the aisle. This article will examine the case law that gutted provisions such as the Federal Election Campaign Act of 1971 and the Bipartisan Campaign Reform Act of 2002, allowing PACs and super PACs to take over election spending. Using the Federalist Papers and Mill's *On Liberty*, both of which shaped the US political system, and examining the socioeconomic gaps in today's society, the article will argue that the court's decisions in cases such as *Citizens United v. F.E.C.* have a negative impact on our society and democracy. The article then proposes some solutions that may be viable even with the Court's conservative majority that is sure to last for decades.

"A democracy cannot function effectively when its constituent members believe laws are being bought and sold."

– Justice John Paul Stevens

I. INTRODUCTION

The United States is now in its second Gilded Age. Today's vast wealth disparity has only been seen one other time in the history of this country. The top 1% richest Americans own 16 times more wealth than the poorest half.[1] Over the last half-century, Congress has made multiple efforts to restrict the influence of this powerful minority in elections, along with corporations and interest groups. In a country built on the principles of a government of, by, and for the people,[2] it should be easy to ensure that the voices of the people are heard relatively equally in elections. However, over the last 45 years, the judicial system has been consistently and increasingly unfavorable to government efforts to stop our democracy from becoming a commodity to be bought and sold by the few who can afford to pay for it.

In the following pages, I will introduce background information on the case law and legislation surrounding campaign finance. Then, pivoting to subjective analysis, I will address the philosophical reasoning behind regulation, arguing that the "marketplace of ideas" is currently restricted only to those who can pay, allowing for a tyranny of the minority. I will follow this with a legal argument, showing that the government has two compelling interests in regulating expenditures: the limitation of corruption and the deterrence of a practice that takes valuable time from officeholders. Next I will address the unfortunate truth that allowing the wealthy and corporations to control election spending puts underrepresented groups such as people of color, women, and young people at a disadvantage. To conclude, I will introduce a potential solution that does not rely on a change in case law or the Constitution, both of which seem highly unlikely, at least for the foreseeable future. In all, I will argue that strict regulation of campaign contributions and expenditures is both constitutional and necessary. Regulation would allow all voices to be heard, limit corruption, give representatives adequate time to carry out their duties, and limit the disproportionate influence of rich white men in elections.

A. Historical Background

After the Watergate scandal, the government attempted to enforce stricter regulations on campaigns with the goal of avoiding corruption or the appearance thereof.[3] In 1974, Congress amended the Federal Election Campaign Act of 1971 ("F.E.C.A.").[4] The amendment placed a $1,000 per election limit[5] on individual donations to a political candidate (contributions) and individual spending on behalf of a candidate (expenditures). It also set a $5,000 limit on individual contributions to a political party or committee and contributions by committees to candidates. The amendment also established the Federal Election Commission[6] ("F.E.C."). In *Buckley v. Valeo*,[7] the Supreme Court struck down the 1974 amendment's expenditure limits[8] and upheld the constitutionality of its contribution limits.

The Court found that both limits were subject to strict scrutiny, referring to *Civil Service Commission v. Letter Carriers*,[9] which established that government action that restricts the freedom to associate[10] is subject to "the highest level of scrutiny." The Court justified contribution limits by referring again to *Letter Carriers*, in which Justice Marshall argued that "neither the right to associate nor the right to participate in political activities is absolute." They pointed to the limitation of corruption as an important government interest, arguing that unlimited spending would essentially allow wealthy donors to purchase political favors.[11] The decision also identified that there are other ways to associate oneself with a candidate, meaning that the effect on free speech is sufficiently minimal. The Court argued that limiting one's ability to freely spend money severely limits their ability

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[1] Megan Leonhardt, "The Top 1% of Americans Have about 16 Times More Wealth than the Bottom 50%," CNBC, (June 23, 2021), https://www.cnbc.com/2021/06/23/how-much-wealth-top-1percent-of-americans-have.html.

[2] Lincoln, Abraham. "Gettysburg Address." Speech, Gettysburg, PA, November 19, 1863. "American Speeches", NATIONAL ARCHIVES.

[3] During the investigation into the Watergate scandal, it was revealed that President Nixon's campaign had benefited from tens of millions of dollars in discreet corporate and individual donations.

[4] 52 U.S.C. § 30101, 1971

[5] This limit is indexed for inflation, and will increase to $2,900 (after being raised to $2,000 in 2002) for the 2021-22 election cycle. The minimum wage is not indexed for inflation.

[6] The F.E.C. is made up of a chair, a vice chair, and six commissioners. They are appointed by the president and confirmed by the Senate and serve 6 year terms. The F.E.C. enforces campaign finance laws and oversees elections.

[7] *Buckley v. Valeo,* 424 U.S. 1, 5 (1976)

[8] A decision that was affirmed by *F.E.C. v. NCPAC*, 470 U.S. 480, 482 (1985)

[9] CSC v. Letter Carriers*,* 413 U.S. 548, 567 (1973)

[10] In many cases, the First Amendment is used to protect the rights of individuals to associate themselves with groups. See generally *NAACP v. Alabama*, 357 U.S. 449 (1958) and *Roberts v. US Jaycees*, 468 U.S. 609 (1984). It is clear that financial contributions to a campaign represent an expression of association with that campaign, but the freedom of association is not substantially limited by limiting this right.

[11] *Buckley*, 424 U.S. 1, 3

to speak freely about political matters, and thus, any restrictions on expenditures for campaigns must pass strict scrutiny.[12]

In order to pass strict scrutiny, a "compelling governmental interest" must be demonstrated and the law must be "narrowly tailored" to carry out the interest. In *Buckley v. Valeo*, the government argued that the avoidance of corruption or the *appearance* of corruption was a sufficient interest to uphold restrictions of political donations.[13] The Court agreed that the avoidance of a *quid pro quo* was a legitimate concern for direct contributions but not for independent expenditures.[14]

B. How Constant Fundraising Interferes with Democracy

With the few campaign finance restrictions that are in place, candidates must raise a substantial amount each election cycle to be competitive. In 2016, the average winning Senate campaign cost $19.4 million with outside spending factored in.[15] Senate terms are six years long. To raise $19.4 million over this period, one must raise around $60 thousand a week. How can this be done while also carrying out the duties of a senator? It can't. Raising nearly as much money in a week as the median US household makes in a year[16] requires a serious time commitment. And that is just the average. The total spending in Georgia's two Senate races in 2020 was $879 million, over half of which came from super PACs and other outside groups.[17] These races proved to be incredibly important, giving Democrats control of the Senate.

The eyes of the nation will be fixed on key races in swing states and swing districts. Adjusted for inflation, total election spending has steadily increased from cycle to cycle in recent years.[18] With the elevated importance of this election cycle, we will likely see another year of unprecedented spending, especially from super PACs, whose spending has skyrocketed since their advent in 2010. In 2020, super PACs raised a total of $3.4 billion and spent $2.1 billion, compared to $828 million raised and $609 million spent in 2012, just two presidential election cycles prior.[19] Due to the considerable power that super PACs now possess, incumbents who are unpopular or represent competitive districts face a barrage of independent expenditures, possibly from out of their district or state. The duties of these representatives may become secondary as they attend fundraisers and court their wealthy supporters, fighting to stay afloat in the sea of super PAC-funded attack ads.

For this reason, Justice John Paul Stevens was critical of *Buckley v. Valeo* in his tenure on the court. Dissenting in *Colorado Republican Federal Campaign Committee v. F.E.C.*, Stevens argued that spending restrictions would "free candidates and their staffs from the interminable burden of fundraising."[20] Legal scholar Vincent Blasi would go a step farther. Blasi argued:

> The quality of representation has to suffer when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views.[21]

For Blasi, what Stevens described as the "interminable burden of fundraising" is a threat to democracy, not simply a nuisance to legislators. The responsibilities that Blasi lists are the constitutionally intended job of legislators, who are in office to serve their constituents, not themselves. If legislators must set aside their constitutional duties for an activity that benefits only themselves, our system is not functioning as intended.

Blasi was also concerned with the implications of constant fundraising for challengers. He claimed that a campaign is a future representative's best chance to understand the issues of their constituents. He took this to mean that representation begins during the campaign, meaning that the time of campaigning candidates is a constitutional concern under Article I.[22]

The Constitution establishes that representatives are, first and foremost, public servants. But, as noted by Blasi, with the

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[12] *Id.* The Court ruled that the test established in *US v. O'Brien*, 391 U.S. 367 (1968), did not apply. This meant that spending money could not be considered conduct.
[13] *Buckley*, 424 U.S. 1, 3
[14] *Id.* at 45.
[15] Soo Rin Kim, "The Price of Winning Just Got Higher, Especially in the Senate," OPENSECRETS, (November 9, 2016), https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/.
[16] Kimberly Amadeo, "What Is the Average Income in the United States?," ed. Thomas J. Brock, THE BALANCE, (October 3, 2021), https://www.thebalance.com/what-is-average-income-in-usa-family-household-history-3306189.
[17] "Most Expensive Races," OPENSECRETS (2020), https://www.opensecrets.org/elections-overview/most-expensive-races?display=allcandsout.
[18] "Cost of Election," OPENSECRETS (2020), https://www.opensecrets.org/elections-overview/cost-of-election?cycle=2020&display=T&infl=N.
[19] "2020 Outside Spending, by Super PAC," OPENSECRETS (2020), https://www.opensecrets.org/outsidespending/summ.php?cycle=2020&disp=O&type=S&chrt=V.
[20] *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604 *(*1996*)* (Stevens, J., dissenting)
[21] Vincent Blasi, *Free speech and the widening gyre of fund-raising*, 94 COLUMBIA LAW REVIEW 1281 (1994).
[22] Blasi, *Free Speech and Fund-Raising*, 1283.

power of unlimited expenditures, this duty becomes secondary for those in competitive races. Challengers and incumbents alike must spend their time cozying up to wealthy and corporate donors and soliciting super PAC assistance rather than interacting with and understanding the concerns of constituents in need. The government has a compelling interest in preserving the democratic process, and it is clear that this process is significantly hindered by fundraising when expenditures are unlimited.

C. Corporate Regulation

While the government lost a good deal of power in regulating individuals' donations to campaigns as a result of *Buckley*, it retained the power of corporate and union regulation, which the Court was generally favorable to until 2010. In 1990, a Michigan law prohibiting corporations from using funds from their general treasuries for campaign expenditures was upheld in *Austin v. Michigan*.[23] Corporations could only contribute to campaigns by establishing an independent political action committee (PAC). However, corporations, along with unions and the wealthy, often exploit the "soft money" loophole.[24] Soft money donations, which cannot be regulated under federal law, are to be used for "party-building activities."[25] However, it is not difficult to see how an unrestricted contribution to a party would benefit a candidate running in the party's name. Soft money represented just 5% of major party spending in 1984, but this increased to 42% in 2000,[26] prompting bipartisan calls to close the loophole.

In 2002, Congress passed the Bipartisan Campaign Reform Act ("B.C.R.A."). The B.C.R.A. banned soft money contributions[27] and prohibited corporations from funding "electioneering communications" that mention a candidate and target over 50,000 people within 30 days of a primary and 60 days of a general election. The B.C.R.A. also required transparent reporting of donations, including donor identity. In 2010, the B.C.R.A.'s power was significantly limited by the Court. Citizens United, an independent expenditure committee, sought an injunction in order to release a movie entitled *Hillary: the Movie*. The film, which expressed concern about Hillary Clinton's fitness for office, was funded in part by donations from corporations' general treasuries and qualified as an electioneering communication under the B.C.R.A.. In *Citizens United v. F.E.C.*, the Court controversially ruled that contributions to a committee for independent expenditures cannot be limited because they are the functional equivalent of spending by an individual.[28] This decision created the "super PAC," a political action committee that can receive unlimited contributions for unlimited expenditures.[29]

D. Tyranny of Big Donors

Since *Citizens United*, total spending in national elections has increased by 50%, driven by an increase in the average amount of donations, not in the number of donors.[30] This uptick in big donations has implications regarding some of the main principles of democracy. In his 1859 treatise *On Liberty*, English philosopher John Stuart Mill made a case for the right of free speech and expression with the concept of the marketplace of ideas—the idea that society, not the government, is best at censoring and elevating opinions. In the marketplace of ideas, every idea can be "sold," and everyone can choose which ones they want to "buy." After considering all opinions, society adopts the best ideas and pushes unpopular ones to the fringe. The democratic process requires a marketplace in which all ideas hold equal weight, and the people decide which are most viable.

In the drafting of the Constitution, the framers aimed to create a democratic republic that would leave no room for tyranny. In *Federalist Paper* No. 10, James Madison argued that the nation under the new document would have safeguards against the tyranny of the majority.[31] The framers of the Constitution feared that an elected government would only respond to the majority's demands, infringing on the rights and liberties of the minority. Madison contended that the representative republic

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[23] *Austin v. Michigan,* 494 U.S. 652, 654 (1990)

[24] Sara Fritz and Dwight Morris, "Firms Utilize Loophole for Election Donations," LOS ANGELES TIMES (June 14, 1991), https://www.latimes.com/archives/la-xpm-1991-06-14-mn-641-story.html.

[25] *Colorado Republican Federal Campaign Commission v. F.E.C.*, 518 U.S. 604, 616 (1996).

[26] Jesse H. Choper and Frederick Schauer, "Wealth, Equality, Elections, and the Political Process," in THE FIRST AMENDMENT, 7 West Academic Publishing, 592, (2019).

[27] This was upheld in *McConnell v. F.E.C.*, 540 U.S. 93 (2003).

[28] *Citizens United v. F.E.C.*, 558 U.S. 310, 310 (2010). Here, corporations are considered to be individuals.

[29] See also *Speechnow.org v. F.E.C.*, 599 F.3d 686 (D.C. Cir. 2010) and *Carey v. F.E.C.*, 791 F. Supp. 2d 121 (D.D.C. 2011). *Speechnow.org* affirmed the *Citizens United* decision and *Carey* established a type of PAC called a hybrid PAC or Carey Committee, which has the same powers as a super PAC, but can also make contributions subject to federal limits as long as its contributions and expenditures come from separate accounts.

[30] Richard Briffault, "Election 2020 Sees Record $11 Billion in Campaign Spending, Mostly from a Handful of Super-Rich Donors,"THE CONVERSATION, (March 24, 2021), https://theconversation.com/election-2020-sees-record-11-billion-in-campaign-spending-mostly-from-a-handful-of-super-rich-donors-145381.

[31] James Madison, *Federalist No.10*, in THE FEDERALIST PAPERS, 77-84 (Clinton Rossiter ed., 1961).

outlined in the Constitution was designed to avoid the direct rule of a majoritarian mob. Legislators were intended to represent the people but ultimately have the power to make decisions themselves. The framers of the Constitution also ensured that there would be enough representatives so that the will of a few would not hold too much power. Madison and his contemporaries intended that the Constitution protect against the tyranny of the majority. Given the power of money for speech, I claim that the Constitution should also be used to shield against the tyranny of those with a majority of wealth, who have the potential for significant power.

II. ANALYSIS

The loosening of spending restrictions is particularly conducive to tyranny given the current wealth disparity in the United States. 70% of American wealth is owned by just the top 10% of Americans. The bottom 50%, a majority of Americans, hold just 2% of the wealth, a comparatively insignificant amount.[32] Which group is more powerful, the one with five times as many people or the one with 35 times as much money? Although winning an election ultimately comes down to getting more votes, those votes can be bought. 88% of Congressional elections in 2020 were won by the candidate who spent the most money.[33] Whether we like it or not, American elections can be bought and sold, and only a handful of people and corporations have the purchasing power. In 2020, House Majority Leader Steny Hoyer spent $4.5 million, of which only $31 thousand came from small donors (those contributing $200 or less).[34] Out of all 535 members of Congress, only 14 received more than half of their funds from small donors in the 2020 election cycle.[35] In a system where this is possible, politicians do not have to respond to the will of everyday constituents. If such a significant amount of a representative's war chest comes from corporations, interest groups, and wealthy donors, all they need to do to get reelected is keep that powerful minority satisfied.

A. Money Beats People

The disproportionate influence of the wealthy in elections has suppressed policies that are generally popular. For example, 63% of Americans believe that it is the government's responsibility to guarantee healthcare for all.[36] Yet we continue to lag behind other wealthy nations, most of which have implemented universal healthcare plans.[37] Government healthcare is funded mainly by taxing the rich and would harm the private healthcare industry. As a result, it is unpopular among health insurance corporations and prominent donors. Supporters of the policy will be opposed by those who have the money to put the "unlimited" in "unlimited expenditures." Failing to limit the spending of this powerful minority gives policies that help businesses and the wealthy an unfair advantage and suppresses utilitarian policies that benefit everyday Americans with small costs to the rich.

Corporations and interest groups are particularly powerful in the post-*Citizens United* world. Corporations often make sizable expenditures to stifle policies that narrow their profit margins. This is particularly evident in small states dominated by one large industry. For example, Alaska, whose legislature has only 60 members, is uniquely easy to influence. The state is something of a banana republic controlled by big oil corporations. Government revenue from the industry supplies 90% of state discretionary funds.[38] Alaskan oil companies, requiring only 11 senators and 21 representatives for a majority, use their superior resources to advertise and drown out the voices of the Alaskan people whenever a policy such as increased production taxes is considered.[39] As a result, legislation that would secure more revenue for the Alaskan people and benefit the environment is not

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[32] Katharina Buchholz, "The Top 10 Percent Own 70 Percent of U.S. Wealth," STATISTA, (August 31, 2021), https://www.statista.com/chart/19635/wealth-distribution-percentiles-in-the-us/.

[33] Eliana Miller, "Despite Some Big Losses, Top Spenders Won 88 Percent of 2020 Races," OPENSECRETS, (November 20, 2020), https://www.opensecrets.org/news/2020/11/top-spenders-won-88-percent-of-2020-races/.

[34] "Large Versus Small Individual Donations," OPENSECRETS, (2020), https://www.opensecrets.org/elections-overview/large-vs-small-donations?cycle=2020&type=M.

[35] *Id.* Among the 14 were Rep. Alexandria Ocasio-Cortez (D, 1st), Sen. Bernie Sanders (D, 3rd), Rep. Matt Gaetz (R, 6th), House Speaker Nancy Pelosi (D, 9th), and Sen. Elizabeth Warren (D, 10th). House Minority Leader Kevin McCarthy (R) was close, with 48.14% of his funds coming from small donors.

[36] Bradley Jones, "Increasing Share of Americans Favor a Single Government Program to Provide Health Care Coverage," PEW RESEARCH CENTER, (September 30, 2020), https://www.pewresearch.org/fact-tank/2020/09/29/increasing-share-of-americans-favor-a-single-government-program-to-provide-health-care-coverage/.

[37] Max Fisher, "Here's a Map of the Countries That Provide Universal Health Care (America's Still Not on It)," THE ATLANIC, (June 28, 2012), https://www.theatlantic.com/international/archive/2012/06/heres-a-map-of-the-countries-that-provide-universal-health-care-americas-still-not-on-it/259153/.

[38] "State Revenue" Alaska Oil and Gas Association, January 14, 2021, https://www.aoga.org/state-revenue/.

[39] Chad Flanders, *Alaskan Exceptionalism in Campaign Finance*, 37 ALASKA L. REV. 191 (2020)

passed, despite its popularity. According to Chad Flanders, many Alaskan reformers have called for stricter restrictions on corporate expenditures to limit the influence of oil companies over the legislature.[40] Corporations' new freedom to spend money has led to a political landscape in which the will of a handful of executives on a board is felt more strongly than the voices of everyday people.

B. PACs and the Incumbency Machine

Powerful interests also work against the people's will by protecting incumbents. The approval rating of Congress has been abysmal for the last 15 years, dropping as low as 9% in November of 2013.[41] Yet incumbents continue to be reelected at a staggeringly high rate. With few exceptions, over 80% of Senators and over 90% of representatives keep their seats each election cycle.[42] The advantage of name recognition can partially explain this counterintuitive phenomenon. But incumbents also have a leg up in funding, which is driven by PACs. In 2020, PACs from every classification excluding labor and single-issue donated over 18 times as much to incumbents as they did to challengers. Even the two exceptions gave around $40 million more each to incumbents.[43] This disparity is hard to combat using only the donations of individuals, even wealthy ones. So despite the sentiments of most Americans that Congress does not adequately carry out its duties, nearly every member keeps their job because they have corporate PAC money on their side.

C. Applying Mill's "Marketplace of Ideas"

The American government should represent the people, not the special interests. It is not enough for each person to have one vote. In a fair election, each person should have a voice that other voters can hear. With the current lack of expenditure restrictions, money is a powerful megaphone, amplifying the voices of those who can afford it and drowning out the voices of everyday Americans who cannot spare thousands of dollars or more for effective political speech. In his 1859 treatise *On Liberty*, Mill made a case for the right of free speech and expression with the concept of the marketplace of ideas—the idea that society, not the government, is best at censoring and elevating opinions. In the marketplace of ideas, every idea can be "sold," and everyone can choose which ones they want to "buy." After considering all opinions, society adopts the best ideas and pushes unpopular ones to the fringe.

Like an economic free market, the marketplace of ideas requires fair competition between "merchants." Due to *Buckley*, *Citizens United*, and other key Supreme Court decisions, the market in which political candidates and ideas are sold has turned into an oligopoly, where only the most powerful can compete with each other, and all others are left out. Super PACs can easily overtake the market with advertising. Candidates like Alexandria Ocasio-Cortez, who rely on grassroots support, may struggle to reach their constituents due to the lack of independent expenditures on their behalf. To make matters worse, these political "outsiders" often face steep financial opposition from super PACs,[44] subjecting them to attack ads funded by big corporations that they are not equipped to fight. With no restrictions on their election spending, the wealthy and special interests are able to control the marketplace of ideas in the political arena. As a result, policies that benefit average Americans may not get the consideration they deserve.

An influential minority's support for a policy is more important than its support from a majority of poor and middle-class Americans, who don't have the resources to advocate for it in a marketplace of ideas controlled by the biggest spenders. A Cambridge University study revealed an almost negligible correlation of .05 between the favorability of a policy to "average citizens"[45] and whether or not it is promptly enacted (within four years of the survey).[46] For "economic elites,"[47] the correlation

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[40] *Id.* at 193.

[41] Gallup, "Congress and the Public," GALLUP INC., (November 13, 2021), https://news.gallup.com/poll/1600/congress-public.aspx.

[42] "Reelection Rates over the Years," OPENSECRETS, (2018), https://www.opensecrets.org/elections-overview/reelection-rates.

[43] "PAC Dollars to Incumbents, Challengers, and Open Seat Candidates," OPENSECRETS, (2021), https://www.opensecrets.org/elections-overview/pacs-stick-with-incumbents.

Do PACs prefer the establishment, fear uncertainty, or both? Their lack of support for open seat candidates as well as incumbents seems to suggest that risk aversion plays a factor. But it is also important to consider that the long standing connections that many PACs have with their party of choice could make them more inclined to support candidates favored by that party's leadership.

[44] "New York District 14 2018 Race," OPENSECRETS, (2019), https://www.opensecrets.org/races/outside-spending?cycle=2018&id=NY14. In 2018, a conservative super PAC called Future 45 spent $633,302 to oppose Rep. Ocasio-Cortez. In 2020, a mix of liberal and conservative PACs spent $145,754 in opposition to Ocasio-Cortez. Just over $2,000 was spent on her behalf in both cycles combined.

[45] Those in the fiftieth percentile of income.

[46] Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens: Perspectives on Politics," CAMBRIDGE UNIVERSITY PRESS (September 18, 2014), https://www.cambridge.org/core/journals/perspectives-on-

was a whopping .78. For ideological interest groups, it was .24, and for business interest groups, it was .43. Only the voices of those with money are important enough to affect change in the United States. The marketplace of ideas is closed to most Americans, limiting effective deliberation on critical policy issues.

It should also be noted that business interest groups have significantly more influence than average citizens and the ideological interest groups that represent them. With no limits on their spending, those with the advantage in resources—businesses and the economic elites—can dominate political discourse. A policy is more likely to be enacted if it is supported by 60% of economic elites than if it is supported by nearly 100% of average citizens.[48] Our nation can no longer be considered a democracy when the government does not respond to the will of everyday people. Without reasonable limits on election spending, the government will continue to respond to the money rather than the voters, limiting political discussion[49] to the few who can pay to join.

D. Corruption and *Quid Pro Quo*

In *Buckley v. Valeo*, the Court argued that because expenditures are independent of campaigns, there is less risk of winning campaigns rewarding their donors.[50] This argument makes sense when comparing contributions and expenditures of equal value. For example, a donation of $15 million directly to a campaign would be preferred over an independent expenditure of $15 million (which was made on behalf of Ted Cruz's presidential campaign in 2015)[51] because the contribution gives the campaign discretionary power. However, this argument does not hold when one is significantly limited and the other is entirely unlimited. In 1976, after *Buckley* was adjudicated, a $15 million expenditure was legal. But the maximum contribution to a campaign was just $1,000.[52] There is no world in which a contribution of $1,001 poses a greater corruption risk than spending $15 million. Limiting contributions without limiting expenditures does very little to deter corruption. People who would have made significant donations directly to campaigns could spend the same amount on an advertisement favoring the candidate or opposing their rival. In his 1985 dissent in *F.E.C. v. NCPAC*, Justice Thurgood Marshall argued that the idea that these giant expenditures would go unnoticed and unrewarded is naive and nonsensical.[53]

In fact, there are many examples of candidates and political groups rewarding those who indirectly invested in them. Betsy DeVos, who served as Secretary of Education under President Trump, came from a family that donated tens of millions of dollars to Republicans, mostly to super PACs.[54] After DeVos stumbled through her confirmation hearing, many wondered whether she was nominated for her merit or the donations made by her and her family.[55] When questioned by Senator Al Franken about her views on the debate between grading students based on growth or proficiency, a well-known debate in education, DeVos could not even define growth and proficiency.[56] DeVos was also widely mocked for her response to Senator Chris Murphy when asked if guns belong in schools. DeVos referenced a school in Wapiti, Wyoming, remarking that there was "probably a gun in the school to protect from potential grizzlies."[57] Ignoring the fact that this answer applied to only a few rural schools, it was also factually incorrect. The superintendent clarified that the school uses fences, not a gun, to deter bears.[58]

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politics/article/testing-theories-of-american-politics-elites-interest-groups-and-average-citizens/62327F513959D0A304D4893B382B992B#article.

[47] Those in the ninetieth percentile of income.

[48] Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens: Perspectives on Politics," Cambridge Core (Cambridge University Press, September 18, 2014), https://www.cambridge.org/core/journals/perspectives-on-politics/article/testing-theories-of-american-politics-elites-interest-groups-and-average-citizens/62327F513959D0A304D4893B382B992B#article. (Figure 1).

[49] See *Mills v. Alabama*, 384 U.S. 214, 218 (1966): "There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This, of course, includes discussions of candidates."

[50] *Buckley v. Valeo*, 424 U.S. 1, 236 (1976).

[51] Theodore Schleifer, "Billionaire Brothers Give Cruz Super PAC $15 Million," CNN (July 27, 2015), https://www.cnn.com/2015/07/25/politics/ted-cruz-wilks-brothers/index.html.

[52] "Archive of Contribution Limits," F.E.C. (2022), https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/archived-contribution-limits/.

[53] *F.E.C. v. NCPAC*, 470 U.S. 480, 518-521 (1985) (Marshall, J., dissenting).

[54] Nick Manes, "Devos Family Doles out $11 Million in 2018 Election," MICHIGAN ADVANCE (February 6, 2020), https://michiganadvance.com/2019/02/22/devos-family-doles-out-11-million-in-2018-election/.

[55] "Why Is Betsy Devos, Trump's Pick for Education Secretary, so Unpopular?," BBC NEWS (February 7, 2017), https://www.bbc.com/news/world-us-canada-38875924.

[56] Alia Wong, "A Closer Look at One of the Questions That Stumped Betsy Devos," THE ATLANTIC (January 20, 2017), https://www.theatlantic.com/education/archive/2017/01/delving-into-one-of-the-questions-betsy-devos-couldnt-answer/513941/.

[57] *Id.*

[58] Dave Alsup, "Wyoming School District Cited by Devos: Grizzlies, Yes; Guns, No," CNN (January 19, 2017),

DeVos was clearly unqualified to be in charge of the country's education policy. She did not attend public school or send her kids there. She did not have a degree in education or experience as a teacher or school administrator.[59] Her lack of experience was made clear by her dismal performance in her Senate confirmation hearing. Her one "qualification" was the money she gave to Republicans. Her nomination and eventual confirmation show how the increased freedom of the wealthy to donate to candidates and super PACs can lead to a resurgence of the spoils system of 19th century politics.[60] With unlimited donations permitted, what is to stop candidates from soliciting large contributions to super PACs in exchange for positions of power in their staff once elected?

It is clear that unlimited expenditures pose the risk of corruption. The government has a compelling interest in avoiding this corruption, as it leads to unqualified people holding important positions in the government. There is no excuse for someone as unqualified as DeVos to be in charge of the Department of Education when Americans owe a record $1.7 trillion in student debt[61] and the racial and socioeconomic achievement gaps are closing at a snail's pace.[62] Not allowing the government to restrict political expenditures opens up the possibility of the wealthy essentially buying political appointments, regardless of their merit. Meanwhile, qualified people who have devoted their lives to their fields miss out on these positions, and the people miss out on the superior service that they would provide. The government has a compelling interest in avoiding *quid pro quo* expenditures, especially if it means ensuring that those in charge of services that profoundly impact millions are qualified to do so.

E. Corporate *Quid Pro Quo* Lobbying

The use of money to gain political favors is a problem when it comes to corporations and interest groups as well as individuals. Thanks to *Citizens United*, big corporations can trade some of their vast resources for favorable treatment from parties and candidates. In 2016, three-quarters of the nearly $70 million budget for the Democratic National Convention was provided by just seventeen donors, most of which were corporations and labor unions.[63] Notable contributions came from Independence Blue Cross ($1.525 million) and Bank of America ($1 million).[64] The Democratic Party claims to favor increased access to government healthcare and increased regulations on big banks.[65] It is also hypocritical that a party that paints itself as the party of the working people takes so much corporate money. Parties may claim to act in the interests of their base of supporters, but in reality, a party's support for policies can be bought by its *financial* base.

With the power of unlimited expenditures, corporations with the resources to spare can use them to buy the support of legislators for policies that favor them. The government should be able to regulate this spending to ensure that votes, not money, cause the enactment of policies. This interest is compelling because it restores the principles at the bedrock of democracy. The framers of the Constitution intended for the government to be composed of representatives who respond to the will of their constituents.[66] If that will is no longer being heard, a change to uphold the values of the Constitution should not only be constitutional, it should be mandated.

F. Wealth Inequality

In addition to its adverse effects on democracy and the marketplace of ideas, spending without limits upholds and heightens systemic inequality in society. First, and most clearly, it allows the wealthy to have the upper hand in electing the representatives of the nation. This is especially problematic because the poor, who have the weakest voices in a system driven by

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https://www.cnn.com/2017/01/18/politics/betsy-devos/index.html.

[59] "Betsy Devos, Secretary of Education - Biography," US DEPARTMENT OF EDUCATION (January 8, 2021), https://www2.ed.gov/news/staff/bios/devos.html.

[60] "Pendleton Act (1883)," NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (February 8, 2022), https://www.archives.gov/milestone-documents/pendleton-act#:~:text=The%20Pendleton%20Act%20provided%20that,were%20covered%20by%20the%20law.

[61] Abigail Johnson Hess, "U.S. Student Debt Has Increased by More than 100% over the Past 10 Years," CNBC(December 22, 2020), https://www.cnbc.com/2020/12/22/us-student-debt-has-increased-by-more-than-100percent-over-past-10-years.html.

[62] Eric A. Hanushek et al., "The Achievement Gap Fails to Close," EDUCATION NEXT (July 16, 2020), https://www.educationnext.org/achievement-gap-fails-close-half-century-testing-shows-persistent-divide/.

[63] Ashley Balcerzak, "17 Donors Gave Three-Quarters of Dems' Convention Money," OPENSECRETS (November 14, 2018), https://www.opensecrets.org/news/2016/09/and-the-good-times-rolled-17-donors-gave-three-quarters-of-dems-convention-money/.

[64] *Id.*

[65] "2020 Democratic Party Platform." DEMOCRATIC NATIONAL COMMITTEE(August 18, 2020), https://democrats.org/where-we-stand/party-platform/

[66] James Madison, *Federalist* No.10, in The Federalist Papers, 77-84 (Clinton Rossiter ed., 1961).

funds,[67] are most in need of good representation. They are most affected by government programs such as healthcare, social security, education, and the social safety net. Many of these programs are in dire need of reform. However, there is little to no money to support improving things that benefit the poor, especially at the expense of the wealthy. Allowing those with the most money to exert their influence over the political process allows the preservation of the status quo, keeping the powerful in power. This is especially problematic given the racist and sexist history of this country.

The racial and gender wealth gaps remain wide due to the lasting institutional racism and sexism in the United States. Although only 60% of the United States is white, white people own 86% of American wealth.[68] The average white person's net worth is over four times that of the average Black person and over eight times that of the average Hispanic person.[69] The median wealth of women is just over half the median wealth of men.[70] Allowing the wealthy to control elections enables white men to exert a disproportionate influence on elections.

There is also a significant wealth disparity between generations. Millennials, currently aged 25-40, own just 4.6% of American wealth, which is over ten times less than Baby Boomers, aged 57-75.[71] Given the demographics of those who have the most power to donate, the demographics of Congress are unsurprising. 77% of representatives are white,[72] and only 27% are women.[73] With campaign spending regulations, people of color, women, and young people would be able to participate more effectively in the political process, ensuring that elected officials represent them and their interests.

G. Who Benefits from Increased Corporate Power?

In the post-*Citizens United* world, corporations have incredible power in elections. Thus, it is also important to examine the individuals dictating the actions of these corporations. Like the leaders of our country, corporate leaders are overwhelmingly white and male, particularly in the most successful companies. Nearly 90% of Fortune 500 CEOs are white men.[74] The boards of these companies are more diverse but still not close to the demographics of the general population. 66% of Fortune 500 board members are white men.[75] As long as old white men continue to dominate American wealth and corporations, failing to regulate the spending of the wealthy and corporations in elections will give them too much power in selecting the leaders of the country at the expense of women, people of color, and young people.

III. CONCLUSION

The preceding sections have established that current case law in the realm of campaign finance has the effect of muting the voices of poor and middle-class Americans, disrupting democracy through legalized bribery, interfering with the duties of legislators and candidates for office, and sustaining institutional racism and sexism dynamics. However, with the Court trending in a conservative direction, it is doubtful that the case law will change, even in the next few decades. In the meantime, we must examine potential solutions that would not require a ruling from the Supreme Court or any federal court.

One potential solution is for candidates to self-regulate, rejecting the support of super PACs. During the Democratic presidential primary in 2020, some candidates disavowed super PAC money, led by Senator Bernie Sanders. But this requires candidates to put themselves at a disadvantage. After initially swearing off outside assistance, now-President Joe Biden went back

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[67] Matt Grossmann, "Does Anyone Speak for the Poor in Congress?," NISKANEN CENTER (December 19, 2019), https://www.niskanencenter.org/does-anyone-speak-for-the-poor-in-congress/.
[68] "White People Own 86% of Wealth and Make up 60% of the Population," USAFACTS (September 23, 2020), https://usafacts.org/articles/white-people-own-86-wealth-despite-making-60-population/.
[69] *Id.*
[70] Ana Hernandez Kent and Lowell Ricketts, "Gender Wealth Gap: Families Headed by Women Have Lower Wealth," ST. LOUIS FED (January 12, 2021), https://www.stlouisfed.org/publications/in-the-balance/2021/gender-wealth-gap-families-women-lower-wealth
[71] Hillary Hoffower, "Millennials Dominate the US Workforce, but They're Still 10 Times Poorer than Boomers," BUSINESS INSIDER (October 12, 2020), https://www.businessinsider.com/millennials-versus-boomers-wealth-gap-2020-10.
[72] Katherine Schaeffer, "Racial, Ethnic Diversity Increases Yet Again with the 117th Congress," PEW RESEARCH CENTER (January 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/.
[73] Carrie Blazina and Drew DeSilver, "A Record Number of Women Are Serving in the 117th Congress," PEW RESEARCH CENTER (January 22, 2021), https://www.pewresearch.org/fact-tank/2021/01/15/a-record-number-of-women-are-serving-in-the-117th-congress/.
[74] Richard L. Zweigenhaft, "Power in America," WHO RULES AMERICA: DIVERSITY AMONG FORTUNE 500 CEOS FROM 2000 TO 2020 (January 2021), https://whorulesamerica.ucsc.edu/power/diversity_update_2020.html.
[75] Michele Buck and Victor Crawford, "It's Time to Make Board Diversity an Expectation, Not Just a Priority," FORTUNE (June 23, 2021), https://fortune.com/2021/06/23/board-diversity-women-poc-inclusion-talent-business-leadership/.

on his word and accepted the support of super PACs after failing to meet fundraising goals.[76] Candidates seemed to learn that the public opinion benefits that come from disavowing super PAC money are outweighed by the steep opportunity cost of giving up millions of dollars worth of advertising.

Another potential solution is public funding for elections.[77] This has been implemented at the local level in a few cases. In Seattle, residents are given four $25 "democracy vouchers" to contribute to candidates running for local office. To be eligible, candidates must agree to a total spending cap and limit each non-voucher contribution to $250.[78] New York City recently implemented a different type of public financing program. With candidate restrictions similar to those in Seattle, small donations are matched with public funds. A $10 contribution could provide as much as $90 for the campaign.[79] These programs are good because they significantly increase the power of small donors. This allows candidates to focus on winning the support of everyday people during their campaigns rather than spending all of their time courting the wealthy. Critics may argue that these programs waste tax dollars that could have more valuable uses. But Seattle's program only costs around $8 per year for the average homeowner[80] in exchange for $100 worth of power to determine representation in each election. The ability to turn $8 into $100 or $10 to $90 is crucial for Americans whose voices fail to make a sound above the din of wealthy and corporate opinions.

These programs may not be the perfect solution, but they make a big difference. Under the current lack of campaign finance limits, most Americans have little to no power in elections. In a government where seats must be bought and sold, only those who can pay have their voices heard. The ideal solution would be to limit the power of the handful of wealthy and corporate donors that control American politics, driving down overall spending in the process. But if the Supreme Court will not allow that, the least that we can do is use public funding to elevate the voices of those who are not currently heard. Decisions like *Buckley v. Valeo* and *Citizens United v. F.E.C.* stand squarely in the way of democracy and progress. On the judicial side or the policy side, something must be done to stop the United States from being a country for the rich and by the rich. Campaign finance reform will lead to the voices of all Americans being heard, uphold the values of representative democracy, and take steps toward breaking down the barriers that exist for women and people of color in this country.

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[76] Alex Kotch, "Fact Check: Does Bernie Sanders Get Support from Big-Money Super Pacs?," ed. Donald Shaw, SLUDGE (February 10, 2020), https://readsludge.com/2020/02/10/fact-check-does-bernie-sanders-get-support-from-big-money-super-pacs

[77] The *Buckley* court ruled that equity in campaign finance could not constitutionally be achieved by limiting the strongest voices, but noted that it could be achieved by aiding the weakest voices.
424 U.S. 1, 92-93 (1976).

[78] "About the Program - DemocracyVoucher," CITY OF SEATTLE (2021), http://www.seattle.gov/democracyvoucher/about-the-program.

