Dedicated to Judah Marans '11

We are incredibly grateful to the Brandeis Law Journal's founder, Judah, for creating this forum for discussion and learning in and around the legal field. His creation of the Journal enables and empowers us to do our work and learn today. We are honored to continue this legacy and maintain this incredible and vibrant forum for legal discussion and debate. Judah's contribution to the Brandeis community will forever be remembered and greatly appreciated. We are honored to continue this legacy and maintain this incredible and vibrant forum for legal discussion and debate. We extend our deepest sympathies to his family and friends throughout the Brandeis community. May his memory be a blessing.

Mission Statement

The *Brandeis University Law Journal* aims to provide Brandeis University with the opportunity to contribute to discussions of law and law-related topics with the publication of undergraduate scholarship. We hope to aid in the furtherance of Brandeis University's motto of "truth even unto its innermost parts" through publishing rigorously researched articles and engaging in respectful, thoughtful, and insightful debates. This journal is both a publication and a constant work in progress as we are grounded in an undergraduate academic environment and constantly trying to learn, grow and improve. Our journal provides a platform for intellectual growth and debate where academic scholarship can flourish. We focus on academic excellence, encouraging expressions of scholarship, and encouragement of educational purposes.

SUBMISSIONS

Our journal requires all submissions of articles and abstracts to be:

1) Original and concerning the Brandeis community
2) Related to law and/or using legal reasoning.

We accept all submissions for publication at any time. We highly encourage undergraduate scholarship. We will work with undergraduates interested in learning about legal writing, research, and scholarship to develop these skills. All those interested in involvement through writing, editing, or administrative roles are welcome.

Please send any questions, submissions, or inquiries to deislawjournal@gmail.com and visit our website at https://brandeislawjournal.wordpress.com

Editor-in-Chief's Letter

Dear Reader,

The Brandeis University Law Journal is proud to present our most recent issue delving into current events and legal developments. These seven rigorously-edited articles showed innovation, passion, and energy from our incredible writers. Through their powerful insight and perspectives, the articles showcase possibilities for the future development of the legal arena. The issue is written, edited, and collected by Brandeis University undergraduates. The articles cover topics from an examination of the right to dignity and a review of our University's namesake Justice Louis D. Brandeis's own relationship to privacy rights, to research on hate crimes and discrimination within the criminal justice system.

Like our Spring 2021 issue, the *Brandeis University Law Journal* is accessible both in print and e-publication on https://brandeislawjournal.wordpress.com. Our journal expanded operations this year as well through an outreach and events partnership with the newly revived Brandeis Pre-Law Society. We are grateful for their help and look forward to working together moving forward.

I would like to thank our incredible leadership team, writers, and editors. Without all of their work, this revived publication would not have been possible. Their dedication, passion, and creativity are evident throughout this issue and provide the foundation for publication. I would like to give great appreciation to Emma Fiesinger and the Allocations Board on Student Union for providing us the funding necessary to print this edition.

Inspired as ever by Judah Marans' foundational example, we continue to grow the journal's success. We look forward to our continued work supported by two phenomenal advisors, Professors Kabrhel and Breen. We really appreciate all of their insight, advice, and support.

Sincerely,

Sophia Reiss
Editor-in-Chief

Brandeis University Law Journal

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Application of European Model to Curtail Hate Speech in the U.S.

Sophia Reiss[1]

As hate speech increases we may need to revisit the question of how to respond to it and whether to limit it within free speech or other areas of law. This article compares free speech law in the United States and the European Union in an effort to explore how one might improve our care of ourselves and each other in the realm of free speech.

The United States is one of several countries around the world that attempts to balance democratic ideals, historical prejudice, and practical concerns when it considers whether to restrict hate speech. Both the United States and the European Union have histories of racial prejudice and movements filled with hateful conduct and speech. Despite this commonality, the two have attempted to deal with this behavior in different ways. American constitutional law and its Supreme Court have been very protective of free speech, allowing for the theoretical "marketplace of ideas" to thrive. While legal definitions vary, hate speech is defined by Merriam Webster as "speech expressing hatred of a particular group of people."[2] An example of this is the recent case *Speech First v. Fenves* in which the U.S. Court of Appeals for the Fifth Circuit struck down a college campus code restricting free speech as a First Amendment violation. In an effort to maintain such strong free speech protections, American courts have gone to great lengths to restrict only the most harmful speech: that speech which actually incites violence. They have not restricted "hate speech" as such. The nations of the European Union, by contrast, understood the impact of free speech from their historical experience, particularly during World War II. The European Union is made up of 27 member states including Belgium, Germany, France, and the Netherlands.[3] Backed by this understanding, the European Union aims to prevent hate speech that might lead to a similar genocidal path. While the United States allows for hate speech unless it is a threat or incites imminent violence, the EU and specifically the European

1 Brandeis University Undergraduate, Class of 2023.
2 "Definition of HATE SPEECH." Accessed September 24, 2021. https://www.merriam-webster.com/dictionary/hate+speech.
3 "List of Countries in the European Union," accessed September 24, 2021, https://worldpopulationreview.com/country-rankings/european-union-countries.

Convention on Human Rights restricts hate speech. In the United States, the worry in restricting hate speech stems from the fear that it would be too restrictive of free speech. The United States has erred on the side of caution for protecting Constitutional ideals while the European Union has erred on the side of limiting speech, fearing a return to its troublesome history. [4]

These differences need not represent a deep and impassable divide. Rather, a standard should be created that would encourage American courts to look elsewhere to gain greater understanding of potential alternatives where new and difficult issues arise, especially where they are crucial to democratic values. In particular, when looking for other tactics to resolve legal issues that embrace core democratic values, American legal experts should look towards Europe, Canada, and other parts of the world which place a similar emphasis on democracy and free expression. Alternatives to America's free speech absolutism should be considered, especially those proven to be successful. American courts could be inspired by other countries' approaches especially when venturing into a new area of law. This should be akin to how Ukraine developed its intellectual property law through what is sometimes called "sideways integration."[5] Specifically in the Texas case *Speech First v. Fenves* and other hate speech cases, the United States legal system would have benefited from learning about the European stance on hate speech. While it may not be best to change our legal stances given the differences in both history and legal tradition of the United States, there should at least be an understanding of what other democratic countries have done, and that these sources may offer possibilities for improvement.

In *Speech First v. Fenves*, the court held that the University of Texas at Austin's policies regulating hate speech were unconstitutional, based on the United States' traditionally-broad freedom of speech interpretations. The University of Texas at Austin's policies restrict freedom of speech in order to protect students against many forms of speech, ranging from the merely offensive to those that may rise to the level of hate speech. The court case

4 Ioanna Tourkochoriti, "Should Hate Speech Be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide between (France) Europe and the United States," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 23, 2014), https://papers.ssrn.com/abstract=2400105.

5Andrii Neugodnikov, Tetiana Barsukova, and Roman Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes," *Journal of Politics and Law* 13, no. 3 (2020): 203-11.

discussed the claim "that students 'are afraid to voice their views out of fear that their speech may violate University policies."[6] A democracy, particularly one with our constitutional history, relies on free discourse, the exchange of ideas, and dissent in order to come up with solutions to political issues. The Court notes "that Speech First's three student-members at the University have an intention to engage in a certain course of conduct, namely political speech" which is the focus of First Amendment protections.[7] As noted in the case, their policies restrict "verbal harassment" and speech qualifying as "'harassment,' 'intimidation,' and 'incivility,'" in addition to "the Hate and Bias Incidents policies against 'bias incident[s]' and 'campus climate incident[s].'"[8] The Court ruled that these terms are too unclear and vague to be allowable restrictions on freedom of speech. Instead, these terms "arguably cover the plaintiffs' intended speech" including the area of political speech, and therefore violate the First Amendment's protections.[9] Unlike other school settings where some necessary discipline is protected under the *Tinker* rationale, public universities have fewer prerogatives to restrict speech based on educational purposes. The case of *Tinker v. Des Moines* underlining the *Tinker* rationale provides the basis for freedom of speech application in the public school setting.[10] *Tinker* decided that public school students deserve the same free speech guarantees as adult citizens with the only exception being where schools' educational interest is being hampered.[11] Universities educate adult students, provide a greater level of independence, and cultivate engagement within civil society. Freedom of speech is a core value that Americans cherish. While this case shows the First Amendment at work through American legal theory, Europe's outlook on free speech, expression, and hate speech could provide insight into alternative balances.

6 Edith H. Jones. *Speech First, Incorporated, v. Gregory L. Fenves, In His Official Capacity as President of the University of Texas at Austin*, No. 19-50529 (United States Court of Appeals for the Fifth Circuit October 28, 2020) 18.
7 *Fenves*,18-19.
8 *Fenves*, 19.
9 *Fenves*, 19.
10 "Facts and Case Summary - Tinker v. Des Moines," United States Courts, accessed September 24, 2021, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-tinker-v-des-moines.
11 "Facts and Case Summary - Tinker v. Des Moines."

"Sideways integration" occurs when a country's courts look towards other countries for insight into alternative resolutions of a certain legal issue. What scholars call the "common core" is an attempt to encourage legal integration through extensive research into specific legal issues, with a view towards finding commonalities in legal responses around the world. These commonalities and common trends are then used to present best practices which judges can incorporate into their reasoning in decisions. The United States maintains a unique position in free speech law as the least restrictive country, as evidenced in its allowance of hate speech. Europe, however, serves as an example of a legal system that balances complexities in the maintenance of democratic values. The U.S. courts need to rely on the U.S. Constitution and statutes in their decisions, but that still allows for them to incorporate the experience of other countries. We could learn from the experience of Europe that restricting hate speech and harassment actually allows for freer speech since potential participants in public discourse are not discouraged from engaging. The courts could justify allowance of restrictions like those found in the University of Texas at Austin by applying European experience. Free speech could be enhanced through hate speech restrictions as seen through the European experience because hate speech intimidates and discourages other voices. These restrictions could help protect speech and be consistent with the greater goals of the First Amendment, in contrast to the court's ruling in *Fenves*.

If the Court had implemented sideways integration from Europe or the common core, *Speech First v. Fenves* would have had the opposite outcome. While there is no international definition of 'hate speech,' there are several provisions of international law outlawing particular aspects of hate speech.[12] Article 20 of the International Covenant on Civil and Political Rights (1966) focuses on advocacy of hate while Article 4 of the International Convention on the Elimination of Racial Discrimination (1965) focuses on disseminating hateful ideas.[13] Such provisions arguably protect free discourse in respect to a democracy by enabling marginalized groups greater security when expressing ideas. In Article 10 of the European Convention on Human Rights, for example, the right to free speech is

12 Sejal Parmar, "The Legal Framework for Addressing 'Hate Speech' in Europe" (International Conference: Organised by the Council of Europe in partnership with the Croatian Agency for Electronic Meeting, Zagreb, Croatia, November 6, 2018).
13 Parmar, "The Legal Framework for Addressing 'Hate Speech' in Europe."

maintained through freedom of expression, but comes along with duties and restrictions including protecting other citizens, national security, and protection of reputation. Article 17 restricts speech or conduct leading to interference with other rights and freedoms which also can result in conflicts in the application of Article 10. Merely "offensive speech" is allowed, but the European Court of Human Rights' decision in *Erbakan v. Turkey* noted that "as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance." Despite the success of such approaches in Europe, American law still maintains that restricting speech, especially political speech, is always problematic and restrictive of democracy. This claim may be wrong, as shown in Europe through their continued maintenance of strong democracies, discussed later, while still restricting hate speech. Democratic principles evolve, and given the harmful impacts of hate speech, free speech could potentially be better protected and encouraged in an environment in which virulent hate speech has no place.

For example, consider the *Féret v. Belgium* case, which directly handled political speech and the harmful effects of hate speech. The European Court of Human Rights ruled that the politician Daniel Feret was properly punished under Belgian law for speech that demeaned people on the basis of religion and national origin.[14] Since people could have felt threatened by this speech which demeaned them, they would probably be less likely to speak. The Court noted that statements like Feret's are a threat to peace and stability in Belgium as racist hate speech devalues democratic principles, including diversity and plurality. This reasoning is similar to the argument that by restricting hate speech the United States would actually enable political speech to thrive. Both this speech and this conduct are protected by the First Amendment, but incorporating some of the European Article 10's restrictions could make American constitutional law more faithful to its constitutional and underlying democratic ideals. This incorporation could allow for and protect more laws at both the state and federal level that are restrictive of hate speech while being specific and limited enough to keep almost all speech free. European free speech law restricts hate speech much more than American courts do, but also fosters

14 "Féret v. Belgium," Global Freedom of Expression, accessed September 27, 2021, https://globalfreedomofexpression.columbia.edu/cases/feret-v-belgium/.

democracy's ideal of allowing for extremely wide, legitimate political dissent.

Despite what an American may expect, European democracies thrive even with these restrictions on hate speech. The slippery slope argument, that any free speech restriction will lead to worse ones, is not inevitable or even likely. It has not happened in Europe. In fact, several European democracies show higher voter turnout than ours: six out of the 10 countries with the highest voter turnout are European, with a range from 87.21% to 71.65% of voter turnout.[15] The Netherlands has the sixth highest voter turnout at 77.31% and has several political parties, showing that political discourse is vibrant. The United States by contrast has a voter turnout of 55.70%.[16] Voter turnout is an important indicator of democracies' health as it shows the level of participation. Freedom of speech is a central component of democratic participation tied to voter turnout. Much like how voters voice their assessment of the government and government agents through their vote, freedom of speech allows further avenues of critique and idea development. The United States inspired several countries to become democratic through the American Revolution and its talk of freedom and representation. Despite how several countries modeled themselves on the American example, the United States is still quite unique. Some of this may be through differences in other countries' democratic development including revisions and potential improvements. The European outlook on hate speech, which has become more common across the world's democracies, may be one of these improvements.

