COLUMBIA UNDERGRADUATE LAW REVIEW

Volume XIV Spring 2018 Issue II

ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

VOLUME XIV | ISSUE II | Spring 2018

LETTER FROM THE EDITORS-IN-CHIEF

Dear Reader,

This issue of the *Columbia Undergraduate Law Review* leaves behind our traditional white cover, a legacy of our 2005 inaugural issue. The Editors-in-Chief are proud to present our selections for Spring 2018. We are similarly proud to bind the authors' contributions, along with the work of our staff, within a cover that represents our publication's renewed sense of progress and ambition.

The *Columbia Undergraduate Law Review* has become the primary forum for undergraduate legal thought on campus. Our publication proudly lists more than fifty-five staff members across our Print, Online, and Business divisions. The Executive Editor of Print, Lucas Drill, led four editing groups that convened throughout the semester to carefully choose and rigorously edit the enclosed work. The Executive Editor of Online, Giselle Valdez, oversaw nine editors and nineteen writers to produce original roundtable-like analyses, accessible on our website. Finally, Katherine Ko, our Business Director, managed a team of Event Coordinators who planned and executed two successful professional panel discussions.

Recognizing our potential for a greater role in the Columbia community, we determined and accomplished a series of ambitious goals throughout the Spring semester. In January, we began our tenure with a redesigned and improved website. Our Publisher, Elizabeth Turovsky, successfully expanded our design staff; with her efforts, this edition will have more print copies than any in our publication's history. We extended leadership opportunities to more members by introducing the Deputy Business Director and Webmaster positions. Our Executive Board also organized our first High School Essay Contest, engaging high schoolers around the nation in legal discourse. Finally, through informal discussions and outings, our staff grew together in both intellect and camaraderie.

We are excited for the opportunities and challenges that lie ahead as we advance our editorial and publishing standards. With each passing semester, the *Columbia Undergraduate Law Review* strives to uphold intellectual discourse around undergraduate legal scholarship with even greater ambition than before. We hope you enjoy reading this testament to our work.

Sincerely,
Nikita Datta and Yerv Melkonyan
Editors-in-Chief

LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Executive Board, I am proud to present the Spring 2018 issue of the *Columbia Undergraduate Law Review*'s print journal. This semester, we had the difficult task of publishing only four articles out of the many high-quality submissions. We are proud to offer the following.

In his article "Why Don't Americans Hate *First National Bank v. Bellotti*?," John Czubek discusses the relationship between two Supreme Court Cases, *First National Bank of Boston v. Bellotti* and *Citizens United v. Federal Election Commission*, both of which increased the presence of corporations in the world of campaign finance. Specifically, the article focuses on the American public's contradictory reaction to each case.

"Implications and Potential Fallout from *United States v. Nagarwala et al.*," by Jared Kelly, analyzes the balance between the Free Exercise Clause of the First Amendment and practices that are potentially detrimental to a child's health. He uses female genital cutting as an example to demonstrate limitations on Free Exercise, although potential consequences of this limitation are also addressed.

In "Banning Anti-Personnel Landmines: The Death of the Perfect Soldier," Pranaya Pahwa highlights the International Campaign to Ban Landmines' successful effort to outlaw landmines by coordinating legal attacks and galvanizing public opinion. He argues that this dual approach proved instrumental in creating a global consensus against the weapons.

Finally, Joe Rabinovitsj, in his article "Regulating Hate Speech on Facebook: Taking Control of the Twenty-First Century Public Forum," investigates Facebook's position as a public forum and identifies an "echo chamber" phenomenon among its users. He then contends that Facebook's "content-based speech distribution algorithm" should be regulated in order to constitutionally dilute the impact of hate speech.

With each continuing publication, the *Columbia Undergraduate Law Review* strives to foster intellectual debate and discussion of legal issues, especially among undergraduates. We hope that you enjoy reading our print journal.

Sincerely,
Lucas B. Drill
Executive Editor, Print

MISSION STATEMENT

The goal of the Columbia Undergraduate Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must inclde a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

Please send inquiries to culr@columbia.edu and visit our website at www.culawreview.org.

TABLE OF CONTENTS

Why Don't Americans Hate First National Bank of Boston v. Belloti?

John Czubek | Boston University

Edited By: Helen Liu, Marco Della Genco, Emma Gomez, Anita Onyimah, Sarah Rosenberg, Isabelle Zaslavsky

Abstract

In 1978, the Supreme Court ruled on a now-forgotten case by the name of *First National Bank of Boston v. Bellotti*. This ruling later became the basis for the infamous *Citizens United v. Federal Election Commission* decision in 2010. Both cases affirmed and expanded the role of corporations in the election financing process, yet the American public received each case in a markedly different fashion. While the general public vehemently denounced the *Citizens United* decision, they remained almost entirely unfazed by the *Bellotti* decision. This article focuses on answering the question of why the public reacted so differently to these very similar cases. The present study adopts a historical analysis approach to assess several different factors that could have caused this inconsistency in public reaction. The findings of this article suggest that palpable differences in the quantity of media coverage received, quality of media coverage received, public opinion about corporations, and exposure to political cues all play a role in resolving this apparent paradox.

I. Introduction

The case of *Citizens United v. Federal Election Commission* (2010) is widely regarded as one of the most controversial Supreme Court rulings in recent history. In its simplest form, the *Citizens United* decision, under the First Amendment, sanctioned unlimited spending on independent political broadcasts by corporations. According to Senator Bernard Sanders (I-VT), it represents "one of the worst Supreme Court decisions in the history of our country," and former Secretary of State Hillary Clinton labeled it as "a decision that has undermined the election system in our country."[1,2] While Democrats in particular tend to be more outspoken in their criticism of the ruling, the disdain is far from divided along party lines. An *ABC News/Washington Post* poll found that eighty percent of all Americans oppose the decision, and sixty-five percent strongly oppose it.[3]

One might reasonably conclude that for a ruling to be met with such enmity it must constitute a radical departure from any established precedent, but this is not the case. Over three decades before the Citizens United ruling, the Supreme Court held in *First National Bank of Boston v. Bellotti (1978)* that the First Amendment protected the rights of corporations to spend money with the sole intention of influencing an election. Whereas the Roberts Court was held that a corporation's First Amendment right is indistinguishable from that of a person, it was the Burger Court that first established that the First Amendment applied to individuals and corporations equally in the realm of elections. Despite the fact that the *Citizens United* decision was largely based on the principle set forth in *Bellotti*, the general public does not revile *Bellotti* in nearly the same way that it reviles *Citizens United*.

In the pages that follow, two questions that arise from this apparent inconsistency on behalf of the American public will be answered. First, given the tremendous opposition to the Roberts

Court's *Citizens United* decision, why do Americans not similarly condemn the Burger Court's decision in *Bellotti*? And second, was the ruling in *Citizens United* simply the next incremental step within the framework established by the *Bellotti*, or did it indeed represent a substantial departure from the principle set forth by *Bellotti*? To answer the former effectively, this paper looks to national newspaper articles from the years 1978 to 1985 that deal explicitly with *First National Bank of Boston v. Bellotti* in order to better understand public opinion after the case was decided. To answer the latter, existing legal scholarship and the full text of each decision are analyzed to determine whether there are any crucial distinctions between *Bellotti* and *Citizens United* that would justify the dissonance between the public's perception of each case.

II. Literature Review

First National Bank of Boston v. Bellotti (1978)

Existing scholarship regarding *First National Bank of Boston v Bellotti (1978)* will serve two distinct purposes towards reconciling public disdain of *Citizens United* and indifference to *Bellotti.* In order to resolve this apparent paradox effectively, this paper's research of *Bellotti* was divided into two separate categories to ensure that both facets of the case received appropriate attention. First, we will directly examine the Court's decision in *Bellotti* so that we can ultimately compare and contrast it with the ruling in *Citizens United*, and second, we will investigate various scholarly legal articles on the topic of *Bellotti* that were written before the *Citizens United* decision was released. It was methodologically important to consider only articles that were published before the Court ruled on *Citizens United* so that the academic community's attitude towards *Bellotti* before it became the basis of a landmark Supreme Court case could be isolated and analyzed.

Before we can properly engage in direct analysis of *Bellotti*, we must first understand its general background and case history. Massachusetts had regulated political election spending since the early 1900s, and corporations were initially prohibited from attempting to influence an election.[4] Decades later, in 1943, corporations were granted the right to spend money with the express aim of influencing the result of an election only if one of the repercussions of that election would *directly* affect the corporation's holdings.[5]

Unsurprisingly, the First Bank of Boston construed this new Massachusetts statute differently than the Massachusetts Attorney General had interpreted it at the time. First Bank of Boston intended to spend money to air its grievances about the newly-proposed ballot initiative that would allow Massachusetts to implement a graduated income tax, and the Attorney General notified the Bank that this behavior was barred because this particular ballot initiative did not directly affect the Bank's "assets and holdings."[6] Just as Citizens United would do thirty two years later, First National Bank of Boston argued that this statute unconstitutionally limited their First Amendment rights. The Supreme Court of Massachusetts responded by upholding the statute as Constitutional.[7]

The Supreme Court narrowly overturned the Massachusetts Supreme Court's decision in in a 5-4 ruling in favor of First National Bank of Boston. Perhaps indicative of the general public's overall ignorance of the *Bellotti* case, a textbook version of the decision could not be located. The full text of the ruling—as found in Volume 435 of the United States Supreme Court Case Law compilation—was consulted instead, in which Justice Lewis F. Powell delivered the opinion of the Court. He based the opinion largely on the principle that the right to influence the outcome of an election is one of the fundamental rights protected by the First Amendment.[8] Powell noted that there would be little doubt that this type of speech would be protected if it were uttered by a person, and that "there is no support in the First or Fourteenth Amendment, or in this Court's decisions,

for the proposition that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation."[9]

Furthermore, Powell argued that the statute in question (limiting the ability of corporations to spend money to influence an election) simply could not "survive the exacting scrutiny required when the legislative prohibition is directed at speech itself and speech on a public issue."[10] Finally, Powell established that the "risk of corruption perceived in this Court's decisions involving candidate elections is not present in a popular vote… Nor can the statute be justified on the asserted ground that it protects the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. The statute is both underinclusive and overinclusive in serving this purpose, and therefore could not be sustained."[11] These are, almost to the letter, the same reasons that the Roberts Court gave in defense of its decision in *Citizens United*.

Academic Reaction to First National Bank of Boston v. Bellotti (1978)

As one might assume about as low-profile a case as *Bellotti*, there does not exist an abundance of legal analysis predicting its future ramifications. Despite that fact, we were able to find several quality pieces of scholarship that speak to the academic elite's immediate reaction to the *Bellotti* decision. This article explores the opinions of select academic elites to capture the nuance necessary to effectively answer whether *Citizens United* was a drastic departure from existing precedent.

Let us begin with Arthur S. Miller, "one of the nation's top Constitutional authorities" of his time.[12] In one of his articles, Miller dubbed *Bellotti* to be "arguably the most important First Amendment decision in recent memory."[13] He was wholly unequivocal about what he (correctly) believed the ramifications of *Bellotti* to

be: the assets of corporations would be used for all types of political expression and persuasion. Miller's tone throughout his article is scathing; he slams the Supreme Court for placing titans of industry—such as AT&T and General Motors—on the same plane as any natural person and argues that the decision is nothing short of "indefensible."[14]

Carl E. Schneider, a professor at Michigan Law School, did not defend the decision of the Court, but he did not employ the same vituperative tone as Miller. Schneider's greatest criticism was that the *Bellotti* decision belonged in the Lochner Era because it featured a "remoteness from social reality."[15] Schneider's primary thesis was not to analyze the *Bellotti* decision, but rather to argue that *Bellotti* signified the beginning of an era of new jurisprudence, one he termed "new formalism."[16] New formalism, according to Schneider, is a way of legal decision making that erroneously bases its conclusions on a level of abstraction that actually serves to inhibit the Court from resolving its contemporary Constitutional questions.

A paper jointly authored by Senator Gary Hart (D-CO) and William Shore, a professor of law at George Washington University, argued that the Court's ruling in *Bellotti* is plainly incorrect, and made eerily accurate predictions about what the future state of politics would look like post-*Bellotti*. Hart and Shore contended that the effect of corporate contributions on political campaigns could be demonstrated, and that fact in itself may be sufficient to prompt further legislation aimed at minimizing the effect of corporate wealth in the public arena.[17] Ingeniously and immediately, Hart and Shore could foresee that "the Supreme Court's decision [in *Bellotti*] raises the possibility that not only corporations, but also such entities as labor unions, partnerships, associations and political action committees will become even more financially involved in politics."[18]

Taken together, these three articles support the hypothesis that Citizens United was simply the next logical step after *Bellotti.* Miller, Hart, and Shore's predictions about what the environment of

American politics would look like in the wake of *Bellotti* are almost entirely accurate, and the fact that these predictions are so accurate strongly supports the idea that *Citizens United* was not a radical shift from existing precedent. Furthermore, these articles suggest that among members of the academic elite, the *Bellotti* decision was poorly received. In order to glean whether the general public received *Bellotti* in a similar manner, we will later examine newspaper articles published within seven years of the *Bellotti* decision.

Citizens United v. Federal Election Commission (2010)

Our investigation of *Citizens United v. Federal Election Commission (2010)* will be similar in some respects to our investigation of *Bellotti*. First, much like *Bellotti*, we will examine the actual decision of the case. Second, we will explore the existing scholarship regarding the *Citizens United* decision in an attempt to ascertain whether or not the academic community as a whole viewed the ruling as unsurprising. We need not emphasize the nuances of several distinct individual reactions to *Citizens United* because we are not using these reactions to determine whether a hypothetical future case conforms to the newly established precedent. If the academic elite are unsurprised by the ruling, this provides strong evidence for the hypothesis that *Citizens United* was simply the next logical step after *Bellotti*.

Again, before we can analyze the ruling, we must first understand the context of the case. Citizens United is a Political Action Committee that sought an injunction to prevent the Bipartisan Campaign Reform Act (BCRA) from applying to its full-length feature film titled *Hillary: The Movie*.[19] The film portrays Secretary Clinton in an unfavorable light and was designed with the express purpose of influencing the outcome of the 2008 Presidential Election. Section 203 of the BCRA bars corporations from contributing to "electioneering communications" from their general treasuries, and Cit-

izens United argued that this section violated the First Amendment by limiting their speech.[20] An electioneering communication is "any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office," that is publicly distributed, and that is distributed within 30 days of a primary election.[21] (Citizens United also challenged the constitutionality of the disclosure requirements established by the BCRA, but this aspect of the case is unrelated to this article and so will not be discussed).

The Supreme Court ruled 5-4 that, under the First Amendment, corporate funding of independent political institutions cannot be limited.[22] Justice Anthony M. Kennedy wrote the majority opinion of the decision, relying heavily on the argument that "because speech is an essential mechanism of democracy, political speech must prevail against laws that would seek to suppress it," which is no less true just because it came from a corporation.[23] Just as Justice Powell did in Bellotti, Justice Kennedy noted the fact that laws burdening speech are subject to strict scrutiny, and asserted that Section 203 of the BRCA simply did not meet this high threshold. Throughout the opinion, Justice Kennedy cited *First National Bank of Boston v. Bellotti* several times, each time underscoring the idea that the government lacks the authority to restrict political speech "based on the speaker's corporate identity."[24]

Academic Reaction to Citizens United v. Federal Election Commission (2010)

Some may find it surprising that the majority of the scholarly legal articles regarding *Citizens United* are written with a markedly more positive tone than the public statements made by political elites such as President Barack Obama, Senator Bernard Sanders (I-VT), and Secretary Hillary Clinton. However, after being exposed to the overwhelming similarities between the *Bellotti* and *Citizens United* decisions, this phenomenon should not come as a shock. The

fact that the legal elite and the political elite differ in their reaction to *Citizens United* suggests that partisanship and incentive structures play a role in explaining the discrepancy between the hatred towards *Citizens United* and the apathy towards *Bellotti*.

A common thread woven through several academic papers addressing the *Citizens United* decision is the sentiment that while the public may be outraged, legal scholars predicted the outcome. The introductory paragraph of the first article regarding the Citizens United ruling published by the *Harvard Law Review* reads, "The *Citizens United* decision was a shock to the American public, but less surprising to those who have been following the Court's jurisprudence around money, politics, speech and corruption."[25] A separate study published in the *Harvard Journal of Law and Public Policy* questioned the intense public backlash that the Supreme Court received for the *Citizens United* decision and pointed out the firm Constitutional ground that the decision stood upon.[26] Finally, an article featured in the *Yale Law and Policy Review* noted that *Citizens United*'s "impact on the scope of campaign finance is far less substantial than commonly assumed."[27]

While the attitude of the three aforementioned papers seems to be representative of the total body of elite legal scholarship examining the *Citizens United* decision, that attitude was not universal. One academic article in particular firmly argued that the Supreme Court simply does not understand the basic principles of corporate law, and contended that the *Citizens United* opinion "is riddled with assumptions about corporations that are often times divorced from the economic and legal realities in which these entities exist."[28] The study, published by the Case Western Law Review, goes on to posit that corporations should not be considered persons: a belief presumably shared by a substantial portion of the American public today.[29] However, the belief that corporations are not persons does not explain the chasm between the public's attitude toward the *Citizens United* and *Bellotti* decisions because both cases consider corpora-

tions as having personhood.

On balance, we can safely conclude that the scholarship regarding the *Citizens United* ruling provides strong evidence in favor of the hypothesis that *Citizens United* was a logical continuation of the precedent set forth by *Bellotti*. But if we cannot attribute the public's enmity toward the *Citizens United* decision to an error in legal reasoning on the part of the Supreme Court, then what can we attribute it to? And if *Citizens United* simply followed the precedent set by *Bellotti*, then why did the American public not feel the same enmity toward the Court in 1978 when *Bellotti* was decided? The remainder of this article seeks to provide compelling answers to these questions.

Public Reaction to Supreme Court Decisions

While there exists a wealth of scholarship discussing the relationship between the Supreme Court and public opinion, a large portion of the literature focuses on measuring the public's overall approval of the Supreme Court as an institution rather than the reason *why* the public reacts to various Supreme Court decisions in the way that they do.[30] These studies are certainly invaluable to a proper understanding of the relationship between the general public and the Supreme Court, but they tend not to address the factors that contribute to the public's reception of a particular ruling, and thus do not play a large role in this paper.

The research that *did* explore the reasons why some Supreme Court rulings give rise to enthusiastic public reactions zeroed in almost exclusively on one factor: the media. One study in particular found that the overall quality and quantity of news coverage that a particular case receives is strongly correlated with the amount of public awareness about that case, and widespread public awareness about a case gives rise to more intense opinions regarding whether or not the case was decided correctly. Furthermore, the study goes

on to provide evidence that widespread public awareness of a case is also correlated, albeit weakly, with increased support for the Court's ruling.[31] The first conclusion drawn in this study presents one viable explanation for the intense reaction to *Citizens United*: widespread public awareness. Later in the paper, we will compare the quantity of newspaper articles discussing *Citizens United* and *Bellotti* to determine whether there is a significant gap in the media coverage that these two cases received. If such a gap exists, that would lend support to the hypothesis that a lack of media coverage of *Bellotti* is one reason why that case is not reviled.

Another study examining the public's various reactions to Supreme Court decisions began by noting the effect of media coverage, but primarily argued that interpersonal influences play an even greater role in determining the public's reaction to a particular ruling. The authors examined the data relating Supreme Court decisions and public opinion through a sociological lens and concluded that "the social interpretation of events drives the differing outcomes [in public opinion]."[32] This view could also serve to partially explain the dissonance between public opinion regarding *Bellotti* and *Citizens United* if we find that the cases in question were characterized in markedly different tones by the same major national newspapers.

Finally, evidence suggests that partisanship and social cues may have an effect on how Supreme Court decisions are received. It is widely accepted that partisanship has an effect on how a particular Court decision is viewed by members of the general public, but new research takes this finding one step further.[33] Specifically, this recent research argues that direct party cues affect even the most well-informed members of society, which indicates that public reactions to Supreme Court decisions can be molded by the cues of political elites. Other studies lend support to this argument, demonstrating that the cues of political elites can even shape the public's opinion about issues as momentous as war.[34] This hypothesis helps to explain the public's hatred of the *Citizens United* decision; to determine if it

contributes to an understanding of why the *Bellotti* decision was met with such little backlash, we must investigate the extent to which the political elite of the late 1970s and early 1980s spoke out about *Bellotti*.

III. Methodology, Evidence, and Results

The literature review has already provided strong and credible evidence supporting the notion that *Citizens United* was the logical next step following *Bellotti*, so we need not pursue this avenue any further. What still remains unanswered, though, is the question of why the American public had such a negative reaction to the *Citizens United* decision after expressing only a mild reaction to the *Bellotti* decision. There are four distinct yet related causes of this apparent paradox. First, *Citizens United* received significantly more media coverage than did *Bellotti*. Second, the tone of the newspaper articles covering *Bellotti* was far less partisan than the tone of newspaper articles covering *Citizens United*. Third, Americans today view corporations in a much more negative light than they did at the time *Bellotti* was decided. Finally, the political elite of today—particularly Democrats—have a powerful incentive to brandish their disdain for the *Citizens United* decision. When the general public witnesses this behavior on the part of elites, they internalize that cue. In order to test these hypotheses effectively, we must consult the newspaper articles published around the time of the *Bellotti* and *Citizens United* decisions.

There are several reasons why a historical analysis of newspaper articles is the most effective way to address the question that this paper sets out to answer. First, since no public opinion polls asking about *Bellotti* were administered after the decision was handed down, the quantity and quality of newspaper articles discussing *Bellotti* are the most reliable proxy for public opinion because newspaper articles often encapsulate the views of the general public. If

Bellotti were a highly salient issue among the public, there would be a large quantity of commentating newspaper articles; a negligible amount of coverage suggests the opposite. Second, while the newspaper industry has certainly undergone substantial changes in the thirty-two years between the *Bellotti* and *Citizens United* decisions, comparing articles written by the same newspaper corporations at two different times allows us to draw more valid conclusions than would comparing newspaper articles from the *Bellotti* era to television or social media coverage of *Citizens United*. Finally, solely examining scholarly articles discussing the *Bellotti* decision would be unrepresentative of the general public's attitude toward the case and so would not have allowed us to draw any valid conclusions about public opinion regarding *Bellotti*.

As this paper will demonstrate, the gap between the media coverage received by *Citizens United* and *Bellotti* is vast. In the seven years following the *Bellotti* decision, a total of six major national newspaper articles were written about the case, and in the seven years following the *Citizens United* decision, a total of 4,988 major national newspaper articles were written about the case.[35] As was mentioned in the literature review, an abundance of media coverage is strongly correlated with intensely-held opinions about a case. It could be true that whether or not the American public holds preexisting, intense beliefs about a particular court case influences the amount of media coverage that court case receives. However, the fact that *Citizens United* received over eight hundred times the amount of media coverage that *Bellotti* received nevertheless contributes to an explanation of why there is such a discrepancy in public opinion when it comes to the *Citizens United* and *Bellotti* decisions.

Not only does the sheer quantity of media coverage have an effect on how the American public reacts to a Supreme Court decision, but so too does the quality of that media coverage. If the news coverage of *Citizens United* was substantially more negative than the media coverage of *Bellotti*, this would also explain why the

American public views these very similar cases so differently. Since only six national newspaper articles discussing the *Bellotti* decision were published in the seven years after the case was decided (1978 to 1985), we will examine each one individually so that we have a complete picture of the quality of newspaper coverage that the case received.

The New York Times wrote half of all of the articles regarding the *Bellotti* ruling. Their first article discussing the *Bellotti* decision was filed under the "Economic Scene" heading, and the author does not favor either side of the case. The vast majority of the piece is dedicated to quoting Justice Powell (the majority writer) and Justice White (the principal dissenter). Only the last paragraph of the article expresses the author's personal reaction to the case: "The *Bellotti* case is no Magna Carta for business corporations, but it does significantly affirm and extend their first Amendment rights to speak out on public issue not directly related to their business activities."[36] The piece was entirely free of political considerations and criticisms, which supports the notion that the media coverage of Bellotti was largely neutral in tone.

In the second article that directly mentions *Bellotti* published by *The New York Times*, *Bellotti* is simply referred to as a precedent that will likely guide two later Supreme Court cases that similarly dealt with the corporate free speech doctrine (*Consolidated Edison Company v. Public Service Commission and Central Hudson Gas and Electric Corporation v. Public Service Commission*). However, while discussion of *Bellotti* is limited to a mere nine lines, this article is the first to suggest that there was, in fact, at least mild opposition to the *Bellotti* ruling at the time it was handed down. The author notes that the *Bellotti* decision was "controversial" and "criticized by those who fear that if companies have the same free speech rights as individuals, their greater financial resources will allow them to dominate the public debate."[37] Unfortunately, though, the author did not include any quotes from political elites or the general public

regarding *Bellotti* and gave no indication as to how widespread this criticism of *Bellotti* really was.

A final article published by *The New York Times* simply announces the primary effect of the case, "The Supreme Court cannot bar corporations from spending unlimited amounts of money to influence the outcome of public referendums," and summarizes the majority and dissenting opinions.[38] The article makes no mention of any public backlash to the decision, and the author does not include his own personal opinion about the ruling.

The day after the *Bellotti* ruling was handed down, the *Los Angeles Times* published a short article simply announcing the decision and quoting the majority and dissenting opinions. There is no commentary speculating how this decision will affect the country moving forward, and there is no mention of any public reaction.[39] As such, this news article does little to help answer the question of why *Bellotti* was met with such little public condemnation.

The Washington Post published the remaining two articles discussing the *Bellotti* decision, and in neither of these pieces was *Bellotti* the focal point. In the first article, *Bellotti* was cited as a precedent that would likely be used when deciding a case in the Supreme Court's next term (*Athens Lumber Company v. Federal Election Commission*). The author of the article did not contribute any of his own opinions about the *Bellotti* decision into his writing. Rather, he simply quoted and paraphrased Justice Powell's majority opinion and Justice White's dissenting opinion.[40] Much like the article published in the *Los Angeles Times*, this piece contributes little to a greater understanding of the question that this paper seeks to answer.