[79] "Matching Funds Program," NEW YORK CITY CAMPAIGN FINANCE BOARD (2021), https://www.nyccfb.info/program/how-it-works/.

[80] "DemocracyVoucher," CITY OF SEATTLE, 2021.

From Tinker to Mahanoy: The Evolution of Student Speech

Corbin Lee

Franklin College

Abstract

This research analyzes the United States Supreme Court case law on student speech and the impact of the recent decision in *Mahanoy v. B.L.* (2021). When on campus, schools can control the content of student speech if it constitutes a substantial interference [1], is "lewd, indecent, or vulgar" [2], has "legitimate pedagogical reasons" [3], or promotes values that conflict with the mission of public education.[4] *Mahanoy* is a modern-day *Tinker v. Des Moines*, considering an untouched subject matter for the Supreme Court: off-campus and online student speech. The ruling grants students the protection to criticize their school on the internet and off-campus, provided it does not pose a substantial disruption to school activity. While the ruling supports student speech rights, the implications of *Mahanoy* can have unintended consequences due to the discretion given to school personnel. It is imperative that future decisions clarify the standard of a substantial disruption and reinforce the right to student expression guaranteed under *Mahanoy*.

[1] Tinker v Des Moines Independent Community School District, 393 U.S. 503, [16] (1969)
[2] Bethel School District v Fraser, 478 U.S. 675, [9-10] (1986)
[3] Hazelwood School District et al. v Kuhlmeier et al., 484 U.S. 260, [21] (1988)
[4] Morse v Frederick, 551 U.S. 393, [2] (2007)

I. BACKGROUND

Free speech is a cherished pillar of American government; even the Framers chose to place it first within the Bill of Rights. Despite some notable exceptions, United States citizens generally maintain the right to criticize their government without fear of persecution (U.S. Const. amend. I). However, students have endured a much longer journey to lay claim to the same freedoms as adults. From the inception of protected student speech in *Tinker v. Des Moines* (1969), the right has evolved into protections that students enjoy today.[5] The ruling in *Mahanoy v. B.L. (2021)* expands on the standard for student speech set in *Tinker* and subsequent cases, adapts it to the current times, and grants students protection from school punishment for indecent speech off campus.[6] *Mahanoy v. B.L.* reflects an important and evolving concern surrounding youth expression, particularly off or near school campuses.

A. History of Student Speech

The starting place for student speech is in Des Moines, Iowa in 1969. In *Tinker v. Des Moines* (1969), a group of students planned a Vietnam War protest by wearing black armbands to school, demonstrating solidarity in a peaceful manner. The Des Moines Independent Community School District discovered the plan and believed the demonstrations would be disruptive, so school administrators threatened to suspend any student that wore them. Five students, including John and Mary Beth Tinker, still decided to wear the armbands, resulting in their suspension. The Tinker children, who were ages 15 and 13 at the time, sued the school district through their parents, claiming that it had infringed upon their right to expression under the First Amendment of the Constitution. The district court ruled in favor of the school, claiming that it was within the rights of the administrator to suppress certain speech to maintain order. The United States Court of Appeals for the Eight Circuit affirmed the ruling of the lower court .[7]

However, in a groundbreaking decision, the Supreme Court reversed these rulings. Justice Fortas, writing for the majority, determined that the school policy violated the First Amendment. The Court found that the armbands were a form of pure speech, which is entirely separate from the actions or conduct of those participating in it. To justify suppressing certain forms of speech, the school must prove that the conduct would "materially and substantially interfere" with the school's operations.[8] Additionally, the Court found that it was unconstitutional to ban the armbands because it discriminated against one viewpoint. Justice Fortas assured that a student's First Amendment rights do not disappear once they enter the schoolhouse gate, issuing a landmark opinion that protects a student's right to free speech in the classroom.[9] The decision recognized that children were worthy of protection and set limitations to the seemingly endless powers of the adults who controlled their education.[10]

Several years later, the Supreme Court analyzed a different scenario in *Bethel v. Fraser* (1986), examining the thoughts of a rebellious teenager who pushed the limits of the precedent set in *Tinker.*[11] Bethel High School held a schoolwide assembly regarding student government elections and gave an opportunity for individuals to endorse a classmate for office. Matthew Fraser, the petitioner, made a speech endorsing his classmate that contained sexual innuendo, which resulted in his suspension. Fraser sued the school over the disciplinary action and argued that his speech was protected under the First Amendment.[12]

The Supreme Court ruled in favor of the school district, drawing a clear distinction between symbolic speech protected in *Tinker* versus the vulgar content in question in *Bethel.* In the majority opinion, Justice Burger stated that the First Amendment does not protect speech that is "lewd, indecent, or patently offensive" and is inconsistent with the "fundamental values of public education."[13] The case of *Bethel* produced new criteria on how to assess the constitutionality of protected speech. The test of "lewd, indecent, or patently offensive" gives a great deal of discretion to future justices on where the line is drawn.[14]

The right to student speech was further defined in *Hazelwood School District v. Kuhlmeier* (1988). At Hazelwood East High School, *The Spectrum* wrote a story about teen pregnancy and divorce that caught the attention of the administration. Principal

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[5] Tinker v Des Moines Independent Community School District, 393 U.S. 503, [29] (1969)
[6] Mahanoy Area School District v B.L., 594 U.S. _, [9-12]
[7] Tinker v Des Moines Independent Community School District, 393 U.S. 503, [5-6] (1969)
[8] Id.
[9] Id.
[10] Id.
[11] Bethel School District v Fraser, 478 U.S. 675, [9-10] (1986)
[12] Bethel School District v Fraser, 478 U.S. 675, [9-10] (1986)
[13] Id.
[14] Id.

Robert E. Reynolds censored two pages of their article on the grounds of privacy, claiming that a reader could easily distinguish the identity of anonymous interviewees. Cathy Kuhlmeier and other student editors challenged the school district, arguing that prior restraint on their story violated the First Amendment and citing Tinker. In a 5-3 decision, Justice White and the majority found that Reynold's actions were not a violation of the First Amendment. The Court reasoned that a school principal has the right to censor certain content in a school newspaper that is "inconsistent with the shared values of a civilized social order."[15] White argued that unlike professional journalists, students may not have mastered the important skill of source confidentiality yet under the weight of sensitive issues, and the court should trust the principal's decision in good faith.[16] A potential limitation in the use of *Hazelwood* as precedent in future cases is that the story was created in the context of a journalism class and not an independent student newspaper.

The decision in *Hazelwood v. Kuhlmeier* adds a new detail to the body of law regarding student speech. Justice White argued that the new right to student speech was not unlimited and can be denied for "legitimate, pedagogical reasons."[17] The decision relinquished some control back to school administrators after *Tinker* fundamentally changed the way they could suppress student speech. Schools are the breeding grounds for democracy, and burgeoning journalists certainly have the right to be heard; however, administrators have at least some constitutional authority to use their discretion on what should or should not be published.[18]

Finally, *Morse v. Frederick* (2007) involved a similar situation to that of *Bethel* and further established caveats to protected student speech. As the Olympic Torch Relay passed through the city of Juneau, Alaska, the procession moved past Juneau-Douglas High School. The principal, Deborah Morse, let school out early to watch the event as an approved school activity where extracurricular groups such as the band and cheerleaders performed along the street. Joseph Frederick, standing across the street from the school, displayed a sign that read "BONG HiTS 4 JESUS" for the entire country to see on live television.[19] Principal Morse saw the banner and suspended Frederick, arguing he violated a school rule by promoting illegal drug usage.[20]

Chief Justice John Roberts and the Supreme Court found that there was no First Amendment violation. The majority ruled that while students do not lose their constitutional right to free speech once they step inside a school, that right does not extend to promotion of illegal drugs. The administrators reserve the right to censor speech that may undermine the school's mission to discourage substance abuse. *Morse* reaffirms much of the precedent from prior rulings and extends them to school sponsored activities, even if a student is not on school premises.[21]

B. Current Landscape

The history of student speech has come to the present, with a substantial and growing body of law that regulates it. In sum, schools can suppress student speech if it is a substantial interference [22], "lewd, indecent, or vulgar" [23], for "legitimate pedagogical reasons" [24] or promotes illegal drug use.[25]

With this full understanding of the law, the recent case of *Mahanoy Area School District v. B.L.* (2021) can be analyzed. B.L. was a student at Mahanoy Area High School who failed to make the varsity cheerleading squad. On her Snapchat story, she wrote disparaging comments about the school, which included the sentence "f*ck school f*ck softball f*ck cheer f*ck everything."[26] The picture was posted during the weekend from a gas station, a public place entirely outside the purview of the Mahanoy Area School District. While B.L. was not at school when posting the picture, her teammates showed the image to their coach out of concern. B.L. was suspended from the cheerleading team for her actions, with the school arguing that it violated the team rules she had agreed to, mainly a conduct agreement. On the other hand, B.L. argued that the school violated her First Amendment rights by engaging in viewpoint discrimination under unclear rules. The district court ruled that the school district violated her

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[15] Hazelwood School District et al. v Kuhlmeier et al., 484 U.S. 260, [21] (1988)
[16] Id.
[17] Id.
[18] Id.
[19] Morse v Frederick, 551 U.S. 393, [2] (2007)
[20] Id.
[21] Id.
[22] Tinker v Des Moines Independent Community School District, 393 U.S. 503, [17] (1969)
[23] Bethel School District v Fraser, 478 U.S. 675, [38] (1986)
[24] Hazelwood School District et al. v Kuhlmeier et al., 484 U.S. 260, [22] (1988)
[25] Morse v Frederick, 551 U.S. 393, [15] (2007)
[26] Mahanoy Area School District v B.L., 594 U.S. _, [2]

First Amendment rights, and the U.S. Court of Appeals for the Third Circuit affirmed.[27]

Finally, Justice Breyer and the majority also ruled in B.L.'s favor. After looking at precedent, the Court determined that the Snapchat messages were protected speech. What sets the facts of *Mahanoy* apart is that the speech in question took place off campus, utilizing the internet and Snapchat's feature of disappearing messages. While the content could surely be categorized as "lewd, indecent, or patently offensive," that rule was decided in a world without social media and in a physical school setting.[28] But with no other option, the *Tinker* standard was applied to *Mahanoy*. There was debate on whether the messages "materially and substantially interfered" with school operation, and the Court decided there was little distraction to the high school.[29] Furthermore, there was no "legitimate, pedagogical reason" to suppress speech, resulting in the *Hazelwood* standard not being relevant.[30] Finally, while *Morse v. Frederick* also dealt with profane speech, its events took place adjacent to the school, while *Mahanoy* was entirely off campus and much farther away. *Morse* addressed an after-school activity, which makes *Mahanoy* the first true off-campus and online student speech case taken by the Supreme Court, a particularly important moment as technology and social media evolve.

Breyer argued that if a student cannot express their opinion off-campus and outside of school hours, there is no place where they can criticize their institution. Important to the decision was the doctrine of *in loco parentis*, which claims that administrators and teachers stand in the place of parents when their children are at school.[31] The doctrine was conceived by a British scholar named William Blackstone in the 1700s in the context of primary school.[32] According to Blackstone, when school concludes for the day and children come home, schools relinquish control back to their parents. When she posted her outburst on social media, B.L. was under the supervision of her parents, according to the doctrine. The *Mahanoy* opinion established that schools may not punish students for profane off-campus speech unless there is a substantial disruption, largely reinforcing and expanding the 1969 *Tinker* standard. The opinion cites specific examples, such as cyberbullying, threats against a teacher, or concerns of school safety as exceptions to the rule.[33]

It is important to note the judicial philosophy that Justice Stephen Breyer brought to *Mahanoy* in understanding the opinion. From the onset of the case, Breyer was steadfast in moving away from categorical rules of law, instead advocating for broader "rules of thumb."[34] He argued that structured rules fail to capture the complexities of a given case and lose the nuance of the First Amendment freedoms.[35] Through this framework of ideas, he wrote the majority opinion in *Mahanoy v. B.L.* and introduced the concept of First Amendment "leeway." In line with his rules of thumb, this leeway deemphasized structured rules, introducing objectivity and allowing for individualization of student speech cases. While the rules of thumb add subjectivity to decisions, they create guidelines that prevent readers from extrapolating too far beyond the opinion. The standards created in *Tinker*, *Bethel*, *Hazelwood*, and *Morse* set guidelines that could theoretically be applied to every conflict of student expression. On the other hand, Breyer's opinion in *Mahanoy* gives more room for an ad hoc analysis of each situation by school administration. This approach certainly has its merits and drawbacks, which will be discussed in the following section.

II. DISCUSSION

A. Stakeholder Responses

i. Students

With every case that the Supreme Court decides, there are stakeholders who have a vested interest in the outcome. Ruling one way or another can have ripple effects that change the course of reality for entire populations, which leads many individuals to lobby or write *amicus curiae* briefs that influence the decision. In *Mahanoy*, students are most directly affected and thus were the primary group of stakeholders. There is little doubt that teenagers across the country wished to see B.L. prevail, as many have sent

[27] Id.
[28] Bethel School District v Fraser, 478 U.S. 675, [24,36] (1986)
[29] Tinker v Des Moines Independent Community School District, 393 U.S. 503, [16] (1969)
[30] Hazelwood School District et al. v Kuhlmeier et al., 484 U.S. 260, [22] (1988)
[31] Mahanoy Area School District v B.L., 594 U.S. _, [2-7]
[32] P. Lee, *The Curious Life of in Loco Parentis at American University,* 8 HIGHER EDUCATION REVIEW 65-90 (2011)
[33] Mahanoy Area School District v B.L., 594 U.S. _, [6]
[34] Id.
[35] M.R. Papandrea, *Mahoney v. BL & First Amendment "Leeway", 2021(*1) THE SUPREME COURT REVIEW 53-97 (2022)

a similar message to their friends in a moment of frustration.[36] *Mahanoy* provides clarity on the boundaries of punishment in a school setting and what students can be comfortable saying on the internet.[37] If the Court had ruled in favor of the Mahanoy Area School District, students would have much less freedom online to express themselves. As Justice Breyer noted, there would have been no way a student could criticize their school if off-campus and online speech was considered under the purview of the district.

The American Civil Liberties Union is a prominent interest group that fights to preserve individual rights in the United States. They took great interest in *Mahanoy v. B.L.* and filed suit on behalf of the outspoken teenager. Additionally, they filed an injunction that put B.L. back on the cheerleading team until the case could be decided. The ACLU celebrated the decision in favor of the student and asserted that it "reaffirmed the importance of free speech rights."[38] They argued that ruling in favor of the Mahanoy Area School District would contradict *Tinker* because the opinion was considered in the context of a physical school setting only. According to the ACLU, extrapolating beyond that to the off-campus nature of *Mahanoy* would be problematic for future decisions. The ACLU feared that students would be unable to speak their minds at any point if there was 24/7 supervision of their thoughts, echoing the later sentiments of Justice Breyer. The ACLU serves an important role in advocacy for civil rights, especially student speech in America, and will be instrumental in fighting to build precedent on the heels of *Mahanoy*.

The National Women's Law Center, an interest group that advocates for women's and gay rights, also released a statement discussing how specific demographics of students were more likely to be impacted by the *Mahanoy* decision. They called the ruling "an important victory for the rights of girls, in particular black, brown, queer, disabled, and LGBTQ students" (National Women's Law Center, 2021).[39] The NWLC asserts that girls are disproportionately punished compared to boys, which has problematic implications for giving administrators more power. In addition, girls are 50% more likely to be harassed online, with racial minorities and LGBTQ+ students even more so.[40] The organization recognizes a disparity in the treatment of women and other marginalized groups in society at large, claiming public education is no different – schools are simply another context of discrimination. Ruling in favor of the Mahanoy Area School District would have given authority figures, who are traditionally men, another opportunity to disproportionately punish women and further unequal treatment.

An equally important group are parents, who have legitimate concerns about the education and discipline of their children. Parents Defending Education wrote an *amicus curiae* brief that supports the respondents in *Mahanoy* and explains their opposition to how B.L. was treated.[41] Parents Defending Education is a grassroots organization that opposes teaching certain topics in the classroom, such as critical race theory or gay issues. The group argues that school staff act in the state of *in loco parentis* only for the duration of the school day, but once students exit the school, their parents should regain full control over the discipline of their children. While Parents Defending Education does not condone the vulgar comments about the cheerleading team, they believe that kids should be disciplined at home accordingly. Additionally, the parents do not believe that the justification of "preventing disruption" in schools is enough for the school to overstep the boundaries of the home.[42] While they are concerned about discipline on social media posts, the parents see the *Mahanoy* case as demonstrative of a much larger issue they are fighting, which is the growing role of the government in American life. Parents Defending Education interpreted the actions of the Mahanoy Area School District as deeply intrusive; while the idea of leaving out-of-school discipline to the parents is a reasonable view, Parents Defending Education resents the idea of any diversity education. At the crux of the *Mahanoy* decision is the inherent value of free expression despite its content. On the same token, schools should be able to discuss ideas that clash with established thought at the home, allowing students to form their own opinion and freely express it.

Finally, the National School Board Association commended the ruling in *Mahanoy*. While it may seem odd, as the Mahanoy Area School District lost the case, the NSBA still got its wish. During the hearing process, the NSBA wrote an

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[36] Id.
[37] Id.
[38] *Supreme Court Rules to Protect Students' Free Speech Rights*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/press-releases/supreme-court-rules-protect-students-full-free-speech-rights (2021) _
[39] *NWLC Responds to Supreme Court Ruling on Student Free Speech in Mahanoy v. B.L.,* TARGETED NEWS SERVICE (JUNE 24, 2021), https://advance-lexis-com.ezproxy.franklincollege.edu/api/document?collection=news&id=urn:contentItem:630F-FMP1-JC11-1047-00000-00&context=1516831
[40] Id.
[41] Brief for the Parents Defending Education as Amicus Curiae, [2], Mahanoy Area School District v B.L., 594 U.S. _,
[42] Brief for the Parents Defending Education as Amicus Curiae, [2], Mahanoy Area School District v B.L., 594 U.S. _,

extensive *amicus curiae* brief arguing that the location of the speech is not relevant, but rather the impact of it is.[43] Social media creates an entirely new space to share ideas, meaning that the physical location of speech should be de-emphasized. Correspondingly, the "substantial disruption" piece in Justice Breyer's opinion gives school districts some power to regulate harmful speech and to adequately protect the student body. Without it, anything that happens off campus is essentially out of the school's hands, for better or worse. Bullying, threats of violence, or other concerns of the NSBA can still be addressed while maintaining freedom of thought in schools.[44]

The bottom line regarding the various stakeholders is that the ruling in *Mahanoy* has ripple effects to various groups of Americans. While interest groups should not dictate what the Supreme Court deems to be consistent with the Constitution, they have an important role in advocacy. The right to dissent and free expression on the internet should be protected, and the interest groups have an important obligation to fight for those rights. *Mahanoy* is only the starting point for legal precedent on off-campus student speech, and interest groups will serve important roles in perpetuating the discussion of these issues and advocacy in future cases that will dictate Mahanoy's longevity.

ii. Potential Implications

The implications of the *Mahanoy* ruling are massive because of the increasingly dominant role that social media plays in everyday life. The Framers could never have imagined the technological revolution that has shaped the United States today, so the justices of the Supreme Court must continuously re-interpret the intentionally vague words of the Constitution for modern day issues. Innovations such as Snapchat and social media are extremely new to constitutional law, resulting in *Mahanoy* being the sole precedent for this type of case because it stands as the single example of how a school deals with criticism on social media. Now, in theory, students have greater freedom to criticize the actions of their school outside of the classroom, provided it does not create a substantial disruption. Subsequent cases will have the task of adding to the foundation and further clarifying online freedoms for students.

While many see *Mahanoy* as a smashing success for student rights, there are elements of the opinion that could have unintended consequences. As previously mentioned, Breyer emphasized greater leeway and individuality in deciding First Amendment student speech cases. For example, it may be advantageous to give school authorities more discretion in disciplining a student's outburst; however, there is a risk of suppressing certain speech that perhaps should remain protected.[45] Giving more discretion to school districts results in greater variation in the treatment of students across the United States because decisions at the local level are largely dependent on the personal inclinations of their school administrators.[46] Supreme Court review of a case is meant to provide clarity and create uniform law on a given topic, and giving more freedom to the school districts compromises that idea.

While the Court ruled in Mahanoy that vulgar off-campus speech is constitutional, provided it does not cause a "substantial disruption," the definition of such is up to interpretation.[47] What causes a substantial disruption in one region can be commonplace somewhere else. For example, a student sporting a Confederate flag belt buckle may be disruptive in California but accepted in Mississippi. In many states in the south, Confederate flags and apparel are rooted in their culture, for better or worse.[48] The Mahanoy Area School District, in eastern Pennsylvania, likely has its own norms and values that create a unique culture. Thus, how can the concept of disruption be objectively measured? Even within the same school, various individuals will have differing opinions on whether an incident substantially disrupted the normal operation of a school. The standard of "a substantial disruption" is too broad and needs to be clarified in future Supreme Court decisions. While it is understandable to give some discretion to the local schools, the current law allows for too much variance in outcomes. Future cases would benefit from the creation of a specific legal test that clearly explains what constitutes a substantial disruption, balancing the judgment of local school administrators and the need to protect student speech.

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[43] *National School Board Association Commends Court's Decision in Landmark Student Speech Case*, NSBA COMMUNICATIONS, https://www.nsba.org/News/2021/mahanoy-decision (2021)

[44] Id.

[45] Id.

[46] R. F. Elmore (1993). The role of local school districts in instructional improvement. *Designing coherent education policy: Improving the system*, 96-124.

[47] Mahanoy Area School District v B.L., 594 U.S. _, [3-6]

[48] R. D. Talbert (2017). Culture and the Confederate flag: Attitudes toward a divisive symbol. *Sociology Compass*, *11*(2), e12454.

With the current standard, much power lies in the hands of local school boards to treat students fairly and to honor the intent of the decision. However, school boards have become politically charged in line with an increasingly polarized America. Schools have become the battlegrounds for culture wars as indignant parents and leaders fight for what their children will be taught in the classroom, including organizations like Parents Defending Education.[49] Meanwhile, the United States Supreme Court is intended to be beyond partisan politics. Future cases must solidify the freedom of speech rights that are guaranteed in *Mahanoy* and its predecessors, or future students may risk losing the liberties that *Mahanoy* grants them online and off-campus. Similar to the decades of precedent regarding on-campus student speech, the same must be done to ensure the permanence of off-campus speech rights. There is an inherent value in expressing dissent, which the ruling recognizes, that should continue to be protected at all costs.[50] Students should be free to criticize their schools in a safe manner on the internet and feel confident they can legally express such dissent. Nevertheless, *Mahanoy* is a net positive for students across America and provides the foundation for a more comprehensive case law regarding online student speech.

III. Conclusion

Since *Tinker v. Des Moines* in 1969, students have enjoyed the right to free speech in schools and can voice their unpopular opinions without fear of punishment. However, it is not unlimited. *Mahanoy v. B.L.* (2021) expands on the past precedent and adapts it to the current times, granting students protection from school punishment for indecent speech off campus through social media. The ruling in *Mahanoy* is undoubtedly only the beginning of cases regarding social media and its effects on school operation. As with the evolution of student speech via *Tinker*, the Court will continue to wrestle with the complexities of digital speech. The implications of the *Mahanoy* opinion are murky, and future cases will rely on the new leeway principle that Justice Breyer has applied to student speech. Despite these uncertainties, it is imperative that future cases reinforce the right to off-campus student speech and create clearer guidance to enforce the intent of the ruling. What is certain, however, is that there will always be the next Mary Beth Tinker, Matthew Fraser, or B.L. who will challenge the boundaries set by adults and push for greater freedoms.

[49] Franke J. Rogers et al. (2017). Teaching and Learning in the Age of Trump: Increasing Stress and Hostility in America's High Schools
[50] Id.

Governing Pleasure: A Modern Feminist Perspective on Pornography & Free Speech

Madison Allen

Georgetown University

Abstract

Today, when Americans think of the "feminist perspective" on pornography and free speech, they mainly think of anti-pornography theories or pro-censorship laws. Championed by feminist legal scholars Catharine MacKinnon and Andrea Dworkin, this perspective posits that pornography and other forms of sex work enforce patriarchal attitudes and violence towards women. Yet, at the core of these anti-sex work theories lie falsehoods and misogynistic notions of womanhood. Further, the theories of MacKinnon and Dworkin have yet to truly integrate the experiences of marginalized people. As a result, pro-censorship feminist theories and laws have had disastrous consequences for women of color and the LGBT+ community. As such, this paper takes a modern, anti-censorship feminist approach to pornography and sex work. Ultimately, this paper discusses the pitfalls within pro-censorship theories, their real-world implications, and suggests more concrete ways of improving the lives of the marginalized.

I. INTRODUCTION

The scholarship of thinkers like Catharine MacKinnon and Andrea Dworkin has led many in politics and the media to believe that a pro-censorship stance is the dominant feminist critique of pornography.[1] Yet, with Generation Z and millennials' increasing involvement in the political sphere, there comes a more modern perspective on feminist theory regarding pornography, one that sees the MacKinnon-Dworkin censorship proposal as dangerous to women and many marginalized communities. In fact, the censorship of obscene or pornographic material (and the sex industry at-large) goes against modern feminist thought on free speech and may do more harm to women and minorities than previously considered. In addition, in the age of the internet, pornography may be impossible for the government to regulate.

A. DEFINING PORNOGRAPHY

i. "I Know It When I See It"

The American legal understanding of pornography generally comes from the judicial precedent set in the Supreme Court case *Miller v. California* (1973). In *Miller*, California business owner Marvin Miller mailed sexually explicit advertisements to members of his community - a misdemeanor in California. The case then went to the Supreme Court, where the Court established a three-part test for determining whether material is obscene and thus does not warrant constitutional protection. The test is as follows:

> (a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[2]

While the courts have seemingly created a straightforward test to determine obscenity, justices have long struggled to define obscenity. In *Jacobellis v. Ohio* (1964), a case that predates the *Miller* test, Justice Stewart's concurring opinion epitomizes this struggle:

> The Court, [in obscenity cases] was faced with the task of trying to define what may be indefinable. I have reached the conclusion [that] criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it.*[3]

One of the most memorable quotes from *Jacobellis* and subsequent obscenity cases, "I know it when I see it," describes the near impossibility of the courts to ever define obscenity and pornography accurately. However, though *Miller* may seem to offer a remedy for Justice Stewart's dilemma and is more precise than previous Supreme Court definitions, the three-part test remains vague. [4] For example, how exactly can it be determined whether allegedly obscene material lacks *serious* literary, artistic, political, or scientific value? How is *seriousness* measured? These questions are often answered on a case-by-case basis, which does not lend itself to making policy.

Despite this ambiguity, U.S. federal law still uses the three-part *Miller* test to determine whether pornographic material is obscene. However, if the material is found to be obscene, that does not necessarily mean the possessor of the material would be

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[1] Nadine Strossen, "A Feminist Critique of "The" Feminist Critique of Pornography," *Virginia Law Review* Vol. 79, No. 5 (August 1993): 1099, https://www.jstor.org/stable/1073402?seq=1#metadata_info_tab_contents (accessed December 14, 2021).

[2] Miller v. California, 413 U.S. 15 (1973) https://tile.loc.gov/storageservices/service/ll/usrep/usrep413/usrep413015/usrep413015.pdf

[3] Jacobellis v. Ohio, 378 U.S. 184 (1964) https://tile.loc.gov/storage-services/service/ll/usrep/usrep378/usrep378184/usrep378184.pdf.gov)

[4] In *Roth v. United States (1957)*, the Supreme Court decided that obscenity was not covered under the First Amendment's clause on freedom of speech. A landmark case, the Court decided that material could be labeled obscene and thus unconstitutional if the "average person, applying contemporary community standards, [believed] the dominant theme of the material taken as a whole appeal to prurient interest." However, this test was incredibly vague. In fact, Justice Brennan, the creator of the *Roth* test, later changed his mind regarding obscenity and the First Amendment in *Paris Adult Theatre I v. Stalton (1973)*. Brennan dissented with the majority, concluding that obscenity laws were too vague to satisfy free speech concerns.
Richard L. Pacelle Jr. "Roth v. United States (1957)," *MTSU The First Amendment Encyclopedia*, https://mtsu.edu/first-amendment/article/414/roth-v-united-states (accessed December 14, 2021).

prosecuted. The private possession of obscene material is not illegal, but "possession with intent to sell or distribute obscenity, to send, ship, or receive obscenity, to import obscenity, and to transport obscenity across state borders for purposes of distribution," is.[5] Federal obscenity law also prohibits "both the production of obscene matter with intent to sell or distribute, and engaging in a business of selling or transferring obscene matter using or affecting means or facility of interstate or foreign commerce, including the use of interactive computer services."[6] Interestingly, the website *OnlyFans*, where some individuals distribute pornographic content to paying customers, is legal under federal law, hinting that censorship laws may be out of touch with the modern distribution of pornography. In addition, websites that host obscene material are not typically prosecuted for doing so. While it may seem as though these websites and their content would be deemed illegal under federal obscenity laws, they still thrive on the internet.

Political theorists, however, tend to see obscenity and pornography differently than our courts and laws do. For example, in 1986, Harvard Law professor Alan Dershowitz attempted to define pornography in an article entitled "What is Porn?." He concludes that there is no definition of pornography, and, therefore, it cannot be censored.[7] To Dershowitz, it is impossible to censor something that does not have an agreed-upon definition. Responding to Justice Stewart, Dershowitz claims that while Stewart "may have known it when he saw it in 1964... today pornography is clearly in the eyes - or as another former justice put it, in 'the crotch' - of the beholder."[8] Dershowitz goes further, asserting that radical (or, in my terms, classical) feminists, religious zealots, atheists, and homophobes all have a unique definition of pornography, proving how fragile any attempt at defining pornography truly is.[9] By basing the protection of a fundamental right like free speech on such a shaky definition, Dershowitz claims that "we give too much definitional power to the voracious censor."[10]

Catharine MacKinnon, one of the radical feminists Dershowitz mentions, believes that pornography leads to sexual violence against women. On a basic level, MacKinnon views pornography as "graphic sexually explicit materials that subordinate women through pictures or words."[11] MacKinnon has determined that this objectification "through pictures or words" leads to the subjugation of women and constitutes a form of sex discrimination.[12] MacKinnon's convictions are complex and will be explored in a later section.

The only consensus when it comes to defining pornography is that it is a difficult, and perhaps impossible, task. Despite this, some feminist scholars attempt to define pornography as inherently anti-women and argue that it should thus be censored.

ii. 1964 vs. Today

Justice Stewart's famous quote, "I know it when I see it," is from an obscenity case from 1964. It is not hard to argue that pornography has changed since Stewart wrote his concurring *Jacobellis* decision. From the '60s to the late '90s, pornography was something you could purchase at an adult bookstore, a movie theater, or a club. Today, it seems as though only the clubs have remained. In the internet age, pornography is free and widely available. Both the mediums and methods have changed. At one point, *Playboy* was considered obscene. Now, it seems almost trite to consider it so. No longer is it just large businesses that produce pornography. Now, individuals make and distribute their own.

The internet has brought with it massive overhauls within the sex industry. Pornographic material is now available for free to anyone with an internet connection. In comparison, during the 1960s to '90s, pornographic material usually had to be purchased through an adult bookstore.[13] Now there are little to no barriers between consumers and pornographic material. However, the widespread availability of pornography poses new challenges to legal scholars. For example, if the *Miller* test is based on a community values standard, as previously mentioned, then how does the government regulate online obscene material

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[5] "Citizen's Guide to U.S. Federal Law on Obscenity," The United States Department of Justice (Department of Justice, November 9, 2021), https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity (accessed December 14, 2021).
[6] Department of Justice, "Citizen's Guide to U.S. Federal Law on Obscenity."
[7] Alan Dershowitz, "What is Porn?" *ABA Journal* (November 1, 1986), https://georgetown.instructure.com/courses/134032/files?preview=7405752 (accessed December 14, 2021).
[8] Dershowitz, "What is Porn?"
[9] *Ibid.*
[10] *Ibid.*
[11] Catharine MacKinnon, *Only Words* (Cambridge, Massachusetts: Harvard University Press, 1993), page 22.
[12] MacKinnon, *Only Words*, 22.
[13] Indeed, during this time period, many US Supreme Court cases regarding pornography dealt with adult bookstores or adult movie theaters. Robert Weiss, "The Evolution of Pornography," *Psychology Today*, July 2, 2020, https://www.psychologytoday.com/us/blog/love-and-sex-in-the-digital-age/202007/the-evolution-pornography (accessed April 19, 2023).

when the internet does not recognize state or local borders?

The rise of self-produced pornography is another massively significant change within the sex industry. A prime example of this is the website *OnlyFans*. The site itself is a subscription service where creators (people who create video content) allow users, or "fans," access to their content for a fee. Instead of *OnlyFans* directing the content that is posted on its website, individual creators make and distribute their own. While the site hosts artists, entertainers, and others, it is widely known for its popularity among sex workers.[14] The site itself has over two million creators and 130 million users, a testament to its popularity.[15] In fact, when the website announced that it would no longer allow sexual content on its platform, both creators and users protested, leading *OnlyFans* to reverse their decision.[16] Importantly, the rise in websites like *OnlyFans* has shifted how pornography is produced. Instead of large production companies making and distributing pornography, individuals can now produce and star in their own content, allowing actors and creators more control. These shifting notions of pornography and the making of pornography have come into conflict with current legal standards, as the law has yet to catch-up with these significant changes.

B. EXPLAINED: THE CLASSICAL FEMINIST ARGUMENT: MACKINNON ET AL.

One of the legal profession's most noted feminist scholars, Catharine MacKinnon started her work in sexual harassment law before writing her well-known theories on pornography with colleague Andrea Dworkin. To many in the political field, MacKinnon and her followers are known as radical feminists. Rather, this paper views MacKinnon as a classical feminist. She is deemed "classical" because her theories are based on an antiquated idea of what pornography can do to women. Her viewpoint is one of an older generation. Nevertheless, it is incredibly important to understand her theory before any critiques can be levied against it.

Importantly, MacKinnon's argument is centered on pornography, not obscenity. To MacKinnon, pornography should be legally defined as "graphic sexually explicit materials that subordinate women through pictures or words."[17] However, MacKinnon's theoretical view of pornography is much broader than what this initial definition implies.[18] She explains that:

> Pornography, in the feminist view, is a system of forced sex, a practice of sexual politics, an institution of gender inequality…[It] institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female.[19]

To MacKinnon, pornography is not just "pictures or words." Rather, pornography is based on a system of sex inequality. It institutionalizes patriarchal ideas of how women should be viewed and teaches men how women should be treated.[20] Pornography is pervasive and, as our world becomes saturated with it, "sex becomes speech, speech becomes sex."[21] Because of this, MacKinnon does not believe pornography can be dealt with merely in the realm of speech. To her, "pornography does not simply express or interpret experience; it substitutes it. Beyond bringing a message from reality, it stands in for reality."[22] Pornography becomes sexuality and gender themselves, and thus how we view our world. Indeed, to MacKinnon this means that pornography is not speech – it is an act. This act leads to sexual violence against women, such as rape. Drawing from the testimony of a convicted rapist and murderer, MacKinnon stated that "sooner or later, in one way or another, the consumers [of rape pornography] want to live out the pornography further in three dimensions."[23] In summary, to MacKinnon, "pornography does what it says."[24]

MacKinnon's argument assumes that women could not possibly be willing participants in the sex industry. To

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[14] Joshua Espinoza, "OnlyFans Explained: What You Need to Know About the NSFW Site," *Complex* September 20, 2021, https://www.complex.com/life/what-is-onlyfans-explainer (accessed December 14, 2021).
[15] Jenny Desborough, "New OnlyFans Rules: Here's What You Can (and Can't) Do on the Platform," *Newsweek* August 20, 2021 https://www.newsweek.com/new-onlyfans-rules-what-you-can-cant-do-platform-sexual-conten t-1621339 (accessed December 14, 2021).
[16] Espinoza, "OnlyFans Explained: What You Need to Know About the NSFW Site."
[17] MacKinnon, *Only Words*, 22.
[18] Bennet, "From Theory to Practice: Catharine MacKinnon, Pornography, and Canadian Law," 216.
[19] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Massachusetts: Harvard University Press, 1987), pg. 148.
[20] Bennet, "From Theory to Practice: Catharine MacKinnon, Pornography, and Canadian Law," 216-217.
[21] MacKinnon, *Only Words*, 26.
[22] MacKinnon, *Only Words*, 25.
[23] MacKinnon, *Only Words*, 19.
[24] MacKinnon, *Only Words*, 40.

MacKinnon, there is no possible way a woman can legitimately *want* to be a part of the sex industry as "empirically, all pornography is made under conditions of inequality based on sex, overwhelmingly by…women who were sexually abused as children."[25] She believes that women in the sex industry are abused and coerced into it and that this abuse transmits to women outside of the sex industry. To MacKinnon, because women must be abused to make pornography and pornography teaches men how to treat women, the abusive nature of the sex industry applies to all women.

For these reasons, MacKinnon does not see pornography as merely sexist, but as constituting sex discrimination, similar to how sexual harassment is labeled sex discrimination. In an attempt to curtail the proliferation of pornography, MacKinnon and Dworkin drafted an anti-pornography ordinance which would have allowed proven "victims" of pornography avenues for legal redress. In their draft anti-pornography ordinance, MacKinnon and Dworkin made the claim that pornography is sex discrimination.[26] Importantly, while sexist speech is constitutional, sex discrimination is illegal and punishable. But, under the MacKinnon-Dworkin ordinance, not only would the production of pornography qualify as sex discrimination, but so too would the sale, exhibition, or distribution of pornography. This ordinance was made into law in Indianapolis, Indiana; however, it was struck down by a Seventh Circuit Court in *American Booksellers Association v. Hudnut (7th Cir.) (*1985*)*, where it was ruled a violation of the *Miller* test.[27] The Supreme Court upheld *Hudnut* in 1986. MacKinnon's response to this ruling was "at least it is now clear that whatever the value of pornography is – and it is universally conceded to be low – the value of women is lower"[28]

C. THE "ANTI-FEMINIST" ARGUMENT: Response to Pro-Censorship Feminist Argment

i. MacKinnon's Vague Criticisms & Their Implications

MacKinnon's anti-sex work criticisms employ hasty generalizations under the guise of feminism. Most notably, MacKinnon does this when discussing the background of women involved in the sex industry. As mentioned earlier, one of the underpinnings of MacKinnon's theory is that the overwhelming majority of women involved in the sex industry have experienced past childhood abuse or were coerced into the industry. However, MacKinnon never cites where she learned this information from, because, at the time, there was no significant research being done on the background of pornography performers. Rather, MacKinnon utilizes stereotypes of female actresses in order to condemn pornography, without data to support her claims.[29] Fortunately, in the past decade, there has been more research done on pornography actresses. In a study published in the *Journal of Sex Research,* researchers found that there was no statistical difference in the likelihood that pornography actresses had experienced child sexual abuse compared to the general population.[30] In addition, another study found that, out of a group of 176 female actresses, only one cited coercion as the reason why she became involved in pornography.[31] Both of these studies cast serious doubt on the idea that female actresses are "damaged goods," forced by abusive men into pornography. Indeed, while cultural attitudes and stereotypes regarding sex workers may support MacKinnon's position, her sweeping generalizations remain unfounded and likely untrue.