As First Amendment precedents are well-founded, this would not clearly fall under the "new area of law" aspect of the standard. Nevertheless, it *would* fit the other aspect of the standard, which encourages a comparative approach in tricky legal issues, especially those balancing democratic values and protecting against harm. Current free speech law in the United States attempts to protect a "marketplace of ideas" vision of open dialogue and space for dissent. Among the few allowable restrictions are those that are placed in content-neutral ways that only restrict the time, place, and manner of the expression.[17] These laws and precedents' only content-based restrictions are those which aim to protect against harms like that of

15 "Voter Turnout by Country 2021," accessed September 24, 2021, https://worldpopulationreview.com/country-rankings/voter-turnout-by-country.
16 "Voter Turnout by Country 2021."

incitement to imminent danger, "fighting words," threats, obscenities, and a few torts. In balancing this duality, an evolving First Amendment interpretation could account for other aspects of the Constitution that work to protect competing democratic values of freedom. Hate speech could be restricted to some extent while keeping robust and constructive democratic debate unrestricted by authorities. This would allow for a truly free discourse and a lively engagement with ideas, similar to what European laws do.

Continuing in the First Amendment legal tradition, hate speech could be restricted as a defense of democracy and an unsullied "marketplace of ideas," similarly to the European law. Hate speech inhibits free speech by causing people in protected classes or marginalized groups to feel unwelcome and potentially unable to speak. Hate speech could prevent incredible thinkers from having the courage to express themselves and contribute productively to our communities. Hate tends to drown out productive thinking and overwhelm other opinions. By restricting hate speech, democracy would be encouraged and an open thriving dialogue would be more possible. The "marketplace of ideas" would be more open and encouraging for all participants.

While one may argue that courts are legal entities and should only focus on individual plaintiffs' rights at issue in each case and not care about enhancing democracy, hate speech and harassment raise both of these vital roles that the courts hold. Courts serve as a check to political entities and various political interests. Through serving as this important balance, courts act to resolve legal problems as their decisions are applicable beyond each individual case and each individual case brings with it important legal issues. Courts are both legal and political entities, as some of their more contentious cases touch on political issues, and their decisions may unavoidably affect life and political actions. An independent judiciary is crucial to democracy, in part because it adds a different perspective to a wide range of difficult questions. The judiciary also helps define terms and legal ranges of possibility. Courts decide issues through legality, fairness, reason, rationality, and predictability. They also rely on past experience, expertise, and a wealth of knowledge through precedent, expert witnesses,

17 Kevin Francis O'Neill, "Time, Place and Manner Restrictions," accessed September 27, 2021, https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions.

and research. The legal argumentative process allows for the airing of both sides of arguments in a "marketplace of ideas" where each side is on equal footing. The courts are naturally involved in democracy including the enhancement of it through their complementary role.

Legal and historical backgrounds provide divergent contexts between the United States and Europe which help explain their differences in free speech law. Their different contexts produce different approaches, both of which can be beneficial for the other to learn from. This is especially true when approaching new areas of law. When the United States develops a new area of law, it could make sense to refer to other countries for insight, similar to the practice of referring to precedent. Prior experience can help other judicial systems see what to do and what not to do, and see what types of law and legal practices lead to what kinds of outcomes. In the development of new areas in other fields, we regularly look towards expertise. We should do the same in the legal arena through the use of sideways integration and common core incorporation.

Ukraine provides an example in the case of intellectual property. Ukrainian legislation in intellectual property "began to take shape in 1993" protecting certain intellectual property rights.[18] These laws mainly focused on patents out of which other intellectual property rights could and would grow. The article notes that "[i]n Ukraine, the development of legislative regulation of free software is very poor, so the involvement of foreign experience may be appropriate."[19] In developing their intellectual property law, "Ukraine must bring its legislation in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1993, which is one of the main legal documents of [the WTO]."[20] Ukraine adopted the European Community's patent laws, trademark law, licensing agreements, and copyright laws in a way that harmonizes their laws with the rest of Europe as a prime example of sideways integration. This could prove a helpful example in the United States' legal development.

18 Neugodnikov, Barsukova, and Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes" 204.
19 Neugodnikov, Barsukova, and Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes" 206.
20 Neugodnikov, Barsukova, and Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes" 206.

Integration should not be compulsory in developing new areas of law, but American courts should respect this resource more than they presently do. Taking inspiration from the European example and creating improvements on American freedom of speech could create a new standard which can particularly help in situations when there are several core democratic values being balanced. European freedom of speech with its exclusion of hate speech takes into account more than simply a limitless idea of freedom. Expertise and a greater amount of experience helps and could only improve legal development. Given the variety within each area of law, the standard should not force acceptance or application of legal principles or rules that do not make sense. Despite this difficulty, the standard could and should encourage learning from outside experience and having clear comparisons especially with a focus on the contexts around each legal theory and history.

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On America's Inexplicit Dignity

Joshua Rotenberg[21]

While the United States explicitly protects many rights, it holds a few as unenumerated rights. This paper seeks to explain the lack of a constitutional right to dignity in America, and argue for such a right. The U.S. common law system allows rights to be developed only after a case of first impression. Nonetheless, some rights-violations are so detrimental to democratic function that a case of first impression must not be required and preemptive protections must be put in place. The right to dignity is such a right.

Since 1787, the American Constitution has been defined by malleability. The ability to adopt rights necessitated by the circumstances of evolving times secures the Constitution as a "living" document. Citizens of the United States enjoy the benefits of malleability through their protected rights, which, in an ideal democracy, help us address pertinent issues faced every day in a context of security. As the common law system teaches, the development of such rights may be traced back through prior cases. However, one of the detriments to a precedent-based legal system highlights an issue with legal development. More often than not, a right becomes protected only after injustice is committed. The prevalence of the Miranda rights, for example, came only after Ernesto Miranda was unjustly arrested. The United States corrects our legal course only after we wander astray. There may be times, however, when a preemptive violation of a to-be-determined right would cause such harm that prophylactic legal measures are a necessity. An example is the protection of the "right to dignity." This right protects a human's ability to be treated as such, and reinforces the basic tenets of equality and freedom of all citizens. The ramifications of a violation of this right fundamentally undermines the foundations of democracy. Thus, the ability to violate such a right must be stifled before any specific "triggering injustice" can occur.

What courts and lawmakers call the "right to dignity" is prevalent in many nations across the globe, primarily to prevent injustice in light of past experiences of political instability or tyranny. Accordingly, the nation with the strongest protection of the right to dignity remains Germany, who,

21 Brandeis University Undergraduate, Class of 2023.

following the atrocities of World War Two, protects this right above all others. The German Right to Dignity reads "Human dignity is inviolable. To respect and protect it is the duty of all state authority."[22] Dignity is established as a fundamental German right even before the right to life itself. This logic holds true considering the abomination of the Third Reich, which treated dignity as a preferential right bestowed only on those with the features or religion the government preferred. It could be argued that, had the right to dignity been instilled in each German citizen prior to the rise of the Nazi Party, genocidal policies could not have prevailed. The right to dignity ensures that each human is treated as such, and thus the dehumanization genocide demands would not be possible. Dignity is upheld as a right across the European Union, India, Iran, South Africa, and Israel. There is no question that while America has yet to ratify this right, powers across the globe have successfully done so, holding the right to dignity up along with the same fundamental rights American values cherish.

The history of dignity in America, however, is complicated by the preference for precedents that characterizes our common law system. American lawmakers never saw it fit to establish the right to dignity as a concrete, protected right in the Constitution. Alternatively, our courts only occasionally deploy the concept to supplement other rights, mentioning dignity in various cases as justification for a certain ruling. Justice Harlan, for instance, referenced dignity in his ruling on *Cohen v. California*. He hoped that the right to freedom of expression would "ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[23] His teachings are representative of dignity in America, which is thought to be a notion that simply justified other, specifically-protected rights. While Germany may hold dignity as its first, most valued right, America presumes that its own most cherished rights, such as free speech, reflect a concern for dignity, even if that concern remains unspoken.

In *Lawrence v. Texas*, Justice Kennedy associates dignity with the Fourteenth Amendment. He highlights a quote from a prior case, *Planned Parenthood of Southeastern PA v. Casey*. "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices

22 The provisions of Article 1(1) of the German Basic Law.
23 *Cohen v. California,* 403.

central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"[24] Here, dignity yet again is used as nothing but a supplemental concept, extrapolated through explaining or justifying other rights. Thus, legal scholars looking to American law presume that a right to dignity is protected by the very existence of other legal protections. In his defense of a bill of rights, New York University law professor and legal philosopher, Jeremy Waldron, contends that the very presence of protected rights acknowledges dignity.[25] He argues that when a government gives rights to a citizen, they automatically assume that the citizen has both autonomy and dignity; rights must be enforced, in this view, to respect and protect human dignity. In sum, American thinking on the right to dignity is simple: it is established through the application of our other rights, and this being so, there is little need to place it explicitly in the Constitution.

America has relied on this assumption since its founding, assuming that dignity will be protected through precedential application in past cases involving other, existing rights. Of course, amending the Constitution, while cherished as a common American practice, is arduous at best. If jurisprudence relies on implied rights, ratifying the right to dignity may not be worth the trouble. Nonetheless, while American security in the protection of dignity is rooted in past success, prevention of future injustice requires a more solidly-grounded right to dignity ratified in the Constitution.

The primary reason for an explicit right to dignity may be found in the very principles of democracy. Democratic theorists such as Alexis de Tocqueville have established a set of traits which define the democratic citizen.[26] Democratic principles include tolerance, cooperation, moderation, and ease of collective action. Leniency in allowing the disruption of such principles in the citizenry could indicate democratic shortcomings. In a society without respect for dignity, such qualities would struggle to surface amongst the population. Where dignity is not properly acknowledged, democratic engagement must suffer. Perhaps it is no coincidence that America, which has no explicit right to dignity, suffers from widespread intolerance as political polarization increases. Today, the breakdown of

24 *Planned Parenthood of Southeastern Pa. v. Casey*, 851.
25 Waldron, J. (2004). *Law and disagreement*. Oxford University Press.
26 Tocqueville, A. de, Goldhammer, A., & Zunz, O. (2012). Democracy in America. Library of America Paperback Classics.

respect for core human dignity is interfering with democratic function. An equal and fair election, for example, is the hallmark of a democracy. The current rash of voter-suppression laws is hard to imagine in a place where all citizens respect each other's essential dignity. A society which does not consistently reinforce the importance of dignity does not inspire democratic trust.

Especially in view of these recent developments, it is no longer enough to allow the right to dignity to reside on the margins of our law. Protection against search and seizure and freedom of speech, for instance, are instilled in the average American through constant repetition. Students memorize the amendments in grade school. Americans are raised with a theoretical knowledge that they can speak their minds openly and should expect to be treated just as their peers would be under the law. Students do not, however, recognize the existence of dignity as a protected right due to its obscurity. The average American is not aware of Justice Kennedy's application of the *Casey* ruling to use dignity to determine *Texas v. Johnson*. This average American may very well be aware of dignity as an important force in every-day life, but they are not repeatedly told that the government has an overriding interest in protecting their dignity. The logic which follows is that such an absence of reinforced dignity protection may cause a decline in trust, which, while not spelling the demise of democracy, makes it more likely that people will fall prey to polarization, and support more voter suppression laws.

Beyond hindering democratic function, where dignity is not enshrined as a freestanding right, there is a greater potential for the worst atrocities known to man. Just as democracy cannot function without dignity, the atrocities of genocide, ethnic cleansing, and ethnic war can be prevented by a zealously protected dignity right. The Holocaust, the Rwandan Genocide, and the ethnic violence in Yugoslavia all involved the demonization of the "other." A government forced by its constitution to protect dignity at all costs could not allow this demonization to take place. The United Nations defined genocide in eight stages: classification, symbolization, dehumanization, organization, polarization, preparation, extermination, and denial[27]. In a government with a cherished and protected

27 Wilson, T. (2020, August 29). Eight stages of genocide: From classification to denial. The Borgen Project. Retrieved November 30, 2021, from https://borgenproject.org/eight-stages-of-genocide/.

right to dignity, only the first two steps could occur. A breakdown of one group's conception of dignity as equally applied to their fellow citizens is a requisite to genocide. Dehumanization simply cannot prevail should a government have the means, will, and capacity to enforce a right to dignity. A functioning democracy with a proper system of checks and balances could prevent such a horrendous outcome if dignity is instilled in each government official and citizen.

Critics may argue the American common law system has worked for centuries, and so there is no reason to break the tradition and preemptively establish a right without a triggering case of first impression. However, the potential consequences of not explicitly ratifying the right to dignity before a case of first impression make it essential. America has relied on precedent to shape its legal applications and definitions of dignity. This process, while perfectly acceptable under common law, is far from preventative. The abominations which may only arise without dignity are far too destructive to be recognized only with the benefit of hindsight. The actions of the Nazi regime will leave a stain on modern day Germany permanently. Germany's current emphasis on dignity stems from some of the most violent actions in human history. The German "case of first impression" was the greatest horror known to man. There is no reason why the rest of the world should not learn from such atrocities and make their prevention the first priority of a state. In fact, as determined above, many states have taken this lesson to heart, working dignity into their constitutions as a preventative measure. Some may argue that if America equally takes such action, such atrocities could never be committed under American rule. However, recent events have taught us all too well the fallacy of believing that we are immune to the influence of dignity-denying demagogues.