The second article that *The Washington Post* published regarding *Bellotti* paints the clearest picture of the case's impact (or lack thereof) on the general public. The piece explains the incremental change that the *Bellotti* ruling enacted, pointing out that "the courts have long held that businesses could lobby on issues that af-

fected them materially."[41] The article further contends that "corporate influence makes little difference at all [on a political issue]," citing the fact that the Massachusetts tax referendum ballot that lies at the heart of the *Bellotti* case lost by the same margin before and after corporations were excluded from influencing the vote.[42] William Dill, dean of New York University's business school at the time, agreed. Dill noted that "it is unclear whether the evolution of businessmen into politicians is good for the system," supporting the idea that *Bellotti* did not elicit substantial public backlash when it was decided.[43] The article concludes by contending that "it is not very likely that corporations will begin speaking out about whatever strikes their fancy," suggesting that the general public in 1978 did not believe that corporations would abuse their newly-expanded First Amendment rights.[44] This apparent trust in corporations is a likely explanation as to why the American public did not revile the *Bellotti* decision. We must consult survey data surrounding the *Citizens United* decision to determine if public mistrust in corporations has increased since *Bellotti*. If it has, this discrepancy in public trust of corporations could also help to explain the reason why *Bellotti* and *Citizens United* are viewed drastically differently by the American public.

Gallup polling data provide strong evidence that the public's view of corporations has changed palpably since *Bellotti*. In the thirty-two years that passed between the *Bellotti* and *Citizens United* decisions, the proportion of Americans who reported feeling dissatisfied by the size and influence of corporations increased by twenty percentage points and the proportion of Americans who have "quite a lot" of confidence in corporations declined by thirteen percentage points.[45,46] Moreover, the proportion of Americans who believe that large corporations present the biggest threat to the country going forward increased by thirteen percentage points.[47] The results of these polls highlight the fact that the public has evolved to view corporations in much more negative light after *Citizens United* than

they did at the time *Bellotti* was decided.

A current member of the Federal Election Commission recently published an article in *The New York Times* vociferously advocating for the overturning of *Citizens United*, claiming that the case ruined the process of funding American elections.[48] An article published by the Chief Political Correspondent of *The New York Times Magazine* dedicated a full two pages to the idea that "Citizens United unleashed a torrent of money from businesses and the multi-millionaires who run them, and as a result we are now seeing the corporate takeover of American politics."[49] The *Los Angeles Times* also took a stand against *Citizens United*, arguing that "the ruling's pernicious effect goes well beyond merely inviting more money into politics; it has opened the way to a debasement of our politics by narrowing the definition of political corruption that can be fought by campaign finance limits."[50] *The Washington Post's* editorial board published a scathing indictment of Citizens United, arguing that the ruling allows business tycoons to "add kingmaker to their names" and that the "potential to warp the political system is ever present" post-*Citizens United*.[51] The list of news articles assailing the *Citizens United* decision goes on and on. This stands in stark contrast to the neutral tone uniformly utilized by the newspaper articles discussing *Bellotti*.

The chasm between the vituperative tone employed by authors of articles focusing on *Citizens United* and the impartial tone employed by authors of press focusing on *Bellotti* could also serve to partially explain the reason why the American public treats the *Bellotti* and *Citizens United* cases so differently.

The final portion of this article will consider the discrepancy between the public's reaction to *Bellotti* and *Citizens United* and the influence of political cues. If the political elite expressed strong opinions following the *Citizens United* decision but remained relatively silent after the *Bellotti* decision, this would contribute to a greater understanding of the question that this article set out to an-

swer.

The introduction of this paper already mentioned Senator Sanders' and former Secretary Clinton's public criticisms of *Citizens United*. President Barack Obama, House Minority Leader Nancy Pelosi (D-CA), and Senate Minority Leader Charles Schumer (D-NY), among many others, have publicly aired their grievances about the case as well. President Obama emphasized the tremendous power the ruling bestows upon special interests.[52] House Minority Leader Pelosi referred to it as a "disastrous ruling that strikes at the heart of our founding principles" and argued that it "opened the floodgates to a tidal wave of special interest spending in our elections."[53] Senate Minority Leader Schumer labeled it as a decision that "has the potential to be disastrous to our democracy."[54] Democratic elites have tended to be more outspoken than Republican elites regarding *Citizens United*, perhaps because Democrats have a stronger incentive to turn the tides of public opinion against *Citizens United* than Republicans. Recent research has concluded that "*Citizens United* is associated with an increase in Republicans' election probabilities in state house races of approximately 4 percentage points overall and as high as 10 or more percentage points in several states."[55]

As the literature review noted, cues on the part of political elites can help shape public opinion about a particular issue. The political elite of today have unambiguously signaled that *Citizens United* is a disastrous ruling, whereas political speeches or statements made by political elites that discuss *Bellotti* are significantly fewer in number. Therefore, a difference in exposure to cues from political elites could be another contributing factor to the American public's logically inconsistent reactions concerning the *Bellotti* and *Citizens United* decisions.

IV. Conclusion

This paper provides evidence that four separate factors all play a role in explaining why Americans revile the *Citizens United* ruling and are agnostic toward the *Bellotti* ruling despite their remarkable similarities: (i) quantity of media coverage, (ii) quality of media coverage, (iii) public opinion about corporations, and (iv) exposure to political cues. We argued that the true explanation for this paradox is some synthesis of these aforementioned factors. It is beyond the scope of this article to determine the degree to which each one may have influenced public sentiment. However, this question suggests potential avenues for further inquiry.

One limit on the generalizability of this article is that it highlighted four distinct factors that work together to contribute to an understanding of the puzzle that this paper set out to solve. It may be unlikely that all four of these variables will be present in other cases. That being said, future studies can draw on the techniques employed in the present study (e.g., examining the quantity of media coverage or exposure to political cues as determining variables) in order to explain inconsistent reactions to select Supreme Court cases.

Another potential limit on this article's generalizability relates to the interestingly anomalous character of public attitudes toward *Bellotti* and *Citizens United*. This example may be unique because existing research indicates that the first case dealing with a highly-salient issue (e.g., election financing) typically sparks more intense public reactions than does any subsequent case dealing with that same issue.[56] As has been described, the relationship between *Bellotti* and *Citizens United* is wholly antithetical to this finding.

While we acknowledge that certain features may limit the generalizability of our conclusions, the theoretical underpinnings of the analysis can be applied to a variety of contexts within the legal universe. For example, this approach may be applied to criminal procedure analyses that investigate the non-legal factors influencing

judicial decisions. This is especially true for cases and sentencing decisions that involve nearly identical sets of facts and vastly different outcomes. Raising awareness of the impact that these factors can have may minimize potential biases and promote greater consistency within our legal system.

The present study can also be applied to future research in the realm of constitutional law. Specifically, it can provide a useful framework for pinpointing the various reasons why the Supreme Court sometimes overturns its own precedent in new cases that are nearly indistinguishable from the original. Finally, the findings of this paper could feasibly be used as a springboard for future studies that deal with the evolution of public opinion over time.

[1] Bernard Sanders. *The Democratic National Convention*. July 28, 2016.
[2] Hillary Clinton. *Third Presidential Debate*. October 18, 2016.
[3] The Washington Post. May 25, 2011.
[4] 1907 Massachusetts Acts. Chapters 576 and 581.
[5] 1943 Massachusetts Acts. Chapter 273.
[6] Oyez.org. "First National Bank of Boston v. Bellotti."
[7] Ibid.
[8] Justia. United States Supreme Court Case Law. Volume 435. "First National Bank of Boston v. Bellotti."
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] The Washington Post. May 14, 1988
[13] Arthur S. Miller, "On Politics, Democracy, and the First Amendment: A Commentary on *First National Bank v. Bellotti,*" Washington and Lee Law Review 38, no. 1 (Winter 1981): 21-42
[14] Ibid.
[15] Carl E. Schneider, "Free Speech and Corporate Freedom: A Comment on *First National Bank of Boston v. Bellotti*," *Southern California Law Review* 59, no. 6 (September 1986): 1227-1294
[16] Ibid.
[17] Gary Hart; William Shore, "Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti," *Case Western Reserve Law Review* 29, no. 4 (Summer 1979): 808-829

[18] Gary Hart; William Shore, "Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti," *Case Western Reserve Law Review* 29, no. 4 (Summer 1979): 808-829
[19] Oyez.org. "Citizens United v. Federal Election Commission."
[20] Bipartisan Campaign Reform Act. Section 203.
[21] Ibid.
[22] Oyez.org. "Citizens United v. Federal Election Commission."
[23] Justia. United States Supreme Court Case Law. Volume 558. "Citizens United v. Federal Elections Commission."
[24] Ibid.
[25] Zephyr Teachout, "The Historical Roots of Citizens United vs. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights," *Harvard Law & Policy Review* 5, no. 1 (Winter 2011): 163-188
[26] Richard A. Epstein, "Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want," *Harvard Journal of Law & Public Policy* 34, no. 2 (Spring 2011): 639-662
[27] Justin Levitt. "Confronting the Impact of "Citizens United"." *Yale Law & Policy Review* 29, no. 1 (2010): 217-34.
[28] Anne Tucker, "Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United," *Case Western Reserve Law Review* 61, no. 2 (Winter 2010): 497-550
[29] Ibid.
[30] Jeffery J. Mondak and Shannon Ishiyama Smithey, "The Dynamics of Public Support for the Supreme Court," *The Journal of Politics* 59, no. 4 (Nov., 1997): 1114-1142.
[31] Valerie J Hoekstra. Public reaction to Supreme Court decisions. Cambridge University Press, 2003.
[32] Charles H. Franklin, and Liane C. Kosaki. "Republican schoolmaster: The US Supreme Court, public opinion, and abortion." *American Political Science Review* 83, no. 3 (1989): 751-771.
[33] Robert S. Erikson, Gerald C. Wright, and John P. McIver. Statehouse democracy: Public opinion and policy in the American states. Cambridge University Press, 1993
[34] Douglas Kriner, and Francis Shen. "Responding to war on Capitol Hill: Battlefield casualties, congressional response, and public support for the war in Iraq." *American Journal of Political Science* 58, no. 1 (2014): 157-174
[35] ProQuest News and Newspapers
[36] Leonard Silk. "Corporate Rights and 1st Amendment." Economic Scene. *The*

New York Times. May 1978.
[37] Linda Greenhouse. "2 Rulings By High Court Expand Corporations' Free Speech Right." *The New York Times*. June 1980.
[38] Warren Weaver. "Justices, 5-4, Allow Corporate Spending for Issues on Ballot." *The New York Times*. April 1978.
[39] Philip Hager. "Court Holds Firms May Try to Sway Voters." *The Los Angeles Times*. April 1978.
[40] Morton Mintz. "Ban on Business Contributions Challenged." *The Washington Post*. November 1981.
[41] Bradley Graham. "Business Asks Wider Freedom of Speech." *The Washington Post*. March 1979.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Rebecca Riffkin. "Majority of Americans Dissatisfied with Size and Influence of Corporations. Gallup. January 2016.
[46] Gallup News. "Confidence in Institutions." Gallup. 2017.
[47] Gallup News. "Big Business." Gallup. 2017.
[48] Ellen Weintraub. "Taking on Citizens United." *The New York Times*. March 2016.
[49] Mat Bai. "How Much Has Citizens United Changed the Political Game?" *The New York Times Magazine*. July 2012.
[50] Michael Hiltzik. "Five Years After Citizens United, Big Money Reigns." *The Los Angeles Times*. January 2015.
[51] Editorial Board. "A Wealthy Oligarchy of Donors is Dominating the 2016 Election." *The Washington Post*. August 2015.
[52] Barack Obama. "Speech at the Rose Garden." July 2010.
[53] Nancy Pelosi. "Statement on the Sixth Anniversary of Citizens United." January 2016.
[54] Charles Schumer. "Interview with Congressional Quarterly." February 2012.
[55] Tilman Klumpp, Hugo M. Mialon, and Michael A. Williams. "The business of American democracy: Citizens United, independent spending, and elections." *The Journal of Law and Economics* 59, no. 1 (2016): 1-43
[56] Mondak, Jeffery J. "Perceived legitimacy of Supreme Court decisions: Three functions of source credibility." *Political Behavior* 12, no. 4 (1990): 363-384

Works Cited

1907 Massachusetts Acts. Chapters 576 and 581.
1943 Massachusetts Acts. Chapter 273.
ABC News-The Washington Post. Citizens United Poll, online at https://www.huffingtonpost.com/2010/02/17/citizens-united-poll-80-p_n_465396.html (visited December 18, 2017)
Bai, Mat. "How Much Has Citizens United Changed the Political Game?" *The New York Times Magazine.* July 2012.
Bipartisan Campaign Reform Act. Section 203.
Citizens United v. Federal Elections Commission, 558 U.S. 310. (United States Supreme Court, 2010).
Clinton, Hillary. "Third Presidential Debate Speech." Las Vegas, NV. October 18, 2016.
Cornell Law School, *Citizens United v. Federal Election Commission*,
Oyez, online at https://www.oyez.org/cases/2008/08-205 (visited
December 17. 2017).
Cornell Law School, *First National Bank of Boston v. Bellotti*, Oyez, online at https://www.oyez.org/cases/1977/76-1172 (visited December 17, 2017).
Editorial Board. "A Wealthy Oligarchy of Donors is Dominating the 2016 Elec tion." *The Washington Post*. August 2015.
Epstein, Richard A. "Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want," *Harvard Journal of Law & Public Policy* 34, no. 2 (Spring 2011): 639-662.
Erikson, Robert S., Gerald C. Wright, and John P. McIver. Statehouse democracy: Public opinion and policy in the American states (Cambridge University Press 1993).
First National Bank of Boston v. Bellotti, 435 U.S. 765. (United States Supreme Court, 1978).
Franklin, Charles H. and Liane C. Kosaki. "Republican schoolmaster: The US Supreme Court, public opinion, and abortion." *American Political Science Review* 83, no. 3 (1989): 751-771.
Gallup News. Big Business. Gallup (2017), online at http://news.gallup.com/poll/5248/big-business.aspx (visited December 21, 2017).
Gallup News. Confidence in Institutions. Gallup (2017), online at http://news.gallup.com/poll/1597/confidence-institutions.aspx (visited December 21, 2017).

Graham, Bradley. "Business Asks Wider Freedom of Speech." *The Washington Post.* March 1979.

Greenhouse, Linda. "2 Rulings By High Court Expand Corporations' Free Speech Right." *The New York Times.* June 1980.

Hager, Philip. "Court Holds Firms May Try to Sway Voters." *The Los Angeles Times*. April 1978.

Hart, Gary and William Shore. "Corporate Spending on State and Local Referendums: *First National Bank of Boston v. Bellotti*," *Case Western Reserve Law Review* 29, no. 4 (Summer 1979): 808-829.

Hiltzik, Michael. "Five Years After *Citizens United*, Big Money Reigns." *The Los Angeles Times*. January 2015.

Hoekstra, Valerie J. Public reaction to Supreme Court decisions (Cambridge University Press 2003).

Klumpp, Tilman, Hugo M. Mialon, and Michael A. Williams. "The business of American democracy: Citizens United, independent spending, and elections." *The Journal of Law and Economics* 59, no. 1 (2016): 1-43.

Kriner, Douglas and Francis Shen. "Responding to war on Capitol Hill: Battlefield casualties, congressional response, and public support for the war in Iraq." *American Journal of Political Science* 58, no. 1 (2014): 157-174.

Levitt, Justin. "Confronting the Impact of "Citizens United"." *Yale Law & Policy Review* 29, no. 1 (2010): 217-34.

Miller, Arthur S. "On Politics, Democracy, and the First Amendment: A Commentary on First National Bank v. Bellotti," *Washington and Lee Law Review* 38, no. 1 (Winter 1981): 21-42.

Mintz, Morton. "Ban on Business Contributions Challenged." The Washington Post. November 1981.

Mondak, Jeffery J. and Shannon Ishiyama Smithey. "The Dynamics of Public Support for the Supreme Court," *The Journal of Politics* 59, no. 4 (Nov., 1997): 1114-1142.

Mondak, Jeffery. "Perceived legitimacy of Supreme Court decisions: Three functions of source credibility." *Political Behavior* 12, no. 4 (1990): 363-384

Obama, Barack. "Speech at the Rose Garden." Speech. Washington, D.C. July 2010.

Pelosi, Nancy. Statement on the Sixth Anniversary of *Citizens United*. Democratic Leader, online at https://www.democraticleader.gov/newsroom/pelosi-statement-on-the-sixth-anniversary-of-the-citizens-united-decision/ (visited December 21, 2017).

ProQuest News and Newspapers. Search Results for "*First National Bank of Boston v. Bellotti*" and *Citizens United v. FEC*," online at https://search-proquest-com.ezproxy.bu.edu/news/advanced?accountid=9676 (visited December 18, 2017).

Riffkin, Rebecca. "Majority of Americans Dissatisfied with Size and Influence of Corporations. Gallup. January 2016, online at http://news.gallup.com/poll/188747/majority-americans-dissatisfied-corporate-influence.aspx (visited December 20, 2017)

Sanders, Bernard. "The Democratic National Convention Speech." Speech. Philadelphia, PA. July 28, 2016.

Schneider, Carl E. "Free Speech and Corporate Freedom: A Comment on *First National Bank of Boston v. Bellotti*," *Southern California Law Review* 59, no. 6 (September 1986): 1227-1294.

Schumer, Charles. Interview with Congressional Quarterly. Congressional Quarterly, online at http://www.pfaw.org/fighting-big-money-in-politics/quotes-by-members-of-congress-on-citizens-united-v-fec/ (visited December 21, 2017).

Silk, Leonard. "Corporate Rights and 1st Amendment." Economic Scene. *The New York Times.* May 1978.

Teachout, Zephyr. "The Historical Roots of Citizens United vs. FEC: How Anar chists and Academics Accidentally Created Corporate Speech Rights," *Harvard Law & Policy Review* 5, no. 1 (Winter 2011): 163-188.

The Washington Post. "Arthur S. Miller, Constitutional Law Expert at GWU, Dies" (1988), online at https://www.washingtonpost.com/archive/local/1988/05/14/arthur-s-miller-constitutional-law-expert-at-gwu-dies/09636708-51b5-45c0-b9a3-64bc79cc7407/?utm_term=.3a9281c089bf. (visited December 17, 2017).

Tucker, Anne. "Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United," *Case Western Reserve Law Review* 61, no. 2 (Winter 2010): 497-550.

Weaver, Warren. "Justices, 5-4, Allow Corporate Spending for Issues on Ballot." The New York Times. April 1978.

Weintraub, Ellen. "Taking on Citizens United." *The New York Times.* March 2016.

Implications and Potential Fallout From United States v. Nagarwala et al.

Jared Kelly | University of California, Berkley

Edited By: Julia Udell, Liza Bukingolts, Max Kwass-Mason, Nora Salitan, Sebastian Torero

Abstract

The pending case of *United States v. Nagarwala et al*. is the first time an individual has been prosecuted under the federal statute 18 USC § 116, which criminalizes the practice of female genital cutting (FGC). The case presents a difficult dilemma to federal court, as any decision will have negative consequences. Dismissal of § 116 would endorse parents to engage in Free Exercise and raise their children according to their traditions, even with practices internationally recognized as detrimental to the health of children. If the defense is convicted on § 116 indictments, such a ruling establishes a precedent that may allow for males to gain standing and challenge circumcision under the precepts of the Equal Protection clause inherent in Fourteenth Amendment jurisprudence. This article demonstrates that the government likely has a compelling interest in preserving the health and safety of girls and women, and thus the court is likely to rule against Free Exercise arguments. The Supreme Court has ruled against Free Exercise in the past, maintaining injunctions against religious polygamy and controlled substance usage, as the government had a compelling interest in preventing such practices. Furthermore, this article will argue that harsh sanction would be an ineffective approach for combatting FGC, and behavior alteration strategies serve as a more appropriate method for preventing the practice.

I. Introduction

A small Indian Muslim sect in Michigan, known as the Dawoodi Bohra, has come under fire for engaging in the practice of female circumcision or female genital cutting (FGC). Jumana Nagarwala, M.D. of Northville, Michigan is facing charges for performing FGC on female minors. The case is significant because it is the first time an individual is being prosecuted under the federal statute 18 USC § 116 charges since the statute's codification in 1996.[1] 18 USC § 116 imposes penalties upon any individual who "knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years." Nagarwala and her associates are believed to have performed the procedure on over one hundred girls in the preceding twelve years across the United States in areas including Minnesota, Chicago, and Los Angeles.[2] In addition to FGC charges under 18 USC § 116, Nagarwala received two more federal indictments: lying to federal law enforcement (18 USC § 1001) and obstructing an official proceeding by deleting electronic communication records (18 USC § 1512).[3] In January 2018, the presiding Judge Bernard Friedman dismissed what many considered to be the most serious charges levied against Nagarwala and her associate Fakhruddin Attar, M.D. in whose clinic the procedures were performed. The dropped charges included those under 18 USC § 2423, which prohibits the interstate transportation of minors with the intent to engage in a criminal sexual act. According to Freidman, Attar and Nagarwala's actions did not qualify as sexual activity, as the doctors did not contact the girls' genitalia for purposes of abuse, sexual gratification, or the humiliation or degradation of the victims.[4] The case will be tried in June 2018 by the United States District Court for the Eastern District of Michigan as *United States v. Nagarwala et al.*[5] The outcomes of this case will present a dilemma for the United States. If a § 116 prosecution is successful, the conviction will likely

do little to stop FGC, as it is a deeply ingrained cultural practice. Moreover, a successful prosecution has the potential to put girls in greater danger because of a practice known as "vacation cutting," in which parents travel internationally for the procedure. More American medical professionals refusing to perform the service due to license revocation could lead to more individuals with little to no formal medical training carrying out the procedure. Conversely, if the court moves to acquit the Nagarwala party of § 116 charges, this may be a condonation of what many, including the United Nations, see as an international human rights violation.

The process of FGC shares many commonalities with male circumcision, despite the fact that male circumcision is widely practiced throughout the United States and much of the world. Both practices are motivated by perceived medical benefits, religion, cultural factors, and both are questioned for their human rights implications, as they result in the permanent alteration of a minor's genitals who does not have the ability to consent to the practice. Currently, male circumcision is legal in the United States and there is little oversight over the procedure; however, a successful prosecution could establish grounds to challenge this custom. Not only does *United States v. Nagarwala et al.* represent a catch-22 scenario, as the court can either condone a human rights violation or create an atmosphere that allows for more FGC, but such a conviction could also establish standing for males to claim injury under Fourteenth Amendment principles which prevent discrimination by federal or state authorities on the basis of sex.[6] If an equal protection precedent were established against the genital cuttings of minors, such a ruling would likely impact millions of Americans who practice secular, non-therapeutic circumcisions and would have a particular effect in preventing Muslim and Jewish Americans from freely practicing their religions. In this article, I aim to discuss the background of religious and cultural genital cuttings, to contrast the right of Free Exercise to the right to physical integrity, to demonstrate the

consequences that may occur from the court's ruling, and to offer a solution that does not contravene the rights of individuals to practice their religion.

II. Background of Female Genital Cutting

According to the United Nations Children's Fund (UNICEF) 2016 brochure "Female Genital Mutilation/Cutting: A global concern," an estimated two hundred million women globally have undergone FGC as of February 3, 2016.[7] An estimated three million girls and women are at risk of having the procedure performed on them annually.[8] The practice of FGC is classified by the World Health Organization (WHO) on a scale of severity, from Type I to Type III, with an additional category, Type IV. Type I represents less invasive forms of the procedure, which range from the removal of the clitoral hood to a partial or full removal of the clitoris, to Type III which entails the complete removal of external genitalia with the suturing of the remains. Type IV entails any female genital alteration, such as pricking or scraping, not accounted for by Types I-III.[9] Today the practice is typically carried out by African Animist religions and Muslim groups in the Middle East, Southeast Asia, and Africa. However, atheists, and certain sects of Judaism and Christianity have historically carried out the practice.[10,11,12] Today, many who carry out FGC subscribe to certain schools of Islamic jurisprudence that view the procedure as being in line with teachings of the *Sunnah* (the teachings of the prophet Muhammad) and thus obligatory or highly preferable.[13] However, despite common misconceptions, the procedure is not originally a Muslim rite, and it does not enjoy universal approval amongst Muslims. A variety of Islamic scholars have condemned the procedure, arguing the practices are not part of Islamic jurisprudence.[14] The procedure is more likely driven by cultural factors as opposed to religious edicts. The practice is rare and unheard of in many predominantly Muslim countries; according

to UNICEF only two countries with a predominantly Muslim population outside Africa had more than one percent of women aged fifteen to forty-nine circumcised (Iraq and Yemen).[15] Many African countries that do not have Muslim majorities have very high circumcision rates for adult women. In Ethiopia, with a Christian plurality, and Liberia, with a Christian majority, seventy-four percent and fifty percent of women aged fifteen to forty-nine have undergone FGC, respectively.[16] Researchers have identified the driver of such procedures to be a cultural preference for dry sex practices (sexual intercourse in the absence of vaginal lubrication) and high regard for female virginity.[17,18] In such cultures, FGC is said to promote virginity, chastity, female modesty, and to attenuate female sexuality "directing it to the desirable moderation."[19]

The procedure of FGC can be radically different depending on the culture being evaluated. According to classical Islamic author Al-Mawardi, the ritual known as *khafḍ* typically involves cutting off skin in the shape of a kernel above the genitalia, which would typically be Type I or Type IV under the WHO's designation.[20] Often more extreme practices are in place such as "pharaonic circumcision," which falls under Type III and is typically practiced throughout Sudan and in many areas in Africa, including Egypt, Somalia, Mali, Nigeria, Ethiopia, Kenya, Eretria, Djibouti, and Chad.[21] This practice involves the excision of all external genitalia including the clitoris, labia majora, labia minora, and the suturing of the remains, leaving only a small hole no larger in circumference than that of a match stick to allow for the excretion of urine and menstrual fluid.[22] This will later be surgically altered through a process known as deinfibulation, typically after marriage, to allow for intercourse and child-birth, but many times is resealed following the birthing process (reinfibulation).[23]

The practice of FGC is largely reinforced by medical misconceptions along with spiritual, societal, and cultural factors. In African countries where the procedure occurs frequently, three

common medical misconceptions perpetuate the continuation of FGC. The first of these misconceptions is that if the clitoris is not removed it will continue to grow to the size of a penis. The second is that women are sterile until FGC is performed, as the procedure is thought to promote fertility. And the third is that the procedure promotes the aesthetics and cleanliness of the genitals as the clitoris produces an "offensive discharge" which is believed to be harmful to themselves, their husbands, and their offspring. Such deeply ingrained beliefs account for the high rate of FGC in Sudan (ninety percent of women aged fifteen to forty-nine).[24,25] Many Sudanese people believe that women can be ready for marriage and childbirth only after FGC as they are thus cleansed of their pollution and unable to bestow spiritual or symbolic injury to their offspring. [26]

Strong social pressures help to reinforce the practice of FGC across Muslim Africa; one of the worst insults that can be directed at a male is that he is the son of an uncircumcised mother.[27] Women who are not circumcised may bring high social costs to their families, establishing the procedure's importance in these cultures. To highlight this phenomenon, I will forward three examples that demonstrate the diversity of social pressures that reinforce the procedure. First, FGC is considered a rite of passage performed during weddings indicating the transition from girl to woman among the Rendille peoples of Northern Kenya.[28] Rendille women who have the procedure performed are typically adults ranging in age from eighteen to twenty.[29] Despite the knowledge of medical risks resulting from the procedure, most Rendille women still elect to have FGC performed because of its ritual significance.[30] Second, among the Samburu peoples of Kenya, uncircumcised women are not considered suitable for marriage as they are seen as immature, unclean, promiscuous, and any younger male siblings of hers are prevented from being inducted into the warrior class.[31] Third, among the Yacouba people of Côte d'Ivoire, men are ostracized and unable to speak at village meetings if their daughters have not been cut.[32]

These significant pressures reinforce the ritual both at the individual level to be suitable for marriage and at a familial level to prevent the imposition of the high social cost of uncircumcised females onto the males of the family.