Though MacKinnon's time spent in sexual harassment law showcases her commitment to fighting patriarchy, the notion that women could not possibly choose sex work[32] out of their own volition stems from a deeply misogynistic view of women's

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[25] MacKinnon, *Only Words*, 20.
[26] MacKinnon, *Only Words*, 22.
[27] American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, aff'd mem., 475 U.S. 1001 (1985) https://law.justia.com/cases/federal/district-courts/FSupp/598/1316/1476351/
[28] MacKinnon, *Feminism Unmodified*, 211.
[29] James D. Griffith et. al., "Why Become a Pornography Actress?" *International Journal of Sexual Health* (July 2012): page 166, https://www.researchgate.net/publication/254365825_Why_Become_a_Pornography_Actressresearchgate .net) (accessed December 14, 2021)
[30] James D. Griffith et. al., "Pornography actresses: an assessment of the damaged goods hypothesis," *Journal of Sex Research* (2012), https://www.tandfonline.com/doi/abs/10.1080/00224499.2012.719168?journalCode=hjsr20 (accessed December 14, 2021).
[31] Griffith et. al., "Why Become a Pornography Actress?" 170.
[32] Even my use of the term "sex worker" would upset MacKinnon, as she argues the term implies a level of consent. Indeed, MacKinnon sees sex work as neither "sex" nor "work," preferring to call sex workers victims of sex trafficking (a distinctly different concept than sex work) and "prostituted women." Notably, when "sex work" and "sex trafficking" are conflated, actual victims of sex trafficking are put in more danger. For more on this issue, see the Medium article linked below.
Catharine MacKinnon, "OnlyFans Is Not a Safe Platform for 'Sex Work.' It's a Pimp," *The New York Times*, September 6, 2021, https://www.nytimes.com/2021/09/06/opinion/onlyfans-sex-work-safety.html (accessed November 29, 2022).
Mari Ramsawakh, "We Need to Stop Confusing Sex Work with Human Trafficking," *Medium*, August 29, 2018, https://medium.com/shareyournuance/we-need-to-stop-confusing-sex-work-with-human-trafficking-6ba7897fd3cd (accessed November 30, 2022).

agency and autonomy. Rather, women who go into the sex industry do so for many different reasons that are *unrelated* to potential sexual abuse or men's social dominance. In a study that looked at women's reasoning for becoming porn actresses, researchers found that the majority of women chose pornography for money, sex, attention, and fun.[33] Further, Mireille Miller-Young, an associate professor at UC Santa Barbara, has done research on the porn industry for the past decade. In her interviews with pornography actresses, she found that women were motivated for numerous reasons to join the industry. For some, sex work was about "making a bold statement about female pleasure" and gaining greater control over their labor.[34] Others "found that it enabled them to rise out of poverty, take care of their families or go to college."[35] In some situations, women's reasoning for doing sex work can be a combination of both liking sex work and also needing money.[36] These reasons are *not* consistent with MacKinnon's theory that sex work is forced onto unwilling women by abusive men. In reality, most women who choose this work do so out of a mixture of societal and personal factors that have nothing to do with past or current experiences of abuse. Indeed, by denying that women can choose to be involved in pornography for their own reasons, MacKinnon denies that women hold any sexual agency over their bodies.

ii. MacKinnon's False Premise

The majority of MacKinnon's work is based on the premise that pornography leads to sexual violence against women. This premise is how MacKinnon concludes that pornography is a form of sex discrimination. However, when MacKinnon and other similar scholars originally published their theories, the social science studies around this proposed link were shaky. Now, with more accurate social science studies being published around this topic, it is safe to say that there is no correlation between pornography and sexual violence. In fact, studies in numerous countries have shown that when restrictions on the sex industry are relaxed, the rate of violent sexual crimes goes down.[37] Further, while a minority of sexual violence perpetrators are known to have watched pornography, pornography was not what led them to act aggressively. Rather, "hostility, callousness and delinquent behavior were determinants of sexual aggression," not pornography.[38] Instead, the link between pornography and sexual violence is more analogous to the relationship between video games and violence. In reality, "many young people play *Grand Theft Auto*, but very few of them hijack cars in real life."[39]

Additionally, if pornography did cause sexual violence, then, with the growth in internet pornography, it follows that there would be a marked increase in instances of sexual violence between the '90s to now. However, the opposite is true. According to the Rape, Abuse & Incest National Network (RAINN), sexual violence has fallen by half in the past twenty years.[40] Indeed, FBI statistics also back the claim that sexual violence has fallen in recent years despite the proliferation of internet pornography.[41] In 1990, the rate of reported forcible rape was 41.2 per 100,000 inhabitants. In 2020, this number stood at 38.4.[42] These statistics rise and fall independent of the amount of widespread pornography, as there is no causation between the two.

Finally, it has been found that poorly designed studies are more likely to support a link between pornography and sexual

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[33] Griffith et. al., "Why Become a Pornography Actress?" 170.
[34] Mireille Miller-Young, "Pornography Can Be Empowering to Women on Screen," *The New York Times*, June 10, 2013, https://www.nytimes.com/roomfordebate/2012/11/11/does-pornography-deserve-its-bad-rap/pornography-can -be-empowering-to-women-on-screen (accessed December 14, 2021).
[35] Miller-Young, "Pornography Can Be Empowering to Women on Screen."
[36] While MacKinnon argues that sex work occurs due to sexual coercion from men, others see sex work as a purely economic issue. Rather than viewing sexual coercion as the culprit, they see sex work as the result of economic coercion (i.e., financial need drives an individual's predilection towards sex work against their best wishes). To clarify, this paper does not argue that sex workers who do not wish to be sex workers should stay in the industry. Of course, anyone who would like to transition out of the sex industry should be given the ability to do so. However, simply censoring pornography or banning the sex trade does not stop sex work from happening, much less end economic coercion. For a more in depth discussion on how to improve the lives of working women, see Section VI.
[37] Alison Bass, "Legal prostitution zones reduce incidents of rape and sexual abuse," *HuffPost* April 7, 2017, https://www.huffpost.com/entry/legal-prostitution-zones-reduce-incidents-of-rape-and_b_58c83be1e4b01d0d473bce8a (accessed December 14, 2021).
[38] Sandra Carr, "Study: Pornography does not cause violent sex crimes," *UTSA Today*, August 5, 2020, https://www.utsa.edu/today/2020/08/story/pornography-sex-crimes-study.html (accessed December 14, 2021).
[39] David Ludden, "Does Porn Use Lead to Sexual Violence?" *Psychology Today*, April 16, 2021, https://www.psychologytoday.com/us/blog/talking-apes/202104/does-porn-use-lead-sexual-violence (accessed December 14, 2021).
[40] "Statistics," *Rape, Abuse & Incest National Network (RAINN)*, https://www.rainn.org/statistics (accessed February 23, 2022)
[41] For clarification, sexual violence does not solely refer to rape. Sexual violence is a broad term that encompasses many different types of unwanted sexual advances, such as sexual harassment, indecent exposure, etc.
[42] FBI. "Reported forcible rape rate in the United States from 1990 to 2020 (per 100,000 of the population)." *Statista,* Chart, September 27, 2021, https://www.statista.com/statistics/191226/reported-forcible-rape-rate-in-the-us-since-1990/ (accessed February 23, 2022).

violence. Chris Ferguson, a professor of psychology at Stetson University, suggested that "some scholars appear to be too quick to try and find evidence for effects" and should not look to falsify hypotheses in "confirmatory mode because it feels morally right."[43] While it may feel like there should be a link between pornography and sexual violence, the fact is that one does not cause the other. Maybe it would be easier to combat sexual violence if we could point to pornography as the sole cause. But sexual violence is born out of a number of factors, and pushes to censor pornography are at best weak attempts to help better the lives of women. At worst, censorship can perpetuate misogynist notions about women's bodily control.

II. DISCUSSION

A. Effects of Censorship on How Society Views of Women

i. Women as Inherently Submissive

MacKinnon's theories beg the question, if the production of pornography is inherently abusive, why does the sex industry only harm women and not men? Further, what does her theory imply when it claims that women are victims?

MacKinnon argues that pornography is an institution of gender inequality that results in the sexual abuse of women; however, in doing so, MacKinnon implies that only women can be victims of sexual abuse. MacKinnon reasons that only women are harmed because of the objectifying nature of pornography and the societal dominance of men. But, if pornography is a "system of forced sex," then it must be forced on both individuals involved. Even if men are being painted as dominant and women as submissive, as MacKinnon claims, under the same logic, they would both still be experiencing sexual abuse and objectification. Indeed, even in her own works, MacKinnon points to the producer of pornography as the criminal, not the actors involved; yet, she never mediates on the effect pornography has on the male performer. In reality, MacKinnon is employing "benevolent sexism," employing a paternalistic attitude that claims that women require special protections.[44] As a result, MacKinnon's assertion that pornography only harms women suggests that women are inevitably victims of sexual abuse and, in turn, are inherently weak in comparison to men.

Interestingly, women have used this portrayal of victimhood to gain rights for decades, especially within the U.S. labor movement. In *Muller v. Oregon (1908)*, the U.S. Supreme Court upheld a 10-hour workday law for women on the basis of women's weaker physical nature and their role as mothers, essentially "treating women as a special class in need of certain protections that men did not [require]."[45] This case was eventually overturned by the addition of the 19th Amendment to the Constitution because of its treatment of women as a special class.[46] Indeed, sexist assumptions can be embedded in purportedly progressive – even radical – positions.[47] In the end, these portrayals of victimhood often backfire, as more forward-thinking laws that are not based on victimization are usually required to forward women's rights.

This portrayal of "women as victims" also pushes a harmful narrative regarding men and sexual abuse. A common misconception is that men cannot fall victim to sexual abuse, typically because men are seen as stronger and more aggressive compared to women. By claiming that only women are abused through pornography, MacKinnon upholds this misconception. In doing so, this view tacitly empowers lawmakers and classical feminist activists to ignore the near quarter of men who have experienced sexual violence.[48] Indeed, this issue is especially poignant for men, because one of the most harmful aspects of male sexual assault is the stigmatization victims face afterward.

ii. Berating Women's Sexuality

While MacKinnon and other classical feminists want to see the progression of women's rights, by supporting pornography censorship, they actually uphold the damaging stereotype that women should be shamed for having sexual desires, effectively holding back the women's rights movement. In fact, Andrea Dworkin, a former friend and colleague of MacKinnon, supports the idea that having sex is bad for women. To Dworkin, "intercourse remains a means or the means of physiologically

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[43] Carr, "Study: Pornography does not cause violent sex crimes."
[44] E. A. Daniels and C. Leaper, "Benevolent Sexism," *Science Direct*, 2011, https://www.sciencedirect.com/topics/ psychology/benevolent-sexism (accessed November 30, 2022).
[45] Nicholas Mosvick, "On this day, the Supreme Court upholds limits on women and factory work hours," *National Constitution Center*, February 24, 2021, https://constitutioncenter.org/interactive- constitution/blog/on-this-day-the-supreme-court-upholds-limits-on-women-and-factory-work-hours (accessed December 14, 2021).
[46] Mosvick, "On this day, the Supreme Court upholds limits on women and factory work hours."
[47] I would like to extend my thanks to Professor Joseph Hartman at Georgetown University for this analysis.
[48] "Statistics," *National Sexual Violence Resource Center*, https://www.nsvrc.org/statistics (accessed December 14, 2021).

making a woman inferior…in the experience of intercourse, she loses the capacity for integrity."[49] Effectively, Dworkin is arguing the extreme view that heterosexual intercourse is rape because, due to the sexist society in which we live, women are unable to properly consent to sex with men.[50]

Dworkin's notion that women lose their integrity when they have sex has deeply sexist connotations. This same anti-sex dogma is also used by many on the political right to both shame women and limit their bodily autonomy. Some religious organizations use this ideology to shame women for having sex.[51] In the occurrence of rape, this sentiment makes women feel used and unwanted. In addition, many of these right-wing activists support anti-abortion measures which give women less control over their bodies. This argument rests on the idea that, as is the flaw with many classical feminist theories, women do not have any agency or autonomy, that, whenever there is gender inequality, it is impossible for women to *choose* to have consensual sex.

B. CENSORSHIP'S IMPLICATIONS FOR MARGINALIZED COMMUNITIES

i. Censorship of the LGBT+ Community

Anti-sex work laws on pornography give enormous leeway to censors to pick and choose what constitutes subordination of women. As Nadine Strossen, feminist and former President of the ACLU, claimes:

> Censorship poses a special threat to any sexual expression that society views as unconventional. Censors would likely target "pornography" that conveys pro-feminist or pro-lesbian themes, because of its inconsistency with "traditional family values" or conventional morality. For example, "pornography" may convey the message that sexuality need not be tied to reproduction, men, or domesticity. It may extol sex for no reason other than pleasure, sex without commitment, and sexual adventure.[52]

In fact, censors who support "traditional family values" could go further, claiming lesbianism threatens women by tempting them with impurity. Lesbianism may degrade or challenge the very concept of femininity. Books that contain both pornography and political statements, such as the queer novel *Macho Sluts* by Pat Califia, may be seen as dangerous to "traditional" women.[53] Furthermore, pornographic images of gay men, or simply images of gay men, may constitute obscenity, as the mere mention or hint at homosexuality is oftentimes deemed inherently sexual in American political discourse.[54] Anything not considered "normal," "pure," or "traditional" could theoretically be pornography to a censor. As a matter of fact, one Canadian Supreme Court ruling influenced by MacKinnon proved this theoretical situation completely realistic.

While MacKinnon's theories have not been successfully made into law in the U.S., her ideas have found their way into Canadian case law through *R v. Butler (1992)*. This case provides helpful insight into the practical implications of MacKinnon's theories. For context, while the Canadian Charter of Rights and Freedoms does guarantee the right to freedom of speech, this right is not absolute.[55] The first section of the Canadian Charter states that the "guarantees [of] rights and freedoms set out in it

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[49] Andrea Dworkin, *Intercourse* (New York: The Free Press, 1987), page 137.

[50] Strossen, "A Feminist Critique of "the" Feminist Critique of Pornography," 1148.

[51] While these organizations purport strong anti-sex rhetoric, it is rare that they would claim men should feel ashamed for having sex outside of marriage. Whether it be in sex-education videos, religious propaganda, or political ads, shame is typically directed at sexually active women, not men.
Terry Gross, "Memoirist: Evangelical Purity Movement Sees Women's Bodies As A 'Threat,'" *NPR*, September 18, 2018, https://www.npr.org/2018/09/18/648737143/memoirist-evangelical-purity-movement-sees-womens-bodies-as-a-threat (accessed April 19, 2023).

[52] Strossen, "A Feminist Critique of "The" Feminist Critique of Pornography," pg. 1145.

[53] In Pat Califia's *Macho Sluts*, the chapter "The Hustler" serves as Califia's response to anti-sex work feminists like MacKinnon and Dworkin. In this chapter, the former prostitute, lesbian sado-masochist protagonist reflects: "But I can't help but wonder why so many of us have not profited from the women's revolution, despite the fact that we are women. Perhaps it's because I'm just not the right kind of woman." Even in times of immense social stigmatization, the protection of pornography has allowed for queer women to challenge pervasive heteronormativity and even major feminist political movements.
Pat Califia, *Macho Sluts* (Boston: Alyson Publications, 1988), pg. 179.

[54] In early 2022, Florida passed the bill colloquially known as the "Don't Say Gay" law. The law itself "aims to limit LGBTQ discussion in schools." The law relies on the stereotype that queerness is inherently sexual. More specifically, the law and its backers push the idea that homosexuality is equivalent to pedophilia, with Florida Governor Ron Desantis' press secretary accusing the law's opponents of "grooming" young kids.
Amber Phillips, "Florida's law limiting LGBTQ discussion in schools, explained," *The Washington Post*, April 22, 2022, https://www.washingtonpost.com/politics/2022/04/01/what-is-florida-dont-say-gay-bill/ (accessed November 29, 2022).

[55] Alexandra G. Bennett, "From Theory to Practice: Catharine MacKinnon, Pornography, and Canadian Law," *Modern Language Studies* Vol. 27, No ¾ (Autumn - Winter 1997): 223,

[are] subject only to such reasonable limits prescribed by law [as] can be demonstrated justified in a free and democratic society," meaning that the government or the Supreme Court of Canada can limit the freedoms laid out in the Charter, if justified.[56] Unlike American constitutional law, this allows greater deference to the Canadian government and courts to limit what Americans would call fundamental rights. Indeed, *Butler* shows that for MacKinnon's theories to be put into practice, it requires greater state control of speech.

In *Butler*, the Canadian Supreme Court upheld the criminalization of publishing obscene material. The Court's explanation of the ruling is notably similar to MacKinnon's feminist theories:

> It is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as *women* and children, and consequently to society as a whole, by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.[57]

The ruling names women as a class of individuals deemed needing enhanced protection, it acknowledges the harm caused by pornography, and it names non-violence and equality as the hopeful goal. However, while the goal of this ruling may have been equality, that is not what the Court's decision led to.

Because *Butler* upheld a criminal statute, not a civil one, it handed the responsibility of regulation over to the state. For Canada, this meant that Canada Customs would be the ones to judge whether or not obscene material was illegal. While *Butler* drew its decision from MacKinnon's idea of harm against women, this was interpreted to include depictions of anal penetration.[58] This interpretation led to homosexual material being targeted by Canada Customs much more frequently than heterosexual material.[59] In fact, the first judicial ruling following *Butler* was used to censor a lesbian magazine. Gay and lesbian bookstores' imports were seized constantly, while some straight bookstores never had their material searched.[60] As one analyst put it, "in MacKinnon's theory, pornography is exclusively made for male heterosexual consumption; in the practice that ultimately derives from her theory, pornography is almost always defined as homosexual."[61] While MacKinnon's theory may derive from wanting to protect women, the result is discrimination based on sexual orientation, leading to the legitimizing of stigma against LGBT+ individuals in the form of a "pro-women" social movement.[62]

ii. Ramifications of the Nordic Model

While this paper mainly focuses on classical feminist theories related to pornography and free speech, it would be negligent to disregard how these same theories apply to the realm of prostitution and other forms of sex work. To MacKinnon, pornography and prostitution are inseparable and, in many ways, the same. She claims that "pornography is an arm of prostitution," explaining that prostitution results in the same subordination, objectification, and violence that pornography does.[63]

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https://www.jstor.org/stable/pdf/3195402.pdf?refreqid=excelsior%3A26a4484d279d3b7a0960b3bf9225c994 (accessed December 14, 2021).

[56] *Canada Act, 1982, sec. 2b*

[57] R v Butler, [1992] 1 S.C.R. 452
https://www.canlii.org/en/ca/scc/doc/1992/1992canlii124/1992canlii124.html?autocompleteStr=R%20v%20Butler&autocompletePos=1
(italicization added)

[58] Bennett, "From Theory to Practice: Catharine MacKinnon, Pornography, and Canadian Law," 227.

[59] Interestingly, Andrea Dworkin's pro-censorship books were also seized by Canada Customs.
Bennett, "From Theory to Practice: Catharine MacKinnon, Pornography, and Canadian Law," 228.

[60] Bennett, "From Theory to Practice: Catharine MacKinnon, Pornography, and Canadian Law," 227.

[61] *Ibid.*

[62] In addition to the harmful effects of censorship on the LGBT+ community and women of color, the censoring of pornography has dangerous legal consequences as well. Pornography can contain sexist and racist speech, but this type of speech is legal and for a good reason too. First of all, it is simply impossible to regulate this type of speech. For example, the federal government does not have the capability to go into an individual's home and make sure they do not use racial slurs. However, MacKinnon argues that what I may personally view as sexist speech in pornography is actually sex discrimination, something the government has authority to regulate. If we did choose to label pornography as sex discrimination, the federal government would then be responsible for answering the seemingly straightforward question "what is pornography?," as well as creating a framework around what is and is not sexist within pornography. Perhaps the government will claim novels with graphic scenes, a queer coming-of-age story, or a gay magazine all constitute obscenity, as they have all done in the not-so-distant past. Furthermore, women would become reliant on the federal government, an institution dominated by straight, white men, to decide *on behalf of all women and minorities* what is legally sexist. As a woman of color who is aware of the history of this country and the current direction of the Supreme Court after *Dobbs*, I am not inclined to trust the government to accurately define pornography, much less sexism or racism.

[63] Catharine MacKinnon, "Prostitution and Civil Rights," *Michigan Journal of Gender & Law* Vol 1, No. 13 (1993): 30, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1192&context=mjgl (accessed November 29, 2022).

Further, in MacKinnon's view, "women in prostitution are the first women pornography subordinates," making the issue of prostitution of the utmost importance to MacKinnon, and thus equally important to this paper's exploration of her theories.[64] However, MacKinnon's support of the "Nordic Model," a form of regulating prostitution, has dangerous consequences for some of the most marginalized individuals in society, specifically women of color and transgender people.[65]

iii. Prostitution and Women of Color

Prostitution and the laws surrounding it have a profound impact on women of color. In the U.S., prostitution is heavily criminalized, so finding the exact demographics of prostitutes is incredibly difficult. The demographic data that is available is gathered from the arrests of prostitutes. According to FBI crime statistics from 2002, Black Americans made up 39.7% of adult arrests for prostitution. However, they only make up 12.1% of the general population.[66] Their white counterparts, however, made up 57.6% of arrests, which more closely matches U.S. Census Bureau data on the amount of White Americans.[67] These racial disparities in prostitution-related offenses also exist for other racial minority groups, yet are highest for Black Americans.[68] As shown, there is a disproportionate amount of women of color in prostitution, or, at least in arrests for prostitution; therefore, any law that touches on prostitution will have much larger ramifications for women of color, especially Black women.

Moreover, notwithstanding the aforementioned demographics, because of institutional racism coupled with the gendered-racism that women of color of face (including hyper-sexualization and sexual objectification), systems that criminalize any aspect of sex work, whether they purport to help women or not, will nevertheless result in disproportionate harm against women of color.

Anti-sex work feminists like Catharine MacKinnon recognize that laws criminalizing women for being prostitutes are antithetical to feminist ideals, as these laws further victimize women. Instead, MacKinnon supports the "Nordic Model," where sex buyers, commonly known as "Johns" and "Pimps," are criminalized while prostitutes are not.[69] However, in reality, anti-sex work feminists' support of the "Nordic Model" has dangerous consequences for women of color.

While the "Nordic Model" may sound appealing because it decriminalizes prostitution for prostitutes, it still results in the same obstacles as full criminalization, such as lack of access to health services and increased rates of violence. This model makes the industry incredibly dangerous for women, and poor women of color in particular.[70] Canada and Sweden, countries that have received international praise for their systems, exemplify the dangers of this "Nordic Model." Firstly, this model has profound impacts on sex workers' health. For example, "police have confiscated belongings to use as evidence against clients, providing sex workers with a strong incentive to avoid carrying condoms," making them more susceptible to STIs.[71] Surprisingly, health service providers are reluctant to provide sex workers with condoms "as it is perceived to render [health service providers] complicit in prostitution-related offenses."[72] So, while prostitutes are not criminalized, the criminalization of "Johns" and "Pimps" still has large effects on sex workers' health. Additionally, Sweden's law has led to "increased policing and surveillance of migrant sex workers," with Asian workers being targeted at disproportionate rates.[73] Furthermore, research from Sweden showed that sex workers' "biggest concerns were prejudice from authorities - especially social services and police - resulting in sex workers being

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[64] MacKinnon, "Prostitution and Civil Rights," pg. 30.
[65] "MacKinnon, Prostitution, Inequality, And A Bit Of Economic Analysis," *The Chronicles of a Capitalist Lawyer*, November 2011, https://www.pramoctavy.com/2011/11/mackinno n-prostitution-inequality-and.html (accessed November 29, 2022).
[66] Eric Jenson et al., "The Chance That Two People Chosen at Random Are of Different Race or Ethnicity Groups Has Increased Since 2010," *United States Census Bureau*, August 12, 2021, https://www.census.gov /library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html (accessed November 29, 2022).
[67] Donna M. Hughes, "Race and Prostitution in the United States," *University of Rhode Island*, December 2005, https://s3.eu-west-3.amazonaws.com/observatoirebdd/2005_Race_and_prost_US_HUGHES.pdf (accessed November 29, 2022).
[68] Hughes, "Race and Prostitution in the United States."
Fitzgerald and Renna, "New Report on Transgender Experiences in Sex Work Recommends Decriminalization."
[69] "Prostitution Legislation - A Way to Shift the Culture through a Three Prong Approach," The London Abused Women's Centre, 2014, https://www.lawc.on.ca/advocacy-and-activism-1 (accessed November 29, 2022).
[70] Elizabeth Bernstein, "Carceral politics as gender justice? The "traffic in women" and neoliberal circuits of crime, sex, and rights," *Theory and Society* Vol 41, No. 3 (May 2012): 241, https://www.jstor.org/stable/pdf/41475719.pdf?refreqid=excelsior%3Abdc874e5c17810a99e699c80a85f5128&ab_segments=&origin=&acceptTC=1 (accessed November 29, 2022).
[71] "Sex Work Law Reform in Canada: Considering problems with the Nordic Model," *Canadian HIV/AIDS Legal Network,* January 2013, pg. 2, https://maggiemcneill.files.wordpress.com/2012/04/ problems-with-the-nordic-model.pdf (accessed November 29, 2022).
[72] "Sex Work Law Reform in Canada: Considering problems with the Nordic Model."
[73] "Challenging the introduction of the Nordic Model: The Smart Sex Worker's Guide," *Global Network of Sex Work Projects*, pg. 9, https://www.nswp.org/sites/nswp.org/files/sg_to_challenging_nordic_model_prf03.pdf (accessed November 29, 2022).

less likely to report crimes committed against them, [and] to seek support or legal assistance."[74] This reluctance to report assaults can be compounded by the fact that police officers are often the most frequent perpetrators of violence against women engaging in prostitution.[75] As a result, the health risks and violence associated with the "Nordic Model" compounds the marginalization already faced by women of color under systemic gendered-racism.

iv. Prostitution and the Transgender Community

Unfortunately, the transgender community has been marginalized by the gay community, feminist movements, and U.S. political discourse as a whole. Classical feminists are no different. This marginalization is especially present when analyzing prostitution and the transgender community. Even though transgender people only make up about 0.58% of the U.S. population,[76] 11% have reported sex trade experience.[77] Black and Latino transgender people were more likely to report experience in the sex trade, at 44% and 33% respectively.[78]

Before we look at the implications of the "Nordic Model" on transgender people, it is important to understand the institutionalized transphobia they face, as it is not widely acknowledged by many cisgender people. Transgender people have long been subjugated to systemic discrimination and violence. Indeed, 90% of transgender people report harassment, mistreatment, and discrimination in the workplace.[79] They are also more likely to experience homelessness compared to their cisgender counterparts. This issue is compounded by the fact that only 30% of homeless shelters are open to housing transgender women. Additionally, structural barriers, such as discrepancies between identification documents with different genders, make accessing benefits particularly difficult.[80] When these barriers are amplified by anti-sex work laws, such as the "Nordic Model," transgender sex workers face a host of consequences, most notably of which is violence.

The violence transgender people may face is exacerbated under the "Nordic Model." Commonly, violence may be triggered when a client learns of a sex worker's gender identity. For example, Lydia, a transgender sex worker, described what happened when a client discovered that she was trans: "I got my hair pulled and [head] banged on the dash. And then he opened the door, threw me out."[81] This intense reaction from a client, while anecdotal, is a symptom of a larger systemic issue of pervasive social stigmas around both transgender people and sex workers. While under the "Nordic Model," prostitutes should theoretically feel empowered to report this kind of violence because they are not criminalized, that has yet to happen. This refusal to report mainly occurs because police are unlikely to investigate accounts of violence, or even missing persons, from trans sex workers. In fact, a year and a half after an initial sexual assault police report, another trans sex worker, Aron, reported being told by an officer "well you know the risks that you take when you do [the] sex trade," essentially blaming Aron for being raped.[82] Indeed, when police do not care for the well-being of sex workers, especially when it comes to transgender sex workers, clients have more free reign to do what they will, worsening the potential violence workers may face.

While classical feminists' goal is the end of systemic gender inequality, the "Nordic Model" only encourages inequity and further marginalizes women of color and transgender people.

C. IF NOT CENSORSHIP, THEN WHAT? IMPROVING THE LIVES OF WORKING WOMEN

i. Pornography Will Stay, Even If Censorship Occurs

No matter how many censorship laws are put into place, they will not be able to curtail the presence of pornography in our society due to the global nature of the internet. Simply put, the federal government has had much difficulty regulating the

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[74] "Challenging the introduction of the Nordic Model: The Smart Sex Worker's Guide," pg. 12.
[75] Hughes, "Race and Prostitution in the United States."
[76] "What Percentage of the Population is Transgender 2022," *World Population Review*, 2022, https://worldpopulationreview.com/state-rankings/transgender-population-by-state (accessed November 29, 2022).
[77] Erin Fitzgerald and Cathy Renna, "New Report on Transgender Experiences in Sex Work Recommends Decriminalization," *National Center for Transgender Equality*, December 7, 2015, https://transequality.org/press/releases/new-report-on-transgender-experiences-in-sex-work-recommends-decriminalization (accessed November 29, 2022).
[78] Fitzgerald and Renna, "New Report on Transgender Experiences in Sex Work Recommends Decriminalization."
[79] Crosby Burns and Jeff Krehely, "Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment: Data Demonstrate Need for Federal Law," *The Center for American Progress*, June 2, 2011, https://www.americanprogress.org/article/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/ (accessed November 29, 2022).
[80] "Sex Work is an LGBTQ Issue," *Reframe Health and Justice*, 2018, https://survivorsagainstsesta.files.wordpress.com/2018/03/lgbtq_2pager1.pdf (accessed November 29, 2022).
[81] Larry A. Nuttbrock, *Transgender Sex Work and Society* (New York: Harrington Park Press, 2018), pg. 424.
[82] Nuttbrock, *Transgender Sex Work and Society*, pg. 425.

internet. As mentioned earlier, websites like *OnlyFans* and others that host obscene content have not been taken down or regulated. This difficulty can be attributed both to the inability of our lawmakers to understand the internet and the widespread nature of the world-wide web. For example, when Facebook CEO Mark Zuckerberg testified on Capitol Hill, Senator Orrin Hatch (R-UT) was confused as to how Facebook made money. Zuckerberg had to explain to the Senator that Facebook generated revenue from running advertisements, demonstrating a general ignorance surrounding the internet and social media.[83] In addition, the global nature of the internet does not lend itself to the community standards requirement under *Miller*. After all, how can local community standards be defined and enforced within the global community of the internet?

Even social media platforms themselves have trouble regulating the pornographic and obscene material on their own sites. Currently, pornography and obscenity run rampant on social media platforms. While social media platforms do put regulations on this type of content, that has not stopped the proliferation of such materials on social sites. Entire companies, whose businesses exist on the internet, are not able to regulate obscene and pornographic material.

Outside of the digital sphere, the sex industry mostly consists of prostitution and clubs. However, unlike internet pornography, state governments have enacted regulations on prostitution. Despite these anti-prostitution laws, prostitution is still alive and well in American cities. Indeed, the criminalization of prostitution has not led to the end of the world's oldest profession. In fact, estimates put the number of prostitutes in the U.S. between 70,000 and 500,000, engaging in nearly 50 million acts of prostitution annually.[84] With the knowledge that both federal and state governments, as well as social media companies, cannot stop the spread of pornography or prostitution, it seems the sex industry can never truly be censored.

ii. Fixing the Underlying Conditions

With the awareness that censoring the sex industry, whether it be in the digital sphere, in printed material or in real life, results in low-income women of color and LGBT+ individuals facing increased violence and stigmatization, it seems that the best way to protect the lives of working women is not through censorship at all. Rather, we must turn away from the idea that pornography is the main cause of objectification, sex discrimination, and violence in our society. Even with true censorship, the gender wage gap, workplace discrimination, and sexual violence would still exist. Further, MacKinnon and those who agree with her theories must realize that censorship is simply not a viable solution in the age of the internet. Therefore, to improve the lives of working women, we must look at ways of uplifting their material conditions.

To do so, we must provide better access to childcare, paid parental leave, and high-paying jobs. Typically, women are expected to stay home and take care of children even if they make a higher salary than their spouse. When a woman stays home, she loses out on promotions and raises, leaving her possible income lower than a man's. However, if the U.S. had universal childcare and parental leave, both mothers and fathers would be able to spend time with their newborn *and* continue their professional lives, potentially leading to a decrease in the gender wage gap.[85] In addition, if we are able to break away from the idea of "pink collar jobs," that is, typically low-paying jobs occupied by women, then women may have better job opportunities. Some female pornography actresses have even claimed that they went into the industry because their previous pink-collar jobs did not provide as much money or autonomy.[86] By providing access to these essential services and jobs, we can further enable women to provide for themselves and their families.

Censoring obscene or pornographic material and criminalizing sex work does nothing to stop violence against women. It is understandable why classical feminists want to make the sex industry the issue in the fight against gender inequality. Fighting rape, assault, discrimination, and sexist ideologies would be much easier if we could point to a single culprit. However, as noted earlier, studies have shown that access to pornography and prostitution actually lead to a decrease in sexually violent crimes and murder, not more. Truly fighting inequality means fighting the institutions that hold women back, both financially and socially, as opposed to making policies based on flawed assumptions surrounding women's sexuality.[87] Indeed, if the sex industry

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[83] Sean Burch, "'Senator, We Run Ads': Hatch Mocked for Basic Facebook Question to Zuckerberg," *The Wrap* April 10, 2018, https://www.thewrap.com/senator-orrin-hatch-facebook-biz-model-zuckerberg/ (accessed December 14, 2021).

[84] *Social Problems: Continuity and Change* (University of Minnesota Libraries Publishing) E-book, https://open.lib.umn.edu/socialproblems/chapter/9-4-prostitution/ (accessed December 14, 2021).

[85] Gaby Galvin, "Paid Family Leave and Child Care Could Erase Motherhood Wage Penalty," *U.S. News* April 7, 2017, https://www.usnews.com/news/best-states/articles/2017-04-07/affordable-child -care-paid-family-leave-key-to-closing-gender-wage-gap (accessed December 14, 2021).

[86] Miller-Young, "Pornography Can Be Empowering to Women on Screen."

[87] The potential solutions outlined in this paragraph are by no means comprehensive. However, they do provide a good starting ground for working against inequality. The continued fight against sexism will take numerous public

disappeared tomorrow, sex discrimination would still remain unshaken.

policy initiatives and national conversations surrounding the history and legacies of gender and racial inequality.

Honor Among Thieves?: A Debate on the Legality of the Taliban

Clary Doyle
Northwestern University

Abstract

In a controversial move, President Joe Biden fully withdrew U.S. forces from Afghanistan in September 2021. Within a month, the Taliban captured the capital, Kabul, and the presidential palace, effectively instating itself as the new Afghani government. Although it has been more than a year since the Taliban retook control of the region, no country yet recognizes it as a legitimate government. Nonetheless, the group has further institutionalized Shariah law and appointed a 30-member cabinet which works in conjunction with acting prime minister Mohammad Hassan Akhund. Many in Afghanistan have spoken out against the abuses of the new regime, which does not allow women to attend school or travel without a male chaperone. While countries around the world struggle to decide whether to recognize the authority of the Taliban government, its citizens grapple with its legal authority. The Taliban's takeover raises questions about what constitutes legitimate authority of law and the consequences of different approaches to this quandary. This article examines whether Talabani rule can be considered legal according to natural law theorist Lon Fuller and positivist law theorist H.L.A. Hart. I will argue that the Taliban's institution of Sharia law is legally invalid according to Fuller and legally valid according to Hart. These determinations are significant because they ascertain whether citizens under this system have the obligation to follow the law. I argue in favor of using Hart's positivist approach to law because it provides the most reasonable and productive theory for questions of legal systems that lack popular support.

I. BACKGROUND AND TWO LEGAL THEORIES APPLIED TO THE TALIBAN

A. Fuller's Natural Law System

First, I will examine the legality of the Taliban according to natural law. This theory asserts that law is valid when based on moral facts of what the law ought to be.[1] Thomas Aquinas pioneered the early form of this approach by advocating that the only legitimate form of law was that which came from God.[2] However, this theory has evolved from pertaining solely to "brooding omnipresence in the skies" and instead to something "entirely terrestrial in origin and in application."[3] To Fuller, natural law is neither a divine order nor "a series of sporadic and patternless exercises of state power."[4] Instead, law is "the enterprise of subjecting human conduct to the governance of rules."[5] In order for law to be legitimate, it must have an inner morality defined by what law should *not* be, rather than what it should be. Fuller defined eight ways through which law can fail: no law is established, law is not publicized, there is abuse of retroactive legislation, laws are not understandable, laws are contradictory, law requires conduct beyond the powers of the affected party, law changes so frequently that people cannot orient their behavior by it, and, finally, there is a failure of congruence between the rules as announced and their application. [6] A deficiency in any of these ways "results in something that is not properly called a legal system at all."[7]

When applying Fuller's legitimacy test to the Taliban's system of law, I rely on a combination of data surrounding its rule between 1996 and 2001 and the little that is known about its current administration. With this information, the Taliban's legal system proves to be invalid according to Fuller's legal guidelines. Although the Taliban established Sharia law, this legal system proves to be invalid according to Fuller, as it has not been made available to the affected party and is not understandable. Laws prohibiting women from going to school and leaving their homes without a male escort are frequently publicized among foreign countries, but non-religious laws—such as those about probate and contracts—remain recondite. Mahmood Mahroon, a professor at Kabul University, says, "There is neither an official constitution nor laws, so they won't be able to run their justice system."[8] Additionally, the Taliban judiciary system relies on interpretations of Sharia law which is not always objective. *Fiqh*—the human understanding of Sharia through which it is applied—is controversial and highly debated amongst Islamic scholars.[9] This, in turn, creates uncertainty and inconsistency amongst Talibani lawmakers as to what should be considered law. Finally, Haroun Rahimi, assistant professor of law at the American University of Afghanistan, says, "The Taliban has yet to either confirm that the existing laws of the country will remain in force or to lay out a new legal system."[10] Without clear knowledge of the laws in place, citizens in Afghanistan will fear state retaliation for unknowingly violating the law.

Fuller's definition of legality also stipulates that law cannot be contradictory nor can the rules as announced differ from their administration.[11] According to Bergen's research, Talibani law fails these standards as well. The chain of command's structure and the Taliban's judiciary in the early 2000s caused frequent legal contradiction and confusion. Bergen states, "many decisions [were] made through…informal channels, bypassing the formal structures."[12] Much of this confusion was due to the "shadow government" --an informal organization of Taliban officials who held undisclosed roles in governance in every province in Afghanistan.[13] Finally, the administration of Sharia law often occurs without due process. For example, "During the 1990s, the Taliban imposed their legal system through the Department for the Promotion of Virtue and Prevention of Vice, which operated a religious police force. The police were empowered to beat and jail offenders, often without any proof or any trial process."[14]

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[1] Hart, H. L. A. "Positivism and the Separation of Law and Morals." *Harvard Law Review*, vol. 71, no. 4, 1958, pp. 593–629. *JSTOR*, https://doi.org/10.2307/1338225.

[2] Murphy, Mark, "The Natural Law Tradition in Ethics", *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/sum2019/entries/natural-law-ethics/.

[3] Fuller, Lon L. *The Morality of Law*. Yale University Press, 1969, 96.

[4] *Id* at 110.

[5] *Id* at 122.

[6] *Id* at 39.

[7] *Ibid.*

[8] Glinski, Stefanie. "12 Million Angry Men." *Foreign Policy*, https://foreignpolicy.com/ 2021/10/28/afghanistan-taliban-justice-sharia/.

[9] Rahimi, Haroun. *The Taliban, the Afghan State and the Rule of Law*. https:// www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law.