A self-serving leader, turbulent times, and a population without respect for the democratic process resulted in the storming of the Capitol on January 6th, 2021. The Capitol riots are by no means akin to genocide. Nonetheless, the riot carries a much more powerful message: America may not rely on democracy to sustain itself. The functions which are essential to democracy are fragile, and demand reinforcement. A ratified right to dignity, held to the same standard as free speech, could very well be that reinforcement. The current system is simply not sufficiently preventative. Inexplicit rights may be used by judges to reach a fair ruling, but they do not instill that right in the values of the citizens. Moreover, they create loopholes

which may be exploited to allow for grave injustices. The magnitude of these injustices may be so large that it simply cannot be allowed to occur even once, requiring a preemptive establishment of the right to dignity to forestall such a horrendous outcome.

The ability to extract a right from judicial precedent is common in American law. Fundamental rights not stated in The Constitution have been adopted before in light of modern issues. Justice Douglas' opinion on *Griswold v. Connecticut* noted that a statute "forbidding the use of contraceptives violates the right of material privacy which is within the penumbra of specific guarantees of the Bill of Rights"[28] The prior legal consensus on the right to privacy perfectly mimics the current applications of dignity in American jurisprudence. Douglas highlights that the Bill of Rights creates "zones" of privacy via previously established amendments. The *Griswold* ruling brought the right to privacy out of the haze of unenumerated rights and into a more solidified application. Today, citizens expect that the government will not meddle with one's possessions or personal life. Moreover, the government knows to treat violations of the right to privacy with strict scrutiny, thus making an initial violation extraordinarily difficult.

The right to dignity shares a similar status as the old right to privacy. It is unenumerated, and restricted to its use as a judicial tool and a background concept, but nothing more. In a vein with Justice Douglas's ruling, dignity may be brought out from the penumbra of other rights. The difference between the two circumstances, however, are the implications of the potential violation. The right to privacy was not established until after Griswold's arrest. In the grand scheme of our nation's functioning as a democracy, an unjust arrest is nothing uncommon. Unjust arrest is, of course, a dire issue in need of resolution, but the violation of Griswold's right to privacy did not negate the values of democracy. A violation of human dignity, however, carries much more severe implications. For this reason, it is imperative that such a right be established not through the common law process but through a Constitutional amendment. Granted, a dignity-based case of first impression may not be as severe as the above paragraphs purport. It could very well be a simple nuisance in the life of one plaintiff. However, the very possibility that a case could carry such severe injustice mandates immediate action which bypasses a case of first

28 *Griswold v. Connecticut*, 381.

impression. Our present political crisis also confirms that the time for making the right to dignity a firm part of our legal landscape has arrived. Thus, the proposed action is not only desirable, but essential to the preservation of our democratic tendencies now and in the future.

The implications of incorporating the proposed right to dignity has limited negative ramifications. One may argue that incorporation of this new personal freedom would severely change government function. What constitutes "dignity" may be subjective and difficult to define in a given case. While judges may apply dignity in new, unexpected methods, such rulings need not be cause for concern. Every fundamental right suffers such constitutional growing pains. Cases still arise today which change the definition of "speech" as protected by the First Amendment. So long as the right to dignity is protected, the specificities of the protection will be shaped by a newly developing line of precedent. Incorporating a new fundamental right will undoubtedly tie the hands of the government but this is the nature of strict scrutiny as a legal construction. However, since the right to dignity has been previously enforced as a passive, unenumerated right, the expectations of the legislature would not alter greatly. As previously established, violations to human dignity often entail violations of other rights. This is the very reason dignity was used by prior justices as a judicial tool. It may be easily predicted that ratifying a right to dignity will create new cases which will guide legal applications of the amendment away from undue subjectivity. Moreover, the actual practice of this law will not drastically change the essential ability of legislatures to function, no more than other enumerated rights have done. The largest difference the right to dignity will make will be in the reassurance of the citizen in their newly protected dignity no matter how the future may challenge that right.

The American legal system roots itself in the past. We make mistakes, correct them, and carry that lesson with us through continued use of precedent. It is a stable system; it functions properly and will likely continue to do so for years to come. That said, there are certain rights which, even if not fully ratified, are so essential to the function of government and life itself, that to not "go through the trouble" of ratification could spell disaster in the future. America has relied on the common law system to support the unenumerated right to dignity while the rest of the world has learned not just from their own legal history, but from that of nations who have failed to protect their population's dignity. As a global hegemon, it is

simply irresponsible to assume that our system will protect us while others have suffered the consequences of that assumption. Despite it's status, the United States is not immune to democratic fault. To prevent severe ramifications of the potential failings of the future, we must take action today. A Right to Dignity must be added to the Constitution, not to undermine the benefits of our common law system, but to take preemptive action to preserve that very system.

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Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833 (1992)
Texas v. Johnson, 491 U.S. 397 (1989)

The Right to Privacy: The Need For an Ever-Evolving Legal Movement

Gianna Bruno[29]

Louis Brandeis and Samuel Warren wrote "The Right to Privacy" in response to the rise of the newspaper and its threat to the public's privacy during the late 19th century. They critiqued the laws of the time because they saw a change in the world that was not being accounted for in existing legislation. Today, new technology is changing the world at an exponential rate and the public's privacy is once again at risk. The laws have fallen behind the technology and there needs to be a call to update the current privacy laws.

Introduction

Diaries can be locked away and letters can be hidden. However, there is a lack of control over our digital footprint in which our thoughts can easily be viewed and shared in a matter of seconds without our consent. In the late 19th and early 20th centuries, the only lines of long-distance communication included phone calls and written letters. For disseminating information to significantly larger groups, there were newspapers. That said, it could take weeks to spread information nationally or even internationally, whereas today, cellphones, computers, and social media have added hundreds of new platforms and applications that distribute information to millions of people in a matter of seconds. It has never been easier to disseminate both accurate and inaccurate information to large audiences, resulting in the rise in exposés and the growth of 'cancel culture.' Louis Brandeis and his law partner, Samuel Warren, set the groundwork for improving privacy laws, especially concerning privacy from the media, but nearly a century later and in the new age of (social) media, those ideas are not being applied in the same way as they were during Brandeis' lifetime.[30] The Right to Privacy legal movement should be re-evaluated in light of social media and the use of exposés which cultivate cancel culture.

Background

29 Brandeis University Undergraduate, Class of 2023.

30 Erwin Chemerinsky, "Rediscovering Brandeis's Right to Privacy," 644.

The Right to Privacy

Brandeis and Warren's "The Right to Privacy" was published in the Harvard Law Review in 1890. They were inspired to write the article because of the new technology of the time, such as cameras, and the intense pressure of the press. Concerned by these developments, they wanted to take a deeper look into how those factors affected the Commonwealth.[31] Brandeis began the article by stating, "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define the exact nature and extent of such protection," which immediately acknowledges the necessity for redefining laws as technology progresses.[32] Brandeis explained that during the early development of common law, most rules centered around the notion of the "right to life," which then only referred to the preservation and protection of physical life. Over time, the term "right to life" has been extended to include the protection of one's physical, spiritual, and intellectual property. Brandeis published the article as a way to influence the continuation of this trend through the creation of new protections for privacy, stating,[33]

> The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.[34]

Brandeis acknowledged the need to "update" laws to encompass the new threats to one's privacy. He articulated the importance of not only bodily and material protection, but also protection over one's identity and personal work.

Examples

Brandeis sought to protect one's personal life and work from the public view. The rise of photography and printed media posed a major threat

31 Cayce Myers. "Warren, Samuel & Louis Brandeis. The Right to Privacy, 4 Harv. L. Rev. 193 (1890)." 520.
32 Louis D. Brandeis, and Samuel D.Warren. "The Right to Privacy." 193.
33 Myers, 519.
34 Brandeis, 213.

to the general public's privacy. Since there were no formal doctrines protecting personal privacy, it was technically not against the law to take photos of someone and their property or personal documents and share them without permission. Brandeis even went so far as to assert under his proposed privacy rules that even if photos or documents rightfully came into the possession of someone else other than the original owner, the secondary individual still could not and should not share them. This would be especially true if there was an intent to devastate one's reputation. For example, Brandeis explained that if "a man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day," then neither the son who received the letter, nor a person who may receive his diary, should share anything about those documents without penalty.[35]

Modern Day Application

"The Right to Privacy" greatly influenced understandings of privacy as a barrier between the government and its citizens through a new interpretation of the 4th Amendment, as well as between citizens themselves as through the Privacy Act of 1974 and its subsequent overviews.[36] Brandeis called for a constant update to privacy rules due to an ever modernizing press and its new capabilities. Since privacy rules are updated largely following the development of new technology, the approaches will always be a step behind any potential new dangers to privacy. Brandeis used the example of the man writing a letter to his son and how his son should not be able to share that letter to the public; the modern day equivalent to letters are emails and, by extension, text messages. Following the example, it should then not be legal to share responses to personal emails and text messages publicly without prior permission from the respondent. However, there is very public proof of messages being shared in this way, specifically through exposé videos on Youtube.

Cancel Culture

The Origin of Cancelling

The concept of cancel culture has played a variety of roles in modern society. The term "cancelled" or "to be cancelled" has recently appeared in

35 Brandeis, 201.

36 Pam Dixon and Robert Gellman. "Online Privacy : A Reference Handbook." 128.;"Overview of the PRIVACY Act: 2020 Edition." The United States Department of Justice. https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/disclosures-third-parties.

right-wing political rhetoric, as early as 2016, as a way to claim that conservatives' competitors silenced counter-perspectives in important debates. The term was used to denote the danger of moving away from true academic debate and towards an emotion-based discussion of particular topics. Over time, the term morphed from opinion-oriented cancelling into cancelling people, and now in 2021, this has come to mean more specifically cancelling celebrities.[37]

Cancelling Celebrities

Certain celebrities live very public lives and, in order to maintain their image, share their lives and their thoughts with their millions of followers across all social media outlets. Images, captions, newsletters, or anything else those celebrities have shared is "liked," retweeted, and reposted by various other accounts in a matter of a few seconds. Even if later in the day the celebrity decides to delete what they had posted, the digital print will still exist because followers had the chance to save the post to their own devices to keep their own copy. Celebrities who are "cancelled" end up chastised on social media, losing potentially thousands of followers, and possibly even brand deals because followers do not want to be associated with the celebrity or their remarks. Cancelling a celebrity is essentially attempting to revoke their celebrity status and influence. Cancelling does not happen randomly, as it is a reaction to something the celebrity has done, such as "morally offensive words and deeds, racism and ethnocentrism, anti-Semitism and Islamophobia, sexual harassment and abuse, misogyny and agism, and homophobia and transphobia."[38] In 2020, *Harry Potter* author, J. K. Rowling came under fire after publicly making transphobic comments. Patrons on social media, specifically on Twitter, berated Rowling and called for her to issue an immediate apology. Social media "allow[s] marginalized groups to engage in networked framing, a process by which collective experiences of an offending party's (or their proxies) unjust behavior is discussed, morally evaluated, and prescribed a remedy (...) through the collective reasoning of culturally aligned online crowds."[39] Celebrities like Rowling who have large followings tend to lose a large amount of popularity but usually do not suffer large scale

37 Pippa Norris. "Cancel Culture: Myth or Reality?"
38 Norris, "Cancel Culture: Myth or Reality?"
39 Meredith D. Clark. "Drag Them: A Brief Etymology of so-Called 'Cancel Culture.'" 90.

consequences because of the strength of their already well established social base.[40]

#JamesCharlesIsOverParty

While A-list celebrities do not typically lose their careers over potentially morally compromising behaviour, micro-celebrities, such as YouTubers, who may have a large but niche following, could lose everything overnight. Micro-celebrities do not have the luxury of a stable following as social trends, and hence their own relevance, are always fluctuating. In order to stay in the public sphere, micro-celebrities constantly need to ride the current trends, but also need to get involved in drama and cancel culture in order to keep people talking about them.[41] In 2019, YouTubers Tati Westbrook, James Charles, and Jeffree Star were all involved in a scandal that was later titled Dramageddon 2.0. In short, during Coachella, James Charles brokered a deal with a brand that was in direct competition with his friend, Westbrook. Distraught, Westbrook released a series of Instagram videos and a Youtube video, which have all since been deleted. The first one regarded Charles' disloyalty, but later posts built on her momentum to claim that he had been exhibiting sexual predatory behavior. Star, who had no connection to either at the time, tweeted his support in Westbrook's favor while further disparaging Charles' name. Between Westbrook's videos and Star's support, Charles was officially "cancelled" on social media and lost nearly 3 million followers because of the scandal, which greatly affected the possible revenue he could receive from his content.[42]

Critique

Charles' Response

Less than a month after Charles' acceptance of the brand deal, he released a video entitled *No More Lies,* in which he apologized to Westbrook for taking the controversial brand deal, but he also asserted his

40 Norris, "Cancel Culture: Myth or Reality?"

41 Tenbarge, Kat. "One Year after the Beauty Youtuber WAR Burned Their Community to the Ground, New Battle Lines Have Been Drawn between the Growing Stars That Started It All." https://www.insider.com/jeffree-star-james-charles-dramageddon-2-tati-westbrook-2020-5#thats-when-star-leveled-his-own-accusations-against-charles-including-that-the-teenager-was-a-danger-to-society-4.