The practice of FGC has been defined as a "traditional practice prejudicial to the health of children" by the United Nations (UN) under Article 24 (3) of the Convention on the Rights of the Child (CRC).[33,34] The procedure has been condemned by other multilateral treaties including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The United States has signed both treaties but has ratified neither the CEDAW nor the CRC. It has taken a more unilateral approach to combating FGC, establishing § 116 in 1996 to impose punitive sanctions on individuals who performed or abetted in the procedure. American public opinion is significantly opposed to FGC, which is reflected by the response to the 2010 American Academy of Pediatrics (AAP) committee on bioethics' recommendations on FGC. The AAP recommended that groups who traditionally practice FGC be allowed to perform a procedure leaving a ritual nick on the clitoris or clitoral hood to draw blood (Type IV). The AAP hoped such an allowance would prevent groups who traditionally practice FGC from engaging in more invasive forms of FGC (Types I-III).[35] This recommendation faced significant backlash from the general American public and resulted in the AAP committee on bioethics retracting their policy statement and issuing an apology.[36] In the prosecution of Nagarwala and her associates, the government hopes to chill or discourage the occurrence of FGC in the United States. The number of women in the United States who have undergone the procedure is uncertain, however the Centers for Disease Control (CDC) currently estimate between five hundred and thirteen thousand girls and women are at risk for FGC procedures in the United States.[37]

FGC procedures are performed by individuals with a wide array of medical experience, from highly trained professionals to

others with little to no experience. Dr. Jumana Nagarwala, a party to the defense in the Nagarwala case, had significant medical experience and impressive credentials as a faculty member of the Wayne State University's School of Medicine Department of Emergency Medicine and as the author of a substantial amount of medical literature (see Appendix A). However, because of its illegality, FGC is often performed underground by practitioners with little to no training. As a result, women who are severely injured from the procedure may refuse to seek medical assistance for fear of exposing their community to authorities. In the United States, FGC also occurs via a process known as "vacation cutting," in which families inform their daughters they are going on a special trip and travel to a country where FGC is common to undergo the procedure. To prevent "vacation cuttings," the United States Department of State and the Department of Homeland Security have created initiatives to analyze communities at risk and prevent travel intended for this purpose.[38]

III. Background of Male Circumcision

FGC shares commonalities with male circumcision as they both are invasive, ethically questionable, and motivated by religious, cultural, and societal factors, as well as prospective medical benefits. FGC differs from male circumcision because typically more healthy tissue is removed in FGC practices, resulting in higher rates of disfigurement, disability, and death than in male circumcision. As with FGC, the ritual alteration of male genitals can range from a minimally invasive procedure with a prick on the foreskin to very invasive with the removal of the foreskin, frenulum, and excision of the urethra in circumcision practices that include penile subincision.[39] Circumcision is often justified because the procedure may have prospective medical benefits as it decreases the risk of urinary tract infections in infants, reduces the risk of contracting

penile cancer, and reduces the risk of some sexually transmitted infections in men.[40] Male circumcision is most commonly performed under religious justifications. The procedure is prescribed in both Islam and Judaism, but has been performed by other groups including Christian sects, animist religions, and many indigenous cultures. Religious condemnation of male circumcision is nowhere near as widespread as that of FGC. However, challenges to the procedure have been brought forth by Islamic Quranists,[3] and the practice is forgone by a handful of Reform Jews who perform a ceremony entitled Brit shalom (naming ceremony) in place of the Brit milah (covenant of circumcision).[41, 42]

Male circumcision is encouraged by strong social motivators, which can be somewhat analogous to the driving forces of FGC. The most notable example of this is found in the United States where, as an elective procedure, it is commonly performed on neonates (infants less than four weeks old) for secular purposes, most typically for aesthetic reasons and a perceived uncleanliness of the foreskin.[43,44] Such beliefs are rooted in Victorian ideals that suggested that foreskins cause masturbation. Masturbation was believed to be responsible for a host of medical ailments such as epilepsy, clubfoot, impotence, eczema, gangrene, tuberculosis, infertility, paralysis, and death.[45] In turn, male circumcision gained medical justifications, and those who did not have their boys circumcised were considered "criminally negligent."[46] The procedure was bolstered by social prestige in commonwealth countries following reports stating that the British royal family had the procedure performed on neonatal males.[47] The non-secular occurrence of circumcision declined in industrialized countries following the adoption and implementation of socialized healthcare systems which did not provide funding for the procedure. In the United States, rates of the procedure declined as the purported medical benefits to protect against urinary tract infections, sexually transmitted infections, and penile cancer came under question. As a result, many insurance companies and State

Medicare programs have designated neo-natal circumcision as a non-therapeutic elective procedure, and no longer offer coverage for it.[48] The procedure is still common in the secular world, notably in the United States, and parts of Africa. In the United States, according to Sarah Waldeck of Seton Hall Law, the procedure persists under social norm theory. Any novel findings regarding the positive attributes of circumcision are used as a justification to continue the procedure, while any nonconforming evidence against the procedure is designated as irrelevant and unreliable, allowing the procedure to remain normative.[49] In Sub-Saharan Africa, voluntary medical male circumcision (VMMC) campaigns have increased the percentage of men circumcised for secular purposes as preliminary evidence indicates that circumcision may have a protective effect against HIV/AIDS transmission in heterosexual unprotected vaginal intercourse.[50] Such an uptick in VMMC in African countries is still motivated by social drivers as state agencies have offered incentives, such as financial rewards, for circumcision,[13] and increased the social cost of not being circumcised through public awareness campaigns against uncircumcised men.[52]

In spite of the prevalence of male circumcision, the practice remains shrouded in controversy as it involves the amputation of healthy erogenous tissues, notably the foreskin and frenulum, often from individuals who cannot consent. The removal of healthy tissue from neonates, infants, and children is questionable as such individuals may have not consented to the procedure later in life. Male circumcision contains risks from surgical and postoperative complications including: hemorrhaging, infection, glanular necrosis, increased risk of meatitis, penile amputation, and death.[53] Furthermore, in addition to neonates and infants having lower pain thresholds, the procedure is often performed without anesthesia in both clinical and non-clinical settings.[54,55,56] The risks associated with circumcision have led some such as J. Steven Svoboda in the Journal of Medical Ethics to propose male circumcision be

treated as a violation of Article 24 (3) of the CRC, as the procedure constitutes a traditional practice prejudicial to the health of children.[57] While FGC and male circumcision are not equivalent in terms of the magnitude and prevalence of adverse health impacts, male circumcision should still be questioned on the basis of pain and consequential health impacts as a practice prejudicial to the health of children.

IV. Different Perceptions of FGC and Male Circumcision

Despite the large degree of similarities shared between FGC and male circumcision practices, the world has very different perceptions of the two procedures. The process of male circumcision is the most common surgical procedure performed in the United States and is sometimes covered by major insurance companies. In contrast, FGC is seen as a human rights violation by many countries, with the United States declaring it a felony offense under § 116, and multilateral bodies such as the World Health Organization (WHO) passing resolutions such as (WHA61.16) in 2008 attempting to curb and eliminate the practice, stating:

> It involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls' and women's bodies…The practice violates a person's rights to health, security, and physical integrity, the right to be free from torture and cruel, inhuman, or degrading treatment, and the right to life when the procedure results in death.[58]

A nearly global international consensus exists condemning FGC with the intent to eliminate all of its forms, including in countries where FGC prevalence is high, though said countries have had difficulty enforcing such bans as the practice is a deeply ingrained cultural ritual.[59] Such a consensus is absent regarding male circumcision

for which there is significantly less concern over the human rights implications. Such a contrast in how the procedures are perceived can be seen in the WHO approach to FGC and male circumcision. The WHO condemns FGC for removing healthy tissue and violating a person's right to physical integrity and has programs to stop such practices, while simultaneously espousing the benefits of male circumcision and financing neonatal circumcision programs in Sub-Saharan Africa.[60]

The diminished concern about male circumcision may be attributed to the belief that the procedure may not have long term health damage and may hold medical benefits.[61,62] Such reasoning is problematic as it provides ample justification to allow for both excision (Type II) and infibulation (Type III) FGC to occur under the guise of reducing instances of vulvar cancer as such a procedure prevents cancer through the removal of the labia majora and minora. Male circumcision is unique in that it is the only highly invasive medical procedure for minors that is performed to prevent ailments that may never affect the recipient of the surgery. Other highly invasive preventative surgeries performed on minors, such as appendectomies, hysterectomies, mastectomies, and castrations would be considered ridiculous. The performance of irreversible medical procedures on non-consenting minors breaches Western medical ethic principles of respect for patient autonomy, the Hippocratic Oath, and that of nonmaleficence: a clinician's responsibility not to cause or expose a patient to harm intentionally.[63,64,65] From a legal standpoint, a procedure such as circumcision remains questionable as a California court held that unnecessary surgeries are harmful to patients even if performed perfectly.[66] In addition, the United States has no regulation of the procedure, and prosecutions against non-medical circumcisions are rare despite being more invasive than certain

forms of FGC which are explicitly prohibited under federal law.[67]

The response against male circumcision has been minimal compared to the response against FGC, but a new response has recently emerged. Medical groups have advocated for making the procedure illegal, even if religious reasons are given, as the procedure is non-therapeutic and heavily culturally influenced.[68,69] Male circumcision has been condemned by international bodies including the United Nations General Assembly which referred to the procedure as "a human rights violation" and "non-beneficial."[70] Additionally, the council of Europe has urged its member countries to pass laws shielding minors from traditional practices not in the best interest of the child.[71] According to Svoboda, a framework exists to challenge the legality of male circumcision in the United States. Svoboda proposes that the United States is beholden to international treaties under the Constitution's Supremacy Clause (Article VI, paragraph 2), according to the precedent established by the Supreme Court in the *Nereide* case which clarified that the United States is beholden to international law including customary law.[72,73] This principle was affirmed in 1900 by *The Paquete Habana* case where the Supreme Court's holding integrated American law with customary international law.[74] As a result the United States is bound to the precepts of international law which contain provisions encouraging the enjoinment of male circumcision and FGC. International conventions which contain grounds to constrain FGC and male circumcision include: the CRC, the Universal Declaration of Human Rights (UDHR), United Nations Convention against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR).[75]

Richard Bilder, in the *Houston Journal of International Law*, clarifies that international law does not require legislation or treaties to be binding domestically. He furthers that a lack of United States ratification of United Nations treaties does not preclude citizens from receiving rights conferred upon them by international treaties.[76] As

such, the United States is beholden to abide by the CRC, and all provisions of the CEDAW despite a lack of ratification. Treaties such as the CRC have international legitimacy as it is the "the most widely ratified human rights instrument in history," and as such the United States is bound to customary law provisions which are enforceable in federal courts.[77] Under such an interpretation, medical professionals who practice non-therapeutic circumcisions can be subject to legal ramifications due to the violation of international humanitarian law. Male circumcision meets the threshold for a traditional practice prejudicial to the health of children because it violates human rights principles such as a child's rights to physical integrity, the right to health, the prohibition of torture, and a child's right to life.[78] Furthermore, discrimination against genital cuttings on the basis of sex in 18 USC § 116 represents a clear departure for Fourteenth Amendment jurisprudence bestowing equal protection irrespective of sex. Because of the analogous nature of genital cutting for non-consenting minors, and the international prohibition against FGC, Svoboda recommends the enjoinment of both FGC and male circumcision, as they are practices prejudicial to the health of children.

V. Free Exercise and The Parent's Right to Decide

The Nagarwala defense plans to argue that prosecution under § 116 would be a violation of constitutionally protected freedom of religion, called a "losing argument" by First Amendment expert Erwin Chemerinsky.[79] Regardless, such a defense presents a challenge to the courts, as any decision must balance protecting children's well-being and autonomy with protecting the right of parents to exercise their freedom of religion. International and domestic law grant protection for parents to rear children according to the guardian's traditions and customs.[80,81] Arguably, parents who pursue

the genital cutting of their children do so because they believe it is in the child's best interest, according to their culture and traditions. Others may choose not to have the procedure performed because they believe it will bring physical harm to the child. Many agree that it would be a bad policy to endanger the welfare of individuals by carrying out procedures upon individuals who have no capacity to consent. This issue is made more complex because the practice in question is a matter of intimate relations, and as a result, the defense meets the criterion for strict scrutiny.[82] Although the statute explicitly prohibits the practice of FGC on the basis of both religion and culture, the government cannot explicitly target the practice unless it has a compelling governmental interest in doing so: one that is narrowly tailored to overcome strict scrutiny. In this case, the government is targeting FGC as it sees the procedure to be equivalent to child abuse. This raises the question of whether the court should protect children from health complications, permanent disfigurement, and death, or protect parents' rights to practice their traditions and raise their children in the best way they know to be possible to further the best interests of the child.

When deciding *Nagarwala*, the court is likely to apply strict scrutiny to the case because claims of free exercise have been violated under the Sherbert Test (reinstated following the Religious Freedom Restoration Act of 1993). Furthermore, the Dawoodi Bohra likely meet the "suspect classification" criterion, as their practices have been historically subject to prejudice, hostility, and stigmatization.[83] The high level of review may reduce the implications of the fallout from the ruling; however, the case will still have its consequences. If the court sides with the prosecution, the government will be exercising a moralistic paternalism through which they assume to know the best interests of the child and a better manner of raising

children than do the parents of the child. If the court sides with the defense, they will be neglecting child welfare in the favor of parents being allowed to exercise traditional practices which are prejudicial to the health of children.

The direction in which the court will head is unclear, as previous case law on the subject is muddled. The government has overcome the test of strict scrutiny in past cases concerning genital cuttings and the free exercise of religion, demonstrating that the laws in question were specific and protected a compelling state interest. This was seen in 2013, when a circumcision regulation decree was declared constitutional regarding a New York City ordinance that required consent from both parents before a *metzitzah b'peh* circumcision ritual was performed on neonates in order to protect public health, as multiple infants had died or suffered brain damage as a result of the ritual.[84,85,86] The courts have also decided bodily integrity to be a right, as seen in *Union Pacific Railway Company v. Botsford*, which held that "no right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law."[87] More recently, however, courts have found in favor of the position of parents to exercise their beliefs in regards to their children as seen in *Wisconsin v. Yoder*.[88] Furthermore, the ability of parents to decide on religious matters is considered an essential civil liberty in American society, as outlined in an American Civil Liberties Union (ACLU) brief submitted to the court against a San Francisco city ordinance which planned to ban the practice of male circumcision.[89] In the brief, the ACLU of Northern California stated:

> Newborn male circumcision is a tenet of the Jewish and Islamic faiths. By criminalizing the circumcision of boys, the proposed ordinance would prevent parents from allowing their children to participate in an essential

> religious ritual, infringing upon the rights of the parents to guide the religious upbringing of their children.[90]

The brief submitted by the ACLU serves as an applicable challenge to § 116, as the current ban on female circumcision interferes with individuals' rights to practice customs and rituals fundamental to their religion, therefore serving as a limit to the Free Exercise clause. The Free Exercise clause reserves the right of American citizens to accept any religious belief and engage in actions and rituals made on behalf of those beliefs.[91] However, the ACLU has maintained an opposite stance in relation to FGC, with the ACLU of Maine releasing a press statement supporting the laws in place against FGC.[92] From a public opinion perspective, the process of FGC is unpopular. However, the courts have established that the government has the duty to allow expression, regardless of that expression's popularity.[93,94]

The comments by Erwin Chemerinsky, that a religious defense is likely a losing position, highlight a double-standard, and a degree of moralistic imperialism exercised within the juridical sphere. Male circumcision, a tradition of many cultures around the world, has especially strong roots grounded in Judeo-Christian tradition. As such, male circumcision is a normative procedure that is accepted by Western society, despite its potential to constitute a human rights violation. Whereas the procedure of FGC, which has strong cultural roots in African cultures, and is not part of the Abrahamic tradition, is considered barbaric, and impermissible in society. As a result, a double-standard emerges in the laws that seek to protect children from genital cutting as attempts to enjoin male circumcision for health and safety purposes have been met with calls of Anti-Semitism and Islamophobia.[95] The states which have established bans against male circumcision, such as South Africa, have invoked exceptions to allow the procedure to continue for religious or cultural reasons.[96] This stands in stark contrast to

laws banning FGC such as § 116, which explicitly prohibit religious or cultural allowances for FGC to be performed. This shows a favoritism of the government toward customs related to the tenets of Abrahamic religions. Such a paradigm leads to future and reinforces existing discrimination based on creed, race, and sex.[97]

VI. The Government's Ability to Restrict Free Exercise

Despite the challenges presented by the Nagarwala case, the government still has grounds to regulate FGC. 18 U.S.C § 116 violates citizens' right to Free Exercise as it overtly prohibits individuals from participating in religious practices. However, the government can exercise restraint and regulate FGC despite First Amendment concerns under the tenets of the Sherbert Test, a balancing test employed by the courts to determine if an individual's right to Free Exercise has been violated by the government.[98] The government can contravene FGC as the procedure constitutes an act of violence, trespass, or encroachment on the rights of others. As a result, § 116 furthers a compelling state interest in protecting girls and women in the least restrictive manner possible. The statute only serves to limit FGC and no other religious engagements of groups who practice FGC. The Supreme Court has historically found protecting the welfare of children to be a compelling state interest.[99] This is seen as the courts have allowed prior restraint or the prohibition of expression before it occurs in cases involving sexual exploitation.[100] The protection of the health and safety of young women in the United States supersedes the protection of cultural or religious exercise. Such was the determination in the conviction of Khalid Adem, an Ethiopian man who was prosecuted by the state of Georgia for aggravated battery and cruelty to children following the excision of his daughter's clitoris.[101] The compelling interest to protect young women would allow the government to retain an injunction on the procedure and would provide the basis for evading

barriers imposed by the strict scrutiny standard.[102] As a result the Dawoodi Bohra maintain the freedom to believe in their ideals even though they do not maintain the freedom to act on those beliefs.

18 U.S.C § 116 is unlikely to face invalidation as its drafting meets the content neutrality principles established in *Police Dept. of Chicago v. Mosley.*[103] The law does not seek to target Muslims of the Dawoodi Bohra sect, but instead aims to prevent anyone from carrying out FGC, irrespective of their religious or cultural affiliation. In cases where federal laws have not sought to selectively abridge the rights of a religious group, but instead to apply rights to society at large, the law has generally been upheld. Two notable examples of this are the Supreme Court's affirmation of the Morrill Anti-Bigamy Act, which outlawed polygamy in *Reynolds v. United States,* and the case of *Employment Division v. Smith*, which denied an exception for ritual drug usage.[104] Laws in both *Reynolds* and *Smith* were not specifically intended to target Mormon or Native American religious practices but rather were neutral laws applied to the general public which furthered a compelling government interest.[105]

VII. Consequences of the acquittal of § 116 Charges

If the court decides in favor of the defense, those practicing FGC would have legal standing on First Amendment grounds. This would allow the state to sanction an act of violence and harm against women so that parents' right to express religious freedom is protected. Exoneration would likely result in a public opinion backlash similar to that which followed the American Academy of Pediatrics' 2010 bioethics recommendations on FGC.[106] Furthermore, such a ruling would establish precedent that could promote a perceived sense of immunity for those who want to practice FGC in the United States, putting more girls and women in harm's way.

VIII. Potential Fallout from a Successful Prosecution under § 116 Charges

With a successful prosecution, the government hopes to establish a chilling effect, to discourage or inhibit the practices by the threat of legal sanction, and to prevent practitioners from carrying out FGC. Yet criminalization may not be an effective means to end the practice, as FGC is a deeply held societal and cultural belief making its eradication unlikely through statutes and legal decisions. Additionally, such laws only further the perceived dominance of the Judeo-Christian traditions in a hierarchy of customs in which cultures that practice FGC are termed inferior and barbaric.[107] A harsh penalty for Nagarwala and her associates may make the procedure more dangerous for girls, as parents may choose to seek more secretive and risky alternatives for FGC. According to the United Nations Children's Fund Innocenti Research Institute, sanctions against FGC by Western governments, without the implementation of behavior change strategies, have led to a greater occurrence of the procedure underground in both the European Union and the United States.[108] Harsh sanctions against Nagarwala could establish a chilling effect among medical practitioners who currently perform the procedure. But parents, instead of ceasing to practice FGC, may instead subject their children to FGC from individuals with little to no formal medical training, or encourage "vacation cuttings," subjecting girls to the procedure in foreign countries, typically in unsanitary conditions with the use of crude instruments.

A successful prosecution would establish a precedent against traditionally harmful cultural practices, which may provide standing for males to claim injury from male circumcision under the precepts of the Fourteenth Amendment. Such challenges are more likely to occur in the future as male circumcision has been facing growing opposition from both Western governments and medical agencies who have released policies or statements against the elective and

religious applications of the practice (see Appendix B). If a consensus emerges that male circumcision is, in fact, harmful for males, the government would have a legitimate concern and just reason to impose restrictions on the practice to protect young males, therefore overcoming any strict scrutiny challenges. A court's decision handing a guilty judgement to Nagarwala and her associates would show the government engaging in an explicit form of viewpoint discrimination. In this case, the government would be condoning the genital cutting of males, which is a familiar custom in the Judeo-Christian tradition, while criminalizing the unfamiliar practices of non-Judeo-Christian and minority religions who engage
in FGC. This is a harmful prospect for democratic legitimacy in the United States as it serves as an explicit contradiction to a value-neutral judgement and instead furthers ethnocentric policies above those that guarantee egalitarian protections. However, this response could also increase the health risks associated with male circumcision as the process would be driven underground in in order to avoid potential legal consequences.

IX. Behavior Alteration

Serious attempts to eliminate FGC in the United States should not be imposed by the judiciary or the legislature; such attempts inadvertently expose girls and women to more unsafe conditions. Rather, the United States needs to wage campaigns against FGC by distributing effective information, increasing effective enforcement, and changing the social norms behind the practice. Harmful, common, and culturally ingrained practices, such as foot binding in China have been eliminated.[109] Strategies have been implemented successfully to combat FGC in Keur Simbara, Senegal under the guidance of Tostan International. The Tostan's FGC eradication program followed a practice of "social diffusion" to bring forth change. In such a program, a respected religious leader such as an

imam, a former cutter, and a grassroots educator visit villages to provide accurate health information and eliminate medical misconceptions surrounding the procedure.[110] The team's messages are reinforced by public service campaigns through common communication channels such as radio.[111] Education based approaches in tandem with condemnation from religious leaders have been successful in other instances. For example, in the Kenyan villages of Garissa and Myale, FGC was reduced by thirty percent in 2006.[112] Such an approach has led to significant declines in the procedure in Burkina Faso, Egypt, Kenya, Liberia, and Togo; however, in the United States, such a process may be a more difficult challenge as many individuals already have access to information regarding FGC's harms. A successful approach for communities in the United States would need to target the normative nature of FGM. These communities operate under the social norm theory which enables the practice to continue, dismissing evidence indicating that FGC may have harmful consequences. However, having influential community members such as community organizers or religious leaders renounce the practice could have a significant impact in lowering the social value of such procedures. Furthermore, an education-centric approach is becoming a more popular policy option as harsh legislation has done little thus far. An education-centric approach against FGC was advocated for by the ACLU of Maine, as opposed to a bill in the Maine state legislature which would have proposed more felony penalties for the procedure. Such an approach, the ACLU believed, would be more effective in combating FGC in Maine, a state with a high Somali population (ninety-eight percent of women in Somalia aged fifteen to forty-nine have undergone the procedure).[113] This approach would likely not solve the problem immediately, but would phase out the process through attrition as more individuals decline to perform or subject their children to the procedure.

X. Conclusion

The prosecution of § 116 in *United States v. Nagarwala et al*. presents a tricky situation for the government. If the prosecution is successful, the case might appear to be a victory for human rights. However, success would highlight the government's contradictory approach to which religious groups are able to exercise their freedom of expression. In this situation, parents of familiar Judeo-Christian customs (male circumcision) would be able to continue potentially harmful practices while non-Abrahamic minority groups would be prosecuted for FGC. A successful prosecution would be decided based on cultural value judgements establishing a cultural and religious hierarchy favoring familiar customs. This approach is the antithesis of Western beliefs of universal human rights, inalienable to all, regardless of caste, class, creed, gender, ethnicity, or race. Furthermore, a successful prosecution has the ability to push FGC further underground, leading the procedure to be performed in less ideal conditions that would put girls in greater danger. In addition, this could open a "Pandora's box" of Fourteenth Amendment legal challenges against male circumcision. If this occurs, it has the potential to establish standing for individuals to challenge male circumcision on equal protection grounds, which could impact a ritual practiced by a significant number of Jewish and Muslim Americans. A decision in favor of the defense could to be equally problematic: a branch of the United States' government will have condoned what is internationally considered a human rights abuse. This would harm the United States' legitimacy in its concern for international human rights issues, most notably the mission to end global FGC outlined in a United Nations declaration that the United States helped draft.[114] A decision in favor of the defense could also lead to the opposite of a chilling effect with practitioners of FGC feeling emboldened to carry out the procedure due to a perceived immunity from the law. This decision would favor the absolute

right of the parents to raise their children how they see fit even if it endangers their child's well-being. Whatever the resulting outcome concerning the § 116 charges, the court will confront a dilemma: do they protect children's physical integrity and ensure they are free from pain, or do they allow parents to maintain a harmful tradition because they believe it is in the best interest of their child? This brings about a broader question for society: does a community have the right to allow physically harmful traditions to be practiced, simply because they are longstanding and culturally important?