[10] *Ibid.*

[11] Fuller, Lon L. *The Morality of Law*. Yale University Press, 1969, 39.

[12] Bergen, Peter L., and Katherine Tiedemann. *Talibanistan : Negotiating the Borders Between Terror, Politics, and Religion*. Edited by Peter L. Bergen and Katherine Tiedemann, Oxford University Press, 2013, 31.

[13] *Ibid.*

[14] Forbes, Jami. "The Significance of Taliban Shari`a Courts in Afghanistan." *Combating Terrorism Center,* https://ctc.westpoint.edu/the-significance-of-taliban-sharia-courts-in afghanistan/.

The police's ability to effectively create new laws through its arbitrary use of force undermined the administration of the written law. Therefore, it can reasonably be concluded that the Taliban administration fails Fuller's legitimacy test and cannot be considered legally valid.

B. Hart's Positivist Law System

Fuller criticized theories of legal positivism because they ask of law, "not what it is or does, but from whence it comes. In other words, 'Who can make the law?'"[15] However, I will now examine the Taliban's legitimacy according to leading legal positivist, H.L.A. Hart, who rejected the sub-theory of positivist law that postulates that somewhere within the legal system there must be a sovereign legislative power which is legally unlimited.[16] Instead, Hart believes the foundations of a legal system, "consist of a situation in which the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons, who themselves habitually obey no one."[17] Hart's recipe of legality is based on the "rule of recognition" which is the cornerstone of a legitimate legal system. It informs the obligation citizens feel to follow the law, and it is the rule through which every other law in the system gets its validity. Hart establishes two conditions for the rule of recognition. First, most private citizens need to obey the law "'for [their] part only' and from any motive whatever."[18] Second, officials of the system "must regard these [laws] as common standard of official behavior and appraise critically their own and each other's deviations as lapses."[19] If both of these conditions are satisfied, Hart says the rule of recognition is realized and a system is legal.

The Taliban's system of law fulfills both of Hart's conditions and, therefore, is legitimate. First, the majority of citizens in Afghanistan abide by the law laid down by the Taliban. Some, of course, follow it due to an acceptance of Sharia law; others do so out of fear of punishment. [20] Regardless, their motives for compliance are insignificant in Hart's interpretation of law. What matters is their obedience.

The mindset of system officials also plays a role in achieving legality. Hart expounds that in order for the second criteria for the rule of recognition to be met, officials in the system must have an internal point of view accepting the law. Hart states that when it comes to the officials, "the simple notion of general obedience, which was adequate to characterize the indispensable minimum in the case of ordinary citizens, is inadequate."[21] Instead, officials themselves must follow the law, and if they see someone disobeying the law, they must condemn that behavior.[22] Taliban officials meet these conditions. Many current leaders grew up under a corrupt and unstable government. Because the state-run educational system was flawed and decrepit, many young boys attended *madrassas*—schools that offered "a free education, food, shelter and military training."[23] This system indoctrinated young men into the Taliban's ideology, and these young men now support and run the Taliban. Therefore, it is reasonable to conclude many Taliban leaders support Sharia law, whether because of religious affinity or because they see it as a better alternative to the failures of the previous government. In Bergen's words, "the Taliban in the province—from the senior leadership to the rank and file—fell into two categories: they either accepted the legitimacy of the new government or they rejected it but did not feel that fighting against it was appropriate or possible."[24] Such motives show that Taliban officials indeed possess the internal point of view necessary to meet Hart's rule of recognition. Because both of Hart's conditions for legality are met, Sharia law can be considered legitimate in his view.

II. SETTLING THE DEBATE: A STANCE IN FAVOR OF POSITIVISM

These analyses lead to conclusions about the Taliban and, more broadly, they allow me to make an argument in favor of positivism as an approach to legality. According to Fuller, the Taliban's system of law cannot be considered valid. Therefore, the citizens of Afghanistan are under no moral obligation to follow the law. On the other hand, Hart's positivist approach dictates

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[15] Strahan, Thomas W. The Natural Law Philosophy of Lon L. Fuller in Contrast to Roe v. Wade and Its Progeny. https://www.lifeissues.net/writers/air/air_vol15no4_2000.html.

[16] Hart, H. L. A. *The Concept of Law*. Clarendon Press, 1961, 102.

[17] *Id* at 97.

[18] *Id* at 113.

[19] *Ibid.*

[20] Bergen, Peter L., and Katherine Tiedemann. *Talibanistan : Negotiating the Borders Between Terror, Politics, and Religion.* Edited by Peter L. Bergen and Katherine Tiedemann, Oxford University Press, 2013, 29.

[21] Hart, H. L. A. *The Concept of Law*. Clarendon Press, 1961, 111.

[22] *Id* at 113.

[23] Sultana, Aneela. "Taliban or Terrorist? Some Reflections on the Taliban's Ideology." *Politics and Religion Journal*, vol. 3, no. 1, 1, 2009, pp. 7–24. www.politicsandreligionjournal.com, https://doi.org/10.54561/prj0301007s, 12.

[24] Bergen, Peter L., and Katherine Tiedemann. *Talibanistan : Negotiating the Borders Between Terror, Politics, and Religion.* Edited by Peter L. Bergen and Katherine Tiedemann, Oxford University Press, 2013, 29.

the Taliban's legal system appears legitimate. From these conclusions and the perspective of Western media, it may seem intuitive to support Fuller's system over Hart's because his eight criteria of legality seemingly condemn the egregious human rights abuses that the Taliban perpetrates, such as rampant discrimination and violence against women. However, such a conjecture is premature. I believe Hart's view of legal legitimacy prevails over Fuller's in terms of its rationality and its productivity when considering legal systems that violate human rights.

In settling the debate between Fuller and Hart, I will not argue that one system allows for less evil legal systems than the other. In fact, this postulate is incorrect. Both Fuller and Hart's theories allow for legitimate legal systems which endorse the violation of human rights. For example, it is perfectly reasonable that a system of law could abide by Fuller's eight requirements and still deny women's rights. So long as a government makes its citizens aware of the laws and remains consistent in their application, the system could be deemed valid. Hart's positivist approach, likewise, lends itself to 'moral iniquity.' Hart admits that situations could arise in which only the officials believe in the correctness of the legal system. He notes, "The society in which this was so might be deplorably sheeplike; the sheep might end up in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system."[25] Thus, when both systems give way to some sort of violation of human rights, it is senseless to debate which is superior in these regards.

A. Which Approach is More Rational?

Seeing as though the moral superiority argument does not favor one theory over the other, I resolve the standstill by first investigating which theory is more rational. Because Fuller focuses his theory on what legality is not, he never explains what practical legality is. Defining a term by a foil creates gaps in an argument. For example, it would be misleading to define peace as an absence of war because it discounts the situations in which there is neither peace nor war, such as during the Cold War. Likewise, such a postulate when thinking about legality is irrational because Fuller's criteria for what law *is not* does not make room for many interpretations of what can actually be considered law. Fuller himself admits that a system of law that achieves perfect legality according to his eight criteria does not exist.[26] The implications are severe. For example, Fuller's idea of legality affirms that citizens of Afghanistan are under no moral obligation to follow the law. However, using those same criteria, there are many countries around the world in which citizens would also have no duty to abide by the law because legal systems are often confusing and contradictory, and what occurs in practice differs from what should ostensibly happen. For example, the contradictions in policing policy and policing practice in the United States alone, would make it difficult to argue that U.S. citizens are under any moral obligation to follow the law. Accordingly, if everyone subscribed to Fuller's theory of law, his criteria would justify countless rebellions and ceaseless violence against inevitably inconsistent systems.

Fuller's definition of legality also struggles to account for multiple legal systems. Because law exists in Fuller's theory solely if it follows his eight criteria, it is possible that multiple legal systems could be established over the same population. This begs the question of which legal system citizens should adopt. For example, in Venezuela, two different men have claimed the title of president.[27] If Nicolas Maduro and Juan Guaido formed two separate legal systems that mostly agreed with Fuller's criteria of legality, Fuller's theory would have no rational solution as to which takes precedence over the other.

Moreover, Fuller's theory claims that if the legal system is not completely coherent, then no law exists; consequently, one cannot really break the law. For someone persecuted for noncompliance with the law under a government that does not follow Fuller's criteria, this is bitterly unrealistic. Ultimately, Fuller's idealism does not explain the lived experience of people in varying political landscapes.

Hart's theory of legality does not encounter these same problems. By clearly defining what constitutes legality, there is little room for ambiguity. Hart's theory accounts for the reason why laws exist in imperfect governments, such as the United States, because he says law does not need to be perfect to be valid; it just needs to be thought of as law. Additionally, Hart's legality offers a clear solution to a problem of opposing or overlapping legal system. Because his idea of validity only occurs if a majority of people recognize the law, the true legal system would be the one which most people follow. Finally, his system is more rational because it explains the use of punishment and imprisonment for lawbreaking where Fuller's criteria theory creates a plethora of instances of what would be random state violence because no law technically exists.

B. Which Approach is More Productive?

The second way positivism prevails over Fuller's natural law approach is through its productivity for those living under the law—the citizens of Afghanistan—who, according to a 2019 survey, overwhelmingly said it is important to protect women's

[25] Hart, H. L. A. *The Concept of Law*. Clarendon Press, 1961, 114.
[26] Fuller, Lon L. *The Morality of Law*. Yale University Press, 1969, 41.
[27] Hellinger, Daniel. "Venezuela Crisis Explained: A Tale of Two Presidents." *The Conversation*, http://theconversation.com/venezuela-crisis-explained-a-tale-of-two presidents-111198.

rights, freedom of speech, and the current constitution.[28] While Fuller's measures of legal legitimacy encourage governments to be more transparent, they do not necessarily incentivize governments to have the support of the people being governed. For example, there is evidence that the Taliban, "given the desire to be recognized as a legitimate political movement…may seek to formalize and adapt their practices so that they are more methodical and predictable."[29] Even if the Taliban reached a perfect system of pellucid law and rulings, women—roughly half of the population—would undoubtedly continue to face legal discrimination.

Furthermore, Fuller's recipe for legality gives citizens no insight into how to overcome a legal system that the population with which the population is not satisfied. A system of law deemed valid in Fuller's terms could only lose its legitimacy if it succumbed to corruption and confusion. For instance, suppose Sharia law in Afghanistan abided by Fuller's eight criteria of legality and the people still opposed it. For it to cease to be legitimate, the system would need to significantly deteriorate in one of Fuller's descriptions of failure. However, no citizen, no matter how unhappy they are, would reasonably advocate for this solely to delegitimize the system of law. Making an already distasteful system worse through confusion or retroactive legislation would only exacerbate the citizens' grievances.

On the other hand, Hart's theory of legality encourages legal systems to seek the approval of its officials and constituents. His reliance on social facts does not have a perfect track record. Throughout history, people have accepted and advocated for egregious legal systems embedded with antisemitism, racism, or sexism. Nonetheless, social facts are subject to revision, and they have changed. For example, during the Civil Rights Movement in the United States, many people exercised civil disobedience by intentionally disregarding segregation laws in different public spaces. In response to such protests, the United States Congress revised the laws in favor of these protesters. This shows that without the recognition of the law by the people, law loses its validity. Considering that support for the Taliban in Afghanistan has decreased in recent years, such a scenario could potentially be mimicked. Should disapprobation build enough to threaten the Taliban's influence, the Taliban might reasonably respond by trying to make their laws more publicly tolerable. Therefore, while Fuller's definition of legality can be achieved by striving toward his standards of legal clarity, Hart's legality can be reached through the thoughts and actions of the people.

Fuller would likely respond to this argument by saying that if a government was attempting to achieve legality in Hart's view, they could make its laws more pleasing to the people; yet, an equally viable path would be to intimidate and coerce the people into following the laws. However, Hart states that the subjective excellence of the rule of recognition is a value statement, something that does not concern legal positivists. Moreover, whether a rule is deemed legal according to Hart does not make it morally binding or permanent; it is solely concerned with legality in action.

Additionally, because the rule of recognition necessitates the approval of officials, this theoretically leads to less corruption as it provides a type of check on the rule makers. Fuller could rebut this using the Taliban as an example of a legal system in which most officials in the government are minions within the Taliban's chain of command. This cabinet, then, is unequivocally corrupt. Nonetheless, the internal point of view is only half of what's necessary for Hart's legal legitimacy. This completely discounts his requisite that the people recognize the laws laid down. If, in fact, the citizens of Afghanistan do not recognize Sharia law, they have the power to effectively change the rule of recognition.

The malleable nature of the rule of recognition has profound political consequences when applied to the Taliban, and it is on this point where Fuller's critiques of Hart's theory
demonstrate its genius. Fuller contends "to speak of one rule of recognition as pointing to something constantly changing" is illogical.[30] Yet, because the rule of recognition presupposes the recognition of the people, it allows legal legitimacy to bend and adapt to their will. Therefore, the rule of recognition is an argument for democracy even in systems where democracy does not exist.

Further, Hart's theory provides citizens with the key to dismantling an unfavorable system of law. It implies that if enough people disobey the law—through negligence, protest, strike, or revolt—a system is no longer legally legitimate. Real political action, though, requires a great deal of energy, time, and risk. Nonetheless, it is the flexibility of the rule of recognition that has been the basis of revolutions employing civil disobedience, and it will continue to be the bastion of such movements in the future. Consequently, the citizens and officials of Afghanistan have the power to rid themselves of a legal system they do not support by refusing to acknowledge it as law.

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[28] "A survey of the Afghan People - Afghanistan in 2019." *Relief Web,* 3 Dec. 2019, https://reliefweb.int/report/afghanistan/survey-afghan-people-afghanistan-2019.

[29] Forbes, Jami. "The Significance of Taliban Shari`a Courts in Afghanistan." *Combating Terrorism Center,* https://ctc.westpoint.edu/the-significance-of-taliban-sharia-courts-in afghanistan/.

[30] Fuller, Lon L. *The Morality of Law*. Yale University Press, 1969, 14.

III. CONCLUSION

In conclusion, according to Lon Fuller, the Taliban does not have a legitimate legal system because it does not fulfill his eight requisites for legality. Sharia law instituted by the Taliban is replete with contraction and confusion, and there are gaps between what is said and what is done. Therefore, the people of Afghanistan are under no moral obligation to follow the law. In contrast, Sharia law is legitimate according to positivist thinker H.L.A Hart. Because the leaders within the Taliban have an internal point of view towards Sharia law and the citizens of Afghanistan mostly comply with the law, the minimum requirements for the rule of recognition are met. Hart's stance is a controversial one; even so, I argue it is the more rational and productive way to approach the rule of law. While Fuller's theory calls for pellucid policies that appeal to anyone critical of Kafkaesque governance, it is an aspirational outlook that is hardly realized in any government around the world, least of all the United States. Therefore, it justifies lawbreaking almost everywhere. In addition, it does not account for situations of competing legal systems and creates instances in which a state power would be imposing punishments for laws that, according to Fuller, are not really laws. Moreover, Fuller's legality can morally bind citizens to follow a system of law which violates human rights. In the case of the Taliban, should their administration organize more effectively, it could make a misogynistic legal system an acceptable one. For these reasons and more, Hart's positivist approach to law is superior. His theory offers a practical definition of legality that can make sense of why imperfect legal systems have power, issues of competing legal systems, and the use of state force for lawbreaking. Although Hart's theory of legality can establish systems of government that violate human rights, it does not morally bind citizens to follow these laws. Most importantly, Hart's recipe provides citizens who are discontent with the legal system a means by which to change it. Because the rule of recognition relies on the obedience of a majority of the constituency, theoretically, the people have the power to delegitimize the law. That said, the people of Afghanistan are not bound to repressive Taliban rule. Organized revolt and revolution are possible avenues for the dissolution of the current rule of recognition from which the Taliban derives its legal power. By no means do I believe these arguments will settle the centuries-long debate between natural law and positivist law, but they hold political consequence in Afghanistan. Moreover, this interpretation empowers people everywhere who are disaffected by their legal systems by reminding them of their power to play a role in the law.

The Prosecutor v. Thomas Lubanga Dyilo: Its Implications on Gender Injustice in International Law

Susanna Andryan

University of Southern California

Abstract

In the early 21st century, the International Criminal Court made strides to prosecute war crimes containing elements of sexual violence and the exploitation of children. The Rome Statute of the ICC enumerates the sex crimes related to international criminal law and incorporates provisions that are designed to set forth appropriate investigations and prosecutions of sexual violence crimes. These provisions have acted as a response to the decades of inadequate procedures regarding sexual and gendered related crimes. Moreover, Regulation 55, which allows the Trial Chamber to change the legal characterization of facts contained in the prosecution's Document Containing the Charges, has been a widely contested measure amongst legal scholars and judges.[1] With some criticizing the regulation for its inconsistencies with the Rome Statute, other scholars deemed it necessary to allow the Trial Chamber to hold the defendant accountable for their crimes and to administer proper justice to victims. These debated topics have been referenced in the case of The Prosecutor v. Thomas Lubanga Dyilo (2012). This article critically analyzes the key uncertainties brought about during this trial including the question of 'active participation' amongst the child soldiers of the Forces Patriotiques pour la Libération du Congo. Whether the crime had international implications or if it was confined within the boundaries of a single country will also be examined, in order to determine if it qualifies as a war crime. Further, this article will argue the limitations of the Court ordered reparations after Lubanaga that failed to secure gender justice under the ICC framework and its impact on future cases set before the International Criminal Court. In my final analysis, I will be advancing certain improvements to Regulation 55 that can be implemented by the ICC to enhance the international justice system.[2]

[1] Margaux Dastugue, *The Faults in 'Fair' Trials: An Evaluation of Regulation 55 at the International Criminal Court*, Vanderbilt Journal of Transnational Law 48, no. 1, 2015, at 273.

[2] In this paper, I will not be discussing the evidence curated by victim witnesses and co-perpetration as the relevant mode of responsibility including the mental element.

I. BACKGROUND

A. Factual Background of *Lubanga*

The Prosecutor v. Thomas Lubanga Dyilo concerns the enlistment and conscription of child soldiers under the age of fifteen. Ituri is a district in the Orientale Province of the Democratic Republic of the Congo, which borders Uganda and Sudan.[3] In the mid 1990s, Laurent Kabila assumed control of the recently established Forces Patriotiques pour la Libération du Congo (FPLC).[4] As President Mobutu Sese Seko authoritarian rule faced mounting resistance, Kabila gathered a coalition of fighters from the eastern Democratic Republic of Congo and advanced westward toward Kinshasa, the capital city.[5] In 1998, President Kabila took power after overthrowing President Mobutu in the Democratic Republic of the Congo.[6] In 2002, violent tensions arose from different groups in various parts of the district due to disputes over the allocation of land and the collection of natural resources, such as diamonds and gold. The most notable groups in this case were the Hema and Lendu tribes. The initial economically motivated violence progressed to ethnic hostilities between the two tribes of the region. One Hema political and militia group included the Union Patriotique des Congolais (UPC), which was established in 2000. Thomas Lubanga Dyilo was appointed as the chairman of the party as well as the commander in chief of the military wing known as the Forces Patriotiques pour la Libération du Congo (FPLC)[7]. Lubanga was alleged to have conscripted, enlisted, and used children under the age of 15 in the context of the Ituri hostilities as members of the FPLC.[8] In March 2004, the President of the Democratic Republic of Congo referred the situation in the State to the Prosecutor of the International Criminal Court.[9] Trial Chamber I reached its verdict in March 2012.

B. The Adoption of the "Straight-18" Policy

The impact of this decision has been prevalent in the adoption of new age policies amongst State legislatures. Some States in the international community advocate for a "straight-18" policy whereby a minimum age of 18 would be adopted for any methods of recruitment into armed forces and groups.[10] For instance, the U.S. proposed that while the minimum age for compulsory recruitment in national armed forces should be set at 18, States should also set a minimum age for voluntary recruitment. In May 2000, the United Nations General Assembly adopted the Optional Protocol to the Convention on the Right of the Child. Article I of the Optional Protocol states that "State Parties shall take feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."[11] The international community's move towards the acceptance of the "straight-18" policy emphasizes the need for greater protection of children under international law. The Draft optional protocol is a step for the international community to adopt a policy that would cease all forms of recruitment and participation of children under the age of 18 in armed conflict.

C. The Offenses Charged Against Lubanga

In its first ever decision, Trial Chamber I convicted Dyilo of "conscripting and enlisting children under the age of fifteen years into the UPC/FPLC and using them to participate actively in hostilities."[12] There are two provisions in the ICC Statute that cover the preceding conduct. Article 8(2)(b)(xxvi) of the *Rome Statute* prohibits certain elements of a war crime including the following:

> "1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
> 2. Such person or persons were under the age of 15 years.
> 3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
> 4. The conduct took place in the context of and was associated with an international armed conflict.

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[3] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06 (14 March 2012) [6].
[4] Encyclopedia Britannica, *Laurent Kabila*, Encyclopedia Britannica, inc. n.d.. https://www.britannica.com/biography/Laurent-Kabila
[5] *Ibid.*
[6] Christian M. de Vos, *Prosecutor v Lubanga 'Someone Who Comes Between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial*, Melbourne Journal of International Law 12, no. 1, 2011, at 218.
[7] *The Prosecutor v. Thomas Lubanga Dyilo* [7].
[8] *Id* at [3].
[9] *Id* at [2].
[10] *Ibid.*
[11] *Id* at 45.
[12] Jamil Ddamulira Mujuzi, *(Mis)interpreting the Statute? The International Criminal Court, the Sentence of Life Imprisonment and Other Emerging Sentencing Issues: A Comment on the Trial Chamber I Decision on the Sentence in Prosecutor V. Thomas Lubanga Dyilo*, International Criminal Law Review 13, no. 5, 2013, at 1037.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[13]

Article 8(2)(e) of the *Rome Statute* covers the same conduct of its previous counterpart; however, it refers to the context of internal armed conflict or "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law…"[14] While the first provision covers the recruitment of child soldiers during non-international armed conflicts, the second provision deals with the same offense in midst of an international armed conflict. Other innovative features of the Rome Statute that define certain crimes against humanity as sexual crimes include Article 7(g) and Article 54.[15] The language of both articles makes note of any form of sexual violence, gender violence, or violence against children. Moreover, Article 65 provides protections for victims of the above-mentioned crimes. These provisions are significant in understanding the extent to which the Rome Statute extends its understanding of sexually violent crimes. Lubanga, however, was only charged under Article 8 of the Rome Statute.

D. Steps Towards the Straight-18 Policy

The first question that was highly disputed by the Chamber was whether a child can consent to join the armed forces voluntarily. According to Article 8(2)(e)(vii) of the *Rome Statute*, enlisting or conscripting children under the age of fifteen into armed forces or groups constitutes as a war crime. The Pre-Trial Chamber concluded that "conscripting" encompasses a forcible act to join the military, while "enlisting" refers to a voluntary decision.[16] The Judges of the Trial Chamber relied on an expert witness who stated that children do not have adequate knowledge nor understanding of the short- and long-term consequences of their actions. Expert witnesses also testified that children have a propensity to be manipulated for recruitment due to their immaturity.[17] As a result, children lack the intellectual capacity to determine their best interests when making decisions.[18] Therefore, the Trial Chamber concluded that children are unable to give genuine and informed consent under the age of fifteen.

V. The Nature of the War Crime

The nature of the war crime as either an international, non-international, or a mixed crime is a contentious topic. In order to establish the commitment of a war crime in accordance with Article 8 of the *Rome Statue*, there must be an armed conflict at the time of the offence and there must be a nexus between the criminal conduct and the armed conflict.[19] There has been debate about the legal character of "armed conflict" in academic literature and discourse in the international courts, including in the case of *Lubanga*. Nevertheless, it was eventually determined that the FPLC, which conscripted and enlisted child soldiers, was involved in the armed conflict in Ituri regarding the Hema and Lendu rebel groups. The contentious aspect of this case was whether the armed conflict would be defined as international since it dealt with opposing rebel groups in the domestic sphere.

The Pre-Trial Chamber of the ICC took a middle ground approach when deciphering the extent to which the crimes were deemed as international. It qualified the nature of the conflict in Ituri as being international between July 2002 and June 2003 due to the involvement of the Uganda's People Defence Force (UPDF), an outside force, as an occupying power in the district for the Hema tribe.[20] After their withdrawal, it recognized that the conflict was deemed to be non-international until the end of 2003.[21] The Prosecution attempted to contest that the alleged crime took place during the time that the conflict was non-international. The Pre-Trial Chamber characterizes the armed conflict as being international for the entire duration of the relevant period from early September 2002 to 13 August 2003.[22] The Chamber makes the legal assumption that other parallel conflicts have been occurring at the same time in the same territory of Ituri. The Trial chamber concluded that the armed conflict in which the FLPC, Lubanga's group, took part in was not internationalized through the involvement of the UPDF.[23] The Chamber supported this view by arguing that Uganda did not exercise overall control of the FLPC. The intervention of the UPDF only internationalized the conflict between Uganda and the Democratic Republic of Congo.[24] It did not, however, involve the FLPC directly. The FLPC was rather focused on the conflict that involved other non-State armed groups thus making the crime non-international. As a

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[13] Julie McBride, *Article 8(2)(b)(xxvi),* Commentary on the Law of the International Criminal Court – The Rome Statute at 3 https://cilrap-lexsitus.org/clicc/8-2-b-xxvi/8-2-b-xxvi.

[14] *Id* at 4.

[15] Julie Fraser and Brianne Leyh McGonigle, *Intersections of Law and Culture at the International Criminal Court,* Cheltenham, UK: Edward Elgar Publishing, 2020.

[16] *The Prosecutor v. Thomas Lubanga Dyilo* [43].

[17] *Id* at 38.

[18] Ann Sheppard, *Child Soldiers: Is the Optional Protocol Evidence of an Emerging ``straight-18" Consensus?*, The International journal of children's rights 8, no. 1, 2000, at 37.

[19] Schabas W. A*., The International Criminal Court: A Commentary on the Rome Statute*, 2010, at 202.

[20] *Id* at 203.

[21] *The Prosecutor v. Thomas Lubanga Dyilo* [201].

[22] Schabas, *supra at* 203.

[23] *Id* at 205.

[24] *Id* at 205-206.

result, *Lubanga* was deemed unreliable under Article 8(2)(e) of the Rome Statue because the provision solely dealt with international armed conflicts.[25]

IV. IMPLICATIONS AND COMPLICATIONS

A. The Rejection of Regulation 55 and its Consequences in Future Proceedings

In the Judgement, the Trial Chamber considered invoking Regulation 55 of the Regulations of the Court. Regulation 55 permits a Chamber to legally recharacterize the facts contained in the prosecution's charges.[26] This allows the Chamber to alter the charges confirmed by the Pre-Trial Chamber including both crimes and modes of participation. By legally recharacterizing the presentation of the factual findings of the case under Regulation 55, the Chamber's charges against Lubanga would include the charges of sexual slavery and inhuman treatment. However, the Trial Chamber rejected this decision and concluded that Regulation 55 should not be used to recharacterize legal facts and add charges.[27] Since the prosecutor failed to charge sexual enslavement and rape during pre-trial, the judges had no authority to add those charges during the trial. As a result, the charges of sexual slavery and inhuman treatments were not included in the overall charges against Lubanga.

In March 2012, the three-member bench unanimously convicted Lubanga on all three counts of enlisting, conscripting, and using child soldiers.[28] The majority did find that the FPLC subjected children, particularly girls, to sexual violence, rape and forced domestic labor. However, the Chamber did not make any further findings about the responsibility of Lubanga for these crimes because they were not listed as part of the charges.

The rejection of Regulation 55 is argued to be problematic by social scientists because it limits the scope of the defendant's crimes. The reversal of Regulation 55 paved the path for negative consequences regarding gender justice by the ICC. There should be an alternative recharacterization of Regulation 55 that adopts a gender-sensitive approach which would support the legal assessment to the crime of sexual violence in *Lubanga* and similar cases in the future before the ICC.[29] This interpretation should be consistent with the scheme of the *Rome Statute* to ensure that procedure before the ICC is gender sensitive. By recharacterizing this regulation, individuals are offered more protection from the irreparable harms associated with sexual violence. The failure to add the charges of sexual violence and inhuman treatment deprives the victims of this sexual and gender-based crime from gaining access to any reparation measures.[30] This case highlights the limitations under the ICC framework for gaining gender justice for victims of war crimes.

Despite the outcry of victim advocate groups to have the Chamber re-invoke Regulation 55 to include the charges of sexual violence, Regulation 55 has been found to have inconsistencies with certain provisions of the *Rome Statute*. Paragraph 9 of Article 61 gives the prosecutor the sole authority to amend charges against the accused after a hearing has been held to confirm the charges.[31] Furthermore, Paragraph 11 explicitly binds the Trial Chamber to the charges that were confirmed by the Pre-Trial Chamber.[32] Supporters of Regulation 55 believed that the Trial Chamber did have the authority to add charges of sexual violence and inhuman treatment.[33] Advocates of Regulation 55 held that Article 61 does not prohibit the Trial Chamber from amending the charges during trial and executing Regulation 55. Article 61 (9) addresses the powers of the Prosecutor to seek an amendment but does not explicitly exclude the possibility of the Trial Chamber to modify the legal characterization of the facts during the trial.[34] Moreover, Article 61 (9) of the Statute and Regulation 55 deal with entirely separate stages of the procedure and address separate powers.[35] Therefore, "the two provisions are not inherently incompatible."[36]

There are various discrepancies with this argument that indicate the Prosecutor as being the only entity to add charges during the trial, rather than the Trial Chamber. The refusal of mentioning Article 61(11), which entitles the Trial Chamber to solely exercise 'any function of the Pre-Trial Chamber that is relevant and capable of application in [subsequent] proceedings,'

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[25] *Id* at 207.
[26] Stahn Carsten et. al., *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements,* Oxford: Oxford University Press, 2014.
[27] *Ibid.*
[28] *The Prosecutor v. Thomas Lubanga Dyilo* [264].

[29] Kevin Jon Heller, 'A Stick to Hit the Accused With: The Legal Recharacterization of Facts under Regulation 55." *FICHL Policy Brief Series* no. 55, 2016, at 5.
[30] Louise Chappell, *The Gender Injustice Cascade: 'Transformative' Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court*, The International Journal of Human Rights 21, no. 9, 2017, at 1238.
[31] Heller, *supra at* 4.
[32] *Ibid.*
[33] *Id* at 23.
[34] *Id* at 24.
[35] *Ibid.*
[36] *Id* at 25.

weakens its argument.[37] This provision shows that the Trial Chamber cannot go beyond the bounds of the charges that were passed on by the Pre-Trial Chamber. The argument is also incompatible with Article 61 (7) of the Rome Statute, which allows the Prosecutor to consider amending any charges if the Pre-Trial Chamber believes that the 'evidence submitted appears to establish a different crime within the jurisdiction of the Court.'[38] The limited power given to the Pre-Trial Chamber implies that the Prosecutor is the sole entity responsible for determining the contents and amending the charges and that the Trial Chamber has no authority in adding extra charges. These provisions demonstrate the Prosecutor's authority to add new charges during the trial even if the Trial Chamber could not do it under Regulation 55. If Regulation 55 goes beyond the scope of allowing the Trial Chamber to add the charges of sexual violence and inhuman treatment in *Lubanga*, the Prosecutor should have the authority in doing so under the articles in the *Rome Statute*. By allowing the Prosecutor to legally recharacterize the charges of the crime, victims would be able to receive proper justice and the defendant would be held accountable for all their crimes.

Nevertheless, one of the possible reasons of not adding new charges in the middle of the trial concerns the right to a fair trial or due process under international law. The addition of new charges during the trial adds a layer of difficulty for the accused to prepare an effective defense. The main goals of the accused's defense strategy in *Lubanga* were to refute the facts in which the child soldier charges were based on and counter that those facts constituted the 'enlistment', 'use', or 'conscription' of children into armed forces.[39] If the Trial Chamber added sexual violence and inhuman treatment charges during the trial, the defense would be ill-prepared and fatally undermined. The crime against humanity of sexual slavery requires additional preparation and an entirely new legal strategy for rebutting these charges.

Legal scholars, however, contend that the Trial Chamber legally re-characterizing the facts to support adding charges relating to sexual violence and crimes against humanity of torture would not have unfairly compromised the defendant's due process rights.[40] It can properly be assumed that Lubanga and his political cohorts were aware that the sexual violence perpetrated by the FPLC against young girls was a form of physical and psychological torture.[41] Moreover, torture is prohibited under international customary law and the laws of war. The *jus cogens* nature of the prohibition of torture and the amount of material in the Prosecutor's opening statement devoted to discussing the widespread systematic sexual violence perpetuated by the FLPC against children demonstrate that the charges of torture relating to sexual violence would not have been unpredicted.[42] Therefore, Lubanga's defense would not have been deprived of proper notice if the facts were legally recharacterized to include the charges.

B. The Ambiguous Definition of 'Active Participation'

The Chamber must also reconcile the specific combative activities that were covered under Article 8(2)(b)(xxvi) and Article 2(e)(vii) using child soldiers. The activities that were included under these articles were "scouting, spying, sabotage, the use of children as checkpoints, as couriers, bodyguards for commanders, or guards of military objects."[43] In the *Lubanga* case, the Trial Chamber did not provide a clear definition regarding 'active participation' in hostilities as an element of the offense of using child soldiers.[44] Instead, the Chamber used a case-by-case analysis of the evidence presented using the exposure-test to form an opinion. Under Article 2(e)(vii), the Chamber held that activities such as children acting as bodyguards for the commanders of the FPLC or guarding military facilities in the Ituri district qualified as active use.[45] Contrarily, domestic housework done by many of the female soldiers did not constitute as 'active use' because it was not defined as hostile nor dangerous.[46] This method of interpretation allows judges to analyze the evidence on a case-by-case basis. The approach gives the ICC flexibility when examining evidence and making a ruling. Even though this flexibility grants judges some discretion, certain judges may prefer a more precise method of interpreting active participation, which would ensure consistency in its application across all cases. Nevertheless, this approach played a significant role in determining the ambiguous definition of 'active participation' in *Lubanga*.

According to witness testimony, sexual abuse of child soldiers was prevalent in their time in the armed forces.[47] The majority of the Trial Chamber, however, refused to consider whether sexual violence against children can be included in the scope of using children to actively participate in hostilities. As a result, the majority considered the acts to be irrelevant to the charges of

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[37] *Id* at 26.
[38] *Id* at 25.
[39] *Id* at 32.
[40] Sonja C. Grover, *The Torture of Children During Armed Conflicts: The ICC's Failure to Prosecute and the Negation of Children's Human Dignity*, (Berlin: Heidelberg: Springer Berlin, 2013), at 2.
[41] Grove *supra at* 4.

[42] *Id* at 26.
[43] *The Prosecutor v. Thomas Lubanga Dyilo* [261-263].
[44] Heller, *supra at* 14.
[45] *Id* at 15.
[46] *Id* at 16.
[47] K' Shaani O. Smith, *Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and the Girls of Congo*, Howard Law Journal vol. 54, no. 2 2011, at 485.

child soldiering.[48] Furthermore, the prosecution failed to include the charges of sexual violence against Lubanga. Article 74 (2) of the *Rome Statute* does not allow the Trial Chamber to rule beyond what is brought before the Court by the prosecution.[49] In her dissenting opinion, Justice Benito believed that the Trial Chamber should not be limited to the charges brought before them. Instead, the International Criminal Court should broaden the definition of child soldiering to encompass more crimes such as sexual violence. This argument stemmed from Article 21 (3) *Rome Statute* which states that "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."[50] Justice Benito's interpretation of the article obliges the ICC to apply any relevant sources of law that are compatible with human rights law.

Although the use of this law would be beneficial in the case of *Lubanga*, scholars conclude that it can be misused. Political scientists have argued that the purpose of Article 21 (3) *Rome Statute* is solely to ensure that the application of the relevant sources of law by the Court, including the *ICC Statute,* the *Elements of Crime,* and the *Rules of Procedure and Evidence,* are in accordance with international human rights.[51] Therefore, the Court is not obliged to rule on a charge that goes beyond the scope of the charges that are presented to them. The Court cannot take initiative in ruling on a matter or defining a legal concept for the sole purpose of protecting one's human rights in the future if it is not explicitly presented to them in the case.

Nevertheless, a comprehensive definition of Article 2 (e) (vii) should be identified to establish the boundaries of active participation in hostilities under international humanitarian law. The Trial Chamber had to decipher whether sexual violence against children, in the form of sexual slavery and forced marriages of child soldiers, fell in the scope 'active participation in hostilities' as mentioned in Article 8 (2) (e) (vii) of the *Rome Statute*. In the Prosecutor's closing brief, it was called upon the Trial Chamber to interpret 'active participation' of child soldiers as a broad definition in order to include the recruitment of young girls for sexual violence and forced marriage.[52] While the Trial Chamber was inconclusive in interpreting this phrase, they found that the concept was distinct from 'direct participation in hostilities,' which is used in the *Additional Protocols* of the *Geneva Convention.*[53] The Court states, "The use of the expression 'to participate actively in hostilities', as opposed to the expression "direct participation" was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence."[54] However, international humanitarian law treats both phrases interchangeably. These differences in interpretations can cause a future divide in the mutually reinforcing relationship between international humanitarian law and international criminal law. A clear distinction of active participation and direct participation should be established in order for the Trial Chamber to properly identify the extent to which participation of certain crimes take place by victims in future international law cases.

While the Trial Chamber takes an inconclusive stance in interpreting the scope of 'active use', Judge Odio Benito stated: "Sexual violence committed against children in the armed groups causes irreparable harm and is a direct and inherent consequence to their involvement with the armed group. Sexual violence is an intrinsic element of the criminal conduct of 'use to participate actively in the hostilities.' Girls who are used as sex slaves or "wives" of commanders or other members of the armed group provide essential support to the armed groups."[55]

Judge Benito's understanding of the concept of 'active use' includes the activities conducted by child soldiers that are exposed to the dangers of combat and any harm against the child from the armed force that illegally recruited the child, which in this case is the FLPC. However, her interpretation of the extent to which participation should be defined is inapplicable in the case of *Lubanga* due to a specific provision. Article 22 (2) of the Rome Statute states that "in case of ambiguity, the definition [of a crime] shall be interpreted in favor of the person being prosecuted."[56] As a result, Judge Benito's overextending interpretation of the provision is deemed invalid because it adds on to the charges made on *Lubanga*. Nonetheless, an argument to be made is that these charges should have been taken into consideration when reflecting on the other provisions of the *Rome Statute*[57] that define sexual crimes in which Lubanga has violated. The Court should assimilate a broad interpretation of the concept of 'active use' in order to encompass all of the crimes that were committed by Lubanga and distribute proper justice to the child victims that were directly and indirectly affected by his conduct.

C. The Effects of Gender-Based Injustice to Victims in *Lubanga*

Gender bias operates in various ways under international criminal and humanitarian law. A main proponent to this injustice is the diminishment of experiences of victims of war crimes, particularly women, that have experienced harm from

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[48] Grover, *supra at* 4.
[49] *Id* at 6.
[50] The United States Rome Statute of the International Criminal Court. International Organizations, 2001. Web Archive. https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf
[51] Heller, *supra at* 14.
[52] Chappell *supra at* 1223.
[53] *Id* at 1224.
[54] *Id* at 1231.
[55] *The Prosecutor v. Thomas Lubanga Dyilo* [Dissenting Opinion].
[56] Article 22(2) of Rome Statute.
[57] These other provisions include Article 8, Article 7, Article 54, and Article 65.

sexual and gender-based violence.[58] In *Lubanga*, young female experiences have been inadequately prosecuted and proper reparations have not been bestowed after over 10 years since Lubanga's conviction due to the absence of invoking Regulation 55 to include sexual violence charges.[59] The serious nature of these gender-based injustices against victims highlight the need for reform of the ICC.