42 Tenbarge, "One Year after the Beauty Youtuber WAR Burned Their Community to the Ground, New Battle Lines Have Been Drawn between the Growing Stars That Started It All."

innocence against the allegations of Westbrook and Star. Up until that point, the allegations made against Charles were either verbal or written digitally, and were in the nature of a "He Said, She Said" situation, with no physical proof either way. In Charles' video, he went line by line through each allegation and tried to clear his name by showing timestamps of messages as well as messages he sent *and* received. Some messages he showed were just his messages along with the recipient's messages, but he also showed screenshots of just the recipient's messages, which is essentially the exact scenario Brandeis warned against with his example of the man and the letter to his son.[43]

Brandeis' Response

The events of Dramageddon 2.0 were not an isolated situation. The act of sharing personal messages on social media has been normalized, not just in regard to proving ones' innocence or guilt, but increasingly also for amusement.[44] Regardless of their use, Brandeis' arguments assert that the sharing of the recipients' messages is a violation of their privacy. He wrote, "The Right to property in its widest sense, includ[es] all possessions."[45] Just as the son could not share what his father wrote in a letter addressed to him, people should not be able to share messages that are not their own with others regardless of intention. Unfortunately, they continue to do so.

Conclusion

The possibilities for interpersonal communication have grown exponentially since Brandeis' time. New technology and social media has made sending, sharing, and receiving information easier and faster than ever. Since privacy laws continue to fall behind the new technology, private messages are being shared without permission which is harmful because, as seen on YouTube, it is being used for the exploitation of people for exposés. Brandeis called for a constant update to privacy laws to bridge the gap between the laws and the technology of the time so as to preserve the privacy of personal messages and conversations.

43 James Charles, *No More Lies*. https://youtu.be/uFvtCUzfyL4.
44 Michelle Rennex, Joseph Earp, Merryana Salem, and Edwina Storie. "Teens Are Sharing Their Most Hilariously Awkward Texts in This New Tiktok Trend." https://junkee.com/awkward-texts-tiktok/232099.
45 Brandeis, 211.

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2020-5#thats-when-star-leveled-his-own-accusations-against-charles-including-that-the-teenager-was-a-danger-to-society-4.

The Discreet Uniter: An Analysis of Elena Kagan's Role on the Roberts Court

Gonny Nir[46]

Eleven years have passed since Elena Kagan's appointment to the United States Supreme Court. Kagan's confirmation hearings were stifled with doubts concerning her lack of experience practicing law and outright absence of judicial experience. Nevertheless, past colleagues, mentors, and former President Obama all endorsed Kagan's intellectual prowess and her particular knack for forging consensus. Since her appointment, doubts regarding the Justice's qualifications to apply justice under the law have gradually dissipated. This article aims to identify Kagan's success through examining her role as I) an advocate for democracy, II) her textualist pragmatism, and III) her role as an uniter on the Court.

Pragmatic, narrow-ruling, impartial, consensus-building, and clever. These adjectives could all be used to describe Justice Elena Kagan. Kagan is neither the subject of a Tumblr blog[47] nor a dazzling DC star. A poll conducted by the American Council of Trustees and Alumni found that only 44% of Americans could identify Kagan as a Justice of the U.S. Supreme Court.[48] Evidently, Kagan does not have the recognizability of some of her current or former colleagues. Yet this Upper West Side New Yorker has revealed herself to be the Supreme Court's quiet and clever linchpin during her tenure thus far. The keys to Kagan's success largely stem from her jurisprudence, authoring style, and unique ability to forge consensus among her increasingly divided colleagues.

Jurisprudence

Examining Kagan's jurisprudence is essential to understanding what makes her unique from her colleagues.[49] Kagan's jurisprudence is unusual in that it is grounded in the principles of *textualism*, a judicial method that

46 Brandeis University Undergraduate, Class of 2025.
47 See, Collaborative Platform. "Notorious R.B.G." *Tumblr*. 2013. https://notoriousrbg.tumblr.com/.
48 American Council of Trustees and Alumni. "A Crisis in Civic Education." *GoActa.Org*, 2016. https://www.goacta.org/wp-content/uploads/ee/download/A_Crisis_in_Civic_Education.pdf
49 Jurisprudence is a legal theory that a judge utilizes to apply law.

interprets laws through the word choice of the legislator.[50] Conservative judges typically utilize this jurisprudence to conserve the role of the Judiciary because it preserves a law's primary language; traditionally resulting in a narrower ruling. Hence, the term 'conservative' refers to the circumscribed outcomes resulting from *textualism*, rather than the political Conservatism associated with the Republican party. Kagan's decisions differ from the traditional use of *textualism* because she uses the principle to interpret a law and then apply the interpretation on a case-by-case basis, keeping in mind how the law will serve itself in practice. Kagan's decisions remain pragmatic, moderate, and reasonable by utilizing this kind of judicial philosophy. Kagan garners intellectual respect from both her conservative and liberal-minded colleagues because she's a grounded textualist who doesn't stray far from the primary words of the legislator, as well as a pragmatist whose judgments are sensibly sound and founded in applicability.

In sum, Kagan's jurisprudence is one of a reasonably-minded judge; which allows her to view cases in a uniquely fair fashion; free from strict ideological constraints. Professor Kate Shaw of the Cardozo School of Law asserted that Kagan's jurisprudence is one of "a common-law judge who takes each case as it comes to her. She's sort of a judge's judge."[51] Kagan doesn't reside on either ideological extreme of the judicial spectrum, rather closer to the center. This has led her to forge consensus with much more ease than some of her more ideologically hard-minded colleagues.

Understanding Kagan's jurisprudence allows for a holistic understanding of her role on the Roberts Court. The following sections of this article will expand on her role as an advocate for democracy and how her unique jurisprudence has united both sides of the spectrum in the Supreme Court.

An Activist for Democracy

Kagan is by no means a "people's lawyer" in the same breath as Justices Ginsburg, T. Marshall, or Brandeis. Yet, court-watchers were

50 Nelson, Caleb. "What is Textualism?" Virginia Law Review. September 2, 2013. https://www.virginialawreview.org/articles/what-textualism/.
51 Talbot, Margaret. "Is the Supreme Court's Fate in Elena Kagan's Hands?" The New Yorker, November, 11, 2019. sec. Profiles, https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands

offered an exclusive glimpse of what invigorates the Justice by virtue of her impassioned dissent in *Rucho v. Common Cause* (2019). *Rucho* encompassed two cases of gerrymandering in North Carolina and Maryland, where voter suppression materialized due to congressional districts drawn to appease political outcomes. The majority opinion, authored by Chief Justice John Roberts, argued that "a 'political question'... [is] nonjusticiable—outside the courts' competence and therefore beyond the court's jurisdiction."[52] In an uncharacteristically sharp dissent, Kagan disputed that the Judiciary is bound by an active pledge to protect the democratic process from politically charged harm. Appealing to the very essence of representative republican democracy, Kagan wrote:

> ...partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power is fundamentally from the people… They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.[53]

The dissent, dripping in impassioned similarity to the dissenting style of her former colleague Justice Ginsburg, marked one of the few occasions where Kagan has so viscerally rejected a majority's opinion. In her quest for plurality, the Justice has not dissented more than four times per term and she has yet to file more than three concurrences in one term.[54] Kagan's dissents convey a heavier significance than some of her other colleagues because so few are issued per term. Less is more in terms of Kagan's dissents; if she does dissent, it is due to a fundamentally rudimentary argument that she cannot align herself with. In Kagan's eyes, *Rucho v. Common Cause* overstepped the bindings of the Framers' vision for this republic. Kagan's tone was that of a gutted Justice, ending her dissent by stating, "with respect but deep sadness, I dissent."[55]

52 *Rucho v. Common Cause,* 588 U.S. 422 (2019).
53 *Rucho v. Common Cause*, 4.
54 BallotPedia. "Elena Kagan," Ballotpedia.Org, 2020. https://ballotpedia.org/Elena_Kagan
55 *Rucho v. Common Cause*, 72.

In the Court's 2020 term, Kagan voted with the majority 75% of the time.[56] Her colleagues take note when she is among the minority, chiefly when she's the author of the dissent. Kagan favors unanimity as a method of safeguarding the Court's legitimacy, often phrasing her majority opinions in the narrowest sense, so that a majority of seven justices or more can be obtained. Her technique is elementary yet effective: adhere to the text, and remain practical.

An Atypical Textualist Who Directs Novel Alliances

Statutory interpretation, the term used to describe adhering to the primary text of a law, is traditionally considered a core principle among conservative judges. Yet Kagan's use of it has enabled her decisions to remain equitable and has even earned a conservative colleague's vote on several occasions. Perhaps the optimal illustration of Kagan's adherence to statutory interpretation is exemplified by her dissent in *Yates v. United States* (2015), which saw the conservative Justices Scalia, Thomas, and Kennedy sign on to her opinion.[57] *Yates* centered around a fisherman, John L. Yates, and his crew, who ventured into the federal waters off the Gulf of Mexico. Once the fishermen returned to the harbor, federal field officer John Jones measured a group of fish that appeared to be less than the mandated twenty inches. Jones issued Yates a citation, informing Yates that the National Marine Fisheries Service would confiscate the fish upon the ship's docking. Yates and co. threw the fish overboard and reinstated a larger group of fish in direct violation of Jones' instructions. Through criminal law, 18 U. S. C. §1519, Yates was charged with falsification and destruction of evidence.[58] The majority, authored by Justice Ginsburg, argued that Yates was not in violation of 18 U. S. C. §1519 because Congress intended the phrase "tangible object" to pertain solely to objects of "financial-fraud mooring… [a tangible object] must be one used to record or preserve information."[59] In a witty dissent, Kagan argued the plain language stated:

> the term "tangible object" means the same thing in §1519 as it means in everyday language—any object capable of being touched… The term "tangible object" is broad, but clear… When Congress has not

56 BallotPedia. "Elena Kagan," Ballotpedia.Org, 2020. https://ballotpedia.org/Elena_Kagan
57 *Yates v. United States*, 574 U.S. 528 (2015).
58 Yates v. United States.
59 *Yates v. United States,* 5.

> supplied a definition, we generally give a statutory term its ordinary meaning.[60]

The dissent flawlessly captures the universality of Kagan's textualist outlook in combination with her *pragmatism*. By examining the plain text of §1519, Kagan implemented a common-law approach to a reasonably candid circumstance. The synthesis of *textualism* and *pragmatism*, showcased how Kagan utilizes the plain meaning of a legislated statute to apply to a case, so that the outcome would make more comprehensive sense in practice. Kagan's unique approach to law has united her with Justices of opposing jurisprudence more commonly than all of her ideologically-like-minded comrades.[61] In this dissent, Kagan even seized the accord of two of the staunchest originalists, Justices Scalia and Thomas, on the Court at the time.

Kagan's unique ability to garner consensus by listening to opposing views ere to her tenure on the Court is best exemplified by her deanship at Harvard Law School. Kagan served as dean of Harvard Law between 2003 and 2009. Within those years, twenty-four full-time professors were hired, an astounding number considering a two-thirds supermajority is required to appoint all new faculty members.[62] Believing that students should receive a holistic education, Kagan sought out conservative-minded professors to add to an overwhelmingly liberal faculty. When testifying before the Senate Judiciary Committee on her Supreme Court nomination, former Harvard Dean turned professor, Robert C. Clark stated, "it says something about the ability of the dean to build consensus."[63] Expanding on Kagan's admiration of opposing views, Clark attested, "she wasn't just 'political'; she actually learned to understand and appreciate many different points of view."[64]

60 *Yates v. United States*, 29.
61 Bowers, Jeremy, Liptak, Adam, & Willis, Derek. "Which Supreme Court Justices Vote Together Most and Least Often." The New York Times, July 3, 2014, sec. The Upshot. https://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html.
62 "HLS Professors Testified on Behalf of Elena Kagan '86," Harvard Law Today, July 7, 2010. sec. Faculty Scholarship, https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/.
63 "HLS Professors Testified on Behalf of Elena Kagan '86," Harvard Law Today, July 7, 2010. sec. Faculty Scholarship, https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/.
64 "HLS Professors Testified on Behalf of Elena Kagan '86," Harvard Law Today, July 7, 2010. sec. Faculty Scholarship, https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/.

Kagan's *sui generis*[65] capability to seek the crux of the opposing side's argument is essential to understanding her role on the Roberts Court. Kagan does not simply search for an argument's elementary claims. Rather, she wishes to comprehend the idea at its core. In his testimony before the Senate Judicial Committee during Kagan's confirmation hearings, Harvard Professor Jack Goldsmith revealed, "Kagan sought my views and expressed a genuine interest in my arguments and ideas. I never got the sense that she wanted to know what I thought as a conservative. For Kagan, it was the idea and the argument that mattered."[66] Perhaps the greatest testament to Kagan's thirst for intellectual difference comes from her late colleague, Justice Scalia, who confessed to CNN's David Axelrod that he hoped President Obama would nominate Kagan for a seat on the High Bench. Scalia divulged, "I hope he sends us someone smart… I hope he sends us Elena Kagan."[67] Scalia unquestionably knew Kagan's jurisprudence would differ axiomatically from his. Yet, Scalia appreciated not only Kagan's intellectual capacity but her willingness to hear the other side for the sake of diversifying her views.