Appendix A: Journal authorship and co-authorship published by Jumana Nagarwala, MD. (Source: Google Scholar)

Nagarwala, Jumana, Sharmistha Dev, and Abraham Markin. "The Vomiting Patient." *Emergency Medicine Clinics* 34, no. 2 (2016): 271-291.

Belsky, Justin B., Jumana F. Nagarwala, and Glenn F. Tokarski. "Massive hemoperitoneum from a ruptured corpus luteum cyst masquerading as biliary colic." *International Journal of Case Reports and Images (IJCRI)* 6, no. 3 (2015): 168-172.

Griffith, Brent, Phyllis Vallee, Seth Krupp, Melissa Jung, Michelle Slezak, Jumana Nagarwala, C. Patrick Loeckner, Lonni R. Schultz, and Rajan Jain. "Screening cervical spine CT in the emergency department, phase 3: increasing effectiveness of imaging." *Journal of the American College of Radiology* 11, no. 2 (2014): 139-144.

Harmouche, Elie, Nikhil Goyal, Ashley Pinawin, Jumana Nagarwala, and Rahul G. Bhat. "Usmle Scores Predict Success in Abem Initial Certification." *Academic Emergency Medicine* 23 (2016): S82-S83.

Goyal, Nikhil, Phyllis A. Vallee, Jason Folt, Bradley Jaskulka, Sudhir Baliga, Jumana Nagarwala, and Michelle Slezak. "WIREd for Milestones." *Journal of graduate medical education* 8, no. 3 (2016): 445-446.

Appendix B: Timeline of institutional opposition to neonatal male circumcision

1993 Queensland Law Reform Commission concludes "*On a strict interpretation of the assault provisions of the Queensland Criminal Code, routine circumcision of a male infant could be regarded as a criminal act*". Also doctors who perform non-medical circumcision on infants are liable for future civil claims by the individual at a later date.[115]

1996 Australasian Association of Paediatric Surgeons Guidelines for Circumcision stated "*We do not support the removal of a normal part of the body, unless there are definite indications to justify the complications and risks which may arise. In particular, we are opposed to male children being subjected to a procedure, which had they been old enough to consider the advantages and disadvantages, may well have opted to reject the operation and retain their prepuce.*" Also "*Neonatal male circumcision has no medical indication. It is a traumatic procedure performed*

without anaesthesia to remove a normal functional and protective prepuce."[116]

1996 Canadian Paediatric Society circumcision statement: "*Circumcision of newborns should not be routinely performed*."[117]

1996 British Medical Association circumcision statement: "*The BMA opposes unnecessarily invasive procedures being used where alternative, less invasive techniques, are equally efficient and available. Therefore, to circumcise for therapeutic reasons where medical research has shown other techniques to be at least as effective and less invasive would be unethical and inappropriate.*"[118]

1999 American Medical Association Neonatal Circumcision Policy Statement: "*virtually all current policy statements from specialty societies and medical organizations do not recommend routine neonatal circumcision*". The statement also calls for a retraining of American physicians as most do not use anesthesia or have inadequate informed consent practices for parents.[119]

2001 British Association of Paediatric Surgeons, The Royal College of Nursing, The Royal College of Paediatrics and Child Health, The Royal College of Surgeons of England and The Royal College of Anaesthetists. Statement on Circumcision: "*The British Association of Paediatric Surgeons recognizes that male circumcision is required in certain religious and cultural groups. Notwithstanding this, it is the majority opinion that the practice should be discouraged.*"[120]

2003 British Medical Association symposium on circumcision conclusions: "*The BMA does not believe that parental preference alone constitutes sufficient grounds for performing a surgical procedure on a child unable to express his own view. . . The BMA considers that the evidence concerning health benefit from non-therapeutic circumcision is insufficient for this alone to be a justification for doing it. . . . Some doctors may wish to not perform circumcisions for reasons of conscience. Doctors are under no obligation to comply with a request to circumcise a child."*[121]

2003 Finland's Central Union for Child Welfare circumcision statement: "*The Central Union for Child Welfare considers that circumcision of boys that violates the personal integrity of the boys is not acceptable unless it is done for medical reasons to treat an illness. The basis for the measures of a society must be an unconditional respect for the bodily integrity of an under-aged person.*"[122]

2005 The South African Children's Act (No. 38 of 2005) indicates that circumcision of male children is unlawful except for medical or religious reasons. Non-therapeutic neonatal circumcision is a criminal act (unless performed for religious reasons). The act allows for every male child to refuse circumcision.[123]

2007 All states in Australia adopt ban of cosmetic neonatal circumcision in Australian public hospitals.[124]

2010 The Royal Australasian College of Physicians circumcision statement: "*After reviewing the currently available evidence, the RACP believes that the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision and the complication rates of circumcision do not warrant routine infant circumcision in Australia and New Zealand.*"[125]

2010 The Royal Dutch Medical Association (KNMG) circumcision statement: "*The official viewpoint of KNMG and other related medical/scientific organizations is that non-therapeutic circumcision of male minors is a violation of children's rights to autonomy and physical integrity. Contrary to popular belief, circumcision can cause complications – bleeding, infection, urethral stricture and panic attacks are particularly common. KNMG is therefore urging a strong policy of deterrence. KNMG is calling upon doctors to actively and insistently inform parents who are considering the procedure of the absence of medical benefits and the danger of complications. Insofar as there are medical benefits it is reasonable to put off circumcision until the age at which such a risk is relevant and the boy himself can decide about the intervention, or opt for any available alternatives.*"[126]

2012 Regional court in Cologne, Germany rules that parents cannot grant consent for ritual (non-therapeutic) circumcision of children as the procedure leads to grievous bodily harm, and eliminates the choice for the individual to decide in the future if they want to remain circumcised or uncircumcised. Determines that the "*fundamental right of the child to bodily integrity to decide* in the future if they want to remain circumcised or uncircumcised. Determines that the "*fundamental right of the child to bodily integrity outweighed the fundamental rights of the parents.*"[127]

2013 Parliamentary Assembly of the Council of Europe adopts resolution 1952 (Children's right to physical integrity) indicating that "*one category is particularly worrisome, namely violations of the physical integrity of children which supporters tend to present as beneficial to the children themselves despite*

evidently negative life-long consequences in many cases: female genital mutilation, the circumcision of young boys for religious reasons, medical interventions during the early childhood of intersex children as well as the submission to or coercion of children into piercings, tattoos or plastic surgery."[128]

2013 The children's ombudspersons from Sweden, Norway, Finland, Denmark, Iceland, and the children's spokesperson from Greenland called for a ban on the circumcision of minors for non-medical reasons in their respective governments as it is a violation of UNCRC and current laws fail to protect minors from harmful traditions. Resolution Summary: *"Circumcision without a medical indication on a person unable to provide informed consent conflicts with basic principles of medical ethics, particularly because the operation is irreversible, painful and may cause serious complications."*[129]

2015 Royal Court of Justice London finds that non-therapeutic circumcision of male children is a significant harm.[130]

2018 The Government of Iceland has circulated a bill making it a crime to perform the non-medical circumcision of boys.[131]

[1] Department of Justice. *The United States District Attorney's Office Eastern District of Michigan*. "Detroit Emergency Room Doctor Arrested and Charged with Performing Female Genital Mutilation." News release, April 13, 2017. Accessed October 25, 2017. https://www.justice.gov/usao-edmi/pr/detroit-emergency-room-doctor-arrested-and-charged-performing-female-genital-mutilation.
[2] Trevor Bach. "Michigan FGM case could test bounds of religious liberty." *The Christian Science Monitor.* July 27, 2017. Accessed October 24, 2017. https://www.csmonitor.com/USA/Justice/2017/0727/Michigan-FGM-case-could-test-bounds-of-religious-liberty.
[3] Ibid.
[4] Bhargavi Kulkarni. "Judge dismisses most serious charge in Detroit genital mutilation case." India Abroad. January 18, 2018. Accessed March 06, 2018. https://www.indiaabroad.com/indian-americans/judge-dismisses-most-serious-charge-in-detroit-genital-mutilation-case/article_d4457e92-fcc1-11e7-9832-8342cad0fcd5.html.
[5] United States of America v. Nagarwala et al, 2:17-cr-20274 (2018).
[6] See Reed v. Reed, 404 U.S. 71 (1971) (Court held the fourteenth Amendment prohibits the unequal treatment on the basis of sex).
[7] Unicef. "Female genital mutilation/cutting: a global concern." New York:

UNICEF (2016): 1-4.
[8] UNICEF. "At least 200 million girls and women alive today living in 30 countries have undergone FGM." (2017).
[9] World Health Organization and UNICEF. "Female genital mutilation: a joint WH." (1997). {Type I also referred to as clitoridectomy, Type II FGC constitutes removal of the clitoris and partial to full removal of the labia minora often referred to as excision. Type IV category includes anything not documented from Types I-III(clitoridectomy, excision, or infibulation) including cauterization, incising, piercing, pricking, and scraping}
[10] Barbara Gualco, Barbara, Regina Rensi, et al. "The female genital mutilations: defining problems, cultural and psychosocial factors, reference regulations." *ITALIAN JOURNAL OF CRIMINOLOGY* 3, no. 2 (2014): 263.
[11] Shaye Cohen JD. *Why Aren't Jewish Women Circumcised?: Gender and Covenant in Judaism*. Univ of California Press, 2005, 55-67.
[12] Alison T. Slack, "Female circumcision: A critical appraisal." Hum. Rts. Q. 10 (1987): 447
[13] with the Sunni - Maliki, Hanbali, and Shafi'i schools of Islamic jurisprudence and Shiite Dawoodi Bohra viewing the procedure as highly preferable or obligatory
[14] United Nations Children's Fund, and Geeta Rao Gupta. "Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change." *Reproductive Health Matters* (2013): 101.
[15] Ibid
[16] United Nations Children's Fund, and Geeta Rao Gupta. "Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change." *Reproductive Health Matters* (2013): 101.
[17] Tamale, Sylvia, ed. *African sexualities: A reader*. Fahamu/Pambazuka, 2011, 277-281.
[18] Ibid, at 663.
[19] Slack. "Female circumcision: A critical appraisal.", 446.
[20] Sami A. Aldeeb Abu-Sahlieh. "Islamic Law and the Issue of Male and Female Circumcision." *Third World Legal Stud*. (1994): 74.
[21] Hanny Lightfoot-Klein. "Pharaonic circumcision of females in the Sudan." Med. & L. 2 (1983): 353.
[22] Aldo Morrone, Jana Hercogova, et al. "Stop female genital mutilation: appeal to the international dermatologic community." *International journal of Dermatology* 41, no. 5 (2002): 256-267. {process is also typically referred to as infibulation}.
[23] Ibid 257, 262 {process of deinfibulation}
[24] Slack, "Female circumcision: A critical appraisal."446.
[25] Geeta Rao Gupta, et al. "Female genital mutilation/cutting: a statistical overview

and exploration of the dynamics of change." *Reproductive Health Matters* (2013): 186-187.

[26] Robert Myers, Francisca Omorodion, et al., "Circumcision: its nature and practice among some ethnic groups in southern Nigeria." *Social science & Medicine* 21, no. 5 (1985): 584.

[27] Erika Sussman. "Contending with culture: an analysis of the female genital mutilation act of 1996." *Cornell Int'l LJ* 31 (1998): 209

[28] Frances Althaus. "Female circumcision: rite of passage or violation of rights?" *International Family Planning Perspectives* (1997): 131.

[29] Bettina Shell-Duncan and Ylva Hernlund. "Female'circumcision'in Africa: Dimensions of the practice and debates." (2000), 146.

[30] Monica Antonazzo. "Problems with criminalizing female genital cutting." *Peace Review* 15, no. 4 (2003): 471-477.

[31] Althaus. "Female circumcision: rite of passage or violation of rights?.", 132.

[32] C.W. Dugger "African Ritual Pain: Genital Cutting," *New York Times*, Oct. 5, 1996. A1 & A6.

[33] Jacqueline Smith. Male Circumcision and the Rights of the Child. In: Mielle Bulterman, Aart Hendriks and Jacqueline Smith (Eds.), To Baehr in Our Minds: Essays in Human Rights from the Heart of the Netherlands (SIM Special No. 21). Netherlands Institute of Human Rights (SIM), University of Utrecht, Utrecht, Netherlands, 1998: pp. 465-498.

[34] U.N. Convention on the Rights of the Child (1989). UN General Assembly Document A/RES/44/25. [such a procedure invokes article(s) 19(1), 37 (a), and Article 24 (3).]

Article 19 (1), "*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*"

Article 37(a) "*No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.*"

Article 24(3) "*States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.*"

[35] Board of Directors. "Policy Statement—Ritual Genital Cutting of Female Minors." Pediatrics (2010): peds-2010.

[36] Ibid.

[37] Howard Goldberg, Paul Stupp, et al. "Female genital mutilation/cutting in the United States: Updated estimates of women and girls at risk, 2012." *Public Health Reports* 131, no. 2 (2016): 340.

[38] United States. Department of Homeland Security. *Department of Homeland Security Female Genital Mutilation or Cutting (FGM/C) Outreach Strategy January 2017*. Washington, D.C.: United States Government Publishing Office, 2017. 1-8; See also "U.S. Government Fact Sheet on Female Genital Mutilation or Cutting (FGM/C)." U.S. Department of State. Accessed March 28, 2018. https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fact-sheet-on-female-genital-mutilation-or-cutting.html.

[39] George C. Denniston, Frederick Mansfield Hodges, et al. *Understanding circumcision: a multi-disciplinary approach to a multi-dimensional problem.* Springer Science & Business Media, 2001, 162. {practiced in Africa, Australia, Melanesia, Polynesia, India, and the Amazon Basin}

[40] "Circumcision Basics." WebMD. Accessed March 29, 2018. https://www.webmd.com/sexual-conditions/guide/circumcision.

[41] Large numbers of Quranists believe circumcision is forbidden and notably support their views through Quaran scriptures (4:119 forbids the alteration of one's body & 95:4 which states man was created perfectly)

[42] Jonah Lowenfeld. "Little-known non-cutting ritual appeals to some who oppose circumcision" *Jewish Journal*. August 02, 2011. Accessed October 25, 2017. http://jewishjournal.com/news/los_angeles/community/94746/.

[43] Centers for Disease Control and Prevention (CDC. "Trends in in-hospital newborn male circumcision--United States, 1999-2010." *MMWR. Morbidity and mortality weekly report* 60, no. 34 (2011): 1167.{2010 Neonatal Circumcision rate 54.7 percent}

[44] Roger Collier. "Circumcision indecision: The ongoing saga of the world's most popular surgery." *Canadian Medical Association Journal* volume 183, no. 17 (2011): 1961

[45] Peter Aggleton. ""Just a snip"?: A social history of male circumcision." *Reproductive health matters* 15, no. 29 (2007): 18-19.

[46] Robert A. Darby. *Surgical Temptation: The demonization of the foreskin and the rise of circumcision in Britain.* University of Chicago Press, 2013, 351. {See reference: Henry, MRS. S. M. I. 1898. *Confidential talks on home and child life*. Edinburgh: Oliphant, Anderson and Ferrier.}

[47] Robert Darby and John Cozijn. "The British royal family's circumcision tradition: Genesis and evolution of a contemporary legend." *SAGE Open* 3, no. 4 (2013): 2158244013508960, 1.

[48] Sarah E. Waldeck. "Social Norm Theory and Male Circumcision: Why Parents Circumcise." (2003): 56-57.

[49] Sarah E. Waldeck. Using male circumcision to understand social norms as multipliers. University of Cincinnati Law Review 2003; 72:455–526.

[50] Richard G. White, Judith R. Glynn, Kate K. Orroth, Esther E. Freeman, Roel Bakker, Helen A. Weiss, Lilani Kumaranayake, J. Dik F. Habbema, Anne Buvé, and Richard J. Hayes. "Male circumcision for HIV prevention in sub-Saharan Africa: who, what and when?" *Aids* 22, no. 14 (2008): 1841-1850.

[51] Arianna Zanolini, Carolyn Bolton, Lane-Lee Lyabola, Gabriel Phiri, Alick Samona, Albert Kaonga, and Harsha Thirumurthy. "Feasibility and effectiveness of a peer referral incentive intervention to promote male circumcision uptake in Zambia." *Journal of acquired immune deficiency syndromes (1999)* 72, no. Suppl 4 (2016): S262.

[52] "A Framework for Voluntary Medical Male Circumcision: Effective HIV Prevention and a Gateway to Improved Adolescent Boys' & Men's Health in Eastern and Southern Africa BY 2021." 2016. Accessed March 27, 2018. http://apps.who.int/iris/bitstream/handle/10665/246234/WHO-HIV-2016.17-eng.pdf?sequence=1.

[53] Aaron J. Krill, Lane S. Palmer, and Jeffrey S. Palmer. "Complications of circumcision." *The Scientific World Journal* 11 (2011): 2460-2468.

[54] Cynthia Howard, Michael L. Weitzman, et al. "Acetaminophen analgesia in neonatal circumcision: the effect on pain." *Pediatrics* 93, no. 4 (1994): 641-646. *See also* Nicole C. Victoria, & Anne Z. Murphy. "The long-term impact of early life pain on adult responses to anxiety and stress: historical perspectives and empirical evidence." *Experimental neurology* 275 (2016): 261-273.

[55] Howard J. Stang, & Leonard W. Snellman. "Circumcision practice patterns in the United States." *Pediatrics* 101, no. 6 (1998): e5-e5. Obstetricians perform the most circumcisions at around 70 percent however only 25 percent use anesthesia in the procedure.

[56] Rabbi Yaakov Montrose. "*Lech Lecha - No Pain, No Bris?*" Halachic World - Volume 3: Contemporary Halachic topics based on the Parshah. Feldham Publishers 2011, pp. 29-32 (Under Jewish Law (acharonim) the tradition mitzvah of brit milah is grounded in the pain it causes so sedation, ointment, or anesthetic should not be used.)

[57] Svoboda, J. Steven. "Circumcision of male infants as a human rights violation." *Journal of medical ethics* 39, no. 7 (2013): 472.

[58] World Health organization Sixty-First World Health Assembly, FEMALE GENITAL MUTILATION (resolution WHA61.16) , A/64/26 (24 May 2008), available from http://apps.who.int/iris/bitstream/10665/23532/1/A61_R16-en.pdf

[59] Rahman, Anika, and Nahid Toubia, eds. *Female genital mutilation: A practical guide to worldwide laws & policies.* Zed Books, 2000.

[60] "A Framework for Voluntary Medical Male Circumcision: Effective HIV Prevention and a Gateway to Improved Adolescent Boys' & Men's Health in

Eastern and Southern Africa BY 2021." 2016. Accessed March 27, 2018. http://apps.who.int/iris/bitstream/handle/10665/246234/WHO-HIV-2016.17-eng.pdf?sequence=1.

[61] Kirsten Lee, "Female Genital Mutilation - Medical aspects and the rights of children," *International Journal of Children's Rights*, Vol. 2, No. 1, 1994, 35. Lee follows by stating *"Contrary to popular belief in various parts of the world, as for example in the United States, male circumcision has no health or sexual advantages either." Also "This procedure [male circumcision] cannot be considered an infringement upon the health or rights of boys and young men as it implies no permanent damage to health"*

[62] *Supra,* see note 33.

[63] Steven J. Svoboda. "Nontherapeutic Circumcision of Minors as an Ethically Problematic Form of Iatrogenic Injury." *AMA Journal of Ethics* 19, no. 8 (2017): 818. The procedure constitutes the removal of healthy body tissues the patient would have otherwise been likely to appreciate if they had been able to maintain bodily integrity and made the choice regarding the procedure in the future.

[64] Primum non nocere" or "First, do no harm." Hippocrates (c. 460 BC - 377 BC) [Whenever a doctor cannot do good, he must be kept from doing harm.]

[65] To either not harm or to accomplish a medical means by inflicting the least harm possible in order to reach a beneficial outcome.

[66] *Tortorella v. Castro*, 140 Cal Rptr 3d 853 (2006). "*it seems self-evident that unnecessary surgery is injurious and causes harm to a patient. Even if a surgery is executed flawlessly, if the surgery were unnecessary, the surgery in and of itself constitutes harm*".

[67] No federal statutes that regulate circumcision procedures, however statues are in place for surgical operations on lab or veterinary animals which requires anesthetic for any painful procedure (7 USC § 2143).

[68] Vittorio Hernandez. "Denmark, Sweden Ban Non-Medical Circumcision of Boys." International Business Times AU. January 28, 2014. Accessed March 30, 2018. http://www.ibtimes.com.au/denmark-sweden-ban-non-medical-circumcision-boys-1330592.

[69] Eleanor LeBourdais. "Circumcision no longer a" routine" surgical procedure." *CMAJ: Canadian Medical Association Journal* 152, no. 11 (1995): 1873.

[70] Paul Jerome McLaughlin, Jr. "The Legal and Medical Ethical Entanglements of Infant Male Circumcision and International Law." *Journal of Medical Law and Ethics* 4, no. 1 (2016): 36.

[71] Ibid.

[72] J. Steven Svoboda. "Circumcision of male infants as a human rights violation."

Journal of medical ethics 39, no. 7 (2013): 471.

[73] *THE NEREIDE, BENNETT, MASTER*, 13 U.S. 388, 3 L. Ed. 769, 3 L. Ed. 2d 769 (1815), at 423.

[74] *THE PAQUETE HABANA*, 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900).

[75] J. Steven Svoboda. "Circumcision of male infants as a human rights violation." *Journal of medical ethics* 39, no. 7 (2013): 471.

[76] Richard B. Bilder. "Integrating International Human Rights Law into Domestic Law--US Experience." *Hous. J. Int'l L.* 4 (1981): 2.

[77] Ibid, see *Supra* note 57 at 472.

[78] Abbreviations: International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations' Universal Declaration of Human Rights (UDHR), United Nations Convention on the Rights of the Child (UNCRC), United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), United Nations Security Council (UNSC). Violation of the child's rights to physical integrity-Circumcision violates children's rights to self-determination as their physical integrity is not protected from violation and offenses against their bodies by others/ Threatens right to health (UDHR [Article 25]), ICESCR [Article 19]) -If one follows the belief that circumcision it is medically unnecessary to alter the natural anatomy and physiology of a child then consequently procedure carries risks of medical complications especially when undertaken in unhygienic conditions posing a threat to the child's health./ Threatens children's Right to life (UDHR [Article 3], ICESCR [Article 12])- life is threatened because the operation can lead to medical consequences occasionally resulting in death./Violation of the prohibition of torture (UNCAT) - subjecting individuals typically neonates, infants, and children to cruel, inhuman, painful, or degrading treatment. Furthermore, the UN Commission on the former Yugoslavia defines practice of male circumcision as a sexual assault and a human rights violation. See UNSC Commission of Experts' Final Report [on the Former Yugoslavia] (S/1994/674, part IV, section F).

[79] Tresa Baldas. "Religious defense planned in landmark Detroit genital mutilation case." *Detroit Free Press*. May 21, 2017. Accessed October 24, 2017. http://www.freep.com/story/news/2017/05/21/female-genital-mutilation-religious-freedom/319911001/.

[80] See UNDR (Article 2 & 18)

[81] See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Court held the parents' fundamental right to freedom of religion outweighed the state's interest in educating its children.

[82] Defense is subject to strict scrutiny as claims as a fundamental constitution right has been violated (1st amdt. Free Exercise clause) and the Defense meets the 'suspect classification' criterion in regard to both their religion, and national

origin.

[83] *United States v. Carolene Products Co*., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), Supra see note 4 at 155.

[84] *Central Rabbinical Congress of the USA and Canada v. New York City Department of Health & Mental Hygiene*, 12 Civ. 7590 (2013)

[85] Alexandra Sifferlin. "How 11 New York City Babies Contracted Herpes Through Circumcision." Time. June 07, 2012. Accessed October 26, 2017. http://healthland.time.com/2012/06/07/how-11-new-york-city-babies-contracted-herpes-through-circumcision/.

[86] *Central Rabbinical Congress of the United States & Canada v. New York City Department of Health & Mental Hygiene*, No. 13–107–cv. (2014) - The United States Court of Appeals Second Circuit remanded the case stating the district court did not apply strict enough scrutiny when evaluating the case. Ultimately § 181.21 was repealed from the health code in 2015 when new mayor Bill de Blasio rescinded the requirement of parental consent.

[87] *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1891)

[88] *406 U.S. 205 (1972); See also* In re Quinlan (70 N.J. 10, 355 A.2d 647 (NJ 1976)) [Court held Parents have the right to make medical decisions for those unable to consent]; *Pierce, Governor of Oregon, et al. v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)

[89] "[Proposed] Breif of *Amicus Curiae* American Civil Liberties Union of Northern California in Support of Verified Petition for Writ of Mandate and Complaint for Injunctive Releif" *Jewish Community Relations Council of San Francisco, et al. v. Director of Elections of the City and County of San Francisco, et al*. no. CPF-11-511370 (2011), 10, 13-15.

[90] Ibid, 10, 13-15.

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

[92] "Statement on FGM Bill." ACLU of Maine. August 08, 2017. Accessed March 22, 2018. https://www.aclumaine.org/en/press-releases/statement-fgm-bill.