The *Lubanga* case impacted the ways in which gender justice has been viewed by various legal scholars. Professor Rashida Manjoo, a significant advocate for preventing violence against women from Cape Town, South Africa, calls for a transformative approach in resolving gender injustice and promoting reparations by the ICC.[60] By identifying the structural causes of sexual and gendered violence, legal reforms can be properly institutionalized to ensure non-repetition of the crimes. Nongovernmental organizations such as the Women's Initiatives established in the Hague called on the Chamber to integrate a gender perspective in the reparation principles under the ICC, to recognize the harmful impact of sexual violence, and to consult with the victims.[61] With the agreement of Judges Fulford, Blattman, and Odio Benito, the bench moving forward decided to apply a 'proximate cause' standard to establish a relationship between the harmful aftermath of the crime and crime itself.[62] This is a positive change which will cover a wider range of victims in future cases than that recognized in *Lubanga*. These overall measures are significant for future ICC cases because they open a path for victims of sexual and gender-based violence to be considered under international law with the aim of receiving reparations.

The Trial Chamber agreed that reparations would also be granted to direct and indirect victims.[63] This consequently broadens the scope of 'active participation' because the definition includes more individuals who may not have had a direct involvement in the crime itself. However, the reparations would only take place for direct and indirect victims of the crimes that the defendant was charged with. This means that "damage, loss, and injury" must come from the crimes of enlisting and conscripting children under the age of 15 into the armed forces and using them to participate in hostilities.[64] The impact of these principles limits the scope of reparations to exclude victims of sexual and gender-based war crimes. This narrow window imposes an injustice to child soldiers who suffered from crimes that were sexual in nature because it depletes any form of proper repair or amendments.

The reparation principles set by the Trial Chamber in the Lubanga case were subject to an appeal in 2012. Two of the for grounds of the defense's appeal - which included the reparations, sentence, and verdict – were associate with sexual violence crimes.[65] The Defense's argument emphasized that the Trial Chamber had no legitimate basis in awarding reparations for sexual violence in Lubanga because the Trial Chamber rejected Regulation 55; thus, the accused was not charged with any sexual violence crimes.[66] The defense also opposed the 'proximate cause standard' established by the Trial Chamber because it interfered with the right to a fair trial. The victims' legal representatives accepted the Trial Chamber's position that reparations are only to be awarded for the damage caused by crimes in which the accused was convicted.[67] However, they argued that the large pool of victims for these crimes were 'many young girls who suffered sexual violence as a *result* of their recruitment into the militia.'[68] Since the damages of sexual violence were a result of the enlistment and conscription in to the FPLC, the victims' representatives argued that these girls were entitled to reparations. This appeals argument highlights the cascade of consequences set forth by the rejection of Regulation 55 by the Trial Chamber. From the conviction of Lubanga himself to the limited reparations granted to the victims, the exclusion of sexual violence charges significantly impacted many phases of the trial.

In March 2015, the Appeals Chamber made its decision regarding reparations in the *Lubanga* case. It confirmed that reparations shall be granted to victims without any distinctions on the basis of gender, sexual orientation, etc.[69] These gender-sensitive orders detailed the progressive standing of the ICC since the *Rome Statute* does not explicitly prohibit discrimination on this basis. However, the Appeals Chamber did side with the defense in bolstering the argument that the Trial Chamber could not grant reparations for those who suffered from sexual violence because Lubanga was ultimately not held responsible for these crimes.[70] The *Lubanga* case demonstrates that sexual violence and gender concerns must be identified and expressed from the outset, or these concerns would form profound consequences for victims of sexual violence in crimes against humanity.

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[58] Chappell *supra at* 1243.
[59] *Id* at 1221.
[60] Grover *supra* at 13.
[61] *Id* at 14.
[62] *Id* at 15.
[63] *Id* at 17.
[64] "Damage," "loss," and "injury" are the components of reparations.
[65] Grover, *supra at*18.
[66] *Ibid.*
[67] In this case, Lubanga was convicted of the war crimes of 'conscripting', 'enlisting,' and 'using' child soldiers. Therefore, reparations would only be granted to these specific crimes.
[68] Grover, *supra at* 18.
[69] *Id* at 19.
[70] *Id* at 20.

Furthermore, the case led to a positive change which focused on the need for greater protection of children under international law through a straight-18 policy.

V. Conclusion

The *Lubanga* trial was the first to be held before the ICC. With the ultimate decision came questions regarding certain elements of the trial. The debate about whether the conflict between the FPLC and other armed forces were international or domestic are essential in establishing which provision in the Rome Statute would be applicable in this case. Furthermore, the case led to a positive change which focused on the need for greater protection of children under international law through a straight-18 policy. The question of what constitutes as 'active participation' narrows down the scope to which victims were affected by Lubanga's crimes. Regulation 55 allows the Trial Chamber to change how they characterize evidence from a legal point of view. As seen in the *Lubanga* case, this has been a controversial issue. Although Regulation 55 had the ability to include sexual violence and inhuman treatment as an additional charge towards the accused, it was ultimately rejected due to its ability to undermine the defendant's right to a fair trial and its confliction with specific provisions of the *Rome Statute*. The rejection of Regulation 55 and its detrimental impact on the *Lubanga* case influenced various gender-focused groups, such as Women's Initiatives, to advocate for victims of sexual and gender related violence. As the first case brought before the ICC, *Lubanga* acted as a catalyst for continual improvements in prosecutions and investigations to safeguard the future of international justice.

The Fast-track Towards Congressional Involvement in Statutory Interpretation

Adrian Aliu

University of Waterloo

Abstract

This paper discusses the relationship between Congress and the Supreme Court in interpreting statutes. It recommends applying expedited congressional procedures, like those of the Congressional Review Act, to bills that would override statutory decisions of the Supreme Court – discussing and evaluating two differing proposals that seek to do this. The paper then proposes a similar scheme that retains the strengths of its counterparts while addressing their shortcomings. The central feature of the proposal is the "Three Justices Rule", which permits Congress to use fast-track procedures to give effect to opinions of the Supreme Court that interpret federal statutes, so long as the opinion was joined by three Justices. These arrangements permit Congress to conveniently take an interpretive stance on laws already on the books, while limiting their ability to use fast-track procedures to pursue far-reaching legislation under the guise of overriding a Supreme Court decision.

I. INTRODUCTION

The influence of the United States Supreme Court is at its maximum when it is engaged with the interpretation of the Constitution. Because amendments must go through the cumbersome process set out in Article V,[1] the Court's pronouncements on the meaning of constitutional provisions are all but final – subject only to change by the decision of the Justices themselves. Congress' legislative power does not extend to changing the Constitution, and it is not vested with the power to substitute its own interpretive judgement for that of the Court where it has found that the Court has erred.

It is for this reason that the constitutional traditions of the United States are said to establish a regime of judicial supremacy:[2] so long as the Court is acting within the confines of its mandate to speak on the meaning of the Constitution,[3] its decisions cannot be meaningfully and realistically challenged in the political arena. No such regime exists in the realm of statutory interpretation, where in the case of federal legislation, Congress is the ultimate authority on what statutes say –[4] and by extension what they mean. Should the Supreme Court adopt an interpretation of a statute that Congress deems unfavorable, it is squarely within the competence of the legislative branch to amend the provisions at issue in such a way that makes similar interpretations by the Court in the future implausible –[5] effectively reversing the result of the decision.[6] Legislation of this kind, of course, requires agreement between the houses of Congress,[7] as well as between Congress and the President absent widespread agreement on the matter within each chamber.[8] It is for this reason that Congress often fails to act in response to the Supreme Court's jurisprudence,[9] and given the unelected nature of the Court, there are a range of issues that stem from its often unchecked power to give precise meaning to federal statutes adopted by Congress. Particularly concerning is when the Supreme Court deviates from a longstanding interpretation of a statute, or from Congress' intended interpretation at the time of its enactment. Decisions of this nature can pose a threat to consistency and predictability in the law, and often have practical implications that go far beyond what the peoples' representatives intended, sometimes having effects that the Congress explicitly declined to pursue.

II. ACCELERATING LEGISLATIVE OVERRIDES OF THE COURT

When the Supreme Court makes a decision on statutory interpretation, the ball then crosses the net into Congress' court, at which point members can decide whether to take up the matter in the form of a legislative revision.[10] Despite a significant appetite for legislative action in response to Supreme Court decisions, greater priorities, political gridlock and the burden of congressional procedure have all contributed to a decline in legislative overrides of the Court in recent decades.[11] This has diminished congressional oversight of the Court, as well as Congress' preeminent position as first among equals relative to the other branches of government. Though there is little that Congress could do to address political gridlock, which is the result of a more polarized electorate,[12] it is within the authority of each house of Congress to lessen the burdens caused by their own rules so as to ease the passage of override bills and free up more time for other priorities –[13] this is something that Congress has done to expedite the otherwise tedious legislative process in other areas.[14]

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[1] U.S. CONST. art. V.

[2] *See* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 6 (2001).

[3] Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[4] U.S. CONST. art. I, §§ 1, 7.

[5] *See* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425 (1992).

[6] William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 THE YALE LAW JOURNAL 331, 332 n.1 (1991).

[7] U.S. CONST. art. I, §§ 7, cl. 2.

[8] *Id.* Widespread agreement is required within both chambers in order to meet the two-thirds threshold needed to override the President's veto.

[9] Richard L. Hasen, *End of the Dialogue: Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 233-238 (2013).

[10] Congress has historically not shied away from responding to unfavorable Supreme Court interpretations of the law, especially in the realm of Civil Rights. In enacting the Pregnancy Discrimination Act of 1978, Pub. L. 95-555 (codified at 42 U.S.C. §§ 2000e *et seq.*), Congress broadened the applicability of Title VII's sex discrimination protections in response to a Supreme Court interpretation they deemed too narrow, General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The Civil Rights Act of 1991, Pub. L. 102-166 (codified at 42 U.S.C. §§ 1981 *et seq.*) affected twelve Supreme Court decisions, most in the civil rights category, *see* Eskridge, *supra* note 6, at 345.

[11] Hasen, *supra* note 9, at 209, 233-238.

[12] David R. Jones, *Party polarization and legislative gridlock,* 54 POLITICAL RESEARCH QUARTERLY. 125, 137 (2001).

[13] U.S. CONST. art. I, § 5, cl. 2.

[14] Congress has sought the use of expedited procedures to aid legislation in several key areas, including but not limited to: congressional oversight of agency rulemaking, the implementation of trade agreements and the budgetary process, *see infra* notes 19, 53, 56-57, 64-65 and accompanying text for a thorough discussion of these arrangements.

A. Existing Reform Proposals

A 2014 article written by Matthew Christiansen and William Eskridge discusses the application of so-called "fast-track" Congressional procedures to bills that seek to overturn a Supreme Court decision on statutory interpretation.[15] Under their scheme – which I will call the Judicially-Initiated Override proposal – six Justices in a statutory case, whether concurring with the ruling or dissenting from it, could propose a legislative override by "certifying" the issue to the relevant Congressional committee in each house. The committee would then have the choice of acting on the proposal by reporting a bill to the chamber, at which point a fast-track process would be triggered for the passage of the proposal through Congress.[16] As with any other piece of legislation, the bill would become law with the President's signature, or with an override of his veto.[17]

Ganesh Sitaraman wrote a piece in November 2019 that discussed a similar proposal.[18] In short, it proposed the enactment of what he calls a "Congressional Review Act for the Supreme Court", which, being inspired by the Congressional Review Act of 1996 (CRA),[19] would apply similar procedures to legislation proposed in response to judicial decisions. Under Sitaraman's scheme – hereafter referred to as the Congressionally-Initiated Override proposal – when the Supreme Court rules on the interpretation of a statute, Congress would have thirty days to vote on whether to reconsider the decision.[20] If both the House and Senate are in favor of overriding the decision, party leadership in both chambers would appoint a special committee to design a legislative solution for the full body to consider within thirty calendar days.[21] The proposal would then make its way through both chambers under expedited procedures and eventually to the Resolute Desk, where the President would have the opportunity to sign it into law or veto it like in the other proposal.[22]

Both proposals stop short of expanding Congressional power, opting instead merely to provide for expedited procedures that allow Congress to exercise its existing powers more effectively. Such procedures would presumably entail among other things: restrictions on the ability of members to introduce amendments on the House or Senate floor, as well as strict time limits on debate in the Senate, which the CRA imposes in order to prevent a potential filibuster.[23] Both proposed versions of the "Judicial Reversal Act" (JRA), as I will refer to them here, raise notable concerns. This paper will briefly discuss each of them, and suggest a similar proposal seeking to retain the merits of the other proposed schemes, while addressing their shortcomings.

B. The Shortcomings of Congressionally-Initiated Overrides

The principal concern that is raised exclusively by the Congressionally-Initiated Override proposal revolves around the time limits it prescribes, chief among them the requirement that Congress initiate the process of overriding the Court no later than thirty days following its decision.[24] This feature was undoubtedly inspired by the CRA itself, which requires that Congress act to nullify a rule no later than sixty legislative days after they received the rule from the issuing agency,[25] and provides that no rule

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[15] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEXAS LAW REVIEW 1317, 1441 (2014).
[16] *Id.*
[17] U.S. CONST. art. I, § 7, cl. 2.
[18] Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, THE ATLANTIC, Nov. 16, 2019.
[19] The Congressional Review Act requires that administrative agencies submit proposed rules to Congress before they can take effect, 5 U.S.C. § 801(a), and allows Congress to render null and void any rule within 60 legislative days of its submission by adopting a joint resolution of disapproval under fast-track procedures. Among other things, these procedures entail: no more than ten hours of debate in the Senate, evenly divided by those supporting and opposing the resolution (preventing a filibuster), as well as limitations on points of order, amendments and appeals from the decisions of the chair, *Id.* § 802(d). If it becomes law, a joint resolution of disapproval adopted pursuant to the CRA prevents agencies from issuing rules that are "substantially the same" in the future absent express statutory authorization, *Id.* § 801(b)(2), though the extent of this prohibition remains unsettled, *see* Adam Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?,* 63 ADMINISTRATIVE LAW REVIEW 707, 727 (2011). The CRA saw little use until 2017, when it was used by the 115th Congress to strike several "midnight regulations" promulgated towards the end of the Obama administration, *see* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 190 (2018).
[20] Sitaraman, *supra* note 18.
[21] *Id.*
[22] *Id.* It is worth noting that Congress' actions in supervising the executive and judicial branches must abide by the bicameralism and presentment requirements contained in the Constitution, U.S. CONST. art. I, § 7, cl. 2. Any scheme that allows one house of Congress to exercise legislative power without the assent of the other, or allows Congress to bypass the President's veto without two thirds of each house in favor, *Id.,* would be invalid, *INS. V. Chadha*, 462 U.S. 919, 956-9.
[23] 5 U.S.C. § 802(d).
[24] Sitaraman, *supra* note 18.
[25] 5 U.S.C. §§ 802(a), 802(e).

can take effect until this sixty-day clock lapses.[26] These arrangements give Congress ample time to consider the rule and debate the merits of a potential joint resolution of disapproval, without empowering them to subject the coming into force of the rule to indefinite delay. By preventing a situation in which a rule may immediately take effect upon promulgation, only to be nullified by Congress a few weeks later, this scheme ensures stability and predictability in the rulemaking process and in the law as it applies to the public. In this sense, the sixty legislative day time limit that applies to joint resolutions under the CRA is inextricably linked to the requirement that rules not take effect until the expiration of this review period – there are no significant benefits derived from having one without the other, as is recommended as part of the Congressionally-Initiated Override proposal.[27]

Any attempt to include both, on the other hand, which would require Congress to provide for the delayed effect of the Court's case law, would likely be at odds with constitutional traditions. The effects of federal court rulings are all but immediate, and Congress' ability to postpone the applicability of judicial precedent (as they have with agency rules in the CRA) seems limited.[28] Because agencies derive their power to make rules from enabling legislation in the first place, it is within Congress' authority to limit these powers in such a way that postpones the coming into force of a rule. The power and duty of the Supreme Court to "say what the law is",[29] on the other hand, exists and has existed in the absence of Congressional delegation since the Constitution was adopted,[30] so any statutory requirement that has the effect of limiting this power, even a mere requirement that the effects of the Court's decisions be delayed, would likely amount to an encroachment on the Judiciary that violates the spirit of the Constitution, if not its express provisions as well.[31]

Moreover, there is little justification for why it is desirable to limit Congress to performing an override of the Court during such a short period of time – empirical evidence shows that it is not at all uncommon for overrides to occur several years after a case was initially decided, often as a result of changing political attitudes rather than strong initial opposition to the Court's position.[32] Legislative overrides are also not limited to appearing in single-issue bills, and can be included in omnibus bills as well as more comprehensive legislative packages that seek to reform or update the law around a specific policy area.[33] Legislation of this kind is likely to take much longer than a mere thirty calendar days for Congress and its committees to devise.

In light of this, it is puzzling that under the Congressionally-Initiated Override proposal, a quick and easy override of the Supreme Court would only be an option for Congress to pursue in the first thirty days that follow the decision.[34] If the electorate is dissatisfied with a statutory decision of the Supreme Court, perhaps they should have the option of electing a Congress at the next opportunity that favors its reversal. It is equally puzzling that the subsequent Congress should be subject in effect to a higher legislative standard, brought about by more onerous congressional procedures,[35] than the Congress that existed at the time of the decision. If anything, the later Congress has had more time to consider the matter, and by virtue of having been chosen after the Court's ruling, represents an electorate more familiar with its impacts. If expedited congressional procedures like those of the CRA were to be applied to bills that seek to reverse the effect of Supreme Court decisions, I would suggest that Congress should have far more than 30 days to consider the ruling. Although my preference would be for there to be no limit on the review period

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[26] *Id.* § 801(a)(3)(A).

[27] Sitaraman, *supra* note 18.

[28] It is, however, perhaps worth discussing the extent to which such a power would be limited. If Congress is, as I describe earlier, "the ultimate authority on what statutes say – and by extension *what they mean*" (emphasis added), perhaps it is indeed within their power to provide that while the actual court decision from which a novel statutory interpretation has arisen is to apply immediately insofar as it pertains to the parties directly concerned, the novel interpretation itself, as case law, is only to take effect after a specified period of time, during which the Congress would have the opportunity to determine whether or not this interpretation should be extended to other parties as the authoritative rule for construing the statute at issue. The question of whether this would be a valid exercise of legislative power is beyond the scope of this paper.

[29] *Marbury*, 5 U.S. at 177.

[30] U.S. CONST. art. III, §§ 1, 2, cl. 2.

[31] *Id.*

[32] Eskridge, *supra* note 6, at 387-388.

[33] *Id* at 338-339; Christiansen & Eskridge, *supra* note 15, at 1320.

[34] Sitaraman, *supra* note 18.

[35] Most procedural obstacles in Congress merely delay the enactment of legislation, but the requirement of sixty votes to invoke cloture in the Senate has the potential to stop legislation in its tracks if it is only has the support of a simple majority of Senators, thereby establishing a higher legislative standard in effect, *see* Catherine Fisk & Erwin Chemerinsky, *The Filibuster,* 49 STANFORD LAW REVIEW 181, 182 (1997). And indeed, under Sitaraman's proposed scheme, legislative overrides of the Supreme Court that are initiated more than 30 days after the decision would need to meet a higher legislative threshold, requiring 60 Senators in favor as opposed to only 51. These arrangements are inconsistent with the scholarship on legislative overrides, which has found that they are rarely initiated so quickly, *see* Eskridge, *supra* note 6, at 388.

at all, a limitation of no less than three years might be appropriate. In effect, this would give the current Congress as well as its successor more than enough time to consider the ruling and deliberate the merits of its potential reversal.

C. The Shortcomings of Judicially-Initiated Overrides

The primary concern raised specifically by the Judicially-Initiated Override proposal – which requires that a minimum of six Justices of the Supreme Court initiate the override process by certifying the issue to Congress – [36] relates to the more political role it proposes for Supreme Court Justices. At first, these arrangements may seem counterintuitive as they require at least two of the Justices that supported the ruling to favor its reversal. But Christiansen and Eskridge's study identifies several Supreme Court cases on statutory interpretation where the Court's reasoning produces a result that even the Justices know will have adverse real-world impacts.[37]

In *Tennessee Valley Authority v. Hill*,[38] for example, the Court enjoined the operation of a newly constructed dam on the grounds that it could exterminate the endangered snail darter species of fish in violation of the Endangered Species Act of 1973 (ESA), which required federal agencies to ensure that their activities were not harmful to species designated as endangered by the Secretary of the Interior.[39] The construction of the dam had begun before the passage of the Endangered Species Act, and despite its apparent illegality, Congress continued to appropriate funds for its completion after the statute took effect.[40] In the view of many, the result of this case was not in the public interest, and opinions in both the majority and dissent all but invited Congress to intervene – [41] and intervene they did, promptly amending the Endangered Species Act later that year.[42]

It is these types of decisions that the Judicially-Initiated Override is directed towards.[43] Rather than providing a route for the reversal of more controversial decisions, the scheme proposed by Christiansen and Eskridge seeks to allow for swift legislative action in response to decisions that are broadly thought to have negative overall consequences. Based on the opinions the Court issued in *TVA v. Hill,* it seems that enough Justices would have been in favor of an override to initiate the process were the Judicially-Initiated Override proposal in effect at the time.[44]

In defending the Judicially-initiated Override, Christiansen and Eskridge characterize the increased political role of the Justices they recommend as merely formalizing tendencies and practices that already exist.[45] And it is indeed the case that Supreme Court cases where the opinions invite a legislative response are by far the most likely to see scrutiny in Congress.[46] But in an era of intense polarization, where the legitimacy and impartiality of the Supreme Court is increasingly called into question,[47] giving the Justices a formal role in partisan politics is arguably one step too far.

Interestingly, Christiansen and Eskridge seem to imply that their scheme would actually reduce the prevalence of policy arguments in the Court's reasoning by giving the Justices the opportunity to address any policy concerns through the certification process, thereby allowing them to avoid taking controversial policy positions in their formal judicial capacity – referring such matters instead to the political branches who could act accordingly with relative ease.[48] This seems like an accurate argument insofar as the Court's case law and decisions are concerned: surely the Justices would sleep well at night knowing the policy concerns they would have otherwise discussed in their opinion could be addressed through other channels, but the requirement that the Justices explicitly take what amounts to a political position in order to initiate the process of reversal would arguably do more to taint the institutional legitimacy of the Court than even the most candid policy arguments made in an opinion.

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[36] Christiansen & Eskridge, *supra* note 15, at 1441.
[37] *Id*; *see also* Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AMERICAN JOURNAL OF POLITICAL SCIENCE 162 (1999).
[38] Tennessee Valley Authority. v. Hill, 437 U.S. 153 (1978).
[39] 16 U.S.C. §§ 1533, 1536(2).
[40] *TVA v. Hill*, 437 U.S. at 158, 172.
[41] *Id.* at 195, 210 (Powell, J., dissenting).
[42] Endangered Species Act Amendments of 1978, Pub. L. 95-632. This statute did not directly authorize the operation of the dam, but rather provided for the establishment of an Endangered Species Committee to determine which works and undertakings could be exempt from ESA provisions.
[43] Christiansen & Eskridge, *supra* note 15, at 1441.
[44] *TVA v. Hill,* 437 U.S. 153.
[45] Christiansen & Eskridge, *supra* note 15, at 1441.
[46] Christiansen & Eskridge, *supra* note 15, at 1370, 1410-1413; *see also* Michael J. Nelson & Alicia Uribe-Mcguire, *Opportunity and Overrides: The Effect of Institutional Public Support on Congressional Overrides of Supreme Court Decisions*, 70 POLITICAL RESEARCH QUARTERLY 632, 634 (2017).
[47] *See* Hasen, *supra* note 9, at 207, 210, 243-244.
[48] Christiansen & Eskridge, *supra* note 15, at 1324, 1442.

Christiansen and Eskridge as well as others have already found that congressional action is more likely when implored by one of the Justices –[49] efforts to formalize this practice are of little benefit and risk making the Court appear as a mere extension of the political branches.

I might add that the Judicially-Initiated Override proposal is to some extent a solution in search of a problem. Though it seeks to reduce the effects of procedural obstacles that hinder the passage through Congress of legislative overrides, it does so for the types of overrides that are the least plagued by congressional obstruction. Decisions like *TVA v. Hill,*[50] whose impacts are almost unanimously opposed, can be promptly overridden in Congress with little resistance, even under ordinary congressional procedures. It is those more controversial decisions whose overrides are subjected to unnecessary procedural obstruction by their opponents on Capitol Hill – these are the overrides that Congress should be looking to accelerate.

D. Concerns Raised by Both Proposals

A shortcoming of both the Congressionally-Initiated and Judicially-Initiated Override proposals relates to the discretion each of them confers upon Congressional committees (a special committee in each house under the former proposal and the appropriate standing committees in the latter) in drafting the legislation that will ultimately receive a vote on the floor of each house. Because Congress can only overturn a decision of the Supreme Court on statutory interpretation through legislation that has the effect of amending the underlying statute itself,[51] the committee would need to have sufficiently broad jurisdiction to propose amendments to the provisions at issue in the case as they see fit.

This is particularly concerning when one considers that it may empower members of Congress to pursue under fast-track procedures, ambitious legislative reforms under the guise of overturning a Court decision, the actual effects of which may be far more limited than what the breadth of the proposed legislation would suggest. In effect, this would mean that a significant change to any provision of federal law could be enacted without the burden of any significant procedural obstacles, so long as the Supreme Court had recently ruled on its interpretation.[52]

The seemingly obvious remedy to this shortcoming would be to require that the legislation proposed by the special committee be bound by certain restrictions on its scope and subject matter. Perhaps these restrictions could be established by Congress in the initial resolution that establishes the committee under the Congressionally-Initiated Override proposal, or by the Justices upon certification to the standing committees under Christiansen and Eskridge's proposal. The Trade Promotion Authority (TPA), first authorized by the Trade Act of 1974 and later reauthorized multiple times thereafter,[53] gives the President the unilateral authority to negotiate a trade agreement, subject to the consent and approval of Congress.[54] In authorizing the TPA over the years, Congress has defined negotiating objectives that limit the scope of what trade agreements brokered under the authority may ultimately contain,[55] thereby establishing a clear mandate for the administration to fulfill. Several features of the TPA help to enforce this mandate – [56] but none are more effective than the requirement that Congress ultimately approve of the

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[49] *Id.* at 1370, 1410-1413; Hausseger & Baum, *supra* note 37, at 166-167.

[50] *TVA v. Hill,* 437 U.S. 153.

[51] Solimine & Walker, *supra* note 5, at 425; Eskridge, *supra* note 6, at 332 n.1.

[52] It is important to note that while the Judicially-Initiated Override proposal does not incorporate formal time limits for congressional action as does the Congressionally-Initiated Override proposal, the requirement that six Justices in a case participate in the initiation of its reversal effectively bars Congress from enacting an override after several years have passed and the makeup of the Court has substantially changed. Depending on how many new Justices have been appointed in the interim, an override of a ruling ten years or so after it was decided may or may not be possible, as no less than six of the nine Justices would have had to have been present at the time of the decision to initiate an override. Most overrides would presumably occur relatively promptly under these arrangements – but in the odd case that the Justices are confronted by a hostile Congress unwilling to act on the issue, they might wait for an election or two to intervene, or may attempt to certify the issue to Congress a second time.

[53] The Trade Promotion Authority was first introduced as the "fast track authority" in the Trade Act of 1974, Pub. L. 93-618, and was later reauthorized by the Trade Act of 2002, Pub. L. 107-210 after having expired in 1994 – being once again renewed by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. 114-26.

[54] 19 U.S.C. § 2191.

[55] Pub. L. 114-26 § 2.

[56] Pursuant to the most recent authorization of the TPA, the administration is bound to abide by certain notification and consultation requirements, *Id.* at § 4, and Congress has the option of denying expedited procedures for the trade agreement's implementing legislation if it finds that the administration did not adequately consult with Congress or advance the negotiating objectives, U.S. Congressional Research Service, *Trade Promotion Authority (TPA),* 29 CRS Reports IF10038 (2020); *see also* Woong Lee & Yeo Joon Yoon, *The Role of Trade Negotiating Objectives in TPA-2015 Voting*, 48 GLOBAL ECONOMIC REVIEW 161 (2019); and U.S. Congressional Research Service, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy,* CRS Reports RL33743 (2013).

agreement.

Like votes under the CRA, Congress' final approval or disapproval of a trade agreement negotiated by the President is expressed by way of an up-or-down vote under expedited procedures in both houses, which have the effect of restricting amendments introduced on the floor and preventing a filibuster.[57] Since a vote against the agreement by Congress would require the administration to go back to the diplomatic drawing board, the President would be less than wise to risk derailing the entire initiative by including too many terms that go against Congress' wishes. Similarly, it would be ill-advised for Congress to vote against a complex and otherwise beneficial trade agreement because of a few questionable features. These arrangements ensure that the country can benefit from the efficiency of unilateral Presidential negotiation, while also protecting the interests of Congress – and because Congress has the opportunity to express their wishes to the President in initially granting him the authority to negotiate the agreement, there is a high probability that the President and Congress will be on the same page by the time the agreement receives a floor vote.

If similar restrictions were imposed on the committees responsible for drafting the text of a legislative override, their proposals would likely not step too far out of line, since this would risk thwarting the entire effort to overturn the Court's decision. The Congressionally-Initiated Override proposal is particularly compatible with these arrangements: Congress would have the chance to express its wishes to the special committee in defining the restrictions,[58] and the chance to vote against the committee's proposal should they deem it more repugnant than the Supreme Court decision itself. Moreover, because of the strict deadlines recommended as part of this proposal,[59] a vote against the special committee's proposal by either house of Congress would virtually spell the end of the effort to overturn the Court's decision, at least under fast-track procedures. This would work to make certain that the committee's proposal is narrowly tailored to addressing what Congress identified as the principal evil of the decision so as to ensure a broader consensus in support of the measure, as opposed to a sweeping package of legislative reforms that may end up being barely approved, or worse, rejected by Congress.

Even with provisions that ensure a clear and enforceable mandate for the congressional committees working to draft override legislation, both proposals are still prone to allowing expedited congressional procedures to be used to pass more expansive legislative reforms. The requirements contemplated in above bind the committees charged with drafting the legislative proposal, but do nothing to bind Congress itself. Under these arrangements, a narrow majority in both houses of Congress could potentially pursue significant legislative revisions without doing the due diligence that ordinary congressional procedure requires, and that the people of the United States have come to expect from the legislative branch when it pursues substantive changes to the law, as opposed to merely interpretive ones.

A seemingly obvious remedy would be to limit the committee's proposals, and thus the applicability of expedited procedures, to bills that amend the statutory provision central to the decision Congress seeks to override – which could be determined based on how many times it is mentioned or cited in the majority opinion. But this is of little help: in many statutory interpretation cases, the Court does not deal with a single provision, but rather with very specific portions of a provision. An example that illustrates this is *Bostock v. Clayton County*,[60] in which the Court was engaged in the interpretation of a provision of the Civil Rights Act dealing with discrimination in the workplace. Although the provision itself contained numerous prohibited grounds of discrimination, [61] the issue at the center of the case was whether the provision's specific restrictions on sex-based discrimination could be thought to encompass protections for gay, lesbian and transgender individuals.[62] A narrow override of the Supreme Court's holding – that these protections did in fact extend to discrimination on the basis of sexual orientation – would entail an amendment to the provision at issue in such a way that has implications only for sex- and sexual orientation- based discrimination. But under the scheme I discuss above, in which expedited procedures would apply to any bill amending only the

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[57] 19 U.S.C. §§ 2191(f), (g). It may be worth mentioning that while the rules providing for expedited congressional consideration of trade agreements are contained in the Trade Act itself, the Constitutional prerogative of each House of Congress to determine the rules of its proceedings, U.S. Const. art. I, § 5, cl. 2, is retained, 19 U.S.C. §§ 2191(a), as is the case with the CRA, 5 U.S.C. § 802(g); *see* Natalie R. Minter, *Fast Track Procedures: Do They Infringe Upon Congressional Constitutional Rights*, 1 SYRACUSE J. LEGIS. & POL'Y 107 (1995).

[58] Sitaraman, *supra* note 18.

[59] *Id.*

[60] Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020).

[61] Under 42 U. S. C. §2000e–2(a)(1), it is unlawful for an employer:
"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*…" (emphasis added).

[62] In *Bostock*, 140 S. Ct. 1731, the Court was not necessarily engaging in the interpretation of 42 U. S. C. §2000e–2(a)(1) in its entirety, but was instead trying to discern the precise meaning of "discriminate … because of … sex" as it appears in that provision.

central provision at issue in the case, Congress could, in response to the Court's decision in *Bostock*, pursue a far-reaching amendment to this provision that expands Civil Rights Act protections beyond anything the Court even contemplated.[63] Conversely, some cases may revolve around several separate provisions that contain similar language. In those cases, limiting Congress to pursuing changes only to the most prominent or controversial provision may prevent them from reversing the decision in its entirety, and would tie the hands of the legislative branch in such a way that arguably defeats the purpose of legislative overrides altogether.

The next logical step is perhaps to require a neutral third party to verify the contents of the legislative proposal, ensuring that it does not extend beyond the scope of the Supreme Court's ruling. The Budget Reconciliation process, which like the CRA, permits simple-majority passage by the Senate of bills that relate to spending, revenue, and the debt ceiling,[64] customarily requires the Senate Parliamentarian to rule whenever a provision's relevance to the budget is called into question,[65] ensuring that Reconciliation is not used to pursue more substantive and permanent changes to the law. If these arrangements were applied to the JRA, the Parliamentarian in either house of Congress, or perhaps another officer of the legislative branch, could be tasked with determining whether the contents of a legislative proposal qualify for fast-track procedures under the JRA.

There are a few criteria by which the Parliamentarian may be bound in making their decision: the JRA could require them to determine whether the proposed legislation extends beyond the central issues of the Court's decision, or it could establish a narrower criterion, such as for example, a limitation on legislative proposals to those which have the effect of restoring the law to its originally-understood meaning. The latter approach would ensure that the JRA is not used to broaden or change the meaning of a statute in opposition to a Court that upheld its original meaning, and would limit the applicability of the JRA to cases in which the effect of the Court's decision was to change the law.

This seems to make intuitive sense: it should arguably be more difficult for Congress to use fast-track procedures to update the law in the face of a resistant Supreme Court than to restore the law to its original meaning and effect. Nonetheless, conferring such substantial discretion in making a subjective determination on the Parliamentarian or another congressional officer is at least somewhat troubling. In the case of Budget Reconciliation, the Senate Parliamentarian is engaged primarily in ruling on more objective matters, such as whether a provision produces a change in outlays or revenues.[66] The question of whether or not a committee's legislative override proposal extends beyond the scope of the Court's ruling, or of whether it would have the effect of restoring the meaning of the law as understood before the decision, are both far too subjective to be decided by one person or a small group; especially in the latter case, where the interpretation of a statute presumably made its way up to the Supreme Court precisely *because* its original meaning was disputed or ambiguous.

III. PROPOSED SOLUTION AND DISCUSSION

In light of my discussion of the other two proposals, I have attempted to devise a scheme for expediting the reversal by Congress of Supreme Court decisions interpreting statutes. In doing so, I attempted to retain the merits of both the Congressionally-Initiated and Judicially-Initiated Override proposals, while addressing each of their shortcomings. This part will explain the proposal and discuss its advantages and disadvantages relative to its counterparts, while also evaluating its anticipated impacts on the Supreme Court and the legislative process.

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[63] If the JRA limited Congress to amending just 42 U.S.C. § 2000e–2(a) due to its importance in *Bostock,* 140 S. Ct. 1731, Congress would have the option of greatly expanding or reducing Civil Rights Act protections under fast-track procedures by adding or striking prohibited grounds of discrimination. This would not be the case if sex-based discrimination in employment were separately addressed in its own provision, something that a quick survey of the Civil Rights Act reveals is a rare occurrence (*see, e.g.*, 42 U.S.C. § 2000a(a); 42 U.S.C. § 2000d for individual provisions that forbid discrimination on several grounds).

[64] Reconciliation was established by the Budget Act of 1974, Pub. L. 93-344 (codified at 2 U.S.C. §§ 601-688) and provides for time-limited debate in the Senate (a total of 20 hours) to prevent a filibuster, 2 U.S.C. § 641(e)(2).

[65] Any provisions deemed extraneous to the Reconciliation bill may be removed according to the "Byrd Rule", which with a few exceptions, defines as extraneous any provision that, "does not produce a change in outlays or revenues, including changes in outlays and revenues brought about by changes in the terms and conditions under which outlays are made or revenues are required to be collected", 2 U.S.C. § 644(b)(1)(A). An extraneous provision may be deleted from the bill if a point of order raised by any Senator is sustained by the Presiding Officer (who almost always rules according to the advice of the Senate Parliamentarian) and not waived by a three-fifths majority vote of the Senate on appeal, *Id.* at § 644(e); *see* Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget Train Wreck*, 35 HARV. J. ON LEGIS. 589, 597-598 (1998).

[66] 2 U.S.C. § 644(b)(1).

A. The Three Justices Rule – Passive Judicial Involvement in Initiating Overrides

The central feature of my proposal is what I call the "Three Justices Rule". Put simply, the rule would allow Congress, by way of a joint resolution, to give effect to *any* opinion (majority, dissenting, concurring) of the Supreme Court in a statutory case, so long as it was joined by three or more Justices.[67] Under my proposed JRA, all such joint resolutions would be subject to fast-track procedures like those of the CRA, and would not necessarily need to originate from or be referred to any Congressional committee. Moreover, there are no concerns pertaining to who is involved in drafting the override legislation, as my proposed JRA, like the CRA, [68] would strictly regulate the text of the joint resolution.[69]

Like the other proposals, joint resolutions adopted by Congress pursuant to my proposed JRA would, strictly speaking, have the effect of amending the statute that underlies the Court's decisions, but would be limited to doing so in such a way that explicitly directs future courts to interpret the statute or provisions at issue in accordance with the opinion the resolution identifies.[70] Thus, in practical terms, a joint resolution adopted under my proposed JRA would change what the law means without necessarily changing what the law says. Since this proposal allows for Congress to give effect to a concurring opinion, it would not necessarily require that a legislative override amount to a total reversal or rebuke of the Court. If Congress agrees with the outcome of a decision, but for whatever reason prefers the reasoning contained in a concurring opinion, they would be able to act to give effect to that opinion, with fewer procedural hurdles than those that apply with respect to ordinary legislation.

Though in a formal sense, Congress would be changing the law whenever it acts pursuant to my proposed JRA, the narrow applicability of the scheme is such that in effect, Congress is doing nothing more than taking an interpretive position on laws already on the books. In doing so, it is logical that Congress should be limited to taking positions plausible enough to have been endorsed by three of the nation's nine foremost jurists, and it also makes sense that Congress merely taking a stance on the interpretation of a statute should be subject to a lower legislative standard than a direct amendment to the statute's express terms. A scheme of such limited applicability is also more likely than others to be adopted by Congress in the first place, and more likely to receive bipartisan support – something vital to its legitimacy and longevity.