In addition to peer confession, Kagan's Martin-Quinn (MQ) score can discern another testament to her ideological overlap with her conservative colleagues. A Martin-Quinn score is a dynamic metric developed by a duo of political scientists from the University of Michigan that measures a Justices' ideological lean by assessing their voting record. By plotting a given Justice on a continuum with conservative on the positive range and liberal on the negative range, each vote a Justice casts shifts the Justice's overall placement on the continuum which has no minimum or maximum values. The objective of the MQ model is to quantitatively measure a Justice's ideological lean, with the hopes of gauging how Justice's align and morph throughout their tenure.[68] Kagan's MQ score

65 Original, or unique.
66 "HLS Professors Testified on Behalf of Elena Kagan '86," Harvard Law Today, July 7, 2010. sec. Faculty Scholarship, https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/.
67 Axelrod, David. "A Surprising Request from Justice Scalia," CNN, March 9, 2016, sec. Opinion, https://www.cnn.com/2016/02/14/opinions/david-axelrod-surprise-request-from-justice-scalia/index.html.
68 Farnsworth, Ward. "The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices with Special Attention to the Problem of Ideological Drift."Northwestern University Law Review Colloquy. Nov. 2007: 12,

stands at -1.69, this reasonably dictates why Justice Brett Kavanaugh (0.51) and Chief Justice John Roberts (0.22) have frequently voted alongside Kagan in cases.[69]

Unanimity, She will Pursue

If the Court is to be continually seen as a statutory institution, widespread consensus whenever and wherever possible is crucial. Kagan's *textualist pragmatism*, which tends to appease both sides of the bench to forge a more robust majority, is well exemplified by *Loughrin v. United States (2014)*. *Lourghin* consisted of a bank-fraud scheme insinuated by the defendant, Kevin Loughrin, in which he stole mailed-out checks from individuals, bought items at Target, and returned those items in exchange for cash. The question at hand regarded whether a federal prosecutor ought to prove a defendant's intent to defraud a financial institution under 18 U. S. C §11344.

At the outset of his trial, Loughrin confessed the sole intent to defraud Target Inc., not the banking institutions from which the checks were derived. The second clause of §11344 states "whoever knowingly executes, or attempts to execute, a scheme or artifice… to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises'" be fined no more than $1,000,000 or 30 years in prison (or both).[70] Loughrin argued that if the Court were to interpret the 'by means of' language to include all petty frauds involving checks "all frauds affected by receipt of a check would become federal crimes."[71] A federalism faux pas, as states are customarily tasked with prosecuting "bad check" cases. Yet, Kagan argued that "it is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement… The criminal must acquire (or attempt to acquire) bank property 'by means of' the misrepresentation."[72] Essentially ruling that bank fraud by means of a check can only be prosecuted federally if the criminal's

https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1110&context=nulr_online

69 Michigan Law School. "Martin-Quinn Scores," M|LSA, 2019, https://mqscores.lsa.umich.edu/measures.php

70 *Loughrin v. United States,* 573 U.S. 316 (2014)

71 *Loughrin v. United States*, 18.

72 *Loughrin v. United States,* 14.

deception naturally induces a bank to part with property or money in its possession.[73]

The central crux of Loughrin's claim rested on the assertion that by stretching the language of 18 U. S. C §11344(2), every bank fraud case committed by means of a check would be subject to federal prosecution. However, Kagan with legislative history as an advocate for her argument, argued: "nothing in the [second] clause additionally demands that a defendant have a specific intent to deceive a bank… imposing that the requirement would prevent §11344(2) from applying to a host of cases falling within clear terms."[74] Kagan clarified that 18 U. S. C §11344's first clause "to defraud a financial institution," was written with the intent to separate it from the language of the second clause so that a broader range of cases could be decided under 18 U. S. C §11344(1) and (2). This opinion chiefly represents how Kagan's *textual pragmaticism* was able to gain a broad consensus, as the Court unanimously ruled 9-0. Each conservative justice signed on to her opinion because of the clear and direct interpretation of 18 U. S. C §11344. Yet, by interpreting it in such a practical manner, Kagan was able to garner the consensus of her liberal colleagues as well. It's not guaranteed that had the second clause of 18 U. S. C §11344 been interpreted alternatively, it would have secured a unanimous vote.

Justice Scalia, for example, merely concurred in the ruling because he was unconvinced by the Government's 'natural inducement' test which the majority accepted. Scalia expressed that the Court heard "scant argument (nothing but the Government's bare-bones assertion) in favor of the 'by means of' textual limitation, and no adversary presentation whatever opposing it."[75] Scalia believed that interpreting §11344(2)'s 'by means of" language, should follow the dictionary's definition, of "[a]method, or course of action, by the employment of which [bank property was] attained," so that 18 U. S. C §11344 would innately involve criminally inducing a bank away from its money or property.[76] Scalia remained unconvinced by the Government's 'natural inducement,' test, thus expressing that the Court should have left deciding the textual limitations of the 'by means of" test for another case. Yet, it should be noted that Justice Thomas was the sole signed

73 *Loughrin v. United States*, 18.
74 *Loughrin v. United States*, 7.
75 *Loughrin v. United States*, 18.
76 *Loughrin v. United States*, 19.

justice to Scalia's opinion. Yet Kagan's received eight signatures, it suffices to show that Kagan's pragmatic interpretation of 18 U. S. C §11344 permitted that unanimity to materialize.

In an era of severe political polarity infiltrating the halls of the Legislature and the office of the Executive, Americans are becoming increasingly pessimistic regarding the federal government's ability to govern. Thus, the Judiciary must take it upon itself to be a model of what the Framer's would identify as "good government," or what modern generations refer to as "productive." Suppose the Court consistently turned out 5-4 or 6-3 decisions. In that case, the American people would see the Judiciary as just another political branch of government that cannot put its differences aside to solve palpable issues. A number of justices have professed their concern for the Court's legitimacy. Yet, none have expressed the concern more directly and frequently than Kagan. In a lecture given at Georgetown Law, Kagan professed that "during these polarized times… [the justices should] look and see if there's something smaller we can agree on, some greater consensus we can achieve," adding that unanimity was crucial to maintaining the Court's legitimacy.[77] Kagan comprehends the colossal weight currently placed on the Court's shoulders. Thus it's not a stretch of the imagination to conclude that she has the Court's legacy in mind while she's tenured on the high bench.

Conclusion

In concluding this analysis, it is of great importance to view Kagan as a unique player on the Roberts Court. Due to her unparalleled jurisprudence, she likely possesses the greatest ability to sway justices from one side of an opinion to the other. Kagan's narrow-rulings allow her to feel more comfortable siding with her decisions as they don't necessarily change the Court's precedent dramatically. Court-watchers mustn't mistake Kagan's fairness for disinterest, she shows a great deal of passion for protecting the voting rights of citizens and has zero tolerance for political gerrymanders, regardless of which side of the political aisle they benefit. Fairness, in every sense of the word, perfectly describes Kagan as a judge. She's shown

77 "What Justice Kagan Told ABA About Decision-Making, Politics, Pro Bono, and More." American Bar
Association. November 2018.
https://www.americanbar.org/news/abanews/publications/youraba/2018/november-2018/what-justice-kagan-told-the-aba-about-decision-making--politics-/

distinguished humbleness and admiration for the position she currently holds; her tenure, though only in its early stages, has proven to be one of vital importance to this unique era of the Supreme Court.

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https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1110&context=nulr_online
Michigan Law School. "Martin-Quinn Scores," *M|LSA*, 2019, https://mqscores.lsa.umich.edu/measures.php

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Yates v. United States, 574 U.S. 528 (2015)
Loughrin v. United States, 573 U.S. 316 (2014)

7,341 Incidents and Counting: Analyzing the Evolution of American Hate Crime Legislation and How it Varies by State

Jessica Daniel[78]

This article will explore what hate crimes are, and explore why they have been on the rise in recent years. I will track the evolution of hate crime legislation on both a federal and state level and argue that while rises in hate are consistent throughout time, they are also episodic. I will justify the need for hate crime legislation and demonstrate how state hate crime laws vastly differ, using a case study as support. I will make policy suggestions to improve existing legislation and advocate for an increase in federal funding allocated to hate crime training for law enforcement agencies. Lastly, I will suggest that training should also be required in schools and workplaces in order to diminish ignorance and intolerance, and to encourage communities to embrace and celebrate diversity rather than fear it.

What is a Hate Crime?

Before elucidating the complexities associated with hate crimes and hate crime legislation, it is important to first define what a hate crime is, and explain why these crimes occur. Considering that each state has its own legal definition of the term hate crime, it is challenging to pinpoint its exact definition. However, the general consensus among scholars is that a hate crime has three main components: (1) it must be a threatened, attempted, or completed overt criminal act, (2) it must be intentionally motivated by bias, and (3) it must target a specific category of identity or property that is protected by law. What is considered a protected category varies by state and can often be controversial. The most common protected categories are race, ethnicity, religion, and national origin.

In the wake of the COVID-19 pandemic, hate crimes directed toward Asian Americans have been on the rise, with at least 2,800 incidents reported in 2020 across the nation.[79] According to the Anti-Defamation League *Audit of Antisemitic Incidents*, in 2020, there were 2,024 reported antisemitic incidents in the United States, including 1,242 cases of

78 Brandeis University Undergraduate, Class of 2021.
79 "Covid 'Hate Crimes' against Asian Americans on the Rise." BBC News , April 2021. https://www.bbc.com/news/world-us-canada-56218684.

harassment, 751 incidents of vandalism, and 31 cases of assault.[80] Additionally, the Human Rights Commission reported that 37 transgender and gender non-conforming people were killed.[81] These days, it seems as though reports of hate crimes are always in the news cycle, putting names and faces to these evergrowing statistics and attracting national attention. Hate crimes are not a recent phenomenon, but they are a continually increasing trend.[82] Hate crimes send a powerful message to members of a victim's group that they are "unwelcome and unsafe in their communities," and can further marginalize minority groups.[83] In 2019, 7,314 total hate crimes were reported across the country (a 3.95% increase from 2018), but because of issues related to reporting (to be explained more in-depth in a later section of this paper), it is estimated that more than half of all hate incidents that *could* be reported are not formally documented.[84,85]

In a study regarding hate crimes, sociologists Jack McDevitt and Jack Levin categorized hate crimes into four classifications. The first and most common classification is "thrill hate crimes," meaning that offenders are looking to "have some fun and stir up a little excitement … but at someone else's expense."[86] They rarely know their victims and choose to target a certain individual who differs from them for psychological

80 "Audit of Antisemitic Incidents 2020." Anti-Defamation League. Anti-Defamation League , April 2021. https://www.adl.org/audit2020#executive-summary.
81 Roberts, Madeleine. "Marking the Deadliest Year on Record, HRC Releases Report on Violence Against Transgender and Gender Non-Conforming People." The Human Rights Campaign . The Human Rights Campaign, November 19, 2020. https://www.hrc.org/press-releases/marking-the-deadliest-year-on-record-hrc-releases-report-on-violence-against-transgender-and-gender-non-conforming-people.
82 Hernandez, Joe. "Hate Crimes Reach The Highest Level In More Than A Decade." *NPR*, 1 Sept. 2021, https://www.npr.org/2021/08/31/1032932257/hate-crimes-reach-the-highest-level-in-more-than-a-decade?t=1634395011991.
83 "The Psychology of Hate Crimes." American Psychological Association. American Psychological Association , August 2017. https://www.apa.org/advocacy/interpersonal-violence/hate-crimes.
84 "Hate Crime Statistics (2019)." The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.
85 Shattuck, John, and Mathias Risse. "Hate Crimes." *Carr Center for Human Rights Policy* , February 22, 2021, 1–13. https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf.
86 Levin , Jack, and Jack McDevitt. "Hate Crimes." *Encyclopedia of Peace, Violence and Conflict* 2 (2008). https://jacklevinonviolence.com/articles/HateCrimesencyc92206FINAL.pdf.

excitement and social acceptance by their peers. [87] An example of this kind of hate crime is when a group of teenage offenders selects a person who looks different from them and physically attacks them for that reason. The second category is defensive hate crimes. The perpetrator in this type of crime uses a triggering incident as a catalyst for the expression of their emotions. These types of perpetrators justify the attack of someone deemed as an outsider by claiming it is necessary to protect the public from "intruders."[88] Additionally, they usually do not know the victim personally and choose them at random. An example of this kind of attack would be if a black family moved into a predominantly white neighborhood and had a rock thrown through their window. Retaliatory hate crimes are the third category, in which the perpetrator is acting out against a stranger in response to a world event and partially blaming him or her for its cause.[89] An example of this would be an attack on an Arab individual during the aftermath of 9/11. The last form of hate crime is rare and mission-based. The perpetrator views individuals who are perceived to be different as grave threats, and feels as though it is their mission to "act before it is too late."[90] These types of perpetrators are the most likely of all types of perpetrators to join an organized hate group.[91]

It is important to note that although some of these hate crime typologies imply that most hate crimes are perpetrated by white supremacists, white supremacy is not the only reason why hate crimes are on the rise. Even though data indicates that acts of hate have increased, there are many who do not believe that hate crime legislation is necessary because they believe that hate crime legislation provides minority groups with special treatment, as most offenders tend to identify as white.[92] However, this is not always the case. In 2019, 23.9% of offenders identified as African

87 Shattuck, John, and Mathias Risse. "Hate Crimes." *Carr Center for Human Rights Policy* , February 22, 2021, 1–13. https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf.
88 Levin , Jack, and Jack McDevitt. "Hate Crimes." *Encyclopedia of Peace, Violence and Conflict* 2 (2008). https://jacklevinonviolence.com/articles/HateCrimesencyc92206FINAL.pdf.
89 Levin and McDevitt. "Hate Crimes."
90 Levin and McDevitt. "Hate Crimes."
91 Levin and McDevitt. "Hate Crimes."
92 "Hate Crime Statistics (2019)." The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.