[93] See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), 509 Justice Abe Fortas *"must be able to show that action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"*

[94] See *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217(2000)

[95] https://www.nytimes.com/2018/02/28/world/europe/circumcision-ban-iceland.html

[96] Republic of South Africa. "Children's Act, No. 38 of 2005." *Government*

Gazette 492, no. 28944 (2005). (see Part II Male Circumcision - Section 5 & 6)
[97] Practice is a direct violation of the International Convention on the Elimination of All Forms of Racial Discrimination which the US both signed and ratified – Article 5 (b): *" The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution..."*
[98] *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).
[99] See *Prince v. Massachusetts*, 321 U.S. 158 (1944)
[100] *New York v. Ferber*, 458 U.S. 747 (1982), 761- State has compelling interest in preventing the sexual exploitation of children and prosecuting those who promote it. Also see *Ginsburg v. New York,* 390 U. S. 629 (1968), the State has a special interest in protecting the wellbeing of its youth. *Id.* at 390 U. S. 638-641.
[101] Lateef Mungin Rite of Outrage: Man Accused of Circumcising His 2-Year-Old Daughter. Female Genital Mutilation Not Uncommon in Some Nations, But a Rare Case in This Country Will Go to Trial Monday in Gwinnett." *The Atlanta Journal-Constitution* 22 Oct. 2006.
[102] The government can overcome strict scrutiny in upholding 18 USC § 116 as the interest to protect females is likely compelling as it has the possibility to protect large numbers of individuals. The law is narrowly tailored in order to achieve this compelling interest without infringing on other rights, Currently the statute serves as the least restrictive means the government can use in order to promote its compelling interest.
[103] 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972).
[104] *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244, 25 L. Ed. 2d 244 (1879).
[105] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).
[106] Board of Directors. "Policy Statement—Ritual Genital Cutting of Female Minors." *Pediatrics* (2010): peds-2010.
[107] Jacqueline Smith. "Male circumcision and the rights of the child." *To Baehr in our minds: Essays in human rights from the heart of the Netherlands* 21 (1998): 465-498. See *Supra* note 78 "The problem with laws and regulations, particularly in the case of a deeply-rooted practice is that, without clear enforcement mechanisms and without the support of education, information and consciousness-raising, no clear effects can be expected from the law. Laws forbidding behaviour which is deeply rooted in a culture will neither receive extensive support nor bring about much change."
[108] Edouard, E., O. Olatunbosun, and L. Edouard. "International efforts on abandoning female genital mutilation." (2013): 152, see *Supra* note 15.
[109] Gerry Mackie. "Ending footbinding and infibulation: A convention account."

American sociological review (1996): 105-107 & 111-113.

[110] Gillespie, Diane, and Molly Melching. "The transformative power of democracy and human rights in nonformal education: The case of Tostan." *Adult Education Quarterly* 60, no. 5 (2010): 477-498.

[111] Gillespie, Diane, and Molly Melching. "The transformative power of democracy and human rights in nonformal education: The case of Tostan." *Adult Education Quarterly* 60, no. 5 (2010): 477-498.

[112] "Education and Awareness Make Progress against Female Genital Cutting in Kenya." UNICEF. August 24, 2006. Accessed March 21, 2018. https://www.unicef.org/protection/kenya_35433.html.

[113] United Nations Children's Fund, and Geeta Rao Gupta. "Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change." *Reproductive Health Matters* (2013): 101.

[114] Assembly, UN General. "Intensifying global efforts for the elimination of female genital mutilations." *UN GA, A/C* 3 (2012): 67.

[115] Circumcision of Male Infants Research Paper. *Queensland Law Reform Commission*. Brisbane 1993.

[116] J. Fred Leditshke. Guidelines for Circumcision. *Australasian Association of Paediatric Surgeons*. Herston, QLD: 1996.

[117] Fetus and Newborn Committee, Canadian Paediatric Society. Neonatal circumcision revisited. *CMAJ* 1996;154(6):769-80.

[118] British Medical Association. Circumcision of Male Infants: Guidance for Doctors. London: *British Medical Association,* 1996.

[119] Council on Scientific Affairs. *Report 10: Neonatal circumcision*. Chicago: American Medical Association, 1999.

[120] British Association of Paediatric Surgeons, The Royal College of Nursing, The Royal College of Paediatrics and Child Health, The Royal College of Surgeons of England and The Royal College of Anaesthetists. *Statement on Male Circumcision*. London: Royal College of Surgeons of England, 6 March 2001.

[121] British Medical Association. "The law and ethics of male circumcision: guidance for doctors." *Journal of medical ethics* 30, no. 3 (2004): 262.

[122] Position Statement on the Circumcision of Boys. Helsinki: *Central Union for Child Welfare*. 25 August 2003.

[123] *Supra*, see Note 96.

[124] "Doctors back call for circumcision ban." *ABC News*. December 08, 2007. Accessed October 26, 2017. http://www.abc.net.au/news/2007-12-09/doctors-back-call-for-circumcision-ban/981976.

[125] S Beasley, B Darlow, *et al*. *Position statement on circumcision*. Sydney: Royal Australasian College of Physicians, 2004.

[126] Non-therapeutic circumcision of male minors KMNG viewpoint. Report. *The Royal Dutch Medical Association (KNM*G). Utrecht, NL, 2010. 1-17.

[127] Elisa Oddone. "German court bans circumcision of young boys." *Reuters*. June 27, 2012. Accessed October 25, 2017. https://www.reuters.com/article/us-germany-circumcision/german-court-bans-circumcision-of-young-boys-idUSBRE85Q19Y20120627.

[128] Committee on Social Affairs, Health and Sustainable Development. *Children's Right to Physical Integrity, Doc. 13297*. Parliamentary Assembly of the Council of Europe, 6 September 2013.

[129] Anne Lindboe, Fredrik Malmberg, et al. "MALE CIRCUMCISION: Nordic Ombudspersons seek ban on non-therapeutic male circumcision." MALE CIRCUMCISION: Nordic Ombudspersons seek ban on non-therapeutic male circumcision | CRIN. Accessed October 26, 2017. https://www.crin.org/en/library/news-archive/male-circumcision-nordic-ombudspersons-seek-ban-non-therapeutic-male.

[130] *In the matter of B and G (Children) (No 2)*, Royal Courts of Justice, Case Number LJ13C00295 (2015). Accessed March 28, 2018. https://www.judiciary.gov.uk/wpcontent/uploads/2015/01/BandG_2_.pdf

[131] Caron, Christina. "Bill Banning Circumcision in Iceland Alarms Religious Groups." The New York Times. February 28, 2018. Accessed March 28, 2018. https://www.nytimes.com/2018/02/28/world/europe/circumcision-ban-iceland.html.

Works Cited

Abu-Sahlieh, Sami A. Aldeeb. "Islamic Law and the Issue of Male and Female Circumcision." *Third World Legal Stud.* (1994): 73-102.

Aggleton, Peter. ""Just a snip?". A social history of male circumcision." *Repro ductive health matters* 15, no. 29 (2007): 15-21.
Harvard Law & Policy Review 5, no. 1 (Winter 2011): 163-188.

Althaus, Frances A. "Female circumcision: rite of passage or violation of rights?" International Family Planning Perspectives (1997): 130-133.

Antonazzo, Monica. "Problems with criminalizing female genital cutting." *Peace Review* 15, no. 4 (2003): 471-477.

Assembly, UN General. "Intensifying global efforts for the elimination of female genital mutilations." UN GA, A/C 3 (2012): 67.

Bach, Trevor. "Michigan FGM case could test bounds of religious liberty." The Christian Science Monitor. July 27, 2017. Accessed October 24, 2017. https://www.csmonitor.com/USA/Justice/2017/0727/Michigan-FGM-case-could-test-bounds-of-religious-liberty.

Baldas, Tresa. "Religious defense planned in landmark Detroit genital mutilation case." Detroit Free Press. May 21, 2017. Accessed October 24, 2017. http://www.freep.com/story/news/2017/05/21/female-genital-mutilation-religious-freedom/319911001/.

Bates, Michael J., John B. Ziegler, Sean E. Kennedy, Adrian Mindel, Alex D. Wodak, Laurie S. Zoloth, Aaron AR Tobian, and Brian J. Morris. "Recommendation by a law body to ban infant male circumcision has serious worldwide implications for pediatric practice and human rights." *BMC pediatrics* 13, no. 1 (2013): 136.

Beasley S, Darlow B, et al. Position statement on circumcision. Sydney: Royal Australasian College of Physicians, 2004.

Bissonnette, Bruno. Pediatric anesthesia: basic principles, state of the art, future. PMPH-USA, 2011. 1-2181

Brief for American Civil Liberties Union of Northern California, et al. as Amici Curiae Supporting Respondents, Jewish Community Relations Council of San et al. V. John Arntz, in his capacity as Director of Elections of the City and County of San Fransisco, et al. (no. CPF-11-511370) (Filed Jun 22, 2011).

British Association of Paediatric Surgeons, The Royal College of Nursing, The Royal College of Paediatrics and Child Health, The Royal College of Surgeons of England and The Royal College of Anaesthetists.

Statement on Male Circumcision. London: Royal College of Surgeons of England, 6 March 2001.
British Medical Association. Circumcision of Male Infants: Guidance for Doctors. London: British Medical Association, 1996.
British Medical Association. "The law and ethics of male circumcision: guidance for doctors." Journal of medical ethics 30, no. 3 (2004): 259-263.
Centers for Disease Control and Prevention (CDC. "Trends in in-hospital newborn male circumcision--United States, 1999-2010." MMWR. Morbidity and mortality weekly report 60, no. 34 (2011): 1167.
Circumcision of Male Infants Research Paper. Queensland Law Reform Commission. Brisbane 1993.
"Circumcision (male) Why it's done." Mayo Clinic. February 20, 2015. Accessed October 26, 2017. https://www.mayoclinic.org/tests-procedures/circumcision/basics/why-its-done/prc/20013585.
Cohen, Shaye JD. Why Aren't Jewish Women Circumcised?: Gender and Covenant in Judaism. Univ. of California Press, 2005.
Collier, Roger. "Circumcision indecision: The ongoing saga of the world's most popular surgery." Canadian Medical Association Journal volume 183, no. 17 (2011): 1961-1962.
Council on Scientific Affairs. Report 10: Neonatal circumcision. Chica go: American Medical Association, 1999.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.
Darby, Robert. A surgical temptation: The demonization of the foreskin and the rise of circumcision in Britain. University of Chicago Press, 2013.
Darby, Robert, and John Cozijn. "The British royal family's circumcision tradition: Genesis and evolution of a contemporary legend." SAGE Open 3, no. 4 (2013): 2158244013508960.
De Martel, Catherine, Jacques Ferlay, Silvia Franceschi, Jérôme Vignat, Freddie Bray, David Forman, and Martyn Plummer. "Global burden of cancers attributable to infections in 2008: a review and synthetic analysis." The lancet oncology 13, no. 6 (2012): 607-615.
Denniston, George C., Frederick Mansfield Hodges, and Marilyn Fayre Milos, eds. Understanding circumcision: a multi-disciplinary approach to a multi-dimensional problem. Springer Science & Business Media, 2001.

Department of Justice. The United States District Attorney's Office Eastern District of Michigan. "Detroit Emergency Room Doctor Arrested and Charged with Performing Female Genital Mutilation." News release, April 13, 2017. The United States District Attorney's Office Eastern District of Michigan. Accessed October 25, 2017. https://www.justice.gov/usao-edmi/pr/detroit-emergency-room-doctor-arrested-and-charged-performing-female-genital-mutilation.

DIRECTORS, BOARD OF. "Policy Statement—Ritual Genital Cutting of Female Minors." Pediatrics (2010): peds-2010.

"Doctors back call for circumcision ban." ABC News. December 08, 2007. Accessed October 26, 2017. http://www.abc.net.au/news/2007-12-09/doctors-back-call-for-circumcision- ban/981976.

Dugger, C.W. "African Ritual Pain: Genital Cutting," *The New York Times*, Oct. 5, 1996. A1 & A6.

Fetus and Newborn Committee, Canadian Paediatric Society. Neonatal circumcision revisited. CMAJ 1996; 154(6):769-80.

Frisch, Morten, Morten Lindholm, and Morten Grønbæk. "Male circumcision and sexual function in men and women: a survey-based, cross-sectional study in Denmark." *International journal of Epidemiology* 40, no. 5 (2011): 1367-1381.

Gollaher, David. Circumcision: a history of the world's most controversial surgery. Basic Books, 2001.

Goldberg, Howard, Paul Stupp, Ekwutosi Okoroh, Ghenet Besera, David Goodman, and Isabella Danel. "Female genital mutilation/cutting in the United States: Updated estimates of women and girls at risk, 2012." Public Health Reports 131, no. 2 (2016): 340-347.

Gualco, Barbara, Regina Rensi, and Cristiano Barbieri. "The female genital mutilations: defining problems, cultural and psycosocial factors, reference regulations." *ITALIAN JOURNAL OF CRIMINOLOGY* 3, no. 2 (2014): 263-293.

Howard, Cynthia R., Michael L. Weitzman, and Fred M. Howard. "Acetamino phen analgesia in neonatal circumcision: the effect on pain." *Pediatrics* 93, no. 4 (1994): 641-646.

J. Fred Leditshke. Guidelines for Circumcision. Australasian Association of Paediatric Surgeons. Herston, QLD: 1996.

Kulkarni, Bhargavi. "Judge dismisses most serious charge in Detroit genital mutilation case." India Abroad. January 18, 2018. Accessed March 06, 2018. https://www.indiaabroad.com/indian-americans/judge-dismisses-most-serious-charge-in-detroit-genital-mutilation-case/article_d4457e92-fcc1-11e7-9832-8342cad0fcd5.html.

Lee, Kirsten. "Female Genital Mutilation - Medical aspects and the rights of children," *International Journal of Children's Rights*, Vol. 2, No. 1, 1994, pp. 35-44.

Lightfoot-Klein, Hanny. "Pharaonic circumcision of females in the Sudan." Med. & L. 2 (1983): 353.

Lindboe, Anne, Fredrik Malmberg, Maria Kaisa Aula, Per Larsen, Margrét Maria Sigurdardóttir, and Anja Chemnitz Larsen. "MALE CIRCUMCISION: Nordic Ombudspersons seek ban on non-therapeutic male circumcision" | CRIN. Accessed October 26, 2017. https://www.crin.org/en/library/news-archive/male-circumcision-nordic-ombudspersons-seek-ban-non-therapeutic-male.

Lowenfeld, Jonah. "Little-known non-cutting ritual appeals to some who oppose circumcision" *Jewish Journal*. August 02, 2011. Accessed October 25, 2017. http://jewishjournal.com/news/los_angeles/community/94746/.

Mackie, Gerry. "Ending footbinding and infibulation: A convention account." *American Sociological review* (1996): 999-1017.

Morrone, Aldo, Jana Hercogova, and Torello Lotti. "Stop female genital mutilation: appeal to the international dermatologic community." *International Journal of Dermatology* 41, no. 5 (2002): 253-263.

Myers, Robert A., Francisca I. Omorodion, Anthony E. Isenalumhe, and Gregory I. Akenzua. "Circumcision: its nature and practice among some ethnic groups in southern Nigeria." *Social Science & Medicine* 21, no. 5 (1985): 581-588.

Non-therapeutic circumcision of male minors KMNG viewpoint. Report. The Royal Dutch Medical Association (KNMG). Utrecht, NL, 2010. 1-17.

Oddone, Elisa. "German court bans circumcision of young boys." Reuters. June 27, 2012. Accessed October 25, 2017. https://www.reuters.com/article/us-germany-circumcision/german-court-bans-circumcision-of-young-boys-idUSBRE85Q19Y20120627.

Position Statement on the Circumcision of Boys. Helsinki: Central Union for Child Welfare. 25 August 2003.

Rabbi Yaakov Montrose. "Lech Lecha - No Pain, No Bris?" Halachic World - Volume 3: Contemporary Halachic topics based on the Parshah. Feldham Publishers 2011, pp. 29-32.

Quaran: the final scripture: (the authorized English version). Khalifa, Rashad. Tuscon, AZ: Islamic Productions, 1981.

Remondino, Peter Charles. History of Circumcision, from the Earliest Times to the Present: Moral and Physical Reasons for Its Performance. Vol. 1. Library of Alexandria, 1891.

Shell-Duncan, Bettina, and Ylva Hernlund. "Female'circumcision'in Africa: Dimensions of the practice and debates." (2000).

Sifferlin, Alexandra. "How 11 New York City Babies Contracted Herpes Through Circumcision." Time. June 07, 2012. Accessed October 26, 2017. http://healthland.time.com/2012/06/07/how-11-new-york-city-babies-contracted-herpes-through-circumcision/.

Smith, Jacqueline. Male Circumcision and the Rights of the Child. In: Mielle Bulterman, Aart Hendriks and Jacqueline Smith (Eds.), To Baehr in Our Minds: Essays in Human Rights from the Heart of the Netherlands (SIM Special No. 21). Netherlands Institute of Human Rights (SIM), University of Utrecht, Utrecht, Netherlands, 1998: pp. 465-498.

Slack, Alison T. "Female circumcision: A critical appraisal." Hum. Rts. Q. 10 (1987): 437-477.

Stang, Howard J., and Leonard W. Snellman. "Circumcision practice patterns in the United States." *Pediatrics* 101, no. 6 (1998): e5-e5.

Sussman, Erika. "Contending with culture: an analysis of the female genital mutilation act of 1996." Cornell Int'l LJ 31 (1998): 193-250.

Svoboda, J. Steven. "Nontherapeutic Circumcision of Minors as an Ethically Problematic Form of Iatrogenic Injury." *AMA Journal of Ethics* 19, no. 8 (2017): 815-824.

The Torah. New York: Union of American Hebrew Congregations, 1974.

UNICEF. "At least 200 million girls and women alive today living in 30 countries have undergone FGM." (2017).

United Nations Children's Fund, and Geeta Rao Gupta. "Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change." *Reproductive Health Matters* (2013): 184-190.

United Nations Security Council. Commission of Experts' Final Report [on the Former Yugoslavia] (S/1994/674, part IV, section F).

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

United States of America v. Nagarwala, et al. (United States District Court Eastern District of Michigan Southern Division April 26, 2017). 2:17-cr-20274

U.N. Convention on the Rights of the Child (1989). UN General Assembly Document A/RES/44/25.

Victoria, Nicole C., and Anne Z. Murphy. "The long-term impact of early life pain on adult responses to anxiety and stress: historical perspectives and empirical evidence." *Experimental Neurology* 275 (2016): 261-273.

World Health Organization, and UNICEF. "Female genital mutilation: a joint WH." (1997).

World Health Organization. "Male circumcision: global trends and determinants of prevalence, safety and acceptability." (2008).

World Health organization Sixty-First World Health Assembly, FEMALE GENITAL MUTILATION (resolution WHA61.16), A/64/26 (24 May 2008), available from http://apps.who.int/iris/bitstream/10665/23532/1/A61_R16-en.pdf.

Banning Anti-Personnel Landmines: The Death of the Perfect Soldier

Pranaya Pahwa | Washington University in St. Louis

Edited By: Arianna Scott, Rachel Dichter, Lucy Kirichenko, Emily Woo, Alie Yu

Abstract

Pol Pot, Prime Minister of Cambodia under the genocidal Khmer Rouge, called landmines his "perfect soldiers." Militaries around the world similarly saw landmines as beneficial and effective weapons. For much of the twentieth century, landmine usage was widespread, employed by developed nations, developing nations, and insurgents alike. Prior to the 1990s, all efforts to reduce deployment or to institute an outright ban had failed. In 1997, however, the Ottawa Treaty was able to ban anti-personnel landmines in 122 countries. This article shows how the International Campaign to Ban Landmines (ICBL) successfully effectuated the ban with an extensive campaign that revealed the weapons' ineffectiveness and galvanized public support. Ultimately, the ICBL motivated the successful Ottawa Treaty negotiations. In analyzing the ICBL campaign, this paper contends that the movement was effective because of its two-pronged strategy that fought landmine supporters in a legal realm and a public realm. In the legal realm, opponents targeted landmines under the principle of discrimination. In the court of public opinion, ICBL supporters created a consensus against the weapon through advertising and celebrity endorsements. This two-pronged approach, the paper concludes, eliminated opposition while creating a strong public push for a global landmine ban by producing a legal and public consensus against the weapon. The ICBL, through the Ottawa Treaty, translated that legal and public sentiment into an outright ban.

I. Introduction

When landmines were banned in 1997, one hundred million landmines were deployed in sixty-four countries and another hundred million were stockpiled.[1,2] According to legal analyst and J.D. candidate Alicia Petrarca, landmines were "the weapon of choice" for governments and insurgent groups because they were "cheap, easy to manufacture, and use, difficult to detect, and expensive and dangerous to remove."[3,4] Pol Pot, Prime Minister of Cambodia under the genocidal Khmer Rouge, even called landmines his "perfect soldiers."[5]

In 1997, these "perfect soldiers" were relieved of their duties. This article analyzes how a coordinated effort between non-governmental organizations (NGOs) mobilized states, seemingly against national interests, to ratify and sign the 1997 Ottawa Treaty which prohibited the use, development, and ownership of anti-personnel landmines. Historical evidence suggests that nations agreed to ban anti-personnel landmines because an effective international campaign both labelled landmines legally impermissible and rallied the public conscience against them. By citing the weapon's indiscriminate nature, combating myths on its military effectiveness, and highlighting the struggles of victims, NGOs led a campaign that dismantled support and resulted in the Ottawa Treaty to ban landmines. This paper will first discuss failed ventures at landmine regulation, then explain the reasons behind their failure, and finally explore how the ICBL learned from those failures and crafted a new approach to effectuate a landmine ban.

II. Historical Failure of Landmine Regulation

The formal movement to curtail anti-personnel landmine deployment began in 1980 with the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Convention-

al Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (hereafter known as the CCW Convention). In the midst of the Cold War, fifty countries signed the CCW Convention. In Protocol II, the CCW Convention regulated use of mines, traps, and other devices. However, these regulations were unsuccessful. The International Committee of the Red Cross (ICRC) wrote extensively on the insufficiencies of the provision. Their report found: "There are many omissions and loopholes in this Convention, the major ones being as follows: It does not apply to internal armed conflicts, where most mine use occurs. It assigns no clear responsibility for the removal of mines. It does not prohibit the use of non-detectable mines. It has excessively weak provisions regarding remotely delivered mines. Its provisions concerning the use of hand-emplaced mines are also weak. It does not provide for any control or supervisory mechanisms for mine transfers and exports. It lacks implementation and monitoring mechanisms."[6] Accordingly, the ICRC concluded, "the 1980 Convention…had little or no effect on the use of AP mines."[7] Predictably, fifteen years after the CCW Convention, when Jody Williams and Shawn Roberts of the Vietnam Veterans of America Foundation wrote their book, *After the Guns Fall Silent: The Enduring Legacy of Landmines*, countries had deployed an additional sixty-five million landmines.[8] Ultimately, the actual provisions of the CCW Convention proved less salient than the debate surrounding its creation and what future movements to ban landmines learned from its failure.

The evolution of landmine warfare initially motivated the CCW Convention. Although some combatants deployed landmines defensively in World War II, the development of new technology in the 1960s turned them into offensive weapons. Technological advances allowed for remotely delivered mines that spurred production in the millions and led to speedy deployment.[9] Don Hubert, a senior policy adviser in the Peacebuilding and Human Security Division of the Canadian Department of Foreign Affairs, explained

that countries integrated landmines into their doctrines of attack and used them as "area denial weapons, rendering villages, fields, and grazing lands unsuitable for civilian use."[10] The evolution of landmine deployment clearly had significant military benefits, but it also made landmines harder to regulate because the new modes of mine deployment made marking minefields or keeping track of mined areas virtually impossible.[11] This development fueled the debate surrounding the CCW Convention's creation.

The CCW Convention inevitably floundered because military leaders saw landmines as a military necessity that they could not forfeit. The principle of military necessity stems from the earliest days of the international laws of war tradition and allows a military to pursue all actions it deems necessary in pursuit of a military objective. Although negotiators, diplomats, and humanitarians have worked to curtail the principle's dominance, it remains an ascendant force in international law.

Hoping that humanitarian concerns would prevail over military necessity, drafters of both the CCW Convention and eventually, the successful Ottawa Treaty, based their work on the 1899 Martens Clause. The Martens Clause, from the preamble of the 1899 Hague Convention, protects people "under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."[12] In other words, because they saw that the code of laws of war was incomplete, diplomats at the turn of the 20th century formulated the clause to indicate that the code was not exhaustive and thereby limit the power of military necessity. The hope was that the principles of international law of which the Martens Clause spoke would hold military necessity in check. One of those principles is the principle of discrimination or distinction.[13]

The principle of discrimination, according to Chris Jochnick and Roger Norman, directors in Harvard Law School's Center for

Economic and Social Rights, requires "belligerents to distinguish between military and civilian targets, and to attack only the former."[14] This principle works in the interest of "balancing military necessity with concerns for humanity."[15] It limits military necessity by requiring that military actions discriminate between lawful and unlawful targets.

Since both civilians and soldiers can trigger landmines during and after a war, landmines violated the principle of discrimination. International legal expert Michael Schmitt explains that landmines are "by nature indiscriminate, that is, incapable of discriminating between lawful (combatants and military objectives) and unlawful (noncombatants and civilian objects) targets."[16] Since soldiers cannot aim landmines, and both combatant and noncombatant stimuli can trigger the devices, the weapon lacks all discriminating capacities. Furthermore, John Lewis, in the Yale Law Journal, finds landmines have a unique "temporal indiscriminateness" in that they "can kill many years after they are placed."[17] International organizations such as the ICRC used these arguments to convince negotiators that landmines violated the principle of discrimination. The title of the CCW Convention itself acknowledges the violation of discrimination by discussing "excessively injurious or […] indiscriminate effects," and placing landmines within the scope of the Convention admits that the weapons violate the non-discrimination principle. Despite this, the CCW Convention did not ban landmines. In the case of antipersonnel landmines, negotiators decided military necessity trumped even principles designed to protect the public.

Historically, this dominance of military necessity has precedent. As Jochnick and Normand write in the *Harvard International Law Review*, "When ideals of humanity clashed with military necessity, as inevitably occurred in all areas critical to protecting civilians, they encountered an immovable force. As a result, any weapon or tactic that a major power considered necessary, or even potentially useful, was beyond the reach of legal regulation."[18] Put another

way by *Politico's* Mark Perry, "The world's militaries are loath to ban weapons that kill effectively."[19] The CCW Convention could not succeed as long as military leaders believed in the efficacy of landmines.

Unfortunately for landmine opponents, during the CCW Convention negotiations, the world's militaries did see landmines as a weapon that kills effectively. Military leaders argued that mines provided numerous benefits including "slowing or stopping enemy advances, channeling enemy movements into more easily-defended routes, conserving forces and firepower, and minimizing casualties."[20] Furthermore, *The Chicago Tribune* reports that the Pentagon called mines "force multipliers," meaning they make the jobs of soldiers easier.[21] Governments saw mines as effective "legitimate weapons" and the CCW Convention did not change this view.[22] The failure of the CCW Convention exposed what Jochnick and Normand themselves found: "the development of […] legal principles did not introduce restraint or humanity into war."[23] Though powerful in theory, the mere existence of legal principles did not ensure either serious regulation or abatement of landmine usage. After the CCW Convention's failure, the anti-landmine movement learned and adapted. When the opportunity presented itself at the end of the Cold War, opponents of landmines reassembled and launched a campaign.