Furthermore, these proposed arrangements would also have the effect of creating a distinction between those cases decided narrowly by a divided court and those decided by unanimous or near-unanimous margins: in the same way that a bill passed by a vote of two thirds in each house of Congress is immune to a Presidential veto,[71] an 8-1 Supreme Court decision would be immune to congressional reversal (though Congress might be able to adopt a concurring opinion in that case), at least under the expedited procedures provided by this version of the JRA. This distinction is justified in my view: Congress' ability to speak on legal questions should generally be limited to those disputes that are actually the subject of a legitimate controversy.

Note that there is nothing in this proposal that stops the legislative override from being used multiple times in relation to

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[67] Note that if an opinion only partially carried the support of three or more Justices, only those parts of the opinion that three or more Justices had signed onto would be given effect by the joint resolution.

[68] A joint resolution of disapproval adopted pursuant to the CRA must, after the resolving clause, read as follows: "That Congress disapproves the rule submitted by the (agency) relating to (subject), and such rule shall have no force or effect." (the parentheses being appropriately filled in), 5 U.S.C. § 802(a). Though, strictly speaking, the effect of a joint resolution of disapproval under the CRA is to amend the statute that enabled the promulgation of the rule in the first place, the CRA ensures that the joint resolution is narrowly tailored to striking the rule Congress identified, as opposed to permitting more comprehensive legislative proposals that may have a more substantial effect on the agency and its powers, *see* Larkin, *supra* note 19 at 198, 244-246.

[69] This proposed JRA might prescribe that a joint resolution of judicial reversal adopted by Congress must, after the resolving clause, read as follows: "That (statute/provision) shall be construed in accordance with the opinion of (name of Justice) in the case of (name/citation of Supreme Court case), and that this joint resolution shall cease to have effect on (expiration date)." (the parentheses being appropriately filled in). The first set of parentheses gives Congress the option either to limit the applicability of the opinion they have chosen to certain provisions of the statute, or to adopt it as an interpretive authority for the entire act. The latter option would presumably apply the chosen opinion's reasoning to other similarly worded provisions in the statute, unless the opinion is itself written in such a way that would render it inapplicable to any provision other than those central to the case. Because opinions on statutory construction are typically narrowly focused on the provisions at issue in the case, this proposed JRA could function without requiring Congress to identify a statute in this first set of parentheses. Nonetheless, the inclusion of this requirement ensures clear guidance for courts on how to apply the opinion Congress chose to adopt, and prevents the Justices from issuing sweeping interpretive rules that apply to several similarly-worded statutes with the help of Congress. This proposed JRA would also permit the optional inclusion of a sunset clause at the end of the joint resolution of judicial reversal (*see infra* pp. 26-28 for a thorough discussion of this feature).

[70] The operative portions of the opinion that Congress chose to adopt would be appended to the joint resolution, thereby giving them the force of law. This would effectively amount to an interpretive rule adopted by Congress through its legislative power, as opposed to by the executive branch or courts.

[71] U.S. Const. art. I, § 7, cl. 2.

the same case: just as an agency may repeatedly change its interpretive stance regarding a statute over which it has jurisdiction,[72] Congress would be able to change their position on any statute's interpretation as often as they see fit with relative ease.[73] This may seem at first like a recipe for instability and unpredictability in the law, but recall that all actions taken under this version of the JRA still require Congress to fulfill the Constitution's requirements of bicameralism and presentment,[74] meaning that the stars would have to align between the Senate, the House and the President (either as a result of bipartisanship or unified control of the federal government under one party) for the JRA to be used once, let alone multiple times.

B. Anticipated Effect on the Court

In addition to how it would function, it is vital to discuss the effect that this proposed scheme may have on the Court and the Justices themselves. In terms of the role it proposes for the Justices, this proposal sits nicely in between the Congressionally-Initiated Override, which entails no significant role for the Justices,[75] and the Judicially-Initiated Override, which proposes the direct involvement of the Justices in the process of initiating a legislative override.[76] Because the ability of Congress to use the fast-track procedures of the JRA under my proposal depends on how the Justices vote in the case, they are necessarily involved in the process of the legislative override, even if there are no formal changes to their job description. Therefore, whereas the role of the Justices under the Judicially-Initiated Override proposal is one of active involvement, the role of the Justices under my proposal is perhaps best described as one of passive involvement.

Dissenting opinions often have potential to influence the majority of a future Court as the philosophy of the Justices appointed shifts over time.[77] To the extent that statutory cases are concerned, this proposed JRA may have the effect of accelerating the evolution of an opinion or type of legal reasoning from dissent into precedent.[78] However, when the Supreme Court changes its stance on an issue, and takes cues from a dissenting opinion of the past, the Court has the opportunity to choose the extent to which the dissent will guide their reasoning, and may revise or omit certain components of it for various reasons. Under this proposed JRA, Congress' power in relation to the adoption of a dissenting opinion is limited to codifying its express terms in their entirety, or declining to adopt the opinion at all. If Congress wished for example, to adopt certain principles of the dissent and reject others, their hands would be tied as any provision that vests in them this authority would go far beyond merely giving them the option to endorse a pre-existing interpretive stance on a statute already in force, and would make my proposed JRA subject to many of the concerns I discussed earlier in relation to its counterparts (namely, allowing Congress to potentially use the JRA for substantive as opposed to interpretive legislation), without incorporating nearly as much legislative flexibility.

Congress' limited authority to revise the opinions they adopt under my proposal is particularly concerning given how dissents are often written. It has been said that Justices of the Supreme Court consciously adopt a more straightforward, albeit less disciplined style when writing separately on their own behalf than they do when writing for the Court.[79] Accordingly, it may be concerning to some that under this proposal, Congress would almost always be required to enact an entire opinion into law, even some of the more unhinged or ideological parts of it. However, to the extent that these parts of a dissenting opinion do not contain formal legal reasoning, they would not serve as an authoritative guide for judges in future cases concerning the statute.

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[72] In accordance with the Supreme Court's ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts must defer to agency interpretations of ambiguous statutes, so long as their interpretation is plausible. In effect, this has allowed incoming administrations to promptly change the meaning, and thus the effect, of certain statutes by issuing interpretive rules that favor their policy preferences, *see* Jeremy D. Rozansky, *Waiving Chevron*, 85 U. CHI. L. REV. 1927, 1929, 1934 (2018).

[73] In effect, this proposed JRA would permit Congress to repeal a joint resolution of judicial reversal adopted earlier by acting to give effect to the opinion of the Court once again.

[74] U.S. CONST. art. I, § 7, cl. 2.

[75] Sitaraman, *supra* note 18.

[76] Christiansen & Eskridge, *supra* note 15 at 1441.

[77] *See* Vanessa Anne Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 Duke Law Journal 183, 186-187 (2009).

[78] There is the question of whether a resolution adopted under this version of the JRA represents, to the extent that the opinion it refers to contains a specific type of legal reasoning, a wholesale endorsement by Congress (by which courts would be bound or at least persuaded) of that type of reasoning as it applies to other future cases that don't concern the statute or provision the resolution refers to. I would be inclined to say that such a resolution would not signal broader Congressional approval of a type of legal reasoning or philosophy, since the applicability of the joint resolution is expressly limited to a specific law, *see supra* note 69.

[79] Justice Kagan has spoken about adopting a more disciplined style when writing for the Court: famously choosing to use contractions only when writing the majority opinion, *see* Brett Milano, All rise! Harvard Law Today (2017), https://today.law.harvard.edu/feature/rise-hls-conversation-six-justices-u-s-supreme-court/ (last visited Nov 14, 2022); *see also* Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 LAW & SOCIETY REVIEW 1027, 1033, 1046 (2011).

Moreover, it has been observed that the Justices generally adopt a more disciplined and compromising style of writing as the number of other Justices they must retain as part of their coalition increases;[80] this explains the stark contrast between majority opinions on one end of the spectrum and lone dissents on the other. Under my proposed JRA, dissenting Justices, knowing that their opinions may be a mere joint resolution of Congress away from having the force of law, might be inclined by the "Three Justices Rule" to present a united front against the Court's majority, writing a more disciplined and compromising opinion in order to retain the support of a three-justice coalition. Though the support of three Justices is certainly a lower threshold for an opinion to meet than five Justices, the possibility that an opinion may be given the force of law by Congress with relative ease may be likely enough to influence its author to formally present their opinion as a true alternative to that of the Court for Congress to consider. This would involve adopting a style akin to that of a majority opinion, both in order to sufficiently appease a three-justice coalition and to provide clearer and more formal interpretive direction to future courts than is typically found in a dissent, since this alternative opinion could potentially bind judges if adopted by Congress.

It is also worth discussing the possibility that my proposed JRA may adversely influence the character of dissenting and concurring opinions. A concern I raised earlier in relation to the other two proposals was that the committee charged with creating the legislative proposal for Congress to consider may draft an expansive proposal that goes far beyond the scope of the decision the Court issued. Similarly, an extreme faction of the Court might be inclined to draft a far-reaching dissenting or concurring opinion in hopes that Congress adopts it by way of a legislative override pursuant to this proposed JRA. Congress' choices under these arrangements are limited to adopting the concurring or dissenting opinion in its entirety or leaving the decision in place as is. So, if the Court makes a ruling that the dissenting Justices know will be unpopular in Congress, it might be in their political interests to write a dissent giving the statute an interpretation that goes further in the other direction than what Congress may have wished for, but still one that legislators prefer to that of the Court.

Politically inclined Justices in similar circumstances may also see an opportunity to insert some of their policy preferences in their opinion knowing that Congress could easily act to give effect to them. Since only three Justices have to sign onto the opinion for the decision to qualify for a fast-track override under this proposal, there is arguably less of an incentive for the opinion to narrowly address the issue at hand than there is in a typical majority opinion, where the author has to hold together a presumably more diverse coalition of five or more Justices.[81] Ultimately, Congress will have the opportunity to decide whether the dissenting or concurring opinion is worth adopting, and like Presidential negotiations under the Trade Promotion Authority,[82] if Congress feels that the Justices have gone too far in drafting an alternative opinion to that of the Court, they can decline to adopt it.

C. Temporary Legislative Overrides

Another important feature of my proposal that I have yet to discuss is that it would allow a sunset clause to be incorporated in Congress' joint resolution of judicial reversal. If it is in Congress' view that a decision of the Supreme Court could cause imminent harm, diverse congressional factions may agree to seek a reversal of the decision under this version of the JRA to avert those effects, on the condition that more comprehensive legislative reform on the subject will be pursued later – the sunset clause would help to enforce this agreement.

Allow me to explain how this would work in the context of the *Bostock* decision, in which Justice Alito's dissent articulated a number of concerns about the applicability of the decision to woman's sports.[83] Suppose a moderate faction in Congress agreed with the overall holding in *Bostock*,[84] but were uneasy about some the policy concerns Justice Alito identified. Here, the moderate faction could form an agreement with those members of Congress wholly opposed to the decision to override *Bostock* for a limited period,[85] on the condition that they would work together during that period to address the concern they have in common, in this case sex-based discrimination in women's sports.

Congress would then adopt a joint resolution of judicial reversal under the JRA conferring authority upon Justice Alito's opinion, and limit the effect of the resolution to a specified period of time, after which the opinion of the Court in *Bostock* would

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[80] Owens & Wedeking, *supra* note 79 at 1032-1033.
[81] Owens & Wedeking, *supra* note 79 at 1032-1033.
[82] 19 U.S.C. § 2191.
[83] *Bostock*, 140 S. Ct. at 1814-1815 (Alito, J., dissenting).
[84] *Id.* at 1767.
[85] assuming this proposed JRA were in effect at the time and that Justice Kavanaugh had joined Justice Alito's dissenting opinion to satisfy the "Three Justices Rule".

once again take effect.[86] If the faction wholly opposed to the Court's ruling declines to co-operate with the moderate faction on the agreed-upon legislative objectives for the duration of the sunset period, the override will cease to have effect, and the opinion of the Court will once again assume authority – an undesirable outcome for both factions, but much more so for the faction opposed to all of the ruling's effects, not just the one. In the absence of the sunset provision, the faction wholly opposed to the Court's ruling would have every incentive *not* to keep their word, as their policy objectives would be closer to reality under an indefinite override of *Bostock* than they could possibly be under legislation created through negotiations with a faction that supports the decision's overall effects.

The applicability of the optional sunset clause to the example discussed above also addresses what would otherwise be a significant limitation to my proposal relative to the others, which is its apparent inability to accommodate legislative overrides that seek merely to create exceptions to the Supreme Court's holding. Under my proposed JRA, Congress must adopt a dissenting or concurring opinion in its entirety, and it is unable to create exceptions to the Court's holding unless those exceptions are discussed in the alternative opinion itself, in which case the applicability of some legal doctrine to a class of persons or type of case would generally have to be the central question of the case, not merely something incidental to it.

Although it is somewhat frustrating that a minor exception to the Court's decision would require Congress to pursue legislation under ordinary procedures, subjecting it to a higher legislative standard than a total reversal of the Court, this limitation is consistent with the assumption that underlies this proposal, which is that it should be more difficult for Congress to change the express terms of the law than for them to take a position on its interpretation. As long as making an exception to a decision of the Supreme Court requires changing the express terms of a statute, it will and should be subject to ordinary congressional procedure. By allowing Congress to conveniently postpone the effects of a Supreme Court decision and buy time for more concrete legislative reforms, which may include provisions that make exceptions to the Court's holding, the option for Congress to include a sunset clause in their joint resolution of judicial reversal under this version of the JRA appropriately accommodates desires to exempt certain types of parties and cases from the effects of a Supreme Court decision.

Despite this, I briefly considered making it possible for my proposed JRA to more conveniently enable legislative overrides that make exceptions to the Court's holding. The JRA could, for instance, potentially permit joint resolutions that limit the applicability of the concurring or dissenting opinion Congress seeks to give effect to.[87] For instance, in the example discussed above, the JRA could permit Congress to give effect to Justice Alito's opinion, but only in cases that involve athletic competitions.

The primary concern with this is that it confers additional discretion upon those charged with drafting the joint resolution of judicial reversal. A favorable feature of the CRA that I tried to emulate in formulating this proposed JRA was the simplicity of the joint resolution of disapproval that the CRA empowers Congress to adopt.[88] Instead of requiring Congress to directly amend the statute that confers upon the agency the power to make the rule Congress seeks to nullify, the CRA merely requires that Congress identify the rule and vote to nullify it,[89] which keeps the process simple and convenient, while significantly limiting the discretion that Congress has in changing the law under expedited procedures.

Likewise, my proposed JRA does not require Congress to devise a "legislative fix" as do its counterparts, but rather requires them only to identify the case they wish to reverse, the opinion they wish to give effect to, and the date on which the override would expire if they are seeking a temporary reversal.[90] Permitting Congress to otherwise limit the effect of the Court's opinions only adds another switch to the control panel, complicating overrides under my proposed JRA and moving it further from a scheme under which Congress can conveniently vote to reverse a Supreme Court decision towards one that permits them to pursue more expansive changes to the law under fast-track procedures. Moreover, allowing Congress to identify certain types of cases or parties, and place them under the regime of another interpretation of the statute has potential to cause great instability and confusion in the law on a permanent, rather than temporary, basis.

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[86] *Bostock*, 140 S. Ct. 1731.

[87] This would take the form of an additional clause permitted as part of the joint resolution of judicial reversal by the JRA (*see supra* note 79), which would permit Congress to identify certain classes of parties or types of cases that the chosen opinion would exclusively apply/not apply to.

[88] 5 U.S.C. § 802(a); *see supra* note 68.

[89] *Id.*

[90] *See supra* note 69.

D. *Applicability to Lower Courts*

Another limitation that applies to my proposal as well as the other two herein discussed is their apparent inapplicability to decisions of any other court other than the United States Supreme Court. While the Supreme Court has nationwide jurisdiction and the last word on issues of federal law, numerous prominent issues are decided at the appellate level, some of which may never make their way up to the Supreme Court, or take years to do so. This raises concerns because Congress may, for instance, have an interest in resolving a disagreement between the appellate circuits before the matter comes to the Supreme Court. The Congressionally-Initiated Override proposal, though seemingly directed chiefly at the decisions of the Supreme Court,[91] could be conceivably expanded to apply the decisions of inferior courts, as it does not involve a formal role for the Justices, only requiring Congress to vote to amend the statute that underlies the decision. The Judicially-Initiated Override proposal as well as mine, on the other hand, both require the Justices to initiate the override in some form (either by certifying the issue to a congressional committee or writing an alternative opinion with sufficient support) and would thus be inapplicable to lower courts without significant changes.

IV. CONCLUSION

Concerns about a so-called "imperial judiciary" are entirely legitimate to the extent that the Supreme Court's constitutional jurisprudence is concerned. But they fall apart when discussion turns to the Supreme Court's role as interpreter of statutes. The Court's pronouncements on the meaning of statutes are persuasive but far from final, and Congress has nobody but itself to blame for the legislative impasse that has stalled efforts to keep the Court in check – the best defense against legislation from the bench is legislation by the legislature. Congress should reclaim its place as first among equals in the nation's constitutional order, looking to accelerate the passage of legislative overrides would be a good start.

[91] Sitaraman, *supra* note 18.

Safety in a Modern World: The Effects of Drug Policy Within American Cities

Joshua Moore, Holden Duflock, Carolina Permuy, Emma Erdoes, Abby Gardner

Georgetown University

Abstract

The questioning of drugs, and the concern over the supposed detrimental impact on people and communities' safety, is longstanding. This paper evaluates the correlation between drug policy and community safety in the United States by focusing on New York City and Philadelphia. It finds either a positive or neutral relationship between lenient drug policy and a lower violent crime rate. This relationship is not absolute. Yet, it suggests the presence of drugs in American communities is not as damaging as once thought, and the draconian drug laws once widely implemented do not contribute to community safety. With that information, American cities like New York City and Philadelphia must ask themselves whether their constituents need laws that restrict and punish the use and possession of drugs in order to establish safe neighborhoods.

I. INTRODUCTION

When President Nixon declared a "War on Drugs" in June of 1971, he forever changed the face of drug sentencing in the United States. Laws implementing the President's ferocious anti-drug rhetoric began to appear in many major American cities. Against the backdrop of the 1970 New York City heroin epidemic,[1] the harsh Rockefeller Drug Laws set the precedent for the forthcoming decades of legislation and policing in the United States.[2] In 1986, President Reagan's Anti-Drug Abuse Act put in place mandatory minimums for drug offenses, continuing Nixon's promise to crack down on American drug usage.[3] The number of incarcerated individuals skyrocketed.[4] The United States quickly became the world's leader in incarceration, largely due to increased vigilance in sentencing for drug-related crimes.[5] However, the "War on Drugs" was not limited to prisons and newsreels. It reached schools and homes with First Lady Nancy Reagan's "Just Say No" Campaign, launched in 1984, and the 1983 D.A.R.E. program in California. These programs simplified the very real crackdown on drugs in America and diverted attention from the unjust incarceration of many American citizens.[6]

The egregious sentencing of drug-related crimes, as well as the public romanticization of the "War on Drugs," created a stigma around drug usage in the United States. The rehabilitation of drug users shrank as a public priority, and the public became more concerned about putting them behind bars and "cleaning up the streets."[7] This stigma is the reason for the United States' current policy focus on criminalization, instead of rehabilitation. These themes are evident in the words of John Ehrlichman, the Counsel and Assistant to the President for Domestic Affairs under President Richard Nixon.

You want to know what this was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[8]

These drug policies of the Nixon era clearly targeted minority groups–especially black people–and those who "threatened" the safety of America.[9] The common argument assumes drugs should be restricted to ensure the safety of communities. However, this paper argues lenient drug policies either have no net effect or a positive effect on community safety.

Recently, cities like Portland and Baltimore changed the way they address drug crime by employing alternative approaches to sentencing.[10] These alternatives aim to treat drug addiction as a disease and to focus more on the individual than their crime. The aforementioned cities implemented policies such as reducing police presence, establishing courts specific for drug-related crimes, and decriminalizing harmful substances. These policies overwhelmingly reduced both the United States' national averages for sentencing and the rates of recidivism for drug use, without demonstrating any correlating increase in violent crime[11]. This lack of correlation suggests drug use, possession, and distribution should not be considered as variables when tackling the issue of community safety. Despite recent progress, the United States has not completely reduced the harmful effects of severe drug crime sentencing from the problematic view that drug use is a criminal issue rather than a public health issue.

Remnants of the "War on Drugs" continue to harm communities and community safety, even in the twenty-first century.

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[1] Blanche Frank, *An Overview of Heroin Trends in New York City: Past, Present and Future,* 67, The Mount Sinai Journal of Medicine. 341-342 (2020).
[2] Brian Mann, *The Drug Laws That Changed How We Punish,* NPR (2013), https://www.npr.org/2013/02/14/171822608/the-drug.
[3] *Timeline: America's War on Drugs,* NPR (2007). https://www.npr.org/templates/story/story.php?storyId=9252490.
[4] 50,000 individuals were imprisoned for non-violent drug related offenses in 1980. By 1994, the number drastically increased to 400,000 people.
[5] *Growth in Mass Incarceration,* The Sentencing Project (2021) https://www.sentencingproject.org/criminal-justice-facts/.
[6] *Reagan's National Drug Strategy*, University of Michigan (2002) https://policing.umhistorylabs.lsa.umich.edu/s/crackdowndetroit/page/reagan-s-national-drug-strategy.
[7] Lawrence D. Bobo, and Devon Johnson. "A TASTE FOR PUNISHMENT: Black and White Americans' Views on the Death Penalty and the War on Drugs," *Du Bois Review: Social Science Research on Race* 1, no. 1 (2004): 151–80. doi:10.1017/S1742058X04040081.
[8] Dan Baum, *Legalize it All,* HARPER'S MAGAZINE *(2016)* https://harpers.org/archive/2016/04/legalize-it-all/.
[9] Lawrence D. Bobo, and Devon Johnson. "A TASTE FOR PUNISHMENT: Black and White Americans' Views on the Death Penalty and the War on Drugs," *Du Bois Review: Social Science Research on Race* 1, no. 1 (2004): 151–80. doi:10.1017/S1742058X04040081.
[10] Juliana Battaglia, "Baltimore Will No Longer Prosecute Drug Possession, Prostitution and Other Low-Level Offenses," CNN (2021), https://www.cnn.com/2021/03/27/us/baltimore-prosecute-prostitution-drug-possession/index.html.
[11] Saba Rouhani, Catherine Tomko, Noelle P. Weicker, and Susan G. Sherman. *Evaluation of Prosecutorial Policy Reforms Eliminating Criminal Penalties for Drug Possession and Sex Work in Baltimore, Maryland*, IDPC. (2023) https://idpc.net/publications/2021/10/evaluation-of-prosecutorial-policy-reforms-eliminating-criminal-penalties-for-drug-possession-and-sex-work-in-baltimore-maryland.

An aspect of Reagan's "War on Drugs" involved increasing policing on a national level. According to the U.S. Department of Justice, the goals of drug policing are to reduce gang violence associated with drug trafficking, control the street crimes committed by drug users, improve the health and economic and social well-being of drug users, restore the quality of life in urban communities by ending street-level drug dealing, help to prevent children from experimenting with drugs, and lastly to protect the integrity of the criminal justice system.[12] However, these goals have been warped to give police too much power pertaining to community surveillance. "War on Drugs" policing involved two main strategies: the stop and frisk policy and the implementation of Special Weapons and Tactics Teams (SWAT).[13] Because of the decision in *Terry v. Ohio* in 1968 that established a police officer's power to frisk anyone they deem suspicious under the fourth amendment of the U.S. Constitution,[14] the public deemed policies such as New York City's controversial "stop and frisk" acceptable. In 2019, the NYCLU recorded 13,549 stops, in which 66% percent of the people stopped were innocent and 59% of the people stopped were African American.[15] Stop-and-frisk policing has a lasting negative impact on communities today. According to a study conducted by Andrew Bacher-Hicks and Elijah de la Campa, students who live in areas with heavy policing perform poorly in school and moreover suffer in the long run when it comes to receiving a college education or finishing high school.[16] According to the American Civil Liberties Union, 80% of SWAT raids in 2014 were conducted to serve search warrants and most were drug raids. SWAT teams often raid homes after receiving anonymous tips regarding a home and the possession of drugs.[17] In 2006, the CATO Institute published a study summarizing the negative effects of SWAT raids on community safety dating back to the 1980s. The article discusses numerous SWAT cases negatively impacting communities such as the fatal case of Anthony Diotaiuto in 2005. Diotaiuto's death occurred after a SWAT raid where officers received a tip regarding his possession of an ounce of marijuana and within the hour-long raid he was killed in his home.[18] The widespread policing strategies of stop-and-frisk and SWAT teams following the "War on Drugs" led to unnecessary deaths which overall harmed numerous communities in the United States.

We selected the cities of Philadelphia and New York City because their demographics are representative of the United States as a whole, which will make this paper's conclusions applicable to federal policy in addition to state policy. Although Philadelphia deviates from national averages more so than New York City, we believe valuable information can still be gleaned from investigating Philadelphia. The population of the United States made a median household income of $68,703 in 2019 and the official poverty rate was 10.5%. In Philadelphia, the median household income in 2019 was $47,474 and the poverty rate was 24.3%. New York City's median income was slightly above the national average with a household making an average of $69,407 a year and their poverty rate, like Philadelphia's, was above the average rate at 17.9%. In a 2019 study from *Drug and Alcohol Dependence,* it found populations with higher percentages of poverty and adults with less than a high school education were associated with higher prescription overdose rates.[19] Though the poverty rates of both cities deviate from national averages, this study provides appropriate conclusions that can be extended to the general population of the United States. Addressing the most extreme examples of drug-related crime in America will ensure solutions which account for all possible cases of drug use, sentencing, and rehabilitation. Furthermore, a thorough analysis of these cities' drug crime rates will yield a comprehensive solution to the issue of mass drug incarceration in America. This study concludes drug policy reform measures such as drug courts, diversion, and more lenient sentencing are significantly effective in decreasing rates of recidivism and reducing drug crime in American cities.

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[12] Mark Moore & Mark A.R. Kleinman, *The Police and Drugs,* U.S. Dep't. of Just. 1-14 (1989) https://www.ojp.gov/pdffiles1/nij/117447.pdf.

[13] Hannah LF Cooper, *War on Drugs Policing and Police Brutality,* 50, Substance Use & Misuse. 1188-1194 (2015).

[14] *Terry v. Ohio*, 392 U.S. 1 (1968)

[15] *Stop and Frisk Data.* NYCLU (2018) https://www.nyclu.org/en/stop-and-frisk-data.

[16] Andrew Bacher-Hicks & Elijah de la Campa, *Social Costs of Proactive Policing: The Impact of NYC's Stop and Frisk Program on Educational Attainment, Harvard Univ, 1-60 (*2020*).*

[17] Kevin Sack, "Door-Busting Drug Raids Leave a Trail of Blood," The New York Times (2017) https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html.

[18] Bradley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO INS. 10 (2006). https://www.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf

[19] Veronica A. Pear, William r. Ponicki, Andrew Gaidus, Katherine M. Keyes, Silvia S. Martins, David S. Fink, Ariadne Rivera-Aguirre, Paul J. Gruenewald, Magdalena Cerdá, *Urban-rural variation in the socioeconomic determinants of opiod overdose,* 195, 66-73 (2018). https://doi.org/10.1016/j.drugalcdep.2018.11.024

II. NEW YORK CITY AND PHILADELPHILADELPHIA'S DRUG POLICY HISTORY

For our study, we examined New York City and Philadelphia's recent legal history surrounding drug sentencing and explored how the austerity of certain drug policies impacted incarceration rates, recidivism, and the seven major felony rates. In New York, we began by examining the Drug Law Reform Act of 2004, which lessened the severity of the draconian measures imposed in the Rockefeller Drug Laws. Under the Drug Law Reform Act, sentencing minimums were reduced from fifteen to eight years for conviction on the most serious (A-I felony) drug charges.[20] Furthermore, the weight thresholds for the two most serious possession offenses (A-I and A-II) were doubled—thus perpetrators must possess double the previous amount of an illegal substance in order to be charged with the longest sentencing period. Finally, those serving life sentences were permitted to apply for resentencing.[21] Historical crime data shows that the lessening in the severity of drug sentencing in New York correlated with the continued decrease in felony crime. Due to the implementation of the act in 2004, from 2003 to 2005 the total number of major felony offenses dropped from 147,069 to 135,475.[22] The Patterson Reforms of 2009 went further,[23] removing mandatory minimums and enabling incarcerated defendants to retroactively apply for resentencing and even release under the new legislation. Once again, the data shows a continual decrease in crime rates. In 2008, there were 117,956 felony offenses.[24] In 2010, there were 105,115 major felony offenses. In this instance, changes in drug policy had a negligible effect on New York City's crime rates.[25]

Historically, harmful drug policies and policing associated with Philadelphia can be seen in the Philadelphia neighborhood of Kensington. Kensington is often home to over "50 separate open-air drug markets at a time."[26] The history of Kensington clearly exhibits the negative and harsh impacts of these policies on people's livelihoods. In 1998, Operation Sunrise began under the leadership of Police Commissioner John Timoney. This operation included the mass proliferation of roadblocks, floodlights, and an overall increased and militant police presence. However, this operation was shown to produce no statistically significant decrease in violent crime rates.[27] More recent drug legislation in Philadelphia has focused on non-incarceration alternatives to sentencing. In 2018, the Philadelphia Department of Prisons began extending their MAT treatment program to female incarcerated individuals.[28] The MAT treatment program is aimed specifically at combating the recent opioid epidemic. In 2018, Philadelphia announced its support of "Overdose Prevention Sites," known colloquially as OPS, where drug users can use with supervision to prevent overdoses, cases of HIV and Hepatitis C, as well as used and discarded drug paraphernalia in public spaces.[29] The city has two separate non-incarceration programs depending on the severity of the crime.[30] Drug users primarily are assigned to the second track, Accelerated Misdemeanor Program 2 (AMP2), which requires a combination of community service and fines.

Strict drug policing in New York dates back to the 1980's in the midst of political uncertainty in New York.[31] Many

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[20] Lisa Lewis, *Reforming Federal Cocaine Sentences: What Congress Can Learn from New York,* Federal Sentencing Reporter. 329–34 (2007).
[21] Id.
[22] Crime Statistics | New York City. (2019, January 14). Nyc.gov. https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/historical-crime-data/seven-major-felony-offenses-2000-2020.pdf.
[23] [4] The Patterson Reforms are technically known as the Public Authorities Reform Bill, but were signed into law by Governor David A. Patterson.
[24] Crime Statistics | New York City. (2019, January 14). Nyc.gov. https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/historical-crime-data/seven-major-felony-offenses-2000-2020.pdf.
[25] Id.
[26] Eduardo Esquivel, VWHY PHILLY KEEPS A BILLION-DOLLAR OPEN AIR DRUG MARKET CONTAINED IN KENSINGTON (August 26, 2021) https://whyy.org/articles/why-the-philly-region-has-chosen-to-keep-a-billion-dollar-open-air-drug-market-contained-within-the-borders-of-my-neighborhood/.
[27] Operation Safe Streets (Philadelphia, Pa.) | Youth.gov. (n.d.). Youth.gov. Retrieved February 6, 2022, from https://youth.gov/content/operation-safe-streets-philadelphia-pa.
[28] The City's response | Department of Public Health. (2018, April 3). City of Philadelphia. https://www.phila.gov/programs/combating-the-opioid-epidemic/the-citys-response/.
[29] Alexis M. Roth, Alex H. Kral, Allison Mitchell, Rohit Mukherjee, Peter Davidson & Stephen E. Lankenau, *Overdose Prevention Site Acceptability among Residents and Businesses Surrounding a Proposed Site in Philadelphia, USA,* JOURNAL OF URBAN HEALTH. 96, 341-352 (2019). https://doi.org/10.1007/s11524-019-00364-2
[30] Drug Possession Charges in Philadelphia | PA Drug Defense. (2022). Philadelphia Criminal Lawyer; Criminal Law Practice of Price Benowitz. https://criminallawpennsylvania.com/philadelphia-drug-lawyer/possession/charges/
[31] NYC in Chaos | American Experience | PBS. (n.d.). Www.pbs.org; PBS.

scholars credit New York's turn to harsher street level policing to the instability of the city partnered with the federal "War on Drugs." In 1969, Mayor John Lindsey enacted harsher street policing in response to high drug rates and the belief that drug use was increasing property crime. The harsh policing measures led to the number of drug arrests in the city rising from 7, 199 in 1967 to 26, 378 in 1970.[32] However, Lindsey and the NYPD's efforts proved to waste the city's economic resources, as the number of property crimes did not decrease as drug arrests increased. When New York's fiscal crisis hit in 1975, the NYPD had to dismiss around 4,000 officers and engaged in a five-year hiring freeze for potential officers.[33] The city experienced a period where their law enforcement acted against the Rockefeller laws and non-enforcement was the main policing strategy. In 1976, Mayor Abraham Beame, Manhattan Borough President Percy Sutton, and Congressman Charles Rangel began the city's trend of strict street level policing with "Operation Drugs." "Operation Drugs" targeted the Harlem community by sending in street level officials that made an estimated 5,000 narcotics arrests in a four month period.[34] During his mayoral term from 2002-2013, Micheal Bloomberg allowed for the NYPD to enact the stop-and-frisk program.[35] While crime decreased under Bloomberg's term, there was no correspondence between the increase in policing leading to less crime. From 2011 to 2018, the number of police stops on the street decreased by 98% and felonies also decreased by 12%.[36] One of the reasons for the increase of the stop-and-frisk cases occurred because of "Operation Impact" which was enacted in 2003 by Police Commissioner Raymond W. Kelly as part of the city's push to reduce crime. Its goal was to "to reduce crime throughout the city by deploying more officers to high-crime hot spots, known as 'Impact Zones.'" The NYPD would identify these zones and then focus its efforts on "gangs and narcotics, high-crime public housing developments and ongoing crime trends."[37] The city cites this operation as the reason crime rates dropped in the early 20th century. Criminologists at the University of Pennsylvania concluded that the operation had the greatest impact on reducing burglary and robbery reports, yet had a minimal impact on other crime reduction, such as drug related felonies, due to the fact that many police stops were not of probable cause.[38]

Similar to "Operation Impact," Philadelphia introduced harsher policing for "high drug activity locations" in 2002, nicknamed "Operation Safe Streets."[39] The city of Philadelphia found "no significant impacts on citywide weekly counts for drug crimes, homicides, or all violent crimes." The data collected about this policy shows a reduction of drug-related crime in the "impact area"—the locations immediately around the site of the crime. However, there was no significant reduction of crime larger than one tenth of a mile from the initial site of the crime.[40] More recently Philadelphia transitioned their policing approach away from sentencing, and toward rehabilitation. In 2017, the city of Philadelphia began equipping their police officers with Naloxone to help prevent drug overdoses. Naloxone is an opioid overdose antidote. The city also offers Naloxone training for civilians. Furthermore, Philadelphia launched Police-Assisted Diversion (PAD), in 2018.[41] PAD is a partnership program between Philadelphia police, "service providers, and community members" in the Philadelphia area.[42] PAD is another way, in addition to the Accelerated Misdemeanor Program, to direct those with substance abuse disorders to the community services they need, instead of receiving jail time.

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https://www.pbs.org/wgbh/americanexperience/features/blackout-gallery/

[32] Mason B. Williams, *How the Rockefeller Laws Hit the Streets: Drug Policing and the Politics of State Competence in New York City, 1973–1989*, 4 MODERN AMERICAN HISTORY , 67–90 (2021) https://doi.org/10.1017/mah.2020.23

[33] Id.

[34] Id.

[35] Emily Badger, *The Lasting Effects of Stop-and-Frisk in Bloomberg's New York,* NEW YORK TIMES, March 20, 2020), https://www.nytimes.com/2020/03/02/upshot/stop-and-frisk-bloomberg.html

[36] Dan Keating & Harry Stevens, *Bloomber said 'stop and frisk' decreased crime. Data suggests it wasn't a major factor in cutting felonies.,* THE WASHINGTON POST (2020). https://www.washingtonpost.com/nation/2020/02/27/bloomberg-said-stop-frisk-decreased-crime-data-suggests-it-wasnt-major-factor-cutting-felonies/.

[37] Operation Impact. (2008, July). Nyc.gov; New York Global Partners. http://www.nyc.gov/html/unccp/gprb/downloads/pdf/NYC_Safety%20and%20Security_Operation%20Impact.pdf

[38] John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City* PLOS ONE 11 (2016). https://doi.org/10.1371/journal.pone.0157223

[39] Lawton, Brian A., Ralph B. Taylor, and Anthony J. Luongo. "Police Officers on Drug Corners in Philadelphia, Drug Crime, and Violent Crime: Intended, Diffusion, and Displacement Impacts." *Justice Quarterly* 22, no. 4 (Dec 01, 2005): 427-451. doi:10.1080/07418820500364619. https://www.tandfonline.com/doi/abs/10.1080/07418820500364619.

[40] City Announces Police-Assisted Diversion (PAD) to Fight Opioid Epidemic | Managing Director's Office. (2018, March 16). City of Philadelphia; Managing Director's Office, Office of Criminal Justice, Office of the Mayor. https://www.phila.gov/2018-03-16-city-announces-police-assisted-diversion-pad-to-fight-opioid-epidemic/

[41] Id.

[42] Id.

The five largest ethnic groups of Philadelphia, New York, and the U.S. are Black or African American, White (Non-Hispanic), Other (Hispanic), Asian, and White (Hispanic).[43] Researching the effects of drug sentencing in cities that contain populations with a similar socioeconomic distribution to the overall population of the United States gives insight into how national legislation could affect the prison system. In examining the incarceration rates relative to drug crime rates, this paper is mindful of the racial inequity involved in criminalization of drugs. Consequently, this paper compares and contrasts the respective population demographics of each city and the country at large. The cities of New York and Philadelphia differ quite drastically in their racial makeup. While both New York and Philadelphia have a White population that composes around 40% of their respective populations, the portion of Black habitants only makes up a fifth of New York's population which contrasts significantly with Philadelphia's Black population that makes up more than 40% of its population.[44] Although the percentage of Black habitants of Philadelphia is double that of New York, the percentage of Asians in New York City is double that of Philadelphia. When looking at data surrounding arrests made for marijuana possession in New York City, it is determined that 93% of those arrests were people of color despite the fact that drug use does not differ immensely across races, and despite the fact that New York City is 40% White.[45] Despite decriminalization in Philadelphia, Black residents are five times more likely to be arrested for marijuana than any other race even though the population is evenly composed of Black residents and White residents. The combined demographics of the cities can be used as microcosms for the U.S. population, but New York resembles the overall country's population far more closely than that of Philadelphia which was kept in mind when observing the data.

III. ANALYSIS

With these drug policies in mind, the main question is whether they are effective at making communities safer. A common argument against softening drug sentencing and policies is that crime rates will increase as a result of having drug-addicted, "dangerous" individuals on the streets. Oregon's Measure 110 tests this thesis by making the "non-commercial possession of a controlled substance no more than a Class E violation (max fine of $100 fine) and establishing a drug addiction treatment and recovery program funded in part by the state's marijuana tax revenue and state prison savings."[46] Measure 110 came into effect on February 1, 2021. In order to assess the effects of the Measure, and thus drug use and availability, on community safety, we chose to evaluate violent crime data in Portland from February-November in 2019 and 2021 in order to avoid the additional variable of Covid-19. Additionally, we chose the range of February to November because the database's most current information only extends to November of 2021. Both spans of time exhibit similar rates of violent crime with 7, 724 assaults occurring from February to November of 2019 and 7, 997 occurring within the specified range in 2021.[47] This suggests more lenient drug-related policies do not have a significant impact on crime due to the insignificant difference in violent crime when comparing the two time periods. This conclusion creates an imperative to proliferate lenient drug policies across the United States because the reasoning of cities like New York City and Philadelphia to punish their constituents for drug use and drug-related activities does not align with reality. Therefore, these laws are unjust and need to be reevaluated.