American, and 10% identified as Hispanic.[93] Furthermore, in the landmark case *Wisconsin v. Mitchell* (508 U.S. 476 (1993), the victim identified as white and the perpetrator identified as black. This dispels the argument that hate crime laws only benefit marginalized groups, as the defendant received the same sentence a white perpetrator would receive if they had committed the same crime.[94] In 2019, data indicates that individuals of all races were victims of a hate crime, further weakening this argument.[95] Additionally, the *Mitchell* case thwarts another anti-hate crime legislation argument related to the First and Fourteenth Amendments. The Supreme Court ruled that there is a meaningful difference between punishing the content of speech and using speech as evidence of the motive behind a crime. Even so, there continues to be a vocal group of individuals who, for as long as hate crime legislation has been in existence, have been adamant in abolishing it.

Historical Background and Federal Legislative History

Hate crimes have been long embedded within the American experience, although they may appear to be a relatively recent phenomenon. Throughout history, individuals within marginalized communities have been subjected to various forms of discrimination and hatred due to elements of their identities that caused them to be percieved as "different."[96] While it can be argued that a rise in hate crimes toward a certain demographic is an episodic reaction to a particular historical moment or event, such as the spike in hate faced by Japanese Americans during the Second World War, it is also evident that the persistence of hate crimes throughout time demonstrates the power and tenacity of prejudice. A prominent example of this is the hatred that those of African descent have historically experienced. While the expressions of hatred they experience has evolved over time, from government protection of slavery via legislation such as the Slave Trade Act of 1794 to the intentional shooting at a predominately African American

93 "Hate Crime Statistics (2019)." The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.
94 Feinman, Amy. Northeast Area Civil Rights Counsel at Anti-Defamation League. "Interview with Jessica Daniel." April 2021.
95 "Hate Crime Statistics (2019)." The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.
96 Shattuck, John, and Mathias Risse. "Hate Crimes." *Carr Center for Human Rights Policy* , February 22, 2021, 1–13. https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf.

church in Charleston, South Carolina in 2015, the fact that they do experience hatred solely because of who they are has remained.[97] The fact that intolerance and disdain toward racial, ethnic, religious, gender and sexual minorities has been a constant within American society is incredibly important to recognize, as it reveals a strong contradiction between constitutional rights in theory versus in practice. While the Constitution puts forth the assumption that all Americans' right to freely be who they are is protected, the recurrence of hate crimes serves as a reminder that this is not necessarily always true, especially for marginalized populations.

There have been efforts made by the federal government to combat civil rights violations and prevent discrimination since the enactment of the Civil Rights Act of 1866. However, the first time the federal government began to address hate crimes specifically was over a century later in 1968 through the passage of 18 U.S.C. Section 245(b)(2), which created federally protected activities.[98] This code states that it is illegal for individuals to willfully injure, intimidate, or interfere with another person's ability to "participat[e] in or enjoy[...] any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof" due to his or her race, color, religion, or national origin.[99,100] While the creation of legislation designed to bar discrimination on the account of these four identifying categories is significant, it is important to note that this statute was limited in its application, as only six activities were explicitly listed as federally protected.

In 1990, the Hate Crimes Statistics Act (28 U.S.C. Section 534) was passed which required the Department of Justice to collect and publish data about crimes motivated by hatred based on race, religion, ethnicity and sexual orientation. The data that continues to be collected annually comes

97 Shattuck, John, and Mathias Risse. "Hate Crimes." *Carr Center for Human Rights Policy* , February 22, 2021, 1–13. https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf.

98 Edward Kennedy, Hate Crimes: *The Unfinished Business of America*, 44 Boston Bar J. 6 (Jan / Feb. 2000) Accessed April 27, 2021.

99 "18 U.S. Code § 245 - Federally Protected Activities." Legal Information Institute . Cornell Law School . Accessed April 27, 2021. https://www.law.cornell.edu/uscode/text/18/245.

100 Shattuck, John, and Mathias Risse. "Hate Crimes." *Carr Center for Human Rights Policy* , February 22, 2021, 1–13. https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf.

from voluntary submissions by state and federal law enforcement agencies. Since reporting is not mandatory, the numbers that are reported are not an accurate reflection of hate crime occurrences each year which can have many harmful consequences. This act is especially significant because it "defined the criminal conduct that constituted a hate crime: hate crimes are acts that manifest evidence of prejudice based on actual or perceived race, religion, [national origin], or ethnicity."[101] Four years later, the Hate Crimes Sentencing Enhancement Act was passed and added to the Violent Crime and Law Enforcement Act of 1994 as an amendment (42 U.S.C. Chapter 136). This Act permits federal judges to impose harsher penalties for hate crimes while also expanding protected categories to include hate crimes motivated by gender, disability, and sexual orientation if they occur on federal property. [102, 103]

The Hate Crimes Prevention Act (18 U.S.C Section 249) was passed in 2009 as a response to the deaths of Matthew Shepard and James Byrd Jr. which were both hate crimes. This Act expanded federal hate crime laws further and officially included gender, disability, gender identity, and sexual orientation to the definition of a hate crime while removing jurisdictional obstacles to prosecutions of racially and religiously motivated violence.[104] Other hate crime related federal laws include the Criminal Interference with Right to Fair Housing Act (42 U.S.C Section 3631), which made it illegal to interfere with an individual's housing rights due to any of their actual or perceived characteristics and the Damage to Religious Property, Church Arson Prevention Act (18 U.S.C. Section 247), which "prohibits the intentional defacement, damage, or destruction of religious property because of the religious nature of the property [...] or because of the race, color, or

101 Shattuck, John, and Mathias Risse. "Hate Crimes." *Carr Center for Human Rights Policy* , February 22, 2021, 1–13. https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf.

102 Stacey, Michele. 2015. "The Effect of Law on Hate Crime Reporting: The Case of Racial and Ethnic Violence." *American Journal of Criminal Justice : AJCJ* 40 (4) (12): 876-900. doi:http://dx.doi.org/10.1007/s12103-015-9289-3.

103 "Hate Crimes Timeline." The Human Rights Campaign. The Human Rights Campaign. Accessed May 5, 2021. https://www.hrc.org/resources/hate-crimes-timeline.

104 "Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act." Legal Information Institute. Cornell Law School. Accessed May 5, 2021. https://www.law.cornell.edu/wex/matthew_shepard_and_james_byrd_jr_hate_crimes_prevention_act.

ethnic characteristics of the people associated with the property."[105, 106] Additionally, 18 U.S.C. Section 241 makes the involvement of two or more people in the conspiracy to commit a hate crime or intimidate an individual due to their actual or perceived characteristics from enjoying constitutional rights illegal in any context where the federal government would have jurisdiction.[107] Through the passage of multiple legislative acts designed to prevent hate crimes from occurring or punish those who commit a crime with the intent of harming a specific person due to an element of who they are, hate crimes became a topic that garnered national attention. Demonstrating that hate crimes are a serious offense, the creation and implementation of these laws has encouraged victims to come forward and report incidents they experience as well as motivated states to add strong hate crime statutes to their criminal codes.

Hate Crime Legislation on a State Level_

States are granted primary regulatory authority over their own criminal codes through the Tenth Amendment, which allows for all "powers not delegated to the United States by the Constitution, nor prohibited to it by the States" to be granted to the States.[108] The Tenth Amendment also gives states police power, which essentially provides states with the right to establish and enforce laws that pertain to the wellbeing of its citizens.[109] This delegation of power is a significant reason why hate crime statutes vary so drastically. It is left up to the states' discretion to determine what is a hate crime and how, if at all, they should be regulated or criminalized. In a recent interview I conducted with Amy Feinman, the Northeast Area Civil Rights Counsel for the Anti-Defamation League, an organization that is devoted to securing justice and fair treatment for all, she noted that this varia nce is also

105 "42 U.S. Code § 3631.Violations; Penalties." Legal Information Institute. Cornell Law School . Accessed May 7, 2021. https://www.law.cornell.edu/uscode/text/42/3631.
106 "18 U.S. Code § 247 - Damage to Religious Property; Obstruction of Persons in the Free Exercise of Religious Beliefs." Legal Information Institute. Cornell Law School . Accessed May 7, 2021. https://www.law.cornell.edu/uscode/text/18/247.
107 "18 U.S. Code § 241 - Conspiracy against Rights." Legal Information Institute. Cornell Law School. Accessed May 5, 2021. https://www.law.cornell.edu/uscode/text/18/241.
108 "Federalism." Criminal Law by University of Minnesota. University of Minnesota. Accessed May 5, 2021. https://open.lib.umn.edu/criminallaw/chapter/1-1-federalism/.
109 "Police Powers." Legal Information Institute . Cornell Law School. Accessed May 5, 2021. "Federalism." Criminal Law by University of Minnesota. University of Minnesota. Accessed May 5, 2021. https://open.lib.umn.edu/criminallaw/chapter/1-1-federalism/. .

due to existing statutory frameworks.[110] Given how their criminal codes are structured, some states opt to create free-standing hate crime statutes while others choose to embed regulations regarding bias-motivated crimes into pre-existing legislation. [111] This variation also determines whether states will choose to adopt a penalty enhancement sentencing model. The rationale behind this model is to "recognize and effectively address this unique type of crime" and use a stiffer sentence to dissuade others from engaging in this problematic and incredibly impactful criminal behavior.[112]

The penalty enhancement model is seen by some as a violation of an individual's First and Fourteenth Amendment rights . However, in the decision of the 1993 case *Wisconsin v. Mitchell*, the penalty enhancement model was upheld as constitutional by the Supreme Court. In the case, Mitchell, a young black male, and his friends were found guilty of aggravated assault after beating a white male on the street into a coma. The facts of the case indicate that Mitchell intentionally selected his victim due to his race, which caused him to receive an increased sentence due to Wisconsin provision Section 939.645. Mitchell challenged the constitutionality of the enhanced penalty sentence by claiming that it was a violation of his First Amendment rights to be sentenced more harshly due to what the legislature considered "offensive thought."[113] He also claimed it was a violation of his Fourteenth Amendment rights under the equal protection clause.[114] The Court disputed these claims and ruled that because it was not Mitchell's thoughts that were being criminalized but rather his motive, which were clearly displayed through his actions, the enhanced

110 Feinman, Amy. Northeast Area Civil Rights Counsel at Anti-Defamation League. "Interview with Jessica Daniel." April 2021.

111 Stacey, Michele. 2015. "The Effect of Law on Hate Crime Reporting: The Case of Racial and Ethnic Violence." *American Journal of Criminal Justice : AJCJ* 40 (4) (12): 876-900. doi:http://dx.doi.org/10.1007/s12103-015-9289-3.;Feinman, Amy. Northeast Area Civil Rights Counsel at Anti-Defamation League. "Interview with Jessica Daniel." April 2021.

112 "Hate Crime Laws." Anti-Defamation League. Anti-Defamation League, 2012. https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Hate-Crimes-Law.pdf.

113 Donna M. Evans; Colleen B. McElhaney, "Historical Overview: Massachusetts Court Decisions Shaping Federal Constitutional Law," Boston Bar Journal 44, no. 1 (January/February 2000): 20-[ii]

114 "Wisconsin v. Mitchell." Legal Information Institute. Cornell Law School. Accessed May 5, 2021. https://www.law.cornell.edu/supct/html/92-515.ZO.html.

sentence was constitutional and justified. This case is noteworthy because it justified the use of penalty enhancement sentencing models and recognized on a national level the consequences of hate crimes. These repercussions include "provok[ing] retaliatory crimes, inflict[ing] distinct emotional harms on their victims, and incit[ing] community unrest.[115]"

Another area of difference is how hate crimes are defined by each state, or more specifically, which identifying categories are considered legally protected. While federal law classifies a hate crime as a crime motivated by bias against race, color, religion, national origin, sexual orientation, gender, gender identity, or disability, many states have politicized some of these categories, resulting in sexual orientation, gender, and gender identity being omitted by some states.[116] According to the Anti-Defamation League, only twenty states have statutes that do not exclude federally recognized populations from receiving legal protection.[117]

The final element that distinguishes hate crime legislation across various states is data reporting. Because the 1990 federal Hate Crimes Statistics Act requires data to be collected on a voluntary basis, there are many problems that can arise, including the fact that not all states collect hate crime data. According to the Department of Justice, only eighteen American states and territories have data reporting mandates.[118] This can explain why states with prominent hate groups report such low numbers of hate incidents. For instance, for the past two years, Alabama has reported to the FBI that no hate crime instances have occurred within the state even though the FBI's Hate Crime Statistics report shows that there was a 113 percent increase in violent hate crimes across the country in 2019.[119] Alabama does not have a state law that mandates hate crime data collection. While it is very plausible to assume that unreported hate crimes have

115 Amy Feinman, "Marblehead Police Training" (Zoom, April 21, 2021).
116 Hate Crime Statistics (2019)." The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.
117 Thebault, Reis. "Nearly Every State Has a Hate Crime Law. Why Don't More People Use Them?" The Washington Post. The Washington Post, April 26, 2021. https://www.washingtonpost.com/nation/2021/04/26/hate-crime-laws-explained/.
118 Morava, Maria and Saba Hamedy. "49 States and Territories have Hate Crime Laws -- but they Vary." *CNN Wire Service,* Mar 17, 2021.
119 "Alabama Only State in U.S. To Report Zero Hate Crimes." ADL Atlanta. Anti-Defamation League , November 16, 2020. https://atlanta.adl.org/news/alabama-only-state-in-u-s-to-report-zero-hate-crimes/.

occurred in Alabama within the past few years, due to the lack of a formal reporting mechanism in place, it makes sense that victims may be fearful of coming forward. Without universally required data reporting laws, victimized populations in states without these laws do not feel as though they have support from law enforcement and legislators to report incidents. This further strains the relationship between marginalized populations and law enforcement and also affects how much funding for hate-crime related training and data collection the state receives from the federal government. This also impacts communities within that state which are the most targeted, as an inaccurate data set may mean that these communities receive less of the resources that they need.