III. ICBL Background

After the Cold War subsided, the international community was forced to consider the catastrophic consequences of conventional weapons. Supporters of a landmine ban found it easier to fight anti-personnel landmines at the end of the Cold War. Bonnie Docherty, a lecturer and researcher at Harvard Law School's International Human Rights Clinic, explains in the *Austrian Review of International and European Law* that "the post-Cold War era saw

a changed perception of armed conflict that influenced the development of humanitarian disarmament treaties. With the fall of the Soviet Union, the threat of mass casualties from a single attack with a weapon of mass destruction diminished. Real-life suffering of individual civilians caused by conventional weapons, such as that documented in the Balkans, Afghanistan, and Iraq, came increasingly into public view. The attention of the international community, therefore, turned to controlling conventional weapons."[24,25] Victims of landmines emerged publically and nations started to question their weapons policies.

The documentation of "real-life suffering" particularly shaped the anti-landmine movement. The movement highlighted the human consequences of landmines to portray the weapons as dangerous and immoral. After the Cold War ended, the press uncovered shocking incidents in which governments and insurgents had deployed landmines, the ICRC writes, "for purposes of population control and terrorism."[26] In Cambodia for example, Petrarca writes, "Government troops placed mines around the perimeters of enemy villages, then bombarded the villages with artillery fire so that the 'enemy'—mainly non-combatant civilians—was forced to flee into the minefields."[27] These stories shifted public sentiment towards weapon regulation. Opponents of landmines capitalized on this sentiment and mobilized a campaign.

After the CCW Convention and into the 1990s, countries largely neglected the growing anti-personnel landmine crisis. However, NGOs working in medical assistance programs did not. Hubert finds that consistently facing the victims of landmine attacks forced NGOs to view landmines as a "daily menace in the drive to assist victims and rebuild war-torn societies."[28] The ICRC, the Coalition for Peace and Reconciliation, Handicap International (HI), and the Mines Advisory Group (MAG) were some of the first NGOs to campaign against landmines. In 1992, a handful of these groups gathered together and launched the "International Campaign to Ban

Landmines" (ICBL). By 1997, the ICBL was made up of over 1,400 organizations.[29]

IV. Public Campaign Against Landmines

Learning from the failed CCW Convention, the ICBL targeted their campaign at the public rather than at diplomats and negotiators. The campaign focused on public opinion in liberal democracies to mobilize expression of public sentiment through policy action. The campaign's objective was to evoke an emotional outcry against landmines that would compel elected representatives to adopt a landmine ban. To target the maximum number of people, the ICBL employed a full media strategy consisting of celebrity and popular culture endorsements, religious endorsements, and press and television advertisements designed to appeal to the sensibilities of voters.

The ICBL's celebrity and popular culture endorsements were particularly effective in raising awareness and support. In Canada, for example, musician Bruce Cockburn and singer Chuck Mondlane toured the country collecting signatures for a petition.[30] The most notable example of celebrity involvement was that of Princess Diana of the United Kingdom, who brought press attention to the growing landmine crisis. In 1997, she visited Kuito, Angola, a heavily mined city, while wearing protective clothing. There, she watched demining operations and spoke to landmine victims.[31] Paul Heslop, director of Britain based demining organization Halo Trust credits the Princess with generating a "massive increase in interest" about landmines and their effects.[33] Princess Diana's greatest gift to the ICBL was to spread its influence globally. Keiko Hirata, a professor in political science, writes that Princess Diana's "anti-landmine work had attracted publicity all over the world."[34] Hirata finds that in Japan, the Princess's role in championing an anti-landmine picture book created sympathy and support for the cause.[34] Alongside celebrities, the ICBL used popular culture institutions as avenues for

spreading their message. In the 1990s, for example, DC Comics unveiled and distributed Batman and Superman comic books that dealt explicitly with the negative consequences of landmines.[35]

The movement against landmines also sought the support of more traditional institutions. For instance, Pope John Paul referred to landmines as "insidious arms" and called directly on world leaders to eliminate the weapons.[36] Other religious figures also spoke against landmines. A prominent advertisement against landmines quotes from Deuteronomy: "I have set before you life and death, blessing and curse; choose life that both thou and thy seed may live." The advertisement ran in *The New York Times* from the Landmines Survivors Network. It called on President Clinton to support a complete landmine ban and touted the endorsement of important Catholic, Protestant, Jewish, and Muslim religious leaders. The final line of its message asked the President to "stand among those who choose life"; the advertisement helped to build a moral consensus against landmines.[37]

In an update on the campaign against landmines in mid 1996, the ICRC summarized its significant television and press advertising positions. According to the update, the ICRC had or was securing television spots on Euronews, EBN, CNBC, BBC World, MTV, MCM, and CNN.[38] They also had or were securing newspaper spots in *Time Magazine*, *Financial Times*, *Newsweek*, *Asia Week*, the *Economist*, the *International Herald Tribune*, *Readers' Digest*, the *Wall Street Journal*, and *Business Week*.[39] Other NGOs followed the same advertising strategy. The Vietnam Veterans of America Foundation (hereafter referred to as VVAF), for example, ran multiple advertisements in the *Washington Post* and *The New York Times*. Press and television outlets allowed the campaign against landmines to reach the public directly.

NGOs tailored their messages to the public, stressing the innocence of victims. Frank Faulkner, author of *Moral Entrepreneurs and the Campaign to Ban Landmines*, writes that "landmine victims

would prove to be prominent in ongoing campaigns to raise public awareness of the issues."[40] Hubert acknowledges the strange irony of this strategy: "Campaigners note that mines are the first weapons widely employed by militaries to be prohibited, yet it was precisely their widespread use that provided the evidence on which to build the campaign. For the activists that sought to prohibit mines, these weapons were no abstract threat."[41] The victim based messaging reframed the issue. Hubert expounds, "Traditionally […] the issue of control has been viewed through an arms control lens. Once the issue was cast in humanitarian terms, it became difficult for states to resist the logic of the ban."[42]

The ICBL emphasized humanitarian concerns by overwhelming the public with numbers. A VVAF advertisement in *The New York Times* warned, "Seventy people will be killed or maimed today, 500 this week, [and] more than 2000 this month."[43] One advertisement reduced the timeframe to just 22 minutes, explaining, "Every 22 minutes someone is killed or maimed by a landmine."[44] An article in the *Washington Post* summarized, "Mines kill or injure more than 26,000 people each year."[45] These advertisements heightened the gravity and urgency of the landmine crisis. The campaign backed these statements with empirics. The same *Washington Post* article looked to Cambodia, "where one of every 236 citizens is an amputee because of mine blasts."[46] After educating the public on the numbers, the ICBL highlighted the innocence of the lives lost.

The ICBL frequently brought up children as ideals of innocence. The earlier *Washington Post* article stressed that "one-third of the victims [from landmines] are children."[47] A VVAF advertisement that ran in *The New York Times* reads, "Today, in 68 countries, 100 million active landmines lie buried. Waiting. For innocent civilians. Children at play."[48] The advertisement conjured an image of buried landmines and innocent children playing above. It threatened immediate disaster and lost innocence. A separate VVAF advertisement in *The New York Times* does the same. Rather than feature a

picture of a maimed child, it instead shows a crudely drawn stick figure self-portrait.[49] The simple drawing does more for revealing the innocence of victims than any picture could hope to do. The advertisement inflamed passions and emotions. It forced the newspaper-reading public to view landmines as a humanitarian issue.

Both recalling the failure of the CCW Convention and advancing their humanitarian narrative, the ICBL made a serious effort to debunk myths on military effectiveness and necessity. The ICBL first produced military officials who spoke of landmines' limited utility. In 1996, *The New York Times* ran an open letter from high-ranking military officials. The letter underlined that a ban of landmines would be "humane" and labeled such a ban "militarily responsible." It denounced ideas of military necessity by arguing that "given the wide range of weaponry available to military forces today, antipersonnel landmines are not essential." The letter concluded that "banning [landmines] would not undermine the military effectiveness or safety of our forces, nor those of other nations."[50] By presenting its argument directly from military leaders, the ICBL convinced the public that a landmine ban would not have any military consequences.

In fact, the ICBL argued that a ban would be militarily advantageous. The same advertisement which warned against dangers for "children at play" mentioned another group vulnerable to landmines: "U.S. peacekeeping troops on patrol."[51] The ICBL portrayed the ban as an intelligent military decision that would save lives. Referencing Department of Defense reports from the Vietnam War, the ICBL formed a compelling case for how landmines caused more harm than benefit to vulnerable U.S. troops. Landmines caused over 64,000 U.S. casualties.[52] U.S. deployed mines resulted in one third of U.S casualties.[53] A 1996 VVAF advertisement concluded, "Antipersonnel landmines do not protect our soldiers. They have killed and maimed us in combat."[54] By both reframing the landmine issue as a humanitarian one and negating defense concerns, the ICBL con-

ducted an aggressive operation to change public sentiment and build legal footing for a landmine ban.

Despite focusing on public sentiment on landmine use, the campaign still made its legal case against landmines clear. In three separate advertisements, the VVAF condemned landmines as "indiscriminate weapons" with an "indiscriminate, harmful, residual potential" that often results in "indiscriminate killings."[55] A *Washington Post* article points to landmines' temporal indiscriminateness when it notes that the "deadly weapons continue to take life and limb indiscriminately long after the conflicts they were designed for have subsided."[56]

The ICBL campaign succeeded in raising awareness on the dangers of landmines, making a landmine ban the topic of international debate from 1994 onwards.[57] Petrarca noted as early as 1996 that landmines were "being stigmatized around the world by the public."[58] By 1997, the consensus was that landmines needed to be banned. A VVAF advertisement in 1997 highlighted that *The New York Times*, *The Orlando Sentinel*, *Pittsburgh Post-Gazette*, *The Washington Post*, *The Grand Rapids Press*, *The Boston Globe*, *The St. Louis Post-Dispatch*, *Houston Chronicle*, and *The Atlanta Constitution* were a just a few of the newspapers supporting, in one or more editorials, a global ban on landmines. The advertisement concluded that "the American people know it's time to eliminate these indiscriminate killers."[59] Polling confirmed such a consensus internationally. A survey done by Gallup international revealed that 60% or greater of the population in Denmark, Spain, Switzerland, Italy, Austria, Slovakia, Russia, India, Czech Republic, Finland, Ukraine, Brazil, Korea, Germany, South Africa, Canada, Ireland, Bulgaria, Poland, and the United States was in favor of an anti-personnel landmine ban.[60] Capitalizing on its momentum, the ICBL reached out directly to politicians.

To translate public opinion into political outreach, the ICBL encouraged local and national partners to run petition drives. Hi-

rata believes that "it was local NGOs that campaigned to persuade their governments to sign and ratify the treaty."[61] In Japan, ICBL partners presented the government with 35,000 signatures.[62] In Canada, 50,000 signatures.[63] In France, 22,000 signatures.[64] In Britain, 280,000.[65] Globally, Leon Sigal, author of *Negotiating Minefields: The Landmines Ban in American Politics*, finds that "petition drives by afflicted groups gathered 1.7 million signatures in 53 nations calling for a ban."[66] This political pressure successfully pushed nations into working with the ICBL.

Finally, the ICBL put together a treaty working group, made up of all 1,400 NGOs across 90 countries, that transformed global consensus into the Ottawa Treaty.[67] After the ICBL set the group's composition, it invited nations to join the negotiations. Hubert writes that while "organizers hoped that as many as 20 states might ultimately gather to strategize with the ICBL and the ICRC," in actuality, "fifty states attended as full participants, including the U.S., France, and the UK, and another 24 attended as observers."[68] Human Rights Watch reported that, to quicken the process, the 'First Forty' campaign was launched, "pressing governments to be among the first forty governments to ratify the treaty and thus contribute to its rapid entry into force. Not surprisingly, given the momentum of the entire Ottawa Process, the "First Forty" was taken very seriously."[69] Countries' desire to join that group delineated a fundamental shift in national attitudes regarding a landmine ban. Eventually, 162 countries would sign the agreement.

The treaty proves the salience of the ICBL campaign in its text. The ICBL fought landmine supporters on the law and on public opinion. The Ottawa Treaty therefore cites both "the principle of international humanitarian law" and "the role of public conscience" in informing its ban.[70] The Ottawa Treaty even cites the legal arguments made via the discrimination principle.[71] Docherty explains that the treaty also articulates its own humanitarianism in its preamble, which "paints a vivid picture of the problem with references

to numbers (mines cause hundreds of casualties per week), descriptions of effects (death and maiming), and the characterization of civilians as 'innocent and defenseless.' Civilian victims of war are the primary focus of the convention."[72]

IV. Conclusion

The campaign against landmines succeeded because of its two-pronged approach, attacking landmines with a masterful manipulation of pre-existing legal principles and a sophisticated campaign targeting an evolving public conscience. NGOs modeled the campaign after the Martens Clause; the success of the campaign has implications for how international causes should be promoted in the future. Rupert Ticehurst of King's College School of Law writes that, "the widest interpretation [of the Martens Clause] is that conduct in armed conflicts is not only judged according to treaties and custom but also to the principles of international law referred to by the Clause."[73] The 1980 debacle with the CCW Convention and Ottawa Treaty disproves this interpretation. Public conscience can collectively influence, or even shape international principles, but those principles have limited legal force. The successful movement to ban landmines reveals that the principles that the public embraces only enact change if the public pressures governments to abide by those principles. President of the International Residual Mechanism for Criminal Tribunals, Theodor Meron, has argued that "Except in extreme cases, its [the Martens Clause's] references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases."[74] Yet, the ICBL discovered–and future movements ought to heed–that simply having principles of humanity or public conscience on one's side accomplishes little. The CCW Convention failed despite the presence of both. Only by making those principles and public opinion salient to elected officials did the ICBL create change. The

ICBL's greatest innovation was its coalition building—creating a consensus within the relevant constituencies that politicians could not ignore. Future movements on weapons reduction and arms regulations would do well to recall these dynamics going forward.

[1] Shawn Roberts and Jody Williams, *After the Guns Fall Silent: The Enduring Legacy of Landmines*, Vietnam Veterans of America Foundation, 1995. 3.
[2] *Ibid.*
[3] Alicia H. Petrarca, "An Impetus of Human Wreckage?: The 1996 Amended Landmine Protocol," *California Western International Law Journal*, vol. 27, no. 1, http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1320&context=cwilj. 1.
[4] *Ibid.*
[5] Stuart Hughes, "Cambodia's Landmine Victims," *BBC*, 11 November 2003, http://news.bbc.co.uk/2/hi/asia-pacific/3259891.stm.
[6] *Anti-Personnel Landmines: Friend or Foe? A Study of the Military Use and Effectiveness of Anti-Personnel Mines,* International Committee of the Red Cross, 1997. 25.
[7] *Ibid.*
[8] Roberts and Williams, *After the Guns Fall Silent: The Enduring Legacy of Landmines,* 3.
[9] Don Hubert, *The Landmine Ban: A Case Study in Humanitarian Advocacy*, Thomas J. Watson Jr. Institute for International Studies, 2000. 4.
[10] *Ibid.*
[11] *Ibid.*
[12] Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience," *The American Journal of International Law*, vol. 94, no. 1, January 2000, https://www.jstor.org/stable/2555232?seq=1#page_scan_tab_contents. 79.
[13] Chris Af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," *Harvard International Law Journal*, vol. 35, no. 1, 1994, http://heinonline.org/HOL/Permalink?a=d3VzdGwuZWR1&u=http%3A%2F%2Fheinonline.org%2FHOL%2FPage%3Fmen_tab%3Dsrchresults%26handle%3Dhein.journals%2Fhilj35%26size%3D2%26collection%3Djournals%26set_as_cursor%3D%26id%3D55. 53.
[14] *Ibid.*
[15] *Ibid.*

[16] Michael N. Schmitt, "The Principle of Discrimination in 21st Century Warfare," *Yale Human Rights and Development Journal,* vol. 2, no. 1, 2014, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1010&context=yhrdlj. 5.

[17] John Lewis, "The Case for Regulating Fully Autonomous Weapons," *The Yale Law Journal*, vol. 124, no. 4, 2015, https://www.yalelawjournal.org/comment/the-case-for-regulating-fully-autonomous-weapons.

[18] Jochnick and Normand, "The Legitimation of Violence: A Critical History of the Laws of War," 68.

[19] Mark Perry, "Why the World Banned Chemical Weapons," *Politico*, 16 April 2017, http://www.politico.eu/article/why-the-world-banned-chemical-weapons/.

[20] Smith, "A Plea for the Total Ban of Land Mines by International Treaty," 11-12.

[21] "The Wrong Solution To Land Mines," *Chicago Tribune*, 10 February 1996, http://articles.chicagotribune.com/1996-02-10/news/9602100006_1_land-mines-nato-mission-soldiers.

[22] Petrarca, "An Impetus of Human Wreckage?: The 1996 Amended Landmine Protocol," 25.

[23] Jochnick and Normand, "The Legitimation of Violence: A Critical History of the Laws of War," 53.

[24] *Id*. at 55.

[25] Docherty, "Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law," 16.

[26] *Anti-Personnel Landmines: Friend or Foe? A Study of the Military Use and Effectiveness of Anti-Personnel Mines*, 6.

[27] Petrarca, "An Impetus of Human Wreckage?: The 1996 Amended Landmine Protocol," 6.

[28] Hubert, *The Landmine Ban: A Case Study in Humanitarian Advocacy*, 30.

[29] "International Campaign to Ban Landmines," *Human Rights Watch*, 1999, https://www.hrw.org/legacy/reports/1999/landmine/WEBICBL.htm.

[30] Leon V. Sigal, *Negotiating Minefields: The Landmines Ban in American Politics*, Routledge, May 13, 2013. 94.

[31] Peter Arnett, "Princess Diana's anti-mine legacy," *CNN*, 10 September 1997, http://www.cnn.com/WORLD/9709/10/diana.angola/index.html.

[32] *Ibid.*

[33] Keiko Hirata, "International Norms and Civil Society: New Influences on Japanese Security Policy," *Norms, Interests, and Power in Japanese Foreign Policy*, edited by Yoichiro Sato and Keiko Hirata, Springer, 2008, pp. 47-70. 55.

[34] *Ibid.*

[35] "Leahy Joins Batman Against Landmines," *UPI*, 11 December 1996,

https://www.upi.com/Archives/1996/12/11/Leahy-joins-Batman-against-landmines/7489850280400/.
"Superman Raises Landmine Awareness," *UNICEF*, 21 October 1996, https://www.unicef.org/newsline/super.htm.
[36] "Security Tight as Pope Call for Land Mine Ban," *CNN*, 20 April 1997, http://www.cnn.com/WORLD/9704/20/briefs/pope.terrorism/index.html.
[37] Landmines Survivors Network, "Deuteronomy 30.19," *New York Times*, 4 December 1999, A17.
[38] "Third Session of the Review Conference of the 1980 United Nations Convention on Certain Conventional Weapons," *International Committee of the Red Cross*, 1 May 1996, https://www.icrc.org/eng/resources/documents/misc/57jmwp.htm.
[39] *Ibid.*
[40] Frank Faulkner, *Moral Entrepreneurs and the Campaign to Ban Landmines*, Rodopi, April 20, 2007. 131.
[41] Hubert, *The Landmine Ban: A Case Study in Humanitarian Advocacy*, 31.
[42] *Id*. at xii.
[43] Vietnam Veterans of America Foundation, "An Open Letter to President Clinton," *New York Times*, 3 April 1996. A11.
[44] Vietnam Veterans of America Foundation, "Every 22 Minutes," *Washington Post*, 6 April 1997. C5.
[45] Jack Anderson and Michael Binstein, "Land Mines: A Danger That Won't Go Away," *Washington Post*, 17 August 1995. MN14.
[46] *Ibid.*
[47] *Ibid.*
[48] Vietnam Veterans of America Foundation, "Landmines Caused More U.S. Casualties in Vietnam than any Other Weapon," *New York Times*, 30 July 1997. A13.
[49] Vietnam Veterans of America Foundation, "Mr. President, Why Won't America Join the Landmine Ban?," *New York Times*, 2 December 1997. A17.
[50] Vietnam Veterans of America Foundation, "An Open Letter to President Clinton."
[51] Vietnam Veterans of America Foundation, "Landmines Caused More U.S. Casualties in Vietnam than any Other Weapon."
[52] *Ibid.*
[53] Petrarca, "An Impetus of Human Wreckage?: The 1996 Amended Landmine Protocol," 7.
[54] Vietnam Veterans of America Foundation, "President Clinton: Ban Landmines Now," *New York Times*, 28 March 1996. A17.
[55] Vietnam Veterans of America Foundation, "Every 22 Minutes."

Vietnam Veterans of America Foundation, "An Open Letter to President Clinton." Vietnam Veterans of America Foundation, "President Clinton: Ban Landmines Now."

[56] Anderson and Binstein, "Land Mines: A Danger That Won't Go Away."

[57] David Isenberg, "Outlaw Those Blind, Deadly Land Mines," *New York Times*, 23 January 1994. E16.

[58] Petrarca, "An Impetus of Human Wreckage?: The 1996 Amended Landmine Protocol," 35.

[59] Vietnam Veterans of America Foundation, "Across the Nation Americans Support a Landmine Ban," *Washington Post*, 15 July 1997. A7.

[60] "Third Session of the Review Conference of the 1980 United Nations Convention on Certain Conventional Weapons."

[61] Hirata, "International Norms and Civil Society: New Influences on Japanese Security Policy," 54.

[62] *Id*. at 55.

[63] Sigal, *Negotiating Minefields: The Landmines Ban in American Politics*, 94.

[64] Ken Rutherford, *Disarming States: The International Movement to Ban Landmines*, ABC-CLIO, December, 2010. 39.

[65] Faulkner, *Moral Entrepreneurs and the Campaign to Ban Landmines*, 130.

[66] Sigal, *Negotiating Minefields: The Landmines Ban in American Politics*, 78.

[67] "International Campaign to Ban Landmines."

[68] Hubert, *The Landmine Ban: A Case Study in Humanitarian Advocacy*, 17-18.

[69] "International Campaign to Ban Landmines."

[70] *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, The United Nations, 18 September 1997.

[71] *Ibid.*

[72] Docherty, "Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law," 23.

[73] Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict," International Review of the Red Cross, 30 April 1997, https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm.

[74] Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience," 88.

Works Cited

Anderson, Jack, and Michael Binstein. "Land Mines: A Danger That Won't Go Away." *Washington Post*, 17 August 1995, p. MN14.

Anti-Personnel Landmines: Friend or Foe? A Study of the Military Use and Effectiveness of Anti-Personnel Mines. International Committee of the Red Cross, 1997.

Arnett, Peter. "Princess Diana's anti-mine legacy." *CNN*, 10 September 1997, http://www.cnn.com/WORLD/9709/10/diana.angola/index.html.

Brown, Bernard L. "The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification." *Cornell International Law Journal*, vol. 10, no. 1, 1976, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1027&context=cilj.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. The United Nations, 18 September 1997, http://www.un.org/Depts/mine/UNDocs/ban_trty.htm.

Docherty, Bonnie. "Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law." *Austrian Review of International and European Law*, vol. 15, 2010, http://hrp.law.harvard.edu/wp-content/uploads/2013/08/04_docherty_neu-FINAL.pdf.

Faulkner, Frank. *Moral Entrepreneurs and the Campaign to Ban Landmines*. Rodopi, April 20, 2007.

"France: Paris: Anti-landmines Protest by Handicap International." AP Archive, uploaded by APTV, 27 September 1997, http://www.aparchive.com/metadata/youtube/0f179e4b7437f273ebcd17896f847c29.

Hirata, Keiko. "International Norms and Civil Society: New Influences on Japanese Security Policy." *Norms, Interests, and Power in Japanese Foreign Policy*, edited by Yoichiro Sato and Keiko Hirata, Springer, 2008, pp. 47-70.

Hubert, Don. *The Landmine Ban: A Case Study in Humanitarian Advocacy*. Thomas J. Watson Jr. Institute for International Studies, 2000.

Hughes, Stuart. "Cambodia's Landmine Victims." *BBC*, 11 November 2003, http://news.bbc.co.uk/2/hi/asia-pacific/3259891.stm.

"International Campaign to Ban Landmines." *Human Rights Watch*, 1999, https://www.hrw.org/legacy/reports/1999/landmine/WEBICBL.htm.

Isenberg, David. "Outlaw Those Blind, Deadly Land Mines." *New York Times*, 23 January 1994, p. E16.

Jochnick, Chris Af., and Roger Normand. "The Legitimation of Violence: A

Critical History of the Laws of War." *Harvard International Law Journal*, vol. 35, no. 1, 1994, http://heinonline.org/HOL/Permalink?a=d3VzdGwuZWR1&u=http%3A%2F%2Fheinonline.org%2FHOL%2FPage%3Fmen_tab%3Dsrchresults%26handle%3Dhein.journals%2Fhilj35%26size%3D2%26collection%3Djournals%26set_as_cursor%3D%26id%3D55.

Landmines Survivors Network. "Deuteronomy 30.19." *New York Times*, 4 December 1999, p. A17.

"Leahy Joins Batman Against Landmines." *UPI*, 11 December 1996, https://www.upi.com/Archives/1996/12/11/Leahy-joins-Batman-against-landmines/7489850280400/.

Lewis, John. "The Case for Regulating Fully Autonomous Weapons." *The Yale Law Journal*, vol. 124, no. 4, 2015, https://www.yalelawjournal.org/comment/the-case-for-regulating-fully-autonomous-weapons.

McCall, Jack H., Jr. "Infernal Machines and Hidden Death: International Law and Limits on the Indiscriminate Use of Land Mine Warfare." *Georgia Journal of International and Comparative Law*, vol. 24, no. 2, 1994, http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1432&context=gjicl.

Meron, Theodor. "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience." *The American Journal of International Law*, vol. 94, no. 1, January 2000, https://www.jstor.org/stable/2555232?seq=1#page_scan_tab_contents.

Perry, Mark. "Why the World Banned Chemical Weapons." *Politico*, 16 April 2017, http://www.politico.eu/article/why-the-world-banned-chemical-weapons/.

Petrarca, Alicia H. "An Impetus of Human Wreckage?: The 1996 Amended Landmine Protocol." *California Western International Law Journal*, vol. 27, no. 1, http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1320&context=cwilj.