The evidence provided from Oregon is not enough to conclude that lenient drug policies either increase or do not affect the safety of neighborhoods. Oregon is not alone in its efforts to explore more liberal drug policies.. In New York City alone, over 400,000 misdemeanor arrests are processed annually, with 10% of cases ending in convictions.[48] This represents a decrease

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[43] Eric Jensen, Nicholas Jones, Megan Rabe, Beverly Pratt, Lauren Medina, Kimberly Orozco and Lindsay Spell. "The Chance that Two People Chosen at Random are of Different Race Or Ethnicity Groups has Increased since 2010." https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html.

[44] "U. S. Census Bureau Quickfacts: Philadelphia City, Pennsylvania; Houston City, Texas; Los Angeles City, California; New York City, New York." https://www.census.gov/quickfacts/fact/table/philadelphiacitypennsylvania,houstoncitytexas,losangelescitycalifornia,newyorkcitynewyork/HSD410221.

[45] "U. S. Census Bureau Quickfacts: Philadelphia City, Pennsylvania; Houston City, Texas; Los Angeles City, California; New York City, New York." https://www.census.gov/quickfacts/fact/table/philadelphiacitypennsylvania,houstoncitytexas,losangelescitycalifornia,newyorkcitynewyork/HSD410221.

[46] BallotPedia. (2020). Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020). https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_(2020)

[47] Crime Statistics | The City of Portland, Oregon. (2016). Portlandoregon.gov. https://www.portlandoregon.gov/police/71978

[48] New York State, Division of Criminal Justice Services, Adult Arrests 18 and Older: 2010–2019, 2020, https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Allcounties.pdf;

of almost 50% since 2015. One of the most significant factors contributing to this decline is the city-wide implementation of pre-trial diversion programs such as Project Reset.[49] At one year after the initial arrest, Project Reset participants were much less likely than comparable defendants to be convicted on a new arrest (2% vs. 8%).[31] Participants in the program also spent substantially more time without forming a new conviction (272 days vs. 197 days).[31] With a 98% completion rate, and data indicating successes in re-arrest rates and time spent without a new conviction, the program provides hopeful evidence for pre-trial diversion.[50] Pre-trial diversion is an alternative pathway to traditional prosecution through trial where arrested individuals enter into a separate program administered by the U.S. Probation Service. When executed on a large scale and combined with restorative justice programming, it can be an effective tool in decreasing both conviction and recidivism rates, especially for juveniles and young adults.

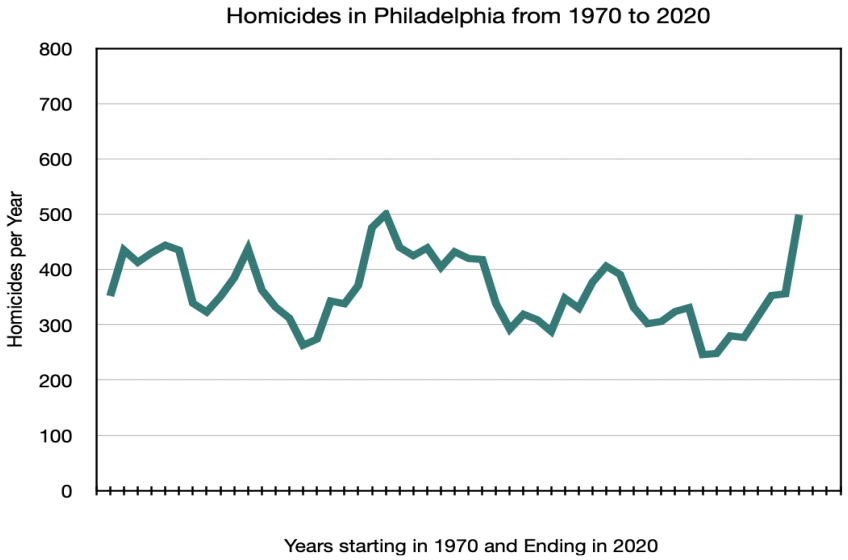

Figure 1. This graph demonstrates the decrease in homicide rates over the course of five decades that coincides with the implementation of rehabilitative efforts.[51]

Prior to the aforementioned diversion efforts of New York City in the early 2000s, Philadelphia's passage of Act 193 of 1990 and the Intermediate Punishment Act, a derivative of State Intermediate Punishment (SIP), was an early example of implementing postconviction alternatives to typical incarceration and sentencing for nonviolent crimes. [52] This includes methods such as intensive supervision probation, financial penalties, house arrest, intermittent confinement, shock probation and incarceration, community service, electronic monitoring, and alcohol and drug abuse treatment. As shown by the data above, homicide rates in Philadelphia decreased with greater emphasis on rehabilitation efforts. The nationwide spike in crime in 2020 due to the COVID-19 pandemic justifies the outlier on the graph occurring in 2020. 53 This provides yet another example of how reducing rates of incarceration for nonviolent offenders is beneficial for individuals and communities due to the effective distinction of drug use being seen as a public health issue as opposed to criminal.

If the data collected is compared before and after drug policy reform attempts, the introduction of stricter drug policies does not lead to a decrease in violent crime and safer neighborhoods. More liberal drug regulations are not always associated with

[49] Kimberly Dalve, and Becca Cadoff. *Project Reset: An Evaluation of a Pre-Arraignment Diversion Program in New York City*. Jan. 2019.
[50] *9-22.000 - Pretrial Diversion Program*. (2015). Www.justice.gov. https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program#:~:text=Pretrial%20diversion%20(PTD)%20is%20an
[51] Michael A. Nutter. Philadelphia homicides 1960-2020. Available from https://mikenutterllc.com/news/news-item/philadelphia-homicides-1960-2020.
[52] *Title 42*. (n.d.). The Official Website for the Pennsylvania General Assembly. https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=42&div=0&chpt=98
[53] Michael A. Nutter. Philadelphia homicides 1960-2020. Available from https://mikenutterllc.com/news/news-item/philadelphia-homicides-1960-2020.

dangerous neighborhoods. In reality, the cases discussed in this paper show that less punitive drug policies tend to result in decreased or neutral rates in violent crime rates in these areas. This evidence reveals the reality that drug use is not fundamentally responsible for crime rates while also demonstrating how rehabilitative methods and policies are more helpful than incarceration when it comes to cultivating community safety.

IV. PRESCRIPTION

Compared with other major U.S. cities, Baltimore is distinguished in the realm of humane drug policies. Baltimore provides a great example of the positive impact these policies can have on neighborhood safety and overall community welfare. In response to the Covid-19 pandemic, Baltimore's State Attorney Marilyn Mosby made limiting the spread of Covid-19 her main priority. She established policies in March 2020 that would temporarily halt the prosecution of drug possession, prostitution, trespassing, and other nonviolent charges in order to prevent overcrowding in jails.[37] Additionally, Mosby dismissed and dropped any pending cases, outstanding warrants, or outstanding charges based on drug possession or prostitution.[37] This caused a massive difference in Baltimore's crime rate when comparing March 2021 to March 2020: violent crime dropped by 20%, and property crime by 36%.[54] This is in stark contrast to New York City which saw homicide increase by 45%.[55] When comparing results between these major cities, it is clear that Mosby's decision incorporates the type of leniency and structure needed to ensure safer neighborhoods. As for those who had their charges and warrants dropped or pending cases dismissed, only 5 out of 1431 people were rearrested over the course of eight months.[34] This dissuades arguments that Baltimore is endangering their communities by letting "dangerous" people back on the streets.

Due to these positive effects, Mosby announced in March of 2021 that she decided to make these changes in prosecution permanent.[37] These changes have completely changed the dynamic between the police and residents: from 2020 to 2021, drug possession charges dropped by 80%.[37] Baltimore is also making efforts to make their citizens feel safer with their partnership with Baltimore Crisis Response, Inc. 9-1-1 calls that concern substance abuse, mental health issues, crisis, or threats of suicide will be directed to the Baltimore Crisis Response, Inc. instead of the Baltimore Police Department.[39] This will allow the police to focus on issues more pertinent to their role like violent crimes, while simultaneously providing residents with professionals who are trained to handle situations of behavioral crisis. From June to October, 438 calls were transferred to mental health experts.[56] Mental health experts were able to successfully take care of 93 of these calls without the aid of the Baltimore Police and Fire Departments.[36] Although the program is not in full force, these measures have brought significant change where approximately 21% of 9-1-1 calls related to substance abuse, mental health issues, crisis, or threats of suicide were dealt with by mental health professionals and registered nurses. This provides a new culture where residents do not have to be afraid of arrest when calling 9-1-1. This shift in culture allows Baltimore to better combat its drug problem by making help and resources more accessible to residents when they overdose or are in crisis.

These policies should be extrapolated to other major cities across America due to their proven effectiveness in Baltimore. In 2019, Baltimore held a median household income of $50,379, and a poverty rate of 21.2%.[57] These data points are relatively similar to other major cities across America, such as the previously mentioned New York City and Philadelphia. A shift away from the harsh policing of drug laws, especially drug possession, would be incredibly beneficial in both New York City and Philadelphia due to the success of this initiative in Baltimore. As of now, index crime has increased by 11.2% in New York City from October 2020 to October 2022,[58] while in Philadelphia, gun violence and homicide rates reached a record high in 2021.[59] It is evident that current practices surrounding drugs are not benefitting the residents of these cities, nor are they making

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[54] Tom Jackman, "After Crime Plummeted in 2020, Baltimore Will Stop Drug, Sex Prosecutions." Washington Post, (2021), www.washingtonpost.com/dc-md-va/2021/03/26/baltimore-reducing-prosecutions/.

[55] Tom Jackman, "Homicides Rose 30 Percent in 2020, Survey of 34 U.S. Cities Finds." Washington Post (2021), www.washingtonpost.com/crime-law/2021/02/03/homicides-rose-2020/.

[56] Phil Davis, "Baltimore's New 911 Call Diversion Program Is Reducing Police Response to Calls of Behavioral Crisis, Officials Say," Baltimoresun.com (2021), www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-baltimore-behavioral-health-plan-20211020-uosltxrtjnh3jkrg2jadhahh6y-story.html.

[57] Deloitte, and Datawheel. "Baltimore City, MD | Data USA." *Datausa.io*, datausa.io/profile/geo/baltimore-city-md.

[58] *NYPD Announces Citywide Crime Statistics for October 2021*, (2021), New York City Police Department. https://www1.nyc.gov/site/nypd/news/pr1103/nypd-citywide-crime-statistics-october-2021.

[59] D. Cuellar, *Philadelphia will end 2021 with all-time record number of homicides*, 6abc Philadelphia, (2021) https://6abc.com/philadelphia-homicides-gun-violence-crime-data-2021-philly-police/11399907/.

neighborhoods safer.

One alternative to the criminalization of drug usage is drug courts, which provide a collaborative approach to drug addiction through a humane, compassionate lens. A 2003 study of six drug courts conducted by the Center for Court Innovation highlights the significant reduction in re-offending rates of the graduates.[60] The drug courts are subdivided into specialized sections, encompassing criminal drug treatment courts, family treatment courts, juvenile drug treatment courts, and opioid courts. The criminal drug treatment courts enable drug addicted felons to be diverted into substance abuse programs, and upon graduation their sentences may be reduced. The family treatment courts target neglectful parents, who are able to be reunited with their children upon graduation. In the juvenile drug treatment courts, petitions are often dismissed, and in opioid courts, those at risk of overdose are granted daily case management. This specialization allows the drug courts to effectively target a specific problem, increasing their efficiency.

In "A Statewide Evaluation of New York's Adult Drug Courts," The Center for Court Innovation discovered that while on average all drug courts were effective at reducing recidivism, a few characteristics separated the most effective courts from the least effective. [61] The drug courts that imposed sanctions for non-compliance and had legal leverage were more effective than those that did not. Drug courts that served a higher-risk population and made greater use of residential treatment were more effective than those that did not. Lastly, the courts that utilized cognitive behavioral therapy as a component of their rehabilitation process were more effective than those that did not.

Drug courts have been shown to excel in several crucial categories. The state-wide retention rate is sixty-six percent, which is higher than community-based programs which accept both voluntary and court-mandated participants.[62] Recidivism drops significantly, and for those receiving sentences their sentences were demonstrated to be less severe.[63] Furthermore, they are highly transmissible. The study showed that regardless of community factors, such as rural or urban location and racial composition, drug courts remained effective.[64] Lastly, drug courts significantly reduced crime by an average of 8 to 26 percentage points; well-administered drug courts were found to reduce crime rates by as much as 35 percent, compared to traditional case dispositions.[65]

V. CONCLUSION

The debate between harsh, reprimanding drug laws as a disincentive, and humane, compassionate views of drug offenses to promote public health is longstanding. In evaluating New York and Philadelphia's historical drug policies and their impact on community safety, it became clear that treating drug addiction as a public health issue rather than a criminal issue was the more effective option. In both New York and Philadelphia, strict laws and strict policing had a neutral impact on violent crime rates, and merely led to the mass incarceration of citizens for non-violent offenses. This suggests that drug use and possession is not the right variable to consider when trying to reduce violent crime rates. Those suffering from drug addiction are not violent criminals whose incarceration increases community safety, but human beings struggling with a health issue. Alternatives to strict criminalization, such as drug courts and various intervention measures are far more effective at addressing drug usage in the United States.

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[60] New York State Unified Court System. NYCourts.gov.
http://ww2.nycourts.gov/courts/problem_solving/drugcourts/index.shtml

[61] Center for Court Innovation, The Urban Institute, and New York State Unified Court System, "A Statewide Evaluation of New York's Adult Drug Courts," (2013) https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CCI-UI-NYS_Adult_DC_Evaluation.pdf.

[62] Id., 74.

[63] Id., 74.

[64] Center for Court Innovation, The Urban Institute, and New York State Unified Court System, "A Statewide Evaluation of New York's Adult Drug Courts," (2013) https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CCI-UI-NYS_Adult_DC_Evaluation.pdf.

[65] Office of National Drug Control, "Drug Courts," https://obamawhitehouse.archives.gov/ondcp/ondcp-fact-sheets/drug-courts-smart-approach-to-criminal-justice.

Who Owns the Marketplace of Ideas: Monopolization and Piracy in Academic Publishing

Claire Denault

Georgetown University

The Congress shall have Power… To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

—United States Constitution, Article I, Section 8[1]

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

—United Nations Declaration of Human Rights, Article 27[2]

Abstract

The current publishing industry is dominated by large, consolidated commercial publishers. These commercial publishers directly harm authors and academic progress as a whole by creating a high barrier to entry and making it difficult for researchers to contribute to academic discourse. Moreover, commercial publishing companies have an adverse impact on the quality of academic literature, as they entrench the prioritization of the quantity of published work generated over substantive contributions to academic progress. The amalgamation of commercial publishers results in subsequent monopolization of the academic publishing market, leading to exclusionary practices which limit competition and access within the marketplace of ideas. While solutions such as piracy may provide a temporary fix for the disparity in access to academic literature, they are not sustainable and do not address the underlying systemic problems in the current publishing market.

[1] U.S. Const. art. I, § 8.

[2] United Nations, *Universal Declaration of Human Rights*, (1948) Article 27.

I. ELSEVIER ET AL. V. SCI-HUB ET AL.: A BRIEF OVERVIEW

In 2011, Alexandra Elbakyan, a Kazakh graduate student working on neuroscience research, discovered that due to expensive paywalls, she was unable to read academic literature relevant to her research. The Kazakh university Elbakyan attended had little to no access to academic journals, so students and researchers were forced to either buy each article individually at prices often upwards of $30 USD or obtain the literature illegally through an online network of other researchers. The system was far from perfect – researchers would have to "post a request on Twitter to #IcanhazPDF" with their contact information in hopes that "a generous researcher at some university with access to the journal" would send a copy of the requested paper to the original poster.[3] Elbakyan was understandably upset with this system and resolved to automate the process, making it easier for researchers to gain "access to knowledge" and become involved in academic discourse "regardless of their income or [university] affiliation."[4] As a result, Sci- Hub, a site that allows users to expediently circumvent paywalls, was born. Sci-Hub's operation is similar to the #IcanhazPDF set-up, as it uses academic logins to retrieve paywalled literature. However, users simply need to enter the Digital Object Identifier (DOI) or title of the paper they are seeking, click a button, and sit back as the site uses university portal logins to obtain a PDF of the article in a matter of seconds. Further, when Sci-Hub receives a new request, the site copies the resulting PDF to its servers so that the next time a user requests the paper, Sci-Hub does not have to re-enter the university portal. The academic logins used to access these papers are allegedly donated, although many opponents of Sci-Hub have claimed that the site uses "phishing" emails to hack students' university accounts and obtain their logins.[5] While Elbakyan stated that she "cannot confirm the exact source of the credentials," she has said that she "did not send any phishing emails [her]self."[6] Despite the uncertain origins of the login credentials used, Sci-Hub users continue to access free literature through the site.

Although Elbakyan has been heralded as the "Robin Hood of Science,"[7] many of the publishers whose copyrighted literature can be accessed for free via Sci-Hub are understandably upset. In 2015, academic journal publishers, led by the Dutch publishing company Elsevier, took legal action against Sci-Hub, claiming that Sci-Hub violated US copyright laws and the Computer Fraud and Abuse Act.[8] Elbakyan explained her motivations behind creating Sci-Hub in an open letter to the New York District Court responsible for the case, claiming that Elsevier "operates by racket: if [researchers] do not send money, [they] will not read any papers. On [her] website, any person can read as many papers as they want for free, and sending donations is their free will."[9] The District Court of Southern New York ruled against Elbakyan and in favor of Elsevier, later awarding the company $15 million in damages. However, because Sci-Hub was housed on servers in Russia, the Court's decision had little impact on the site, which remains operational.[10]

II. IMPLICATIONS FOR RESEARCHERS, AUTHORS, AND ACADEMIC INSTITUTIONS

A. Impact on Authors

Many critics of Sci-Hub have pointed out that the site's illegal access to academic literature may hurt authors. Although many authors do not receive monetary benefits from their published work, the primary advantage for authors published in major publications is download citation statistics. As *Science* Editor Marcia McNutt describes in 2016,

> When researchers access papers through Sci-Hub, article usage information is lost. Authors do not benefit from

[3] John Bohannon, The frustrated science student behind Sci-Hub, Science (2016).
[4] Ernesto Van der Sar, Sci-Hub Tears Down Academia's "Illegal" Copyright Paywalls, TorrentFreak (2015), https://torrentfreak.com/sci-hub-tears-down-academias-illegal-copyright-paywalls-150627/.
[5] Brian Resnick, Why one woman stole 50 million academic papers — and made them all free to read, Vox (2016), https://www.vox.com/2016/2/17/11024334/sci-hub-free-academic-papers.; Andrew Pitts, Think Sci-Hub is Just Downloading PDFs? Think Again, The Scholarly Kitchen (2018), https://scholarlykitchen.sspnet.org/2018/09/18/guest-post-think-sci-hub-is-just-downloading-pdfs-think-again/.
[6] John Bohannon, Who's downloading pirated papers? Everyone, Science (2016), https://www.science.org/content/article/whos-downloading-pirated-papers-everyone.
[7] Simon Oxenham, Meet the Robin Hood of Science, Alexandra Elbakyan, Big Think (2021), https://bigthink.com/culture-religion/a-pirate-bay-for-science/.
[8] *Elsevier Inc. v. www.Sci-Hub.org*, 15 Civ. 4282 (RWS) (S.D.N.Y. Oct. 28, 2015).
[9] *Elsevier Inc. v. www.Sci-Hub.org*, 15 Civ. 4282 (RWS) (S.D.N.Y. Oct. 28, 2015).
[10] Resnick, *Why One Woman Stole 50 Million Academic Papers.*

> download statistics, for example, *which are increasingly being used to assess the impact of their work*. Libraries cannot properly track usage for the journals they provide and could wind up discontinuing titles that are useful to their institution. As institutions cancel subscriptions, the ability of nonprofit scientific societies to provide journals and support their research communities is diminished.[11]

Download statistics are important to authors, as authors rely on the quantified impact of their work to generate funding for future research.[12] Further, journal subscriptions make it easy for institutions to see how many people are using each subscription, influencing which journals they continue to subscribe to and financially support.

Consequently, it seems that authors may suffer from Sci-Hub's piracy of their work. However, many authors disagree – in collaboration with journalist John Bohannon, Sci-Hub founder Alexandra Elbakyan released extensive data and download statistics in 2016, detailing what Sci-Hub users were downloading and where they were downloading it.[13] In an interview with three authors of Sci-Hub's most frequently downloaded papers, all authors expressed that they were not angry or concerned that their work was being pirated – in fact, some were actually happy about it. Dr. Jordan Pober, a Pathology Professor at Yale University, said that he "doesn't mind that many people download his paper free since he didn't make money from its publication. In fact, like most academics, he paid to submit his article."[14] "Author-pays models"[15] are common across the publishing industry, for both open-access and subscription-based journals. Authors are required to pay both submission fees and fees associated with printing and publication, creating a monetary barrier to entry that limits authors without financial means from publishing.[16] By imposing a financial restriction on who can enter into scientific and academic discourse, the academic publishing industry limits authors' freedom of speech and their ability to promote their ideas and work.

One of the primary reasons that authors pay to have their works published in subscription-based journals is distinction. Academic literature's recognition is analyzed using a practice known as the Impact Factor (IF), a calculation based on the number of citations a piece of writing receives.[17] These statistics can determine which journals libraries subscribe to, which scientists and authors get faculty positions at universities, and myriad other factors that impact a researcher's ability to continue their work.[18] Because a great deal of the success of an academic's career is dependent on status, the prospect of being published in a select few prestigious "legacy publisher" journals is a motivation factor for many researchers.[19] As Jeremy Faust, emergency physician and Harvard professor, explains, "an author's decision to print in any particular journal is not a matter of economics but of prestige; researchers publish in the best place possible to maximize their influence and their career advancements."[20] As a result, Sci- Hub may seemingly hurt authors' citations and, by extension, their IF. However, analysis of the Impact Factors of papers available on Sci-Hub found that "articles downloaded from Sci-Hub were cited 1.72 times more than papers not downloaded from Sci-Hub and that the number of downloads from Sci-Hub was a robust predictor of future citations."[21] These findings may indicate that "limited access to publications may limit some scientific research from achieving its full impact" – in other words, because researchers have difficulty accessing literature behind paywalls, papers that are pirated are actually *more* successful and garner authors more attention for their work.[22] Researchers' inability to access academic literature suggests that paywalls stifle academic discourse, as they limit the trade of ideas and knowledge and, consequently, the development of new research.

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[11] Marcia McNutt, My love-hate of Sci-Hub, 352 Science 497–497 (2016).
[12] Joannah W., What's a Good Impact Factor (Ranking in 27 Categories) 2023, www.scijournal.org (2021), https://www.scijournal.org/articles/good-impact-factor.
[13] Bohannon, *Who's Downloading Pirated Papers?*
[14] Corinne Ruff, What Do the Authors of Sci-Hub's Most-Downloaded Articles Think About Sci-Hub?, The Chronicle of Higher Education (2016), https://www.chronicle.com/article/what-do-the-authors-of-sci-hubs-most-downloaded-articles-think-about-sci-hub/.
[15] Michaela Panter, Understanding Submission and Publication Fees | AJE, American Journal Experts, https://www.aje.com/arc/understanding-submission-and-publication-fees.
[16] Panter, *Understanding Submission and Publication Fees.*
[17] Joannah W. *What's a Good Impact Factor & Why It Matters.*
[18] Joannah W. *What's a Good Impact Factor & Why It Matters*; Yvonne Couch, Why does a high-impact publication matter so much for a career in research?, Nature (2020).
[19] Lucy Barnes, Publisher Prestige Is a Barrier to Open Access, Research Professional News (2018),https://www.researchprofessionalnews.com/rr-news-europe-views-of-europe-2020-3-publisher-prestige-is-a-barrier-to-open-access/.
[20] Jeremy S. Faust, Sci-Hub: A Solution to the Problem of Paywalls, or Merely a Diagnosis of a Broken System?, 68 Annals of Emergency Medicine A15–A17 (2016).
21 Juan C. Correa et al., The Sci-Hub effect on papers' citations, Scientometrics (2021).
[22] Correa et al., *The Sci-Hub Effect on Papers' Citations.*

B. The International Academic Community

Paywall limitations on researchers' ability to engage in academic discourse are exacerbated in low-income countries, as universities in these countries, such as Elbakyan's university in Kazakhstan, often lack access to journal subscriptions. The data released by Bohannon and Elbakyan show that most Sci-Hub requests were coming from Iran, China, India, Russia, and the United States.[23] After factoring for downloads per population size, Tunisia, Iran[24], Greece, Morocco, and Jordan were the top five countries for Sci-Hub users.[25] Looking only at papers downloaded in Latin America, eight of the ten most downloaded papers were medical, most detailing treatment strategies for illness and ailments ranging from diabetes, to high blood pressure, to tuberculosis.[26] After examining the data, it becomes clear that limited access to academic publishing in low-income countries not only hinders academic discourse by excluding academics and researchers from those countries, but also directly jeopardizes the health and safety of people suffering from life-threatening diseases. Further, because "the collective productive knowledge provided by scientific literature might be one of the driving mechanisms of economic development, more access to this literature would translate into more prosperity, especially for those nations which used to have limited access."[27] Thus, stifling access to academic literature hurts economic development and jeopardizes the protection of human lives, all while stifling researchers' ability to contribute to academic dialogue.

C. Spread of Misinformation

While Elbakyan has been outspoken in her support of the Open Access (OA) movement, many OA supporters are displeased at the association between OA and Sci-Hub.[28] Open Access publishing is rapidly growing; in 2018, it was estimated that "at least 28% of the scholarly literature is OA (19M in total)" and that the amount of literature available for free would only continue to increase.[29] Despite this trend, many researchers are hesitant to publish in OA journals, as they are often seen as "predatory."[30] Predatory journals are "entities that prioritize self-interest at the expense of scholarship and are characterized by false or misleading information, deviation from best editorial and publication practices, a lack of transparency, and/or the use of aggressive and indiscriminate solicitation practices."[31] Often resorting to spamming researchers' inboxes in search of new material to publish, predatory journals publish low-quality literature in exchange for authors' submission fees.[32] Thus, critics of the OA movement praise the peer review processes of subscription-based journals' and disparage those of OA journals, despite being unable to "connect the failures of the peer review system with scholarly publication access."[33] In fact,

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[23] Bohannon, *Who's Downloading Pirated Papers?*

[24] *See* Bohannon, *Who's Downloading Pirated Papers?* for further discussion of how US sanctions make access to academic literature difficult in Iran.

[25] Correa et al., *The Sci-Hub Effect on Papers' Citations.*

[26] Juan D Machin-Mastromatteo, Alejandro Uribe-Tirado & Maria E Romero-Ortiz, Piracy of Scientific Papers in Latin America: An Analysis of Sci-Hub Usage Data, 32 Information Development 1806–1814 (2016), http://eprints.rclis.org/38961/2/DLA%2010%20Sci.Hub%20espa%C3%B1ol-converted.pdf.

[27] Correa et al., *The Sci-Hub Effect on Papers' Citations.*

[28] Ian Graber-Stiehl, Meet the pirate queen making academic papers free online, The Verge (2018), https://www.theverge.com/2018/2/8/16985666/alexandra-elbakyan-sci-hub-open-access-science-papers-lawsuit.

[29] Heather Piwowar et al., The state of OA: a large-scale analysis of the prevalence and impact of Open Access articles, 6 PeerJ e4375 (2018). ;Ken Hyland & Feng Jiang, Academic Discourse and Global Publishing (2019), 7. For additional context, OA academic literature consists of different models. The most popular among them are Gold, Delayed, Green, Hybrid, and Bronze. Gold allows the paper to be freely viewed upon publishing; Delayed allows articles in subscription-based journals to be read openly after an embargo period; Green refers to when an author self-archives their work; Hybrid allows authors in subscription-based journals to make their papers OA; Bronze is an OA article without a Creative Commons license and sometimes without an Article Processing Charge (APC) for the author

[30] Franciszek Krawczyk & Emanuel Kulczycki, How is open access accused of being predatory? The impact of Beall's lists of predatory journals on academic publishing, 47 The Journal of Academic Librarianship 102271 (2021).; Jeffrey Beall, The Open-Access Movement is Not Really about Open Access, 11 tripleC: Communication, Capitalism & Critique. Open Access Journal for a Global Sustainable Information Society 589–597 (2013).

[31] Agnes Grudniewicz et al., Predatory journals: no definition, no defence, 576 Nature 210–212 (2019), https://www.nature.com/articles/d41586-019-03759-y.

[32] *See Joseph Stromberg, "Get Me Off Your Fucking Mailing List" is an Actual Science Paper Accepted by a Journal, Vox (2014), https://www.vox.com/2014/11/21/7259207/scientific-paper-scam.* ; As an attempt to escape emails from the *International Journal of Advanced Computer Technology* (a misleadingly named low-quality predatory journal), two computer scientists created a ten-page paper of profane flow charts asking to be removed from the journal's mailing list. To their surprise, they received an automated response alerting them that their "excellent" research could be published in the journal in exchange for the $150 publishing fee.

[33] Franciszek Krawczyk and Emanuel Kulczycki, *How Is Open Access Accused of Being Predatory?*

there may not be a substantial difference between the quality of many OA and subscription-based journals.

Though subscription-based commercial publishing companies assert that they add value to academic literature by "ensuring the quality of academic research," growing pressure to publish facilitated by commercial publishing companies may actually undermine the integrity of published works.[34] "Researchers have found themselves in a culture which measures 'productivity' in terms of the number of papers they produce and the citations they receive on those papers,"[35] resulting in career success and security stemming from prestige and reputation.[36] This pressure for repute and high Impact Factors in academic literature, dubbed "publish or perish," has myriad impacts on the quality of education and published literature.[37] Academics feel compelled to publish research as quickly as possible, often leading them to cut corners and use questionable practices – analysis of retraction notices in *Nature* showed a 44% increase over 10 years, with half of all retractions arising from "researcher misconduct."[38] Further, some researchers argue that "the academic journal publishing industry has skewed science itself," as commercial publishers "favor publishing groundbreaking research, leading the scientists conducting this research to, consciously or subconsciously, submit papers that highly regard the most striking and overly positive findings."[39] Lachenmayer explained the reasoning for this contention in 2019:

> A 2008 study, published in the New England Journal of Medicine, has supported this assertion. Surveying clinical trials on antidepressants, the study found "a bias toward the publication of positive results." Not only "were positive results more likely to be published, but studies that were not positive," in their professional opinion, "were often published in a way that conveyed a positive outcome." While this bodes well for the scientists conducting these clinical trials and for the pharmaceutical companies producing these anti-depressants, it convolutes reality and undermines scientific progress.[40]

The current publishing industry prioritizes productivity and views "science as a profit system" rather than valuing progress within academic fields and "science as knowledge."[41] Scientific and academic progress are thus hindered by the current "publish or perish" mindset, impeding both the ability of academics to effectively contribute to their respective fields and the capacity for the development and growth of knowledge and creativity overall.[42]

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[34] Brian Resnick, The War to Free Science, Vox (2019), https://www.vox.com/the-highlight/2019/6/3/18271538/open-access-elsevier-california-sci-hub-academic-paywalls.

[35] Hyland and Jiang, Academic Discourse and Global Publishing, 10.

[36] The hunt for prestige has impacts globally. *See* Hyland and Jiang, Academic Discourse and Global Publishing, 11: "While what counts towards success varies from one field to another, making a name for oneself in most disciplines requires a regular output of published works which are frequently cited and which come to be seen as authoritative. This is not to say that financial rewards are entirely negligible, and they can have a significant effect on research and publishing. One example is the defunct Australian policy of partly funding research on quantity rather than the quality of publications, which led to a dramatic fall in the number of citations to the work of Australian academics. More nakedly, many universities in China (and Iran) offer direct monetary rewards to encourage academics to publish in international journals. Inducements of GBP 20,000 for acceptance in Science or Nature are not unknown, and while raising the visibility of Chinese science it does little to encourage research into local issues or to foster a Chinese academic register."

[37] Seema Rawat & Sanjay Meena, Publish or perish: Where are we heading?, 19 Journal of Research in Medical Sciences: the official journal of Isfahan University of Medical Sciences 87–9 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3999612/.; *See* (Hyland and Jiang, Academic Discourse and Global Publishing, 12.): "Research assessment criteria have meant that many universities have found their funding cut while non-research active staff, who have primarily been responsible for teaching, have lost their jobs or come under increased pressure to produce research output. Engaging students in their learning requires work by the teacher, but with the publication edict hovering over them teachers have no incentive to prioritize this area of their work."

[38] Hyland and Jiang, Academic Discourse and Global Publishing, 13.

[39] Dana Lachenmayer, Let It Flow: The Monopolization of Academic Content Providers and How It Threatens the Democratization of Information, 75 The Serials Librarian 70–80 (2019).

[40] Lachenmayer, *Let It Flow*, 5.

[41] Faust, *Sci-Hub: A Solution to the Problem of Paywalls, or Merely a Diagnosis of a Broken System?*

[42] *See* Faust, *Sci-Hub: A Solution to the Problem of Paywalls, or Merely a Diagnosis of a Broken System?* for analysis of the role of the pharmaceutical industry in academic publishing. As Faust explains, "Articles like mine cost $38 because the intended target of such a price tag is not the private individual, nor even the ivory-tower- enclave graduate student with access to a second- or even first-rate but incomplete online medical library, but rather the pharmaceutical industry. In fact, most individual article sales (online and hard copy reprints) are to employees of pharmaceutical companies. These companies spend millions of dollars on reprints without batting an eye because the revenues for the drugs being hyped by those very industry-sponsored studies frequently measure in the billions. Armed with reprints of peer review research, drug representatives give articles away to physicians, hoping to influence their prescribing practices." Pharmaceutical companies are given some control over the scientific reception of their products, as they can provide doctors with free literature that supports their products. Because doctors may not want to pay for additional literature, they'll use the free literature provided and may be influenced to prescribe that drug in the future.

III. RAMIFICATIONS FOR THE ACADEMIC MARKETPLACE OF IDEAS

A. Commercial Publishing Companies: Where Did They Come From and Why Are They So Big?

Academic journals have been an important tool in the diffusion of academic discourse since their beginnings in the 17th century, when the *Journal des Sçavans* and the *Philosophical Transactions* were published.[43] While the peer review and dissemination of knowledge provided by journals remain integral to scientific and academic process, journal publishing has gone through numerouschanges since its beginnings. Scholarly journals were initially written and published by scientific societies "with the intent to advance scientific knowledge by building on colleagues' results and [to] avoid duplication of results."[44] The aim of these publications was rarely monetary, as "publishing and distributing research necessarily required the services and skills of printers, publishers and booksellers" and was thus unprofitable.[45] Rather, academics published articles to circulate their findings and to gain prestige in their educated social circles.[46] As education levels and government funding for scientific research increased during the Cold War, commercial publishing companies began catering to the new international academic community.[47] These new commercial publishers made impactful changes to preexisting publishers' business models. Firstly, they switched their focus from "scientific news and short research reports" to "detailed primary research papers," often creating new research journals for academic niches that did not already have dedicated journals or scientific societies.[48] Secondly, they began selling to institutions, as they realized they could charge libraries higher rates than individual academics.[49] Finally, they circulated journals – often written in English – internationally.[50] These publishing companies were also aided by growth in research and expansion of the library market: "there was more research to be published, but also more institutions able to purchase it."[51] Due to these new strategies and the expanding market for academic literature, commercial publishing became extremely lucrative, and individual publishing companies began acquiring and merging journals.[52]

Commercial publishers have become so consolidated that, as of 2019, "just three for-profit companies (Reed Elsevier, Springer and John Wiley) account for 42% of all the articles published."[53] The amalgamation of publishing companies has allowed for almost complete control of the publishing market, leading to price surging in journal subscriptions. Journal prices have "increased by 188% over 10 years while the U.S. Consumer Price Index rose only 73%."[54] This price increase may appear counterintuitive, as digitization of academic literature has made it less expensive for publishing companies to store, maintain, and distribute writing.[55] Further, astronomical journal prices may not actually indicate value added by publishing companies, as the "quality control" that journals claim to provide is actually performed by members of the scientific community who volunteer to peer-review articles for non-monetary incentives, as evidenced below:[56]

> Journal publishing's costs are minimal because researchers contribute papers free, to advance their careers. Others review submissions free, too, which takes care of most of the editing. And the potential for price increases is enormous because journals are the lifeblood of scholarship -- libraries and researchers cannot function without them.[57]

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[43] Vincent Larivière, Stefanie Haustein & Philippe Mongeon, The Oligopoly of Academic Publishers in the Digital Era, 10 PLOS ONE (2015).
[44] Larivière,*The Oligopoly of Academic Publishers in the Digital Era.*
[45] Aileen Fyfe et al., Untangling Academic Publishing: A History of the Relationship Between Commercial Interests, Academic Prestige and the Circulation of Research, Zenodo (2017).
[46] Fyfe et al., *Untangling Academic Publishing,* 5.
[47] Id. at 8.
[48] Id. at 9.
[49] Id. at 9.; Resnick and Julia Belluz, *The War to Free Science.*
[50] Id. at 9.;Ken Hyland, Academic Publishing: Issues and Challenges in the Construction of Knowledge (2016).46. The dominance of the English language in academia stems from the post-WWII global scientific community. As Hyland explains, "While the reach of the British empire in the 18th and 19th centuries had establish the importance of English, French and German were also widely used as academic languages in the early 1900s. In fact, the dominance of English can be traced to the end of World War II which destroyed the scientific communities of France and Germany, while the United States emerged from the conflict as the only power with its educational and scientific infrastructure intact" (Hyland, *Academic Publishing*, 46).
[51] Id. at 9.
[52] Id. At 9.
[53] Ken Hyland & Feng Jiang, Academic Discourse and Global Publishing (2019).
[54] Hyland and Jiang, Academic Discourse and Global Publishing, 5.
[55] Neil Weinstock Netanel, Copyright's Paradox (2010). 201.
[56] Vincent Larivière, Stefanie Haustein & Philippe Mongeon, The Oligopoly of Academic Publishers in the Digital Era, 10 PLOS ONE (2015).
[57] David D. Kirkpatrick, As Publishers Perish, Libraries Feel the Pain; Mergers Keep Pushing Up Journal Costs, The New York Times, November 3, 2000, https://www.nytimes.com/2000/11/03/business/publishers-perish-libraries-feel-pain-mergers-keep-pushing-up-journal-

Due to the low operation cost and high revenue, many commercial publishing companies report extremely high profit margins: in 2010, Elsevier reported a 36% profit margin, higher than companies such as Apple, Google, Netflix, or Amazon.[58] This high profit margin underscores the reason that many critics of the academic publishing industry find the status quo "indefensible" – commercial publishing companies are paid by authors and libraries, add minimal value to academic literature, and make an exorbitant amount of money in the process.[59]

While extremely profitable for publishing companies, the massive increase in journal prices, combined with library budget cuts, has had serious ramifications for libraries, as it has left many universities unable to foot the bill for journal subscriptions. The high cost has become so untenable that many institutions have begun canceling their subscriptions altogether.[60] In 2019, the University of California decided to terminate their $11 million annual contract with Elsevier– Jeffrey MacKie-Mason, head of UC Berkeley's campus libraries, was quoted saying: "They're a monopolist, and they act like a monopolist."[61] Even Harvard University, the institution with the world's highest budget for academic journals, had to cancel subscriptions due to difficulties meeting the rising subscription costs.[62]

B. Unconscionability in Academic Publishing: "Big Deal" Publishing

While the digitization of academic literature has decreased costs associated with publishing, it has also allowed publishing companies to raise prices (thus generating high profit margins) through bundling. Before the advent of online editions of academic literature, journal subscriptions were sold journal-by-journal, allowing libraries and institutions to choose which subscriptions to buy based on the needs of their constituents. However, as new pricing methods became available and independent journals became increasingly consolidated within large companies, publishing companies began to "bundle" journal subscriptions, meaning that universities would have to buy all of a company's journals, even if they only wanted to access a select few.[63] This practice, known as "Big Deal" bundling, provides a strategic barrier for other journals in the publishing market, as libraries are unable to easily get out of bundling contracts to buy smaller journals, even if the smaller journals are far less expensive.[64]

> Once a school has signed up for the Big Deal with the largest publishers, it becomes very difficult for a journal or journals of a smaller publisher to compete to replace the print journals to which the school subscribes. Because of the structure of the Big Deal contracts, canceling a print journal yields little savings, because cancellation saves only a fraction of the journal's list price (in some cases, 10 percent). So, for example, while the price of the Journal of Economic Theory, an Elsevier title, was $2070 per year in 2002, canceling the journal might only have saved a school $207. This means that if a competitor offers an alternative journal comparable to the Journal of Economic Theory for $300, and the library could not afford both, the library would not take the alternative journal—to do so would actually cost the library nearly $100 extra. To compete effectively, the publisher of alternative journals either must price below $207, or it must produce its own bundle of journals of sufficient size and breadth that the school would actually be willing to cancel all of ScienceDirect instead of just the print titles.[65]

Thus, the contract adhesion present in Big Deal bundling makes it difficult for libraries to purchase individual journals. Libraries that sign Big Deal contracts are effectively prevented from accessing journals outside of the publisher they contract

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costs.html.