Training in hate crime education is essential, especially for law enforcement officers. A significant reason why hate crimes may not be formally reported is because officers may not recognize when they happen. Only twelve states require special training for law enforcement officers so that they can properly identify hate crimes if they occur, which is an alarming statistic given the prevalence of hate crimes in recent years.[120] Furthermore, due to the fact that agencies possess varying knowledge about the ways that bias can motivate crime, there are instances where hate is present in a crime in a less glaring manner that may be overlooked. Additionally, some manifestations of hate that occur are not considered part of a state's official hate crime reporting data, such as bullying in schools where a slur or symbol is used to intimidate another student.[121] Therefore, it makes sense that over half of the estimated 250,000 hate crimes that occurred annually between 2005 and 2014 around the country were not formally reported, as there are many reasons that a victim may be dissuaded from coming forward (including the fear of retaliation from the perpetrator).[122] It is very problematic that hate crime statistics are inaccurate

120 Shattuck, John, and Mathias Risse. "Hate Crimes." *Carr Center for Human Rights Policy* , February 22, 2021, 1–13. https://carrcenter.hks.harvard.edu/files/cchr/files/hate_crimes.pdf.

121 Ross, Janell. *Why Americans can't Agree on which Crimes are Hate Crimes: What an Image about the Care and Pace of Investigating a White Baton Rouge Man Possibly Involved in Hate Crimes Tells and Conceals*. Washington: WP Company LLC d/b/a The Washington Post, 2017.

122 Ross, Janell. *Why Americans can't Agree on which Crimes are Hate Crimes: What an Image about the Care and Pace of Investigating a White Baton Rouge Man Possibly Involved in Hate Crimes Tells and Conceals*. Washington: WP Company LLC d/b/a The

and appear to be lower than the actual instance, and prevents the well-being of victimized groups from becoming a national priority.

Case Studies: Massachusetts and Pennsylvania

In order to better understand the extent to which hate crimes legislation varies in terms of structure and implementation, the hate crime laws of Massachusetts and Pennsylvania will be analyzed. These two states were selected because it is interesting to assess hate crime laws of two states within the same geographic region, but with divergent political leanings. The evaluation of laws from each state detailed below will demonstrate how and why legal responses toward hate crimes are so separate and dissimilar on a state by state basis. I also will explore how arguments against hate crime statutes have informed the creation of legislation.

In Massachusetts, there were 388 total incidents of hate crimes reported in 2019. The three highest categories of crimes committed include: race, ethnicity, and ancestry (213), religion (10), and sexual orientation (92).[123,] Massachusetts uses a penalty enhancement sentencing model and defines hate crime officially through Mass. Gen Laws Ch. 22C, Section 32 as any criminal act that is committed with biased intentions. This means that any crime in which a victim or property is intentionally selected due to their racial, religious, ethnic, disability, gender identity, or sexual orientation is legally classified as a hate crime.[124] The Commonwealth requires hate crime data to be collected through Mass. Gen Laws Ch. 22C, Sections 33-35 and made available to all law enforcement agencies within the state.[125] Through Mass. Gen Law Ch. 266, Section 127A, it is a felony to "destroy, deface, mar or injure a church, synagogue, or other structure [...] or threaten to do so."[126] Furthermore, Massachusetts is one of only twelve states to require

Washington Post, 2017.

123 "State Hate Crimes Statutes." Brennan Center for Justice. Brennan Center for Justice, July 2, 2020. https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes.; "Hate Crime Statistics (2019)." The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.

124 "Hate Crime Law in Massachusetts." Mass.gov. Commonwealth of Massachusetts. Accessed May 7, 2021. https://blog.mass.gov/masslawlib/legal-topics/hate-crime-law-in-massachusetts/.

125 "State Hate Crimes Statutes." Brennan Center for Justice. Brennan Center for Justice, July 2, 2020. https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes.

126 "State Hate Crimes Statutes." Brennan Center for Justice. Brennan Center for Justice, July 2, 2020. https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-

law enforcement officers to receive training through Mass. Gen Laws Ch. 6, Section 116B, which could be an indication of why Massachusetts hate crime statistics appear much higher than Alabama's, and other states with a significant history of intolerance and racism. Additionally, Massachusetts treats hate crimes as a separate criminal violation through Mass. Gen Laws Ch. 265, Section 39, which states that it is illegal to "commit assault or battery upon a person, or damage the real or personal property of a person, with the intent to intimidate" due to any of the state's listed protected categories.[127] Currently, there is a new hate crime bill being discussed that would amend Section 39 to provide clear explanations of each element of the existing legislation and expand protected categories to include gender and immigration status. It would also "combine civil rights and hate crime statutes into one section of law, [...] impose stricter maximum sentences on serious offenses and strengthen penalties for repeat offenders."[128] While stressing the need for a new bill and attempting to gain support for it from colleagues and constituents, Representative Tram Nugueyen, one of the new proposed bill's lead authors, is quoted as saying:

> "Hate crimes are not just against individuals. These crimes are meant to terrorize entire communities. These are crimes against all of us [...] hate crimes, much like terrorism, are designed to create fear and make people feel unsafe. We need to name them for what they are — hate crimes — and prosecute them to an added degree to tell the community that we see them, that they are valued, and that we won't tolerate such violence and hate." [129]

statutes.

127 "Section 39: Assault or Battery for Purpose of Intimidation; Weapons; Punishment." The 192nd General Court of the Commonwealth of Massachusetts. Mass.gov. Accessed May 7, 2021. https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter265/section39#:~:text=(a)%20Whoever%20commits%20an%20assault,of%20not%20more%20than%20five.

128 Lisinski, Chris. "Massachusetts Attorney General Maura Healey: Times Call for Overhaul of Hate Crime Laws." The Lowell Sun, March 31, 2021. https://www.lowellsun.com/2021/03/31/healey-times-call-for-overhaul-of-hate-crime-laws/.

129 Lisinski, Chris. "Massachusetts Attorney General Maura Healey: Times Call for Overhaul of Hate Crime Laws." The Lowell Sun, March 31, 2021. https://www.lowellsun.com/2021/03/31/healey-times-call-for-overhaul-of-hate-crime-laws/.

Representative Nuguyen's statement epitomizes why it is essential for Massachusetts, and all states, to implement stronger legislation in response to the rise in hate witnessed around the country.

While Massachusetts is actively working on eradicating hate by considering newer, more updated legislation, Pennsylvania has had the same hate crime laws with little modification since 1982. Although there has recently been discussion on the local level to expand protected categories, progress has not yet been achieved. In its laws, Pennsylvania does not explicitly use hate crime as a legal term, but rather, classifies it as ethnic intimidation. Pennsylvania's Ethnic Intimidation Law (18 P.S. Section 2710) defines ethnic intimidation by stating that it is illegal for an individual to commit certain crimes with motivation either partly or in whole rooted in hatred toward the race, color, religion, or national origin of another person or group.[130] Ethnic intimidation is usually considered to be a separate offense, but can be charged if one of the following charges also occur: criminal mischief, assault, harassment, threats, stalking or homicide.[131] Related is the Crimes Code (18 P.S. Section 3307) which makes it a crime to knowingly deface a religious facility.[132] Furthermore, Pennsylvania mandates data collection for all crimes through its code (PA. ADM. Code Section 710) regarding state police responsibilities, so technically, even though it is not explicitly mentioned, hate crime data collection is required.[133] Even so, hate crime numbers are very low in Pennsylvania, with 41 total incidents reported in 2019. 28 incidents were related to race, ethnicity, and ancestry, 9 were connected to religion, and 4 were related to

130 "2010 Pennsylvania Code Title 18 - CRIMES AND OFFENSES Chapter 27 - Assault 2710 - Ethnic Intimidation." Justia US Law. Justia. Accessed May 7, 2021. https://law.justia.com/codes/pennsylvania/2010/title-18/chapter-27/2710.

131 "State Hate Crimes Statutes." Brennan Center for Justice. Brennan Center for Justice, July 2, 2020. https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes.

132 "Hate Crime." Office of Attorney General Josh Shapiro. Office of the Attorney General of the Commonwealth of Pennsylvania . Accessed May 7, 2021. https://www.attorneygeneral.gov/protect-yourself/civil-rights/hate-crime/.

133 "Bias and Hate Crimes." Pennsylvania Human Rights Commission. Commonwealth of Pennsylvania, https://www.phrc.pa.gov/Resources/Pages/Hate-Crime.aspx.

sexual orientation.[134] Pennsylvania uses a penalty enhancement model for ethnic intimidation violations, but because convictions are minimal despite the fact that Pennsylvania is a very populous state, it is rarely used. If one were to be considered a victim of ethnic intimidation, however, under Civil Redress (42 Pa. C.S.A. Section 8309) they can file a civil rights lawsuit against the perpetrator of a hate crime.[135]

There are several reasons that could explain why this is the case, the most plausible being that the list of protected categories is quite short, excluding many populations who also face bias-motivated crimes. The reason why various demographics are excluded seems entirely political. For instance, in a 2002 amendment, sexual orientation was briefly a protected category in Pennsylvania. However, due to public outcry and how controversial it was, sexual orientation was removed as a protected category.[136] Another reason for why there are minimal ethnic intimidation convictions is because the term hate crime is never explicitly used, and the phrase ethnic intimidation appears to have different connotations on various state websites. This may amount to confusion on what would count as ethnic intimidation. This can dissuade individuals from feeling comfortable coming forward and also may cause law enforcement officials to improperly recognize and respond to a hate incident, since training related to hate crimes is not a requirement in Pennsylvania.

The difference in the number of convictions reported in Massachusetts (388) and Pennsylvania (41) in 2019 proves how the variations seen in hate crime laws and procedures by state have drastically different outcomes.[137] It is not outrageous to assume that Pennsylvania, a state with a population nearly double the size of Massachusetts, would have

134 Hate Crime Statistics (2019).” The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.
135 “Hate Crime.” Office of Attorney General Josh Shapiro . Office of Attorney General Commonwealth of Pennsylvania, 2021. https://www.attorneygeneral.gov/protect-yourself/civil-rights/hate-crime/.
136 Boren, Michael. “Pa Expands Protections for LGBT People, but Hate-Crime Law Still Doesn’t Include Them.” The Philadelphia Inquirer . The Philadelphia Inquirer, August 27, 2018. https://www.inquirer.com/philly/news/pennsylvania/lgbt-hate-crimes-pennsylvania-human-relations-commission-20180817.html.

137 “Hate Crime Statistics (2019).” The United States Department of Justice . U.S. Department of Justice , 2019. https://www.justice.gov/hatecrimes/hate-crime-statistics.

more incidents of hate crimes occurring than what is formally reported. However, what we have is an inaccurate picture of hate in Pennsylvania and other states with similar protocols. This is due to a variety of factors including different definitions of hate crimes, protected categories, and different training requirements. To further demonstrate how problematic this discrepancy is, I will use a federal hate crime case example and address, based on their current hate crime statutes, how Massachusetts and Pennsylvania would respond if the case occurred in either state. In May 2020, Sean Díaz De León and Juan Carlos Pagán Bonilla were convicted of knowingly targetting two transgender women in a violent carjacking.[138] They had sexual relations with the two women who were visiting Puerto Rico from New York and were angered after discovering that they were transgender.[139] The defendants then attacked the women, shot at them, and then set their car on fire. If this case were to happen in Massachusetts, it would be classified as a hate crime because gender identity is considered a protected category. Furthermore, through Mass. Gen Laws Ch. 265, Section 39, the crime would be counted as a separate offense and the defendants would receive an enhanced penalty sentence. However, if this case occurred in Pennsylvania, it would not be considered in violation of 18 P.S. Section 2710, as gender identity is not a legally recognized protected category. The families of the victims would not get justice, and the fact that the case would proceed missing an ethnic intimidation charge would send a message to transgender Pennsylvania residents that if hate crimes occur against them, no action would be taken by law enforcement because of the identifying factors that make them who they are.

Conclusion

Senator Edward Kennedy, a staunch supporter of hate crime legislation, once said "[h]ate crimes are a modern plague afflicting communities throughout the nation. Again and again, lives have been shattered by the violence of hate."[140] While it is evident that instances of

138 "Hate Crime Case Examples." United States Department of Justice. U.S. Department of Justice . Accessed May 5, 2021. https://www.justice.gov/hatecrimes/hate-crimes-case-examples.

139 Ring, Trudy. "Two Men Indicted for Murders of Transgender Women in Puerto Rico." https://www.advocate.com/crime/2020/5/14/two-men-indicted-murders-transgender-women-puerto-rico. Advocate, May 14, 2020.

140 Edward Kennedy, Hate Crimes: *The Unfinished Business of America*, 44 Boston Bar J. 6 (Jan / Feb. 2000) Accessed April 27, 2021.

hate have been woven into the American experience since its very beginning, Kennedy's quote is accurate in reflecting the urgency and necessity of legislation to combat a rising tide of hostility and violence experienced by marginalized communities. White supremacy, xenophobia, racism, antisemitism, homophobia, and other expressions of intolerance toward difference are nothing new, but have simply been magnified in recent years due to immense social, political, and economic change. Even though hate crime legislation exists on both a federal level and in most states, it is clear that there are flaws that must be addressed in order to ensure that the legislation is as effective as possible. It is imperative that all states have at least basic hate crime statutes implemented and utilize similar definitions of hate crimes to prevent confusion about what the term means in practice. Currently, Arkansas, South Carolina, and Wyoming do not have any hate crime statutes in place which is very problematic, as it implies that hate crimes are not legitimate or do not occur within those areas, which is not true.