Pichet, Jean Simon. *Development and Principles of International Humanitarian Law: Course Given in July 1982 at the University of Strasbourg as Part of the Courses Organized by the International Institute of Human Rights*. Martinus Nijhoff Publishers, September 30, 1985.

Roberts, Shawn, and Jody Williams. *After the Guns Fall Silent: The Enduring Legacy of Landmines*. Vietnam Veterans of America Foundation, 1995.

Rutherford, Ken. *Disarming States: The International Movement to Ban Landmines*. ABC-CLIO, December, 2010.

"Security Tight as Pope Call for Land Mine Ban." *CNN*, 20 April 1997, http://www.cnn.com/WORLD/9704/20/briefs/pope.terrorism/index.html.

Schmitt, Michael N. "The Principle of Discrimination in 21st Century Warfare." *Yale Human Rights and Development Journal*, vol. 2, no. 1, 2014, http://digitalcommons.law.yale.edu/cgi/viewcontent cgi?article=1010&context=yhrdlj.

Shenon, Philip. "U.S.-Made Land Mines Killed Many Americans, Report Says." *New York Times*, 29 July 1997, http://www.nytimes.com/1997/07/29/us/us-made-land-mines-killed-many-americans-report-says.html.

Sigal, Leon V. *Negotiating Minefields: The Landmines Ban in American Politics*. Routledge, May 13, 2013.

Smith, Norman B. "A Plea for the Total Ban of Land Mines by International Treaty." *Loyola of Los Angeles International and Comparative Law Review*, vol. 17, no. 3, 1995, http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1358&context=ilr.

"Superman Raises Landmine Awareness." *UNICEF*, 21 October 1996, https://www.unicef.org/newsline/super.htm.

"The Wrong Solution To Land Mines." *Chicago Tribune*, 10 February 1996, http://articles.chicagotribune.com/1996-02-10/news/9602100006_1_land-mines-nato-mission-soldiers.

"Third Session of the Review Conference of the 1980 United Nations Convention on Certain Conventional Weapons." *International Committee of the Red Cross*, 1 May 1996, https://www.icrc.org/eng/resources/documents/misc/57jmwp.htm.

Ticehurst, Rupert. "The Martens Clause and the Laws of Armed Conflict." *International Review of the Red Cross*, 30 April 1997, https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm.

Vietnam Veterans of America Foundation. "Across the Nation Americans Support a Landmine Ban." *Washington Post*, 15 July 1997, A7.

Vietnam Veterans of America Foundation. "An Open Letter to President Clinton." *New York Times*, 3 April 1996, p. A11.

Vietnam Veterans of America Foundation. "Every 22 Minutes." *Washington Post*, 6 April 1997, p. C5.

Vietnam Veterans of America Foundation. "Landmines Caused More U.S. Casualties in Vietnam than any Other Weapon." *New York Times*, 30 July 1997, p. A13.

Vietnam Veterans of America Foundation. "Mr. President, Why Won't America Join the Landmine Ban?" *New York Times*, 2 December 1997, A17.

Vietnam Veterans of America Foundation. "President Clinton: Ban Landmines Now." *New York Times*, 28 March 1996, p. A17.
Williams, Vanessa. "Youngsters Carry Anti-Land Mine Plea to White House." *Washington Post*, 30 November 1997, p. B3.

Regulating Hate Speech on Facebook: Taking Control of the Twenty-First Century Public Forum

Joe Rabinovitsj | Columbia University

Edited By: Caroline Zupan, Sarah Brody Bizar, Nathan Canadas, Emily Dolgin, Erin Mizraki

Abstract

Hate speech has always been a problem in the United States. But First Amendment jurisprudence does not grant hate speech a content-based exception, an exception based on *what* is said as opposed to *how* it is said, to free speech protections. In the twenty-first century, online platforms such as Facebook have become the main platform for hate speech. In this article, I will propose a content-neutral definition of hate speech: one concerned with the way speech is emitted as opposed to the content of the speech itself.

I first provide an overview of public forum doctrine in First Amendment jurisprudence. I then defend Facebook's legal status as a public forum, and by extension the enhanced speech protections granted by this status. I proceed to examine the "echo chamber" phenomenon on Facebook: the phenomenon whereby users are more likely to encounter views with which they already agree. Echo chambers contribute to the particularly pernicious quality of hate speech on Facebook; users susceptible to hateful messages are less likely to see anti-hate speech in their Newsfeeds. Based on available data, I then infer that Facebook's content distribution algorithm contributes to the echo chamber effect by distributing speech based on content. Since echo chambers automatically isolate individuals from views with which they may disagree, Facebook's algorithm effectively *discriminates* against speech based on content. The First Amendment does not protect such content-based discrimination of speech in public forums.

I conclude that regulating Facebook's content-based speech distribution algorithm would be a content-neutral and therefore constitutionally-permitted way of curbing the pernicious effects of hate speech on Facebook.

I. Introduction

Justice Brandeis' concurrence in *Whitney v. California* articulates the following bedrock principle of constitutional interpretation: when confronted with hateful or offensive speech, the First Amendment should disfavor restrictions for two reasons. First, the most effective, lasting way to combat offensive speech is with more speech. Second, restrictions risk undermining the personal and political autonomy that freedom of expression affords. In Brandeis' words:

> [The framers] knew…that it is hazardous to discourage thought…; that repression breeds hate;…that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.[1]

In recent years, hate speech seems to have flooded the United States. The number of hate groups in America has nearly doubled in the past two decades. Unlike the "low-value" speech at issue in *Chaplinsky v. New Hampshire* or the burning cross in *Virginia v. Black*, the main stage for hate speech in the twenty-first century is neither a street-corner nor a lawn: it is social media platforms. A particularity of Facebook, one of the primary online platforms where hate speech proliferates today, is that its algorithm sorts posts based on their content and diffuses them accordingly. In doing so, it creates hate-speech "echo-chambers" for many users. In other words, Facebook's algorithm determines which users are most likely to be receptive to certain views—such as hate speech—and then inundates their page with such content to the detriment of other opinions. Thus, Facebook's algorithm deprives Americans of the fundamental good that Brandeis claims the First Amendment protects: access to speech meant to combat hate.

It may be tempting to defend the idea that the First Amend-

ment ought to provide a content-based exception for hate speech. Under such an exception, hate speech would likely be defined in a manner similar to the way that anti-hate speech statutes in other Western legal systems define it: as speech that offends, insults, humiliates, intimidates or expresses hate towards an individual or group based on qualities of race, color, national origin, or religion associated with that group.[2] Such a content-based exception for hate speech may be enticing because it would allow the government to proscribe it in all contexts, including on Facebook.[3]

The closest the Supreme Court has ever come to recognizing a content-based exception to First Amendment protections came in *Virginia v. Black*.[4] In *Black*, the Court acknowledged a First Amendment exception for a narrow subset of hate speech: "intimidating utterances," defined as true threats directed towards an individual or group with the intent of placing them in fear of bodily harm or death.[5] Taken in conjunction with the Court's earlier ruling in *R.A.V. v. City of St. Paul*, which held that an anti-hate speech statute is invalid if it refers to viewpoints (including those that discriminate on the basis of race, gender, or religion), the possibility of proscribing hate speech beyond the narrow category permitted in *Black* seems faint because most hate speech seems necessarily affiliated with a viewpoint.[6, 7] Therefore, First Amendment jurisprudence, as *Virginia v. Black and R.A.V. v. City of St. Paul* make evident, has practically closed the door on the success of such an argument.

For these reasons, I will pursue an approach different from the content-based one discussed above. I will restrict my analysis to hate speech on Facebook, and I will instead propose to enact a content-neutral regulation of Facebook that curbs the pernicious effects yielded by the platform's hate speech echo-chambers, against Brandeis' hopes. To do so, I will first demonstrate that Facebook, vis-à-vis First Amendment protections, is a limited public forum. I will then show that Facebook's algorithm treats the diffusion of hate speech in a content-based way, differently from how it shares

other kinds of speech. By promoting the diffusion of hate speech, Facebook's algorithm creates a content-based manipulation of speech in a limited public forum. Therefore, I will argue that the government has the authority to proscribe the use of these kinds of content-discriminatory algorithms in public forums. Though such regulations would not eradicate hate speech on Facebook, they would restore users' access to speech that may combat hate speech, thus healing the unencumbered, adversarial marketplace of ideas enshrined in the First Amendment.

II. "The Modern Public Square": Facebook as a Limited Public Forum

A. A Walk Through Public Forum Doctrine

A public forum is defined as a space that has "immemorially been held in trust for the use of the public and, time out of mind…been used for purposes of assembly, communicating thought between citizens, and discussing public questions."[8] The classic examples of such spaces are public parks and streets, which, according to the Court's foundational decisions in *Hague v. C.I.O* and *Schneider v. State*, are conducive and crucial to the public discussion of public questions.[9] The Court has upheld strong protections of First Amendment rights in public forums on the basis that they facilitate speech about public issues.[10] In *United States v. Grace,* the Court succinctly articulated the standard it applied to regulations of speech in public forums since *Hague* and *Schneider*. Specifically, the government may enact "reasonable time, place, and manner restrictions" on speech in public forums only if they are (a) content-neutral, (b) narrowly tailored to serve a significant government interest (i.e. meet intermediary scrutiny), and (c) leave open ample alternative channels of communication.[11] But the government *cannot* enact content-based regulations on expression in public forums unless the

restrictions meet strict scrutiny: it can only enact such regulations if they are narrowly tailored to further a compelling government interest and there are no less restrictive means available to do so.

The Court has recognized various types of public forums. After a series of cases in which the Court conferred the status of public forum to spaces other than public streets and parks, in *Perry Education Association v. Perry Local Educators' Association,* the Court distinguished between three kinds of forums.

1. Quintessential public forums are protected in *Hague* and *Schneider* and have "time out of mind" served the purpose of assembly and public discussion of public issues. The test articulated in *Grace* applies to such forums.

2. Limited public forums "consist of public property which the State has opened for use by the public as a place for expressive activity," such as an airport terminal.[12] "Although a State is not required to indefinitely retain the open character of the [forum], as long as it does so, it is bound by the same standards as apply in a [quintessential] public forum."

3. Nonpublic forums consist of "[p]ublic property which is not, by tradition or designation, a forum for public communication." Examples cited include jailhouses.[13] The Court argues that when it comes to time, place, and manner regulations of speech in such spaces, the government may "reserve the forum for its intended purposes" so long as its restrictions on speech are (a) reasonable and (b) "not an effort to suppress expression merely because public officials oppose the speaker's view."[14]

B. Facebook as a Limited Public Forum

What is at stake for arguing that Facebook is a limited public forum? Convincingly showing Facebook to be a limited public forum supports the validity of a content-neutral regulation of hate-speech on Facebook in two ways. First, doing so would strengthen

the government's interest in regulating Facebook's content-based treatment of speech. Second, showing Facebook to be a limited public forum would permit the government to enact a time, place, or manner regulation of Facebook's content-based speech-diffusion algorithm as per *Grace*.

The Supreme Court's decision in *Packingham v. North Carolina* sets a precedent for understanding numerous social media platforms, and Facebook in particular, as public forums.[15] Justice Kennedy, delivering the majority opinion, argues that Facebook functions as a limited public forum. Though this argument is not part of the holding, and thus non-binding, it provides a blueprint for understanding Facebook as a public forum. Furthermore, it indicates the Court's willingness to embrace such an understanding, thereby lending it legal clout.

At issue in *Packingham* is a North Carolina statute making it a felony for a registered sex offender "to access a commercial social networking web site where the sex offender knows that the site permits minor[s] to become members or to create or maintain personal Web pages."[16] The Court reviewed the validity of this statute as it applied to Lester Packingham, a registered sex offender residing in North Carolina. Packingham was convicted of violating this statute after a police officer, during a routine check of social media websites, found that Packingham had posted on Facebook about avoiding a traffic ticket. The Court recognized North Carolina's stated justification for enacting this statute, to protect minors from sexual predators, as substantial. The question before the Court was whether this statute met the intermediate scrutiny standard for content-neutral regulations of speech. The Court held that the statute did not meet this standard because it was not narrowly tailored to the State's substantial interest.[17]

Because Kennedy uses an intermediate scrutiny standard to assess the content-neutrality of the statute rather than the reasonable time, place, and manner standard for speech in a public forum,

Packingham cannot establish binding precedent for Facebook's status as a public forum. However, Kennedy uses his argument that social media sites constitute limited public forums to demonstrate the significant First Amendment interest in protecting the use of such sites.[18] This dictum demonstrates the Court's willingness to recognize Facebook and other social media platforms as limited public forums, which serves as a litmus test for how this Court may decide future cases where the status of such sites as public forums is among the primary legal questions.

Kennedy begins his opinion by arguing that while "a street or a park is [still] a quintessential forum for the exercise of First Amendment rights," modern technology has created new "democratic forums" in cyberspace.[19] Unlike previous rulings, wherein the Court relied heavily on analogizing the physical special features of a place to a street or park to establish it as a public forum, Kennedy demonstrates (a) that social media (Facebook in particular) functions as a public forum by facilitating public speech about public issues and (b) that it does so on a massive scale, potentially making it a more important twenty-first century public forum than streets or parks. Because social media users "employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought," Kennedy argues that social media serves the function of a public forum.[20] Kennedy attributes many of these functions to Facebook: "[o]n Facebook…users can debate religion and politics with their friends and neighbors or share vacation photos."[21] Recall the *Haugue* and *Schneider* rationale for vigorously protecting First Amendment rights in public forums. Public forums are the primary spaces in which those rights are exercised, so limiting the ability to use those spaces undermines the ability to exercise First Amendment rights. Kennedy applies this reasoning to Facebook and social media: restricting access to social media sites "bars access to…the principal sources for knowing current events, checking ads for employment, speaking and listening, in the mod-

ern public square, and otherwise exploring the vast realms of human thought and knowledge."[22] Moreover, his second justification, as mentioned above, relies on Facebook's size. At the time of the *Packingham* decision, Facebook had 1.79 billion active users.[23]

Kennedy ultimately uses this argument to show that the statute at stake is not narrowly tailored to the State's interest in protecting minors from sexual predators and is thereby invalid. Indeed, the statute prohibits speech that would not endanger minors on platforms such as Amazon, the Washington Post, and WebMD.[24] He also argues that, even when it comes to sites like Facebook, where a sex offender *could* prey on minors, the statute's wholesale prohibition on sex offenders' use is not narrowly tailored to the State's significant interest because it "prevent[s] the user from engaging in the legitimate exercise of First Amendment rights" rather than limiting the statute's restriction to speech tantamount to predatory conduct.[25] This second argument would not be convincing had the Court not shown there to be a significant interest in preserving one's ability to speak on Facebook, meaning that Facebook is a public forum.

Kennedy's opinion in *Packingham* legitimizes the notion that Facebook is a public forum. To strengthen my argument, I will elaborate on Kennedy's view. I will focus on four of Facebook's qualities which make it sufficiently resemble a street or public park to merit qualification as a public forum. These four qualities emerge from *Hague*'s explanation of why public streets and parks qualify as public forums: they are spaces that have "immemorially been held in trust for the use of the public and, time out of mind…been used for purposes of assembly, communicating thought between citizens, and discussing public questions."[26]

B.1. Facebook is Used for "Assembly and Communicating Thought Between Citizens"

Facebook facilitates the assembly and communication of

thoughts between citizens. Arguably, it plays a larger role in facilitating these dynamics than do streets or parks. Facebook enables its users to "Friend" individual acquaintances and "Like" companies, media outlets, and other websites. Then, Facebook compiles the most "relevant" content that these sources post in a continually refreshing stream of content called the "Newsfeed," thus facilitating communication between citizens in a highly-curated way. Of course, the communication Facebook facilitates is limited to the people or pages one follows and the content that they post. But this phenomenon is akin to the physical limitations placed on communication in public streets and parks, where one's thoughts can only be communicated to people (a) within earshot or reasonable visibility, (b) whom the speaker chooses to address, and (c) who are willing to listen. The main difference here is audience size. On Facebook one could communicate with 100 million "Friends" via their individual Newsfeeds. It would be practically impossible to reach such an audience in a park.

Facebook also facilitates forms of assembly similar to those which occur in streets or public parks. First, Facebook users can join or create "Groups." Groups can revolve around any sort of special interest, from Black Lives Matter, to White Lives Matter, to the University Debate Club. The virtual assembly based on a common cause or interest that Facebook facilitates with its Group function is thus akin to how public parks and streets host public protests, demonstrations, and group meetings. Second, Facebook's "Events" function, allowing users to organize, be notified about, express interest in, and ultimately attend real events, has been instrumental in organizing protests and political demonstrations around the world. For example, Facebook Events were crucial to organizing many political demonstrations such as the 2017 Women's March on Washington and demonstrations that took place during the Arab Spring from 2010 to 2012.

B.2. Facebook is Used for "Discussing Public Questions"

The difference between "discussing" and "communicating thoughts," according to the Courts, is subtle yet important. By examining the statute invalidated by the Court in *Hague,* we may expose this distinction. This statute involved two provisions: the first made it a crime to distribute in "any public street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet," and the second prohibited "leasing a hall without a permit from the Chief of Police, for a public meeting at which a speaker shall advocate obstruction of the Government of the United States or a State, or a change of government by other than lawful means."[27] The Court held that the *first* provision denied the First Amendment right to communicate thoughts.[28] Associating the first provision with the communication of thoughts indicates that communication, according to the Court, refers specifically to the one-way *expression* of a view (e.g. distributing pamphlets or literature). Although the distribution of circulars may foster two-way discussion, the act itself is a singly-directed way of putting one's views out into the world. On the other hand, associating discussion with public meetings implies that the Court understands discussion as the two-way *exchange* of ideas.[29]

The "Comment Thread" is Facebook's primary facilitator of public discussion. On any content, from the most benign personal status updates to elected officials' posts about policy, users may leave comments to express their views. In a comment thread, users may also respond directly to other users' comments. This feature demonstrates Facebook's commitment to preventing the comment thread from becoming a space in which users merely become entrenched in their views about a piece of content and fail to engage with others.

Ultimately, speech on Facebook is inherently public. Everything posted on Facebook is necessarily available for

the consumption of a public audience and intended for public consumption. Depending on a user's privacy settings, the audience may range from one's friend group to anybody with internet access. Furthermore, much of the speech on Facebook, news articles about current political and cultural events and announcements by elected officials alike, is of quintessential public import. In fact, according to a recent Pew Research Center report, 45 percent of Americans use Facebook as a primary source for news.[30] Additionally, according to the Congressional Management Foundation's 2016 survey, 76 percent of members of Congress felt that social media enabled more meaningful interactions with constituents, 70 percent believed social media made them more accountable to their constituents, and 71 percent claimed that constituent comments on social media would influence them should they be undecided on an issue.[31] The issues discussed on Facebook are not merely of public importance insofar as they are important to the public generally, but they are often of *political* importance: the sort of public speech that the First Amendment most strongly protects.

B.3. Facebook Has Been Used for Such Purposes "Time Out of Mind"

The Court has denied conferring the status of public forum on a space when the relevant space had not always been used for the purposes of assembly, communication of ideas, and discussion of public issues. For example, in *ISKCON v. Lee* the Court argued that, when it comes to soliciting money, an airport terminal is not a public forum because "even within the rather short history of air transport, it is only in recent years that it has become a common practice for various [groups] to use commercial airports as a forum for the… solicitation of funds…and other similar activities… [nor] have [airport terminals] been intentionally opened by their operators to such activity."[32]

Unlike airport terminals, Facebook was conceived expressly to facilitate assembly, communication of ideas, and discussion of public issues. Upon its founding in 2004, Facebook lacked some of the functions that emphasize its status as a public forum (e.g. the Newsfeed, which went live in 2006), and reached a narrower audience (until 2006 one had to be affiliated with one of a select group of universities and high schools). Yet, its intended function has *always* been that of a public forum. Consider Facebook's first mission statement: "Thefacebook is an online directory that connects people through social networks at colleges." The fact that the public forum-like features, such as Comment Threads and content-sharing in large groups, have been part of Facebook since 2004 indicates that Facebook's incipient mission to "connect" people was not merely superficial but rather aimed at creating a channel of public communication between people; in other words, to serve the function of a public forum. Facebook's current mission statement, which states that its aim is to "[g]ive people the power to build community and bring the world closer together," makes this idea even more explicit.

B.4. Facebook is Open "for the Use of the Public"

A highly-elaborated area of limited public forum doctrine is the extent to which private property (held either by the government or a private individual or corporation) may be subject to the First Amendment protections of quintessential public forums. Public forum jurisprudence ultimately interprets the Court's holding in *Hague* that a public forum is open "for the use of the public" to mean that a necessary condition for a space to be considered a public forum is that it be open for the use of the public regardless of its ownership.[33] According to the doctrine articulated in key cases *Marsh v. Alabama*, *Food Employees v. Logan Valley Plaza*, and *Pruneyard Shopping Center v. Robbins*, Facebook is open to the public in the

manner required of a public forum.

At issue in *Marsh* was a local ordinance of Chickasaw, Alabama, a town privately owned by the Gulf Shipbuilding Corporation, prohibiting any kind of "solicitation" "without permission" in the town.[34] Petitioner, a Jehovah's witness, was convicted of violating this ordinance while she was distributing literature on the town's sidewalks. The State argued that because the town was private property, the ordinance, which would otherwise be an unconstitutional infringement on First Amendment rights in a public forum, was valid. The Court rejected this argument by claiming, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[35] In other words, *Marsh*'s holding maintains that privately-owned property may count as a public forum if that property is open for public use in the same sense as public streets and parks.

Logan Valley and *Pruneyard* demonstrate that the *Marsh* rule applies to more familiar forms of private property: shopping malls. The facts of these two cases are nearly identical. They each involve demonstrations in privately-owned shopping centers that were generally open to the public, followed by the mall quelling these demonstrations. At issue in *Logan Valley* was a labor union protest of Weis Markets: a store in Logan Valley Mall. The shopping center enjoined the picketers on the grounds that they were trespassing on private property.[36] Similarly, at issue in *Pruneyard* was an anti-Zionist demonstration involving the distribution of literature and solicitation for signatures on a petition. Pursuant to Pruneyard's policy prohibiting public expressive activities in the shopping center, security guards requested that the demonstrators vacate the premises.[37] Pruneyard maintained that its anti-expression policy was constitutionally permitted according to its private property rights. In both cases, the Court remarked that the sense in which the respective shopping centers were open to encourage patronage at the

shopping center's stores rendered them similarly open to public use as public streets and parks.[38] Moreover, the Court maintained that if private property is open for the general use of the public, it may be considered a public forum and private property rights do not justify limits on First Amendment rights to use that property. In *Logan Valley,* the Court affirmed the principle that "peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment."[39] In other words, it is whether a space is open to the public, not whether it is private property, that is the necessary factor to determine whether that space is a public forum. The Court in *Pruneyard* articulates this principle slightly differently:

> When a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law [but]… a State, in the exercise of its police power, may adopt reasonable restrictions on private property.[40]

Unlike in *Logan Valley*, *Pruneyard* involved a clause of the California State Constitution protecting "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." Although *Pruneyard* basically advances the same principle as *Logan Valley*, that private property opened to the general use of the public may count as a public forum from the perspective of the First Amendment, it adds some important specifications. Specifically, it establishes (a) that the public forum rights conferred on private property opened to the public cannot exceed those permitted under the First Amendment and (b) that the burden this places on private property rights do not violate any other federal constitutional provision. [41]

Facebook is a private platform open to the public in a

sufficiently similar way to Chickasaw and malls, as it affords its users the First Amendment right to a public forum. Facebook's platform (the code, servers, databases, domain, etc.) through which users post content is Facebook's private property. In *Logan Valley*, in order to establish that the shopping center was generally accessible to the public, the Court argued that the roadways leading to the mall and sidewalks within the mall were functionally equivalent to the streets and sidewalks connecting a town with the rest of the country.[42] To establish that Facebook is publicly accessible in the same way will require showing that the "roads" connecting Americans to the social media platform are as publicly accessible as those connecting the Logan Valley Mall to the surrounding public. While it is unlikely that more than 80 percent of Americans had access to Logan Valley Mall, in 2016, 87 percent of Americans had access to the internet, and this number is only growing. [43, 44] Moreover, as of 2016, 79 percent of Americans have Facebook accounts.[45] This data indicates that Facebook is at least as accessible to the American public today as Logan Valley Mall was in 1968. Although Facebook is privately owned, the fact that it is open for the general use of the public precludes private property rights from interfering with the First Amendment public forum rights that its users ought to have.

C. Justice Alito's Contentions

Justice Alito wrote a concurring opinion to *Packingham v. North Carolina* for the sole purpose of contending the majority opinion's "undisciplined dicta…equat[ing] the entirety of the internet with public streets and parks."[46] Alito levies two objections against the idea that Facebook is a public forum: (1) on Facebook (unlike in a street or park) not all of one's actions are visible to the public, and (2) the degree of anonymity Facebook provides undermines the publicness of its forum.[47] These objections are inconsistent with the material facts of both Facebook's platforms and First Amendment

jurisprudence.

The objection that Facebook does not afford the same public visibility as public streets and parks is demonstrably false. By "visibility," Alito conveys an unconstrained public access to all the actions that take place in a public space. According to his objection, if the fact that Facebook users have limited access to others' actions on the platform is sufficient to deprive it of the status of public forum, then Alito is committed to the idea that users of public streets and parks have at least relatively greater access to others' actions in those settings. If anything, Facebook affords greater access. It could be argued that Facebook affords its users heightened control over their audience, via the ability to determine whether a post is available to the general public, only "Friends," or "Friends of Friends." For this assumption to survive, it would require there to be a substantial difference between the kind of audience-curation in a public street or park and the kind of audience-curation that occurs on Facebook. However, there is no such difference. In the same way that people can choose to have an intimate conversation in a park or give a speech to anybody who will listen, people may direct their speech on Facebook to audiences of various scopes by toggling the privacy and audience settings on a post. In this regard, there seems to be little difference between the public accessibility of speech that occurs on Facebook compared to that which occurs in a public street or park.