[58] Stephen Buranyi, Is the staggeringly profitable business of scientific publishing bad for science?, the Guardian (2018), https://www.theguardian.com/science/2017/jun/27/profitable-business-scientific-publishing-bad-for-science.

[59] Time to Break Academic Publishing's Stranglehold on Research, New Scientist (2018), https://www.newscientist.com/article/mg24032052-900-time-to-break-academic-publishings-stranglehold-on-research/.

[60] Resnick and Belluz, *The War to Free Science.*

[61] Id.

[62] Ian Sample, Harvard University Says It Can't Afford Journal Publishers' Prices, the Guardian (2012), https://www.theguardian.com/science/2012/apr/24/harvard-university-journal-publishers-prices.

[63] Theodore C. Bergstrom et al., Evaluating Big Deal Journal Bundles, 111 Proceedings of the National Academy of Sciences 9425–9430 (2014), https://www.pnas.org/content/111/26/9425.

[64] Aaron S Edlin & Daniel L Rubinfeld, Exclusion or Efficient Pricing? The "Big Deal" Bundling of Academic Journals, 72 Antitrust Law Journal 119–57 (2004).

[65] Edlin and Rubinfeld, *Exclusion or Efficient Pricing?* 138.

with. The standard for unconscionable adhesive contracts is summarized in *Schlobohm v. Spa Petite, Inc*:

> By definition, an adhesion contract is drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere.
> … It is a contract generally not bargained for, but which is imposed on the public for necessary service on a "take it or leave it" basis. Even though a contract is on a printed form and offered on a "take it or leave it" basis, those facts alone do not cause it to be an adhesion contract. There must be a showing that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation and that the services could not be obtained elsewhere.[66]

Because of the "oligopolistic conditions" of the publishing market, major publishing companies are able to unilaterally determine annual price increases, stripping institutions of their negotiating power and "leaving academic libraries with no other choice but to cancel subscriptions"[67] or pay the astronomical charges. Academic publishers are uniquely able to increase their profits, as "unlike usual suppliers, authors provide their goods without financial compensation and consumers (i.e. readers) are isolated from the purchase."[68]

Academic journals constitute a "necessary service" for university libraries, as libraries cannot fulfill their institutional mission and aid researchers in joining academic discourse without proper access to academic literature.[69] Furthermore, because each article is unique, and cannot be substituted for another article from a different journal, individual articles constitute "services [that] could not be obtained elsewhere."[70] Thus, "libraries are more or less helpless" and are forced to choose between limiting their researchers' access to vital academic information and overspending on their already tight budgets, demonstrating a salient imbalance of power.[71]

C. A Monopolistic System: Drawing a Comparison to United States v. Microsoft

Commercial publishing companies' use of "Big Deal" contracts demonstrates their monopoly over the academic publishing market. Under *United States v. Grinnell Corp*, "the offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[72]

Monopoly power is the "long term ability to raise price or exclude competitors."[73] Ownership of the relevant market is merely a means of demonstrating monopoly and a company can possess a monopoly without owning a majority of the relevant market.[74] Thus, although no single publisher monopolizes the majority of revenue generated through academic literature as a whole, the ramifications of commercial publishing companies' consolidation still constitute monopoly power:

> Defining the relevant market is not a necessary step in a monopoly power analysis, however, if Elsevier can be shown to have already exercised substantial power over price with regard to its journals collectively. In fact, there is substantial direct evidence that Elsevier and other large publishers have the power to raise price substantially above competitive levels. We argue below that they have already done so. If a publisher has already raised price substantially above competitive levels and maintained that price increase for a substantial period of time, this evidence is sufficient to establish that publisher's monopoly power over price.[75]

Because commercial publishers have been able to raise prices much higher than market value without catalyzing a decrease in sales, they have demonstrated "significant and durable market power," and thus constitute a monopoly.[76] Further, commercial

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[66] *Schlobohm v. Spa Petite, Inc.,* 326 N.W.2d 920, 922 (Minn. 1982).
[67] Larivière, Haustein, and Mongeon, *The Oligopoly of Academic Publishers in the Digital Era.*
[68] Id.
[69] *Schlobohm v. Spa Petite, Inc.,* 326 N.W.2d 920, 922 (Minn. 1982).
[70] Id.

[71] Larivière, Haustein, and Mongeon, *The Oligopoly of Academic Publishers in the Digital Era.*
[72] *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).
[73] Monopolization Defined, Federal Trade Commission (2013), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined.
[74] *See* Monopolization Defined, Federal Trade Commission: "Courts do not require a literal monopoly before applying rules for single firm conduct; that term is used as shorthand for a firm with significant and durable market power — that is, the long term ability to raise price or exclude competitors."
[75] Edlin and Rubinfeld, *Exclusion or Efficient Pricing?*, 140.
[76] Monopolization Defined, Federal Trade Commission.

publishers' success is not a "consequence of a superior product," as evidenced by UCSB Economics Professor Theodore Bergstrom's analysis of the quality of published economics papers:[77]

> The six most-cited economics journals listed in the Social Science Citation Index are all nonprofit journals, and their library subscription prices average about $180 per year. Only five of the 20 most-cited journals are owned by commercial publishers, and the average price of these five journals is about $1660 per year. Tables 1 and 2 compare library costs and measures of cost- effectiveness for the ten most-cited nonprofit journals and the ten most-cited journals owned by commercial presses. The average price per page of the commercial journals is about six times as high and the average price per citation is about 16 times as high as for the nonprofit journals.[78]

Consolidation in the publishing industry mirrors the monopolization prosecuted in *United States v. Microsoft*. Microsoft's market monopoly is described below:

> Microsoft enjoys so much power in the market for Intel-compatible PC operating systems that if it wished to exercise this power solely in terms of price, it could charge a price for Windows substantially above that which could be charged in a competitive market. Moreover, it could do so for a significant period of time without losing an unacceptable amount of business to competitors. In other words, Microsoft enjoys monopoly power in the relevant market.

Commercial publishers have been able to extort this same market power over academic literature, as they are able to charge far higher rates for their products than non-profit journals, which market similar (if not higher) quality goods.[79] *United States v. Microsoft* went on to define the evidence of Microsoft's monopoly power as 1) Microsoft's large share of the "market for Intel-compatible PC operating systems," 2) the "high barrier to entry" due to Microsoft's monopoly and 3) "Microsoft's customers lack[ing] a commercially viable alternative to Windows," resulting from their "high barrier to entry."[80] As previously demonstrated, commercial publishers have control over price, thus demonstrating their command of the market. Further, exclusionary practices such as "Big Deal" bundling pose a barrier to entry by preventing competition from smaller journals. Finally, commercial publishers quell competition by limiting "commercially viable alternative[s]" to their "Big Deal" packages – because they own so much literature, libraries must buy their products to have adequate access to current academic literature and are then unable to justify purchasing articles from other companies due to "Big Deal" prices. The current "market for purchasing scholarly articles is not an open one, leading to a lack of competition" – consequently, "article prices do not reflect a free market but an artificial one, one with correspondingly arbitrary pricing schemes."[81]

IV. A TRUE MARKETPLACE OF IDEAS: WHAT FUNCTION DOES COPYRIGHT LAW SERVE?

The United States Constitution guarantees Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[82] The intent of copyright protection is to foster development in academia by encouraging those who are producing work for the common good to continue to do so by ensuring that they "benefit from the good sufficiently to justify their labor."[83] John Stuart Mill, the pioneer of the concept of a "marketplace of ideas" explained in his essay *On Liberty*:

> The only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner. The steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it: for, being cognizant of all that can, at least obviously, be said against him, and having taken up his position against all gainsayers knowing that he has sought for objections.[84]

This concept is essential to the progress of academic discourse, as academics must be able to trade ideas and build off

[77] *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).
[78] Theodore C Bergstrom, Free Labor for Costly Journals?, 15 Journal of Economic Perspectives 183–198 (2001).
[79] Bergstrom, *Free Labor for Costly Journals?*
[80] *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).
[81] Faust, *Sci-Hub: A Solution to the Problem of Paywalls, or Merely a Diagnosis of a Broken System?*
[82] U.S. Const. art. I, § 8.
[83] Roger E Schechter & John R Thomas, Principles of Copyright Law (2010), 12.
[84] Vincent Blasi, Freedom of Speech in the History of Ideas: Landmark Cases, Historic Essays, and Recent Developments (2016), 172.

one another. Monopolization of academic publishing directly limits the marketplace of ideas through its suppression of the speech and contributions of individual authors and the broader global academic community. The exclusionary practices employed by the current academic publishing industry limit competition and access within the marketplace of ideas. The ramifications on the scientific and academic marketplace of ideas are succinctly explained by Pratt Institute's Dana Lachenmayer in 2019:

> The contextual nature of information demands openness in order for it to be understood at its utmost capacity. Institutions such as universities, laboratories, and medical centers, as well as general research of the sciences and humanities, cannot progress, disseminate information, and educate at an ideal rate without unbridled access to information, let alone such inhibitions instituted by these monopolies. Researchers cannot perform ideally with barriers such as paywalls. Additionally, libraries, which provide access to information, not only for scholars, but also as a public good, have already had and will continue to have an increasingly harder time providing their patrons with the best resources possible, if rates are controlled by corporations with such concentrated power.[85]

Paywalls and exclusionary business tactics limit access to academic discourse and the marketplace of ideas, thus suppressing speech. Further, monopolization of academic publishing harms freedom of expression in and of itself. In *Harper & Row v. Nation*, Justice Brennan argued that copyright laws only act as an "engine of free expression" when they do not stifle the "broad dissemination of information and ideas."[86] In order to ensure both the constitutional directive "to ensure the progress of arts and sciences" and the "integrity of First Amendment values," Brennan asserted that "ideas and information must not be freighted with claims of proprietary right."[87] Commercial publishing companies directly limit this "broad dissemination of information and ideas" by making it absurdly difficult for researchers, both domestically an internationally, to access academic research and writing. This hinders progress in science and academia, as the ability to build off of the work of others is *critical* to success and growth in these fields.[88] The end goal of copyright protection is to serve the public good by incentivizing the creation of public goods. As explained in *Twentieth Century Music Corp. v. Aiken*: "The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[89] In addition to protection of authors, the fundamental purpose of copyright law is to foster "creativity" that will benefit the public – the dissemination and growth of academic literature enriches each individual field of study, allowing for new discoveries and inventions which may benefit society as a whole.[90]

V. CONCLUSION AND POTENTIAL SOLUTIONS: THE CASE FOR DISINTERMEDIATION

Although the current academic publishing system is deeply flawed, piracy sites like Sci- Hub are only a temporary fix. Although Sci-Hub claims to remove the barriers that prohibit growth in science, "the papers Sci-Hub provides access to are those only available via subscriptions" and are usually from large commercial publishing companies, possibly "[reinforcing] the association that these final, peer-reviewed manuscripts are the de facto currency of science" and "perversely [enhancing] the status of prestige publication."[91] Further, by providing a way to access paywalled content illegally, Sci-Hub may reduce the push in the academic community for *legal* ways to gain access to academic literature and often causes researchers to ignore existing legal alternatives to Sci-Hub in favor of Sci-Hub's vast library.[92] Thus, a legal alternative that instead focuses on the root issues in the academic publishing industry is necessary to ensure equitable dissemination of academic literature.

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[85] Lachenmayer, *Let It Flow.*

[86] *Harper & Row v. Nation Enterprises,* 471 U.S. 539 (1985).

[87] Id.

[88] *See Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975). The Court found photocopying of medical textbooks within the National Institutes of Health (NIH) to be fair use, as they speculated ruling against the NIH photocopying would have adverse impacts on research. This may be an avenue for further exploration in this topic, as because researchers may use academic literature to enhance the educational experiences of themselves and others, there may be similarities between *Williams & Wilkins* and the current struggle for access to literature.

[89] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

[90] Id.

[91] Ruth Harrison, Yvonne Nobis & Charles Oppenheim, A librarian perspective on Sci-Hub: the true solution to the scholarly communication crisis is in the hands of the academic community, not librarians, Impact of Social Sciences (2018), https://blogs.lse.ac.uk/impactofsocialsciences/2018/11/09/a-librarian-perspective-on-sci-hub-the-true-solution-to-the-scholarly-communication-crisis-is-in-the-hands-of-the- academic-community-not-librarians/.

[92] Harrison, Nobis, and Oppenheim, *A Librarian Perspective on Sci-Hub.*

Resources that foster the democratization and spread of academic literature already exist, but are in need of strengthening. For instance, "some organizations have outsourced their libraries to services such as DeepDyve, a Web site that offers online access to scholarly research articles at more affordable rates (including articles published by Springer, Wiley-Blackwell, and Elsevier)."[93] For $40 per month, DeepDyve users are able to "freely preview an entire article for 5 minutes at a time" before deciding whether or not they would like to purchase the article.[94] The ability to read a paper before purchasing it allows researchers to only spend money on articles that will be useful to their research. However, DeepDyve's library is currently far smaller than Sci-Hub's, as Sci-Hub has the "distinct advantage of being undeterred by pesky considerations such as copyright law."[95]

Open Access journals also attempt to ameliorate limited access to academic literature. However, they have yet to provide meaningful competition for commercial publishers, as the desire for prestige and the fear of "predatory" journal practices still drive researchers to publish in large commercial journals.[96] Moreover, many OA journals charge researchers "high fees in exchange for publication and at least the perception that the article was peer reviewed," which "discriminates, once again, against low-resource and early-career investigators who can't afford steep publication fees."[97] Nevertheless, OA may serve as an equalizer if modified. Dr. Teresa Chan, Assistant Professor of Emergency Medicine at McMaster University, has suggested "that instead of having to pay for open access publication, researchers should be able to earn publication credits by providing high-quality peer review of other articles in consideration," thus "[encouraging] participation in the peer review process" and "[increasing] the quality of literature published in the open access space."[98] However, this shift would be difficult to accomplish without first disrupting the current commercial monopoly in the academic publishing market, allowing libraries to monetarily invest in OA resources and incentivizing authors to freely contribute to OA journals.

The advent of the internet has aided and catalyzed the restructuring of countless industries and business models. Notably, pirate sites like Napster and the broader digital revolution facilitated disintermediation in the music industry following a "decrease of production costs" resulting in "music production [being] made accessible to general public."[99] Critics of the academic publishing industry point out that although "large commercial publishing houses have increased their control of the science system" since their creation, "the value added, however, has not followed a similar trend."[100] The services associated with publishing – "typesetting, printing, and diffusion" – are superfluous in the digital age. Further, the "essential step of quality control is not a value added by the publishers but by the scientific community itself" in the form of volunteer researchers who peer review others' work.[101] Without the responsibility of physically printing and disseminating literature, publishing companies are pointless. Moreover, they directly harm the progress of academic thought through monopolization and are therefore no longer necessary in the digital age. This dilemma offers an opportunity to rethink the hierarchical academic publishing industry and center the protection of the marketplace of ideas to *truly* democratize knowledge.

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[93] Faust, *Sci-Hub: A Solution to the Problem of Paywalls, or Merely a Diagnosis of a Broken System?*
[94] Id.
[95] Id.
[96] Id.
[97] Id.
[98] Id.
[99] Francisco Bernardo & Luis Gustavo Martins, Disintermediation Effects in the Music Business – A Return to Old Times?, (2021), https://musicbusinessresearch.files.wordpress.com/2013/06/bernardo_desintermediation-effects-in-the-music-business.pdf.
[100] Larivière, Haustein, and Mongeon, *The Oligopoly of Academic Publishers in the Digital Era.*
[101] Larivière, Haustein, and Mongeon, *The Oligopoly of Academic Publishers in the Digital Era.*

Doping In E-Sports – A Global Menace

Niyati Prabhu

National University of Advanced Legal Studies

Abstract

Electronic sport, i.e., E-sport, is a competitive sport wherein individuals/teams participate in online competitions or tournaments by competing against each other to achieve the highest global rankings. E-sports are different from gambling, gaming or i-gaming as the former is contingent on the skillset of the athletes while the latter are majorly arbitrary and chance-based. Despite E-sports not requiring intense physical effort, it is incredibly taxing to the mind due to the amount of cerebral effort involved. The issues related to doping in E-sports have stirred many debates, primarily because of the conundrum in the regulatory mechanisms undertaken to enforce stringent Anti-Doping Policies in the E-sports domain. This essay shall explore the various nuances of tackling doping cases with a particular emphasis on E-sports in the Indian scenario. Despite its immense potential, a structured set of rules and regulations to address issues related to doping in the E-sports sector in India is lacking due to this domain being a relatively grey area. The scope of Arbitration concerning international doping issues, along with the role of the Court of Arbitration for Sport (CAS), will also be considered.

I. INTRODUCTION

The E-sports industry has grown significantly[1] in a brief period, which has spectacularly altered the nature of the sector, thereby causing it to become increasingly commercialized rather than merely being perceived as a leisure pursuit. This commercialization of E-sports is especially true given the exorbitant amount of cash in a few major E-sports. E-sports professionals have a dedicated team of physicians, physical trainers, nutritionists, sports psychologists, massage therapists etc., with six-figure salaries being paid to seasoned professionals without including endorsements and prize money income.[2] There has been a sporadic boom in the market revenue generated by E-Sports[3] globally, with a present value of over 1.38 billion US Dollars.[4]

A. Seen, yet Unseen?

The E-sports sector received its primary public censure for doping concerns (a mere two years after the International E-sports Federation[5] became an official signatory of the World Anti-Doping Agency) when Korey Friesen, a celebrated *'Counter-Strike: Global Offensive'* player unreservedly avowed[6] his usage of *Adderall*[7] (Mixed amphetamine salts), a drug which increases dopamine and norepinephrine levels in the brain, following which German e-sports organizer, ESL (Electronic Sports League) Gaming GmbH[8] announced the inception of unscheduled drug tests in an attempt to forestall the proliferation of such illegal methods.[9] Meanwhile, saliva tests are not considered as reliable, with no certainty that someone on these drugs will get caught. Subsequently, the tests have never been declared as positive.[10] The preponderance of the usage of non-prescribed pharmaceutical nootropic supplements (brain enhancers) such as *Aniracetam* (*N-anisoyl-2-pyrrolidinone*), *N-Acetyl-L-Tyrosine* (NALT), *L-Theanine*, *Adderall* (Mixed amphetamine salts) etc. which act specifically as cognitive enhancers will be antithetical to the recognition of E-Sports in the global sporting realm.[11] Due to the fragmented nature of the various leagues and the lack of recognized regulatory bodies, doping in E-sports is less known yet ubiquitous.[12] Not only does this provoke ethical issues in this sector while questioning the integrity of the players using these drugs, but it also causes imminent long-term damage to individuals consuming these performance-enhancing drugs (some of the side effects aggravate mental illnesses, long-term addictive attributes etc.).[13] It is, therefore, sacrosanct to tackle this menace as soon as possible.

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[1] Settimi C, 'The Most Valuable Esports Companies 2020' (*Forbes*) <https://www.forbes.com/sites/christinasettimi/2020/12/05/the-most-valuable-esports-companies-2020/> accessed 13 October 2022.

[2] 'Why Esports Players Are in a League of Their Own' (*The Independent*, 15 April 2019) <https://www.independent.co.uk/news/long_reads/esports-players-training-fitness-athletes-perform-league-video-games-a8863051.html> accessed 13 October 2022.

[3] Leroux-Parra M, 'Esports Part 1: What Are Esports?' (*Harvard International Review*, 24 April 2020) <https://hir.harvard.edu/esports-part-1-what-are-esports/> accessed 14 October 2022.

[4] 'Global ESports Market Revenue 2025' (*Statista*) <https://www.statista.com/statistics/490522/global-esports-market-revenue/> accessed 13 October 2022.

[5] '[IeSF News] IeSF Became an Official Signatory of WADA' (*International Esports Federation*, 2 June 2013) <https://iesf.org/news/3753> accessed 14 October 2022.

[6] Crawley, 'Pro Counter-Strike Player Admits Drug Use at Recent Tournament: "We Were All on Adderall" | VentureBeat' (*Venture Beat*, 14 July 2015) available at <https://venturebeat.com/games/pro-counter-strike-player-admits-drug-use-at-recent-tournament-we-were-all-on-adderall/> accessed 14 October 2022.

[7] Durbin, 'Adderall: Uses, Dosage, Side Effects & Safety Info - Drugs.Com' (*Drugs.com*, 23 May 2022) <https://www.drugs.com/adderall.html> accessed 13 October 2022.

[8] Nast C, 'ESL Responds to Esports Doping Controversy' (*Wired UK,* 20 July 2015) <https://www.wired.co.uk/article/esl-responds-doping-esports-controversy> accessed 14 October 2022.

[9] Langley H, 'Sex, Drugs and Counter-Strike: ESports Is Fighting Its Demons' (*TechRadar India*, 1 April 2016) available at <https://www.techradar.com/news/gaming/sex-drugs-and-counter-strike-esports-is-fighting-its-demons-1318109> accessed 13 October 2022.

[10] Wright S, 'ESL Announced Details of Anti-Doping Policy, but Did They Miss Some Things? | Counter-Strike Global Offensive' (*GameSkinny*) <https://www.gameskinny.com/1jek5/esl-announced-details-of-anti-doping-policy-but-did-they-miss-some-things> accessed 14 October 2022.

[11] Tomen D, 'Best Nootropics for ESports & Gaming – Nootropics Expert' (*NOOTROPICSEXPERT*) <https://nootropicsexpert.com/best-nootropics-for-esports-gaming/> accessed 14 October 2022.

[12] Boxer J, 'Doping in Esports: An International Solution to the Problem That No One Is Talking About' (*Medium*, 9 May 2022) <https://gothamsn.com/doping-in-esports-an-international-solution-to-the-problem-that-no-one-is-talking-about-8d34cb64704f> accessed 15 October 2022.

[13] Catlin O, 'Esports Fuel the Battle for Supremacy in Nootropic Supplements' (*Natural Products INSIDER*, 10 September 2020) <https://www.naturalproductsinsider.com/cognitive-health/esports-fuel-battle-supremacy-nootropic-supplements> accessed 13 October 2022.

B. The Indian Scenario

Consequently, the E-Sports[14] industry in India has also grown tremendously, with games like League of Legends, Valorant, DOTA and many others having gained nationwide prominence, thus, resulting in the release of a press statement[15] by the erstwhile Minister of Youth Affairs and Sports, Shri Kiren Rijiju declaring E-Sports as different from gaming, gambling and betting. Several federations have been established in India in order to promote e-Sports, including the Electronic Sports Federation of India (ESFI), the E-sports India (EI) and the E-sports Development Association of India (EDAI). Nevertheless, the Ministry of Youth Affairs & Sports has not officially recognized any Association or Federation related to E-sports. Since 'sports' is classified as a State subject, the Government of the respective State or the Union Territory in question is fundamentally accountable and responsible for its promotion and development, while the Department of Youth Affairs and Sports supports the State or Union Territory Government's various operations through its many initiatives. As of now, there has been no such overture being taken into consideration to include gaming and sports into the Concurrent List. Since betting and gambling are State Subjects (under Entry number 34 in the List II-State List of the Seventh Schedule of the Constitution of India),[16] it is the responsibility of the respective State Authorities to supervise or even outright outlaw these activities in their respective states. The Law Commission of India's Report No. 276,[17] entitled "Legal Framework: Gambling and Sports Betting including Cricket in India," chaired by Justice B. S. Chauhan, which was delivered to the Government of India on July 5, 2018, mentioned that it is undesirable to legalize gambling and betting in India in the present context.[18] In the case of *Dr. K. R. Lakshmanan v. State of Tamil Nadu,*[19] the Hon'ble Supreme Court of India gave a delineation between a '*game of chance*' and a '*game of skill*' in an attempt to make amends for the lack of a specific definition for a '*game of skill*'. Various judgments have been passed to distinguish gambling from E-sports (and other modes of online gaming), the prominent ones being *Gurdeep Singh Sachar v. Union of India*[20] and *Varun Gumber v. UT of Chandigarh.*[21]

II. HURDLES TO EFFECTIVE LEGAL REMEDIES: -

A. Fragmented Frameworks

One of the main reasons for the lack of a standardized, global 'code' for e-doping, like that of the Word Anti-Doping Code (WADC)[22] established by the World Anti-Doping Agency (WADA), is that the regulation and restriction of illegal doping practices, and having an all-encompassing policy to further the Anti-Doping regime in E-sports is far more arduous as opposed to that of traditional sports. Various national E-sports Authorities have been established in many countries, such as in the United Kingdom, where the British E-sports Association (BESA) was instituted in late 2016, right after the inception of the World E-sports Association (WESA) in May 2016. Despite this, many national associations, including the BESA, are not involved in regulatory activities and are therefore not considered as governing agencies. This has caused a significant void in terms of addressing the multitude of legal and regulatory issues (in particular, the doping problems) which arise as a result of the massive growth of the E-sports sector and its subsequent commercialization.

B. Autonomy versus Authority - To Regulate or Not?

The Anti-Doping Rules, the Competition Regulation and the Statute are all published as part of the International E-sports Federation (IESF) Rules and Regulations.[23] These Regulations, in their entirety, comprise a set of guidelines for managing

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[14] Dwan H, 'What Are Esports? | A Beginner's Guide' (*The Telegraph,* 18 October 2017) <https://www.telegraph.co.uk/gaming/guides/esports-beginners-guide/> accessed 13 October 2022.
[15] LOK SABHA DEBATES, Gaming and e-Sports Policy, Question no. 48, 4 February, 2021 <https://loksabhaph.nic.in/Questions/QResult15.aspx?qref=19210&lsno=17> accessed 12 October 2022.
[16] The Constitution of India, 1950, Schedule VII, List II, State List, Entry 34 (Sports, Entertainments and Amusements).
[17] Law Commission of India Legal Framework: Gambling and Sports Betting including Cricket in India, Report No. 276, 8, (July 4 2018) <https://lawcommissionofindia.nic.in/reports/Report276.pdf> accessed October 14, 2022.
[18] 'Committee Reports' (PRS Legislative Research) <https://prsindia.org/policy/report-summaries/legal-framework-gambling-and-sports-betting-including-cricket-india> accessed 14 October 2022.
[19] *Dr. K. R. Lakshmanan v. State of Tamil Nadu,* (1996) 2 SCC 226.
[20] *Gurdeep Singh Sachar v. Union of India,* 2017 SCC OnLine P&H 5372.
[21] *Varun Gumber* v. *UT of Chandigarh,* 2019 SCC OnLine Bom 13059.
[22] David P, *A Guide to the World Anti-Doping Code: The Fight for the Spirit of Sport* (Cambridge University Press 2017).
[23] 'The International E-Sports Federation (IeSF) Rules and Regulations' (*International Esports Federation*, 18 January 2020) available at <https://iesf.org/governance/regulations> accessed 14 October 2022.

the affiliated E-Sports tournaments. The fact that the leading E-sports leagues, such as the Major League Gaming, the Electronic Sports League (ESL) and the Gfinity,[24] operate autonomously from the International E-sports Federation (IESF), and that a large number of them also have their norms (in particular the Electronic Sports League (ESL) Rulebook), add to the complexity of this conundrum. Nevertheless, game developers have devised anti-cheat algorithms to determine whether a player is doping or not to counteract doping.[25] These software programs typically operate in the background and conduct a monitoring program to survey third-party programs that may give players an unfair advantage over rivals, such as wallhacks, scripts, aimbots, and many others. The Anti-Cheat System of Valve (prominently considered as VAC) is one of the well-known examples.

C. The ESFI for India?

Moreover, in the Indian context, the Electronic Sports Federation of India (ESFI), which is a full member of the International E-sports Federation (IESF), is merely a Non-Profit Organization incorporated under Section 7(2) of the Companies Act, 2013[26] and Rule 8 of the Companies (Incorporation) Rules, 2014,[27] while not having been granted formal recognition as a National Sports Federation (NSF) as per the National Sports Development Code of India, 2011 (Sports Code) by the Ministry of Youth Affairs and Sports, thus implying that the authority vested under the ESFI is substantially limited. In addition, the ESFI has not yet received formal recognition from the Indian Olympic Association despite several deliberations to include E-sports at the Olympics.[28] These issues, coupled with the lack of structured legal mechanisms, exacerbate the perils of doping in India's E-sports sphere.[29]

D. Minors and Enforceability of Contracts

Publishers of specific games impose certain rules and restrictions, while tournament organizers take steps to limit drug usage by enacting tournament-specific rules based on the World Anti-Doping Code (WADC). Nevertheless, another critical issue with Anti-Doping laws in E-Sports is the question of adequate enforceability of the E-sports Player Contract between clans (teams) and players. This becomes even more cumbersome as, according to the E-sports Player Welfare Association of India (EPWA), the majority of E-Sports competitors are minors (under the age of 18), thereby rendering the contract *void ab initio* under Section 11(4) of the Indian Contracts Act, 1872,[30] which was further reiterated in the landmark case of *Mohori Bibee v. Dharmodas Ghose*[31] wherein the '*doctrine of restitution*' was considered as unenforceable.

E. Arbitration and the CAS

In terms of Alternative Dispute Resolution (ADR) Mechanisms, the closest that the E-sports sector has come to having a framework for arbitration proceedings is the World E-sports Association Arbitration Rules, 2016, which does not contain a very operative, comprehensive settlement mechanism when compared to the procedural rules of the Court of Arbitration for Sport (CAS). This results in the lack of an authoritative regulator and adequate extrajudicial mechanisms for settling disputes concerning cases of doping in E-sports. As per Article 8 of the IESF Anti-Doping Rules, 2014, the first instance for reference for matters arising out of doping is the Doping Hearing Panel of the IESF, with further appeals to be filed at the Court of Arbitration for Sport (CAS). In the case of *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v. International Olympic Committee (IOC),*[32] the analytically distinct jurisprudence of the Court of Arbitration for Sport (CAS) concerning strict liability in doping cases was considered as an aspect of '*lex sportiva*'. Furthermore, one of the primary sources used by the parties to decide the applicable law for certain aspects of the case was the jurisprudence of the CAS on doping cases.

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[24] 'Gfinity Organizer Overview | Esports Charts' (*ESPORTS Charts*) <https://escharts.com/organizers/gfinity> accessed 14 October 2022.
[25] Schöber T and Stadtmann G, 'The Dark Side of E-Sports – An Analysis of Cheating, Doping & Match-Fixing Activities and Their Countermeasures' (2022) 2 International Journal of Esports <https://www.ijesports.org/article/98/html> accessed 14 October 2022.
[26] The Companies Act, 2013, §7(2).
[27] The Companies (Incorporation) Rules, 2014, Rule 8.
[28] 'Tokyo Olympics Get a Taste of Esports, Sort Of' *Washington Post* (24 July 2021) <https://www.washingtonpost.com/video-games/2021/07/24/tokyo-olympics-esports/> accessed 15 October 2022.
[29] 'ESFI | Esports Federation of India' (*Esports Federation of India (ESFI)*) <https://esportsfederation.in/> accessed 14 October 2022.
[30] The Indian Contracts Act, 1872, §11(4).
[31] *Mohori Bibee v. Dharmodas Ghose*, (1903) ILR30 Cal539 (Pc).
[32] *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v. International Olympic Committee (IOC)*, CAS 2002/O/372; para 65 at fn.15.

F. Finality of the Arbitral Awards Vis-à-vis Guaranteeing Fairness

Despite the prominence of the Court of the CAS in resolving sports disputes through Arbitration, there is also an issue regarding the arbitrary nature of the appointment of arbitrators to adjudge at the CAS due to the autonomous nature of the court.[33] Additionally, in order to set aside the arbitral awards delivered by the CAS in accordance with Chapter 12 of the Swiss Private International Law Act (PILA) (for *international* matters), the appeal should be filed as a *recours en matière civile* under Article 190(2) of the PILA at the Swiss Federal Supreme Court, based on extremely narrow procedural grounds. Moreover, the number of benches of the CAS is limited, thereby narrowing down the scope of Arbitration in sports significantly.

III. POSSIBLE SOLUTIONS:

A. Providing Formal Recognition to a Single Authority to make Binding Decisions

The issue of doping in E-sports can be substantially curtailed with the help of a global coalition of E-sporting Agencies to supervise and regulate not just doping issues but also problems with respect to cheating and match-fixing, thus, subsequently attempting to eradicate the extreme commercialization of E-sports. This ambitious, industry-wide initiative will have a significant chance of succour with the help of collaborative efforts on the part of all the major E-sporting Agencies and their officials. On the national front, it is sacrosanct to either officially recognize the E-sports Federation of India to regulate matters in India or to incorporate and formally recognize a new national regulatory authority for governing E-sports in India. The creation of an Authority with legal recognition to make binding decisions and the power to impose bans or sanctions upon the violators can prevent the violators from evading justice to a large extent. Various legislative interventions are crucial to safeguard the rights of E-sports athletes while penalizing those who contravene the requisite Anti-Doping Policies.

B. Analyzing and Rectifying the E-sports Players Contract

In the absence of 'contractual stability' and well-developed regulatory frameworks in the E-sports industry, various aspects of the E-sports Players Contract (such as Player Obligations, Player Restrictions, Non-Disparagement Clauses, Termination and Renewal etc.) need to be standardized across the world to lay down specific guidelines for players and clans (teams). Consequently, the Roster Management Contract, which is commonly ignored by E-sports players, needs to clarify various aspects, such as the terms and conditions regarding the 'benching' of athletes for doping violations. Moreover, it was ruled in the case of *VFS Global Services Ltd. v. Mr. S Roy*[34] that a team's continued benching (without providing any justification) would be viewed as a restraint of trade and a legitimate reason for terminating a contract.

C. Effective Dispute Resolution Mechanisms

The possibility of a disputes resolution mechanism for E-sports needs to be analyzed. The first-instance authority for adjudicating the procedural aspect of Arbitration in Anti-Doping cases is the Anti-Doping Division of the CAS (CAS ADD). At the same time, the ESIC E-Sports Prohibited List, 2016, instituted by the E-sports Integrity Commission (ESIC), is the substantive law governing these disputes. According to the Code, IESF supervises all the facets of Doping Control. A Delegated Third Party, in particular, the International Testing Agency (ITA), may be assigned by the International E-sports Federation (IESF) to carry out any component of Doping Control or Anti-Doping Education; however, IESF requires the Delegated Third Party to undertake such aspects in accordance with the 'Code' and International Standards along with the Anti-Doping Rules. The CAS Anti-Doping Division may accept delegations from IESF for results management and adjudication. Any reference to IESF in these Rules, when appropriate and in the context of the foregoing delegation, should be understood as a delegation of the IESF's authority to implement all the Doping Control to the Delegated Third Party. Moreover, E-sports players can claim Therapeutic Use Exemptions (TUEs) under Article 4 of the ESIC Anti-Doping Code, which contains the 'Prohibited List' as a remedy for violating Article 14.1.1 of the Code.

D. Establishment of an E-sports Centric Arbitration Court with Appellate Powers

The sanctions imposed and rulings delivered by the national federations in doping cases must be reviewed and revised by

[33] Rigozzi A, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 Journal of International Dispute Settlement 217.
[34] *V.F.S. Global Services Ltd. v. Mr. S. Roy*, (2) BomCR 446.

international sporting federations as specified by the Court of Arbitration for Sport (CAS) in the case of *B. v. International Judo Federation (IJF)*[35] to ensure transparency in the process, and thus, implicitly deeming it as an overriding principle. In juxtaposition, the decisions of the regional E-sporting agencies and gaming organizations must be reviewed by the International E-sports Federation (IESF) to ensure that they have not been tacitly lenient or partial in imposing sanctions on their players so that they benefit from participating in prestigious competitions. The National E-sports Federations must also not claim jurisdictional monopoly over their athletes and ensure that the decisions of the international agency would have an overarching precedence in order to promote uniform anti-doping policies. A similar principle was stated by the CAS in the case of *Union Cycliste Internationale (UCI) v. S., Danmarks Cykle Union (DCU) & Danmarks Idraets-Forbund (DIF),*[36] wherein despite the Danish National Olympic Committee having imposed a two-year ban for non-compliance of Anti-Doping Policies, the decision of the CAS of imposing merely a one-year ban prevailed. Additionally, the fast-paced world of E-sports might not be particularly suited for Arbitration, which is quite cumbersome. However, a tailored approach involving the establishment of a specific E-sports Centric Arbitration Court to suit the requirements of the E-sports sector, along with a structured timeframe for resolving disputes, is much needed.

IV. CONCLUSION

Doping control in E-sports is mandatory for the detection and control of the use of prohibited drugs. Therefore, it is essential for the E-sports sector to make significant progress with respect to resolving the legal issues pertaining to doping and ensuring that the integrity of the athletes and the tournament organizers is maintained. Consequently, due to the growing popularity of E-sports among players below 18, the youth need to be educated and warned about the consequences of doping in E-sports and the subsequent repercussions to face. Education needs to take its place where the law falls short. The relevance of opting for Arbitration for doping issues in E-sports needs to be pondered, along with effective remedies for challenging arbitral awards delivered by the court. Creating an E-sports-specific arbitration court coupled with institutional norms customized to the needs of E-sports and stipulating stricter timescales for settlement, similar to the CAS, is essential. A more global unified approach to tackle doping in E-sports, such as the creation of a single worldwide standard set of rules to substitute the fragmented, *ad hoc* methods of the various leagues and competitions, is needed.

[35] *B. v. International Judo Federation (IJF),* CAS 98/214; Digest Vol.2 p. 308; para. 8.
[36] *Union Cycliste Internationale (UCI) v. S., Danmarks Cykle Union (DCU) & Danmarks Idraets-Forbund (DIF),* CAS 98/192. Digest Vol.2 p. 205.

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