Alito's second substantial objection to Facebook's status as a public forum, that it allows users to speak anonymously or through aliases, is inconsistent with the First Amendment's strong protections of anonymous speech in public forums. *Talley v. California* overturned a Los Angeles city ordinance prohibiting the distribution of any leaflet or handbill that did not have the name and address of the person or organization from whom it originated because of the important role the Court found anonymous literature to play in the exercise of free speech in public forums.[48] The Court argued

that "time out of mind," the anonymous distribution of literature has served as a crucial means by which persecuted minorities can decry government oppression.[49]

The Court granted even broader protections to anonymous speech in *McIntyre v. Ohio Elections Commission* by overturning an Ohio statute prohibiting the distribution of anonymous campaign advertising.[50] Historically, official campaign speech has received fewer First Amendment protections than other forms of public speech about public issues. As such, the fact that the Court upheld anonymity in this less protective context demonstrates the importance of anonymous speech to the First Amendment. Although Alito is correct that Facebook permits anonymous speech, that fact does not call into question its status as a public forum.

III. Amplifying Hate Speech on Facebook: The Echo-Chamber Effect

In general, hate groups have been on the rise, and hate messages that they produce have been spreading on physical and online platforms. According to the Southern Poverty Law Center (SPLC), the number of active hate groups increased from 457 in 1999 to 917 in 2017.[51] Hate speech online increased proportionally.[52] As mentioned above, although there may be compelling reasons for why hate speech *should* be generally regulated, First Amendment jurisprudence is stacked against permitting content-based regulations of hate speech. Facebook is a notable player in the rise of hate and hate speech in America not just because it is a prominent platform for hate speech but also because it facilitates the *proliferation* of hate speech.

Furthermore, I will demonstrate the degree to which Facebook creates "echo-chambers": that is, when the content one receives on Facebook's Newsfeed is almost exclusively aligned with the views a user already endorses. When it comes to hate speech, I

will argue that Facebook's echo-chamber effect is dangerous insofar as it distorts the marketplace of ideas by allowing the spread of hate to go unchecked by rebutting speech. I will continue to show that the algorithm by which Facebook determines when to present which content to whom does so in a content-based manner that propagates conspiracy theories and hate speech on users' Newsfeeds more widely and for longer than other kinds of content. I will conclude that this content-based treatment of hate speech is not protected by the First Amendment, given Facebook's status as a public forum.

A. The Echo-Chamber Effect on Facebook

Before describing the reality of echo-chambers on Facebook, it is paramount to note what is at stake. Consider the fundamental First Amendment principle advanced by Justice Brennan's majority opinion in *New York Times v. Sullivan* that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[53] This principle, applied in *Sullivan* to the protection of factually false defamatory statements about a public official published in the New York Times, provides an elaboration of Brandeis' doctrine in his concurrence in *Whitney*. The doctrine underlying the *Sullivan* decision claims that restricting citizens' exposure to "offensive" views by means of striking them from publication is not only dangerous because it distorts the marketplace of ideas as Brandeis claims, but because doing so distorts citizens' perspectives of public opinion, thereby impairing their ability to make informed political decisions. This philosophical perspective on the First Amendment implies that exposure to more viewpoints improves one's ability to participate in public debates about public issues and thereby become a more effective participant in democratic processes. Therefore, receiving news primarily from a platform that creates echo-chambers restricts access to multiple

viewpoints, which degrades citizens' ability to engage democratically, especially when those echo-chambers become mired with hate speech. Of the 66 percent of American adults who use Facebook, at least 45 percent of them use it as a news source.[54] The echo-chamber effect on Facebook is indeed an issue about the information that informs citizens about public issues.

The echo-chamber effect on Facebook can be quantified in terms of the availability of "cross-cutting content," which is content that expresses a view contrary to the views a user (based on demographic and behavioral data) already endorses. By this metric, the closer the percentage of cross-cutting content on a Newsfeed approaches zero, the more that Newsfeed exemplifies the echo-chamber effect. Of course, before the internet, citizens did not consume a perfectly balanced diet of media representing views from across the political and social spectrum; liberals may have favored the *New York Times* while conservatives may have opted to watch *Fox News*. If this were the case, 50 percent of a citizen's media diet likely would not have been cross-cutting.

One of the most widely-cited studies of the echo-chamber effect on Facebook, also happens to be one of the most biased because two of its three authors work for Facebook.[55] But even this article identifies Facebook's algorithm as playing an active role in facilitating the echo-chamber effect. To measure the extent to which Facebook's *algorithm* facilitates the echo-chamber effect, the authors of this article need to control for the influence that users' independent choices have on the echo-chamber effect. To do so, they measure the percentage of all the content posted and viewed by groups and friends in a user's network that is cross-cutting, as opposed to the content a user *sees* on her Newsfeed, to serve as this control group.[56] This article's scope is restricted to political content, focusing on two opposing views (liberal and conservative) and it uses these two views to quantify cross-cutting political content available in one's network and on one's Newsfeed. According to the authors'

statistical analysis, before Facebook's algorithm influences the content that appears on a user's Newsfeed, the potential cross-cutting content available from a conservative user's network is 35 percent, while that which is available on a liberal user's network is 24 percent. Once Facebook's algorithm kicks in, the proportion of cross-cutting content that a conservative user actually sees on her Newsfeed is 30 percent, while that which a liberal sees is 21 percent.[57] Even an arguably heavily biased scientific study admits that Facebook's algorithm contributes to the echo-chamber effect in a statistically significant way: Facebook's algorithm causes a 17 percent decline in the cross-cutting content a conservative user sees on her Newsfeed as opposed to what is available to her in her network of Friends and a 13 percent decline for liberal users.[58]

Another article that demonstrates statistically-significant evidence of the echo-chamber effect on Facebook is arguably less biased (all the researchers were neither corporately or politically affiliated) and takes a different approach. It begins with a pool of widely circulated content on Facebook around the time of the Brexit referendum and sorts it into two categories: "Brexit pages" (content engaging in the Brexit debate) and "non-Brexit pages" (content not mentioning the Brexit referendum).[59] The researchers catalogued a random sample of British users and ranked them on a scale of -1 to 1 based on how many posts in each category the users liked, commented on, or shared. For the purpose of this study, -1 indicates high engagement in the Brexit debate and 1 indicates no engagement in the Brexit debate. Mapping this data into various probability density functions shows stark polarization: it was highly likely that users' Newsfeeds were brimming with Brexit content or devoid thereof, while it was highly unlikely that their Newsfeeds were only moderately composed of Brexit content.[60] The way in which Facebook's algorithm serves content into Newsfeeds likely contributed significantly to this echo-chamber effect surrounding the Brexit debate.

Data about users' emotional responses towards all the other political debates occurring at the same time hovered around neutral for the most part, which means that most people probably cared about important political issues like Brexit, but only enough to want a moderate amount of information about it.[61] It seems reasonable to infer that those who received *no* Brexit-related information on Facebook probably received none because Facebook's algorithm served them none, whereas those whose Newsfeeds were overwhelmed by Brexit-related content would likely have sought out a more modest quantity of content had they been left to their own news-collecting devices without the influence of Facebook's algorithm.[62]

B. Facebook's Content-Based Diffusion of Speech Creates the Echo-Chamber Effect

Facebook's algorithm determines which posts that users see in a content-based way: the algorithm takes into account what the posts are *about* in order to determine what will compose which users' Newsfeeds.[63] The National Academy of Sciences (NAS) demonstrated that a given post's content can reliably determine how widely and frequently the post appears on Newsfeeds. Based on this study, I will argue that Facebook's algorithm restricts speech in a public forum in a content-based way. The NAS study focuses on how Facebook's Newsfeed treats two different kinds of content: (1) speech about "conspiracy theories" and (2) speech about "science." The authors define these categories broadly.[64] "Conspiracy theories" includes speech and articles about empirically false or recklessly unsubstantiated claims ranging from articles claiming that 9/11 was an "inside job," studies touting that smoking cigarettes reduces one's risk of lung cancer, or public service announcements warning citizens of Wisconsin that towns in their state are subject to Sharia law. It should be clear that this category includes hate speech. In addition to articles in peer-reviewed academic journals, the "science"

category contains articles and posts about issues pertinent to the physical and social scientific fields that reference empirically-verifiable claims that are substantiated by data.[65]

The authors tracked Facebook's *diffusion* of 7,319 posts that fall into one of these two categories.[66] In other words, they examined the rate at which each of these posts was served by Facebook's algorithm into Newsfeeds as well as the duration over which Facebook's algorithm continued to show those posts in Newsfeeds.[67]

Posts in the science category reach large audiences quickly. But the size of their audience begins to shrink quickly thereafter. Posts in the conspiracy theory category take much longer to reach the average maximum size of science posts. However, once they have reached an audience of a certain "critical mass" size, the size of their audience continues to grow thereafter.[68]

This data must be interpreted to determine the extent to which Facebook's algorithm (as opposed to users' choices) contributes to this asymmetrical diffusion of information based on content. The share function (i.e. a user sharing content directly to certain targeted individuals) is the only kind of activity on Facebook that could diffuse information in a content-based way *because of* a user's confirmation bias. But only a fraction of the content users consume on Facebook is that which a friend has shared directly. The majority of the news content users consume on Facebook is that served to them by Facebook's Newsfeed algorithm, which "decides" which content to offer based on thousands of criteria.[69] In Pew Research's report on Facebook users' news habits, the researchers do not even consider shared posts as a significant source of users' news on Facebook because users so heavily rely on getting news from their algorithmically compiled Newsfeeds.[70] Therefore the *cause* of the asymmetrical diffusion of posts based on content is most likely linked to Facebook's Newsfeed algorithm, meaning that it discriminates between posts on a content-based basis.

An obvious objection is that if Facebook's diffusion

algorithm relies on criteria relating to the views of a user's network of friends and a user's preexisting political views, and users tend to segregate themselves into echo-chambers by themselves, then Facebook's Newsfeed algorithm is not *really* content-based. In other words, it is the users' segregation of themselves into echo-chambers that explains the content-based diffusion patterns, not Facebook's algorithm. This objection misses the point. Facebook's Newsfeed algorithm uses users' *opinions*—a content-based criterion—and the opinions of those people in a user's network—another content-based criterion—for the purpose of serving that user information. Although Facebook may be amplifying preexisting biases, the *means* by which its algorithm does so is sufficient to conclude that Facebook's Newsfeed algorithm discriminates between posts in a content-based way.

Of course, not all content-based treatments of speech lose First Amendment protection.[71] But, Facebook's content-based treatment of speech deprives users of speech to which they would otherwise have access because its algorithm contributes to the echo-chamber effect by decreasing the amount of cross-cutting content that a user sees in the Newsfeed compared to that which is available in that user's Friend network. Therefore, Facebook's algorithm amounts to a content-based *restriction* of speech.

IV. Facebook's Content-Based, Speech-Restricting Algorithm Can and Should be Regulated

Precedent clearly authorizes the government to regulate content-based restrictions of speech in public forums. Because the Courts held that the private policies prohibiting demonstrations in malls at issue in *Logan Valley* and *Pruneyard*—both of which the court found to be content-based restrictions on speech—were valid subjects of state regulation, there is a strong argument that Facebook's Newsfeed algorithm should similarly be subject to State

regulation since it also violates First Amendment rights in public forums.

The government could take a variety of approaches to curb the way in which Facebook's echo-chamber-creating Newsfeed algorithm yields content-based speech restriction. The FCC could issue a rule prohibiting owners and operators of online public forums from taking account of the message or content of users' speech when determining the diffusion of information. States or the federal government could pass statutes prohibiting that conduct. States could even adopt constitutional amendments protecting public forum rights online, analogous to the California constitutional amendment protecting free speech rights in shopping centers at issue in *Pruneyard*. Each of these rules would count as content-neutral regulations, meaning that to be constitutional regulations of public forums they would need to also serve a significant government interest, be narrowly tailored to that interest, and leave open ample alternative channels of communication.[72] The interest that would motivate enacting such regulation—upholding free speech rights in public forums—has long been acknowledged as "important" and even compelling.[73] It also seems that there is a strong if not a winning argument that these rules are narrowly tailored to that interest. The above regulations would only be aimed at the criteria an online public forum like Facebook could consider in the diffusion of information, which would not prohibit speech but merely restore neutrality to Facebook and other online public forums. In this sense, alternative channels of communication would still abound.

Should any of the above regulations be enacted, Facebook would likely challenge its constitutionality for "taking" private property without just compensation prohibited by the Fifth Amendment's Takings Clause as well as a depriving Facebook of its private property without due process of the law, triggering the Fourteenth Amendment. In *Pruneyard*, the shopping center issued a similar challenge, arguing that by requiring them to allow respondents'

speech on their property, the California Supreme Court's ruling constituted an unlawful "taking" of their property without just compensation or due process.[74]

The Court in *Pruneyard* found it sufficient to reject these Fifth and Fourteenth Amendment challenges by showing that regulating Pruneyard's private property would not "unreasonably impair the value or use of their property as a shopping center."[75] The same reasoning, applied to Facebook, would likely preclude the analogous challenges. Preventing Facebook, a limited public forum, from using an algorithm that diffuses speech differently based on its content would not impair its value—Facebook could still sell advertisements and mine data to sell—nor would doing so impair its use as a social media platform. In fact, such a regulation would *improve* Facebook's use as a social media platform because it would likely expose viewers to more viewpoints and fewer hate speech echo-chambers.

V. Conclusion

Regulating the content-based speech-restricting aspects of Facebook's Newsfeed algorithm would not eradicate hate speech on Facebook. To do so would probably require the Supreme Court to recognize hate speech as a content-based exception to First Amendment protections. Given the precedent set by *R.A.V* and *Black*, discussed at the beginning of this paper, the prospect of such a ruling is unlikely at best. However, proscribing the sort of content-discriminatory algorithms Facebook uses on its Newsfeed would curb the detrimental *effects* of hate speech on its users. Specifically, it would ensure that for all the opprobrious speech on online public forums like Facebook, participants will also have access to more speech combatting it. Such access would sustain Americans' ability to participate in democratic processes per Brennan's theory expressed in *Sullivan*. This argument for why Facebook's content-based restric-

tions of speech *should* be regulated is an expression of Brandeis' theory that close to the heart of the First Amendment is an interest in ensuring that individuals have the opportunity to challenge hateful speech with more speech.

In the previous section, my argument for why such regulation is *permitted* under American law may seem to have invoked a more contentious First Amendment theory than Brandeis': the idea that certain media outlets should be treated by the law as public trustees, with a fiduciary duty towards the public. Although the Court applied this theory in *Red Lion v. FCC* to uphold the FCC's fairness doctrine as applied to broadcast and radio television, it explicitly rejected applying this fiduciary argument to cable television in *Turner Broadcasting System v. FCC*.[76] Because the Court's application of this theory depends on the medium, it is contentious whether it applies to the internet because the issue has not yet been brought before the Court.

One may contend that my argument requires accepting the *Red Lion* fiduciary argument and unwarrantedly applying it to the internet. Although I am sympathetic to the *Red Lion* rationale and believe that it captures the logical culmination of the theories underlying Brandeis' concurrence in *Whitney* and the Court's opinion in *Sullivan*, these sympathies are beyond the scope of this paper. Public forum doctrine is sufficient to permit regulating Facebook's content-based restrictions of speech. Although the regulation's effects could end up cohering with the *Red Lion* rationale, it does not form part of the regulation's legal basis.

[1] *Whitney v. California* 274 U.S. 375 (1927), Brandeis, J. concurring.
[2] E.g. The Racial Discrimination Act (1975) sec. 18C of the Law of Australia, e.g. also Canadian Criminal Code §319(2).
[3] Content-based exception to First Amendment protection already recognized—e.g. libel, advocacy of illegal action, fighting words, et al—work in this way.
[4] *Virginia v. Black* 538 U.S. 343 (2003).
[5] *Id.* at 344.

[6] See *R.A.V. v. City of St. Paul* 505 U.S. 387 (1992).
[7] Under this standard, the protesters in Charlottesville making monkey noises at black counter-protesters were merely expressing the white nationalist *viewpoint*. This standard would even recognize Adolf Hitler, in his speeches promising the "annihilation of the Jewish race in Europe" (speech to the Reichstag, January 30, 1941), as expressing the protected Aryan "viewpoint."
[8] *Hague v. Committee for Industrial Organization* 307 U.S. 515 (1939).
[9] See *id.* at 516. See also *Schneider v. State of New Jersey* 308 U.S. 147 (1939).
[10] See *Schneider* at 147.
[11] *United States v. Grace* 461 U.S. 177 (1983).
[12] See *International Society for Krishna Consciousness v. Lee* 505 U.S. 672 (1992).
[13] E.g. *Adderly v. Florida* 385 U.S. 35 (1966).
[14] *Perry Education Association v. Perry Local Educators' Association* 460 U.S. 45-46 (1983).
[15] *Packingham v. North Carolina* 582 U.S. 1 (2017).
[16] *Packingham* at 1, citing N.C. Gen. Stat. Ann. §§14-202.5(a)(e). The statute characterizes "commercial social networking web sites" as (1) those owned by somebody who "derives revenue" form operating the site, (2) those that "facilitate the social introduction between two or more persons…", (3) those that "allow users to create Web pages or personal profiles that contain [personal] information, and (4) those that "provide users or visitors…mechanisms to communicate with other users…"
[17] See *Id*. at 6 & 9.
[18] See *Packingham* at 6.
[19] *Id.* at 4-5.
[20] *Id*. at 5.
[21] *Id*. at 5.
[22] *Id.* at 8.
[23] *Id.* at 5.
[24] See *Id*. at 7.
[25] See *Id.* at 8.
[26] *Hague* at 515.
[27] *Hague* at 501.
[28] E.g. *Id*. at 518.
[29] E.g. *Id.* at 513.
[30] Pew Research, "Social Media Sites as Pathways to News" (September 5, 2017).
[31] *Knight Institute v Trump* brief of Electronic Frontier Foundation, citing Congressional Research Service, *Social Media in Congress: The Impact of*

Electronic Media on Member Communications (May 26, 2016).
[32] *Lee* 505 U.S. 680 (1992).
[33] *Hague v. Committee for Industrial Organization* 307 U.S. 515 (1939).
[34] *Marsh v. Alabama* 326 U.S. 503 (1946).
[35] *Id.* at 506.
[36] *Food Employees v. Logan Valley Plaza* 391 U.S. 312 (1968).
[37] *Pruneyard Shopping Center v. Robbins* 447 U.S. 77 (1980).
[38] See *Logan Valley* at 319, see also *Pruneyard* at 77.
[39] *Logan Valley* at 313.
[40] *Pruneyard* at 81.
[41] The path to the current doctrine *Pruneyard* advances was winding, which explains some of the slight differences between *Logan Valley* and *Pruneyard*. *Hudgens v NLRB* effectively overruled *Logan Valley* before *Pruneyard*. *Hudgens* 424 U.S. 518 (1974). The Court in *Hudgens* argued that *Logan Valley* was inconsistent with the Court's ruling *Lloyd Corporation v Tanner*. *Id.* In *Lloyd* the Court held that Tanner's distribution of handbills in a privately-owned mall was not protected by the First Amendment, and that the mall's private property rights were more important. *Lloyd* 407 U.S. 551 (1972). What *Hudgens* failed to sufficiently acknowledge was the sense in which the *Lloyd* carefully distinguishes its case from *Logan Valley*. The Court in *Lloyd* argues that in *Logan Valley* the picketers had no alternate places where they could express their message, and therefore the mall's order for them to leave was unconstitutional because it did not leave open ample alternative channels of communication for the picketers. *Id.* at 560. In *Lloyd*, however, the mall's content-neutral policy prohibiting the distribution of handbills did allow for ample alternate channels of communication (e.g. the public sidewalk outside of the shopping center), making it valid. *Id*. at 561. *Hudgens* also dealt with union employees picketing a business in a privately-owned mall and getting kicked off the premises for trespassing. When deciding Hudgens, the Court interpreted Lloyd to stand for the blanket proposition that the First Amendment does not require owners of private property to allow individuals to speak on their property. *Pruneyard* allowed the Court to revisit this doctrine because at issue was a State constitution provision explicitly protecting the freedom of expression in malls. In so doing, the Court undermined the *Hudgens* reasoning, and revived a semblance of the Court's reasoning in *Logan Valley* (which is why I believe it appropriate to cite for this paper) with the excerpt above: the government may protect First Amendment public forum rights as part of their police power, even if that means some minimal regulation of private property, when it comes to limited public forums (i.e. property open for public use akin to public streets and parks).

[42] See *Logan Valley* at 319.
[43] Because Logan Valley Mall was located on a highway, with no entrances connecting it to residential roads, it seems fair to assume that that majority of its patrons accessed it by car. In 1970, two years after the Logan Valley decision, according to the Bureau of Transportation Statistics only 43 percent of Americans owned cars. Of course, plenty of customers likely accessed the mall via public transportation. But in 1970 at least 11 percent of American adults had disabilities that significantly impairing mobility and it is likely that a significant number of residents inhabiting the environs of Logan Valley Mall lacked access to public transportation from their homes. Kaye, LaPlante, et al. "Trends in Disability Rates in the United States 1970-1994," *Disability Statistics Abstract: Number 17* (April 7, 1997).
[44] Pew Research Center, *"13 percent of Americans Don't Use the Internet: Who Are They?"* (Sept. 7, 2016).
[45] Pew Research Center, *"Social Media Update 2016"* (November 11, 2016).
[46] *Packingham*, Alito concurring at 1.
[47] *Id*. at 10-11.
[48] *Talley v. California* 362 U.S. 64 (1960).
[49] *Id.*
[50] *McIntyre v. Ohio Elections Commission* 514 U.S. 334 (1995).
[51] SPLC counts hate groups as groups whose primary message aligns with one of the following categories: Ku Klux Klan, white nationalist, neo-Nazi, antigovernment militia, anti-muslim, anti-LGBTQ, black separatists, and others.
[52] See Safehome, "Hate on Social Media: A Look at Hate Groups and their Twitter Presence."
[53] *New York Times v. Sullivan* 376 U.S. 270 (1964).
[54] Pew Research Center, "Social Media Sites as Pathways to News" (Sept. 5, 2017).
[55] Bakshy, Messing, and Adamic, "Exposure to Ideologically Diverse News and Opinion on Facebook," Science (May 7, 2015). Because Facebook guards the code for its Newsfeed algorithm as proprietary, establishing the factual basis indicating the presence of the echo-chamber effect on Facebook's Newsfeed requires relying on third-party studies.
[56] See *Id*. at 2.
[57] *Id.* at 5.
[58] *Id.* at 5.
[59] Del Vicario, Zollo, Caldarelli, et al. "Mapping Social Dynamics on Facebook: the Brexit Debate," *Social Networks* (March 2017).
[60] Del Vicario, Zollo, Caldarelli, et al. "Mapping Social Dynamics on Facebook:

the Brexit Debate," *Social Networks* (March 2017).

[61] *Id.* at 10-11.

[62] *Id*.

Del Vicario, Bessi, Zollo, et al. "The Spreading of Misinformation Online," *Proceedings of the National Academy of Sciences* (January, 2016) p. 554-559.

[63] *Id.* at 555.

[64] *Id.* at 555.

[65] *Id.* at 555.

[67] The NAS' data confirms that the echo-chamber effect on Facebook applies to their conspiracy theories and science categories by demonstrating through a mean-edge homogeneity probability density function that if a Newsfeed features posts from one category it is very likely brimming with posts falling in that category with little cross-cutting. *Id*. at 556. The authors acknowledge that much of what causes the echo-chamber effect on Facebook is likely confirmation bias in users' sharing habits: i.e. people tend to share content with which they already agree to people who will also already agree with it. *Id*. at 556. This speculation, however, has little bearing on what this article is really measuring: the diffusion of content on Facebook.

[68] *Id*. at 555.

[69] Pew Research "The Evolving Role of News on Twitter and Facebook" (July 2015).

[70] *Ibid.*

[71] E.g. *National Endowment for the Arts v. Finley* 524 U.S. 569 (1998).

[72] See *Grace* at 177.

[73] E.g. *Hague* at 516.

[74] *Pruneyard* at 82.

[75] *Id.* at 83.

[76] *Red Lion v FCC* 395 U.S. 389 and *Turner Broadcasting System v. FCC* 512 U.S. 639 (1994).

Works Cited

Adderly v. Florida, 385 U.S. 39 (1966).

Bakshy, Eytan, Solomon Messing, and Lada Adamic. "Exposure to Ideologically Diverse News and Opinion on Facebook." *Science*, May 7, 2015.

Barthel, Michael, Elisa Shearer, Jeffrey Gottfried, and Amy Mitchell. "The Evolving Role of News on Twitter and Facebook." *Pew Research Center's Journalism Project* (blog), July 14, 2015.

Del Vicario, Michela, Fabiana Zollo, Guido Caldarelli, Antonio Scala, and Walter Quattrociocchi. "Mapping Social Dynamics on Facebook: The Brexit Debate." *Social Networks* 50 (March 2, 2017).

Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

Greenwood, Shannon, Perrin, and Maeve Duggan. "Social Media Update 2016." *Pew Research Center: Internet, Science & Tech* (blog), November 11, 2016.

Knight First Amendment Amendment Institute v. Trump." Electronic Frontier Foundation, November 6, 2017.

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).

"Hate on Social Media." SafeHome.org. Accessed February 2, 2018.https://www.safehome.org/resources/hate-on-social-media/.

Hudgens v. NLRB 424 U.S. 507 (1976).

International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

Lloyd Corporation Ltd. v. Tanner 407 U.S. 551 (1972).

Marsh v. Alabama, 326 U.S. 501 (1946).

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

Monica, Person, Perrin. "13 percent of Americans Don't Use the Internet. Who Are They?" *Pew Research Center* (blog), September 7, 2016.

National Endowment for Arts v. Finley, 524 U.S. 569 (1998).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Packingham v. North Carolina, 582 U.S. ___ (2017).

Packingham v. North Carolina, Alito dissenting, 582 U.S. ___ (2017).

Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983).

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).

R.A.V. v. St. Paul, 505 U.S. 377 (1992).

Schneider v. State, 308 U.S. 147 (1939).

"Social Media Sites as Pathways to News." *Pew Research Center's Journalism Project* (blog), September 5, 2017.

Talley v. California, 362 U.S. 60 (1960).

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997).
United States v. Grace, 461 U.S. 171 (1983).
Vicario, Michela Del, Alessandro Bessi, Fabiana Zollo, Fabio Petroni, Antonio Scala, Guido Caldarelli, H. Eugene Stanley, and Walter Quattrociocchi. "The Spreading of Misinformation Online." *Proceedings of the National Academy of Sciences* 113, no. 3 (January 19, 2016): 554–59.
Virginia v. Black, 538 U.S. 343 (2003).
Whitney v. California, Brandeis concurring, 274 U.S. 357 (1927).