While it is understandable that different states have different statutory structures, making universal hate crime laws across all states difficult to achieve, the categories of identity that are legally protected should be consistent within all states. In order to effectively combat hate experienced by one marginalized group in one state or location, it is essential to send the message that hate toward that group is not tolerated anywhere. Furthermore, training for law enforcement officers in each state should be mandatory, so that they can accurately recognize and report hate crimes if they occur and ensure that they are being entered into the system accordingly. Federal funding should be allocated to state agencies to ensure that each agency has the resources necessary to accomplish this endeavor. To that end, it should be required that all states report data of hate crimes that occur and sentencing that follows. This may dissuade potential perpetrators from manifesting hate into action and sends a message to affected communities that their experiences are being taken seriously. Ways to report hate crimes should be more accessible for those who experience them. Training should be a requirement in schools and workplaces to spread awareness about hate crimes and help individuals who experience them be able to accurately report them. Additionally, it would be beneficial if there was a hotline in place to help victims and provide guidance for how they can

achieve justice. If these steps are implemented, relationships between victimized communities, law enforcement, and legislators could improve and individuals who experience hate crimes would feel more comfortable coming forward, sharing their experiences, and assisting in the efforts for change.

While hate crime legislation is important, it is not the one solution to halting hate crimes for good. It is important to look outside the legal system and dismantle or transform systems of oppression that keep marginalized communities marginalized. Additionally, because hate crimes are often rooted in intolerance and ignorance, it is essential for there to be educational efforts in schools and workplaces to help the public to understand each other's differences, rather than fear them. There should be events within communities to celebrate different cultures, customs, and traditions, as well as more local efforts to create community and unity. For future research, it would be interesting to assess recent manifestations of hate, such as the murder of George Floyd, through the lens of hate crimes and evaluate if and how current laws would apply.

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Gender, Crime, and the Disparities in the Criminal Justice System

Alyssa Fu[141]

Crime rates in the United States have dropped overall, pointing to the efficacy of rehabilitation. When the data is separated by gender, however, female recidivism rates have exponentially increased. This suggests a failure in the criminal justice system- in fact, women may be more vulnerable to a cycle of crime. To resolve this issue, we must first understand what gender differences our system currently neglects. Studies have shown that women involved in crime experience greater amounts of psychological distress and trauma—both risk factors for recidivism. Thus, gender-focused programs may be necessary to properly address unique female pathways and experiences in crime.

Introduction

Before the United States legal system can create curated programs for specific groups to reduce and prevent crime, we must have an idea of where the key differences between groups are in our current statistical trends. Generalizations about pathways into crime can be difficult to pinpoint when individual factors vary significantly based on crime type and personal background. One key feature that existing research has been able to evaluate within these findings is the role that gender plays within these factors. Law and criminology have previously studied several questions involving gender, but one remains: what are the effects of gender discrepancy in the United States justice system? This article will analyze crime statistics and criminology theories to understand and reform a systemic issue in United States criminal law. Based on these findings, we will provide potential recommendations for institutional change in order to better address the needs of specific genders to prevent a cycle of crime and allocate more attention to underserved groups.

The substantial rise in crime within the female population presents a juxtaposition in crime rates based on a gross disparity between the genders.[142] Despite an increase for one group, the overall rate of crime in the

141 Brandeis University Undergraduate, Class of 2021.

142 "Crime in the United States: Five-Year Arrest Trends by Sex 2013-2017." *Federal Bureau of Investigation, U.S. Department of Justice* (2017).

US has declined in the past few decades.[143] This indicates there are factors causing female offenders to be left behind in many existing diversion programs designed to reduce crime. Initial research shows it is true that male recidivism remains statistically higher than females.[144] However, gender differences often begin with psychological norms and conformity to societal expectations. As such, criminology-related research may also help to inform what causes this gender disparity and how we might better address a frequently overlooked group. Ultimately, focusing on gender-specific solutions will improve the methods of reducing crime in our communities.

History of Women's Involvement with Crime and Law

143 "U.S. Arrests Estimates, 1980-2014." *Bureau of Justice Statistics, U.S. Department of Justice* (2019).

144 "Crime in the United States: Ten-Year Arrest Trends by Sex 2009-2018." *Federal Bureau of Investigation, U.S. Department of Justice* (2018).

Women have historically been underrepresented in studies of crime and rehabilitation. This may be a result of a large majority of female charges being within the category of property crimes or drug-related misconduct, because most women tend to avoid confrontational forms of crime as opposed to men.[145] Very few women commit violent crime, and as of 2018, 75% of those who had only perpetrated minor forms of assault.[146] The rate of women committing homicides has always been low and has declined within the past decade. Statistically, the average amount of time served for any conviction is also shorter for females than for males who have committed the same offenses.[147] Based on the types and degrees of crime that women are more prone to, our institutions consider the consequences of male crime as more threatening, and so provide these perpetrators with better services. In general, men are found to be more often violent and more likely to have a juvenile history or multiple convictions.[148]

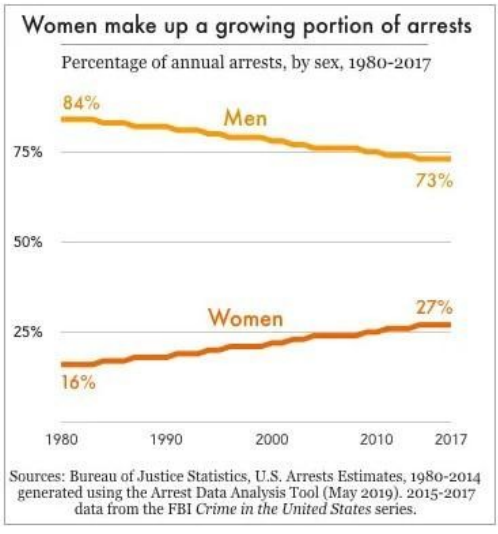

Figure 1: Female arrests have increased while males decreased

Women in the legal system do not receive adequate rehabilitation to suit their needs because they only make up a small portion of arrests. As of 2017, 27% of arrests were of women compared to 73% of men (Figure 1),[149] but the same graph shows a rise in female arrests. Some analysts argue that much of the initial surge in the incarceration of women is from amplified

145 Lawrence A. Greenfeld & Tracy L. Snell. "Women Offenders." *Bureau of Justice Statistics Special Report*, (2000): 9.
146 "Crime in the United States: Ten-Year Arrest Trends by Sex 2009-2018," (2018).
147 Greenfeld & Snell, "Women Offenders," (2000): 5.
148 Anonymous Prosecutor in discussion with the author, May 2021.
149 "Crime in the United States: Five-Year Arrest Trends by Sex 2013-2017," (2017).

prosecution toward female perpetrators of domestic violence in the 1990s.[150] However, this justification is far too outdated to explain why many categories of major crime have continued to occur at an increasing rate for females in the past two decades.[151]

The tendency to focus more attention on men over women due to perceived higher threat is also seen in criminal law enforcement. Overall, men are more likely to be contacted by the police while females are more likely to initiate contact to report crimes, disturbance, suspicious activity, or other reasons for seeking help even though they usually avoid doing so.[152] For both traffic and street stops, males are more likely than females to have their most recent contact with authorities be initiated by the officers, whereas women will more often look to police as a source of security and assistance.[153] Such findings may be compounded by the idea that women are often victims of crime. In 2000, a survey found that 60% of women who entered the realm of recidivism experienced physical or sexual abuse in the past, with just over 50% reporting that their aggressor was a family member or intimate partner.[154] This percentage has only grown since, which indicates a clear connection for female pathways to crime. In 35 states, the crime rates for women have been consistently higher than crime rates for men in the past five years.[155] Even though a low percentage of offenders are women, their involvement in crime reflects unique, gendered problems that are not sufficiently addressed in our justice system. A collective history of victimization is evidence of the need female offenders have for enhanced support and resources. Different life circumstances also illustrate that women's motives in committing crime diverge from men. While male pathways are often explained as part of their inherent gendered traits, such as an expectation for violence, women appear to be more externally motivated. Some scholars claim that women involved in crime may be

150 Greenfeld & Snell, "Women Offenders," (2000): 3.
151 Greenfeld & Snell, "Women Offenders," (2000): 11-12.
152 Elizabeth Davis, Anthony Whyde, & Lynn Langton. "Contacts Between Police and the Public, 2015." *Bureau of Justice Statistics Special Report*, (2018): 11.
153 Davis, Whyde, & Langton. "Contacts Between Police and the Public, 2015," (2018): 27.
154 Greenfeld & Snell, "Women Offenders," (2000).
155 Sawyer, Wendy. "The Gender Divide: Tracking Women's State Prison Growth." *Prison Policy Initiative* (2018).

propelled by the need to support children or other family members.[156] Numerous incarcerated women also suffer from chronic substance abuse, but the lack of treatment programs in certain states creates difficulty for those seeking recovery.[157] Gender-specific challenges can be overwhelming, so we must determine why they exist before we can propose resolutions.

Criminology Theories: Pathways to Crime for Men and Women

From a psychological and criminological perspective, there are circumstances of perceived gender biases targeting both men and women leading to the idea that males involved in the criminal justice system require more attention. In the process of implementing these male-centric programs, the criminal justice system has neglected the perspectives of women. A notable issue starts with psychological beliefs about gender wherein young men have grown up in a society that reinforces male assertiveness and dominance.[158] Traditional gender roles have historically shaped men to be controlling and aggressive, and the perspectives resulting from this are further exacerbated for communities of color. Such principles can create problematic behavior in young boys, posing a risk for societal perception of future criminal actions. One study examined boys between the ages of 8 and 14, discovering that criminal offenses were more likely if the subject accumulated behavioral problems earlier in childhood.[159] The risk for future violent crime was highest for those who exhibited conduct issues alongside aggressiveness, while failure in school combined with aggressiveness correlated with high risk for future property offenses.[160] These findings indicate that the pathways to crime are influenced by reinforcement of outdated gender norms.

A similar criminology study found that certain childhood factors are reliable predictors of male crime. Stressful situations such as parent separation, conflict, socio-economic instability, and poor child-rearing can contribute to recidivism later in life because of their tendency to enable children to participate in delinquent behavior.[161] The behaviors most strongly associated with higher levels of repeated offenses were reports of

156 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 119-120.
157 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 123.
158 Lee Ellis. "A Theory Explaining Biological Correlates of Criminality." *European Journal of Criminology* 2 no. 3 (2005): 288.
159 Ellis, "A Theory Explaining Biological Correlates of Criminality," (2005): 292.
160 Hamalainen, Minna & Pulkkinen Lea. "Problem Behavior as a Precursor of Male Criminality." *Development and Psychopathology* 8 no. 2 (1996): 447.

truancy and other behavioral conduct problems as well as low education level.[162] Self-reported internal distress notably served as a sign for risk of future criminal activity, but these youth were given a voice through early assessments so appropriate measures could be taken to intervene with various educational programs and social skills training before they encountered opportunities to enter crime.[163] These results contribute to our understanding of why many treatment programs are particularly concerned with male offenders since society may believe this behavior has the potential to become a positive feedback loop. The prevalence of young males committing offenses that are considered more extreme and thus more harmful to the public also contributes to prioritizing their treatment.[164]

It is equally imperative to note that traditional gender roles still influence how women are perceived. Those who conform to the expectations that females ought to be submissive and avoid confrontation are indeed more leniently treated than male offenders.[165] For example, one prosecutor interviewed by the author believes committing forgeries or retail theft are passive crimes and often result in a reduced charge for first offenses.[166] Women who do not conform to societal gender expectations, however, are treated even more harshly compared to men, often with more severe charges and longer sentences.[167] With the development of modern feminism, female offenders who do not conform to gender roles may be more common than in the past. Perhaps as a result, society perceives the actions of women as not so easily excused now as they once were.[168]

Two theories borrowed from criminology can help explain our society's evolving treatment of accused females. The Chivalry Hypothesis suggests that a male-dominated criminal justice system will more often excuse women due to the dated attitude that men are obligated to protect

161 Andre Sourander, Henrik Elonheimo, et al. "Childhood Predictors of Male Criminality: A Prospective Population-Based Follow-up Study From Age 8 to Late Adolescence." *Journal of the American Academy of Child and Adolescent Psychiatry* 45 no. 5 (2006): 581.
162 Sourander, et al. "Childhood Predictors of Male Criminality." (2006): 584.
163 Sourander, et al. "Childhood Predictors of Male Criminality." (2006): 588.
164 Anonymous Prosecutor in discussion with the author, May 2021.
165 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 129.
166 Anonymous Prosecutor in discussion with the author, May 2021.
167 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 128-129.
168 Anonymous Prosecutor in discussion with the author, May 2021.

women.[169] The majority of positions for judges, law enforcement officers, and attorneys continue to be dominated by males, so when faced with a female defendant that fits their schema of how women should behave, they may show more compassion toward them.[170] Alternatively, the theory of Paternalism emphasizes the "weaker sex" as incapable of committing serious crimes because male authorities view them as childlike, naïve, and therefore not fully responsible.[171] Both theories can be used to reward female offenders in traditionally submissive roles with lower charges while punishing those who violate gender expectations with more severe charges. Failing to meet a standard ideal induces additional perceived criminalization of the conduct that conflicts with the expectation.

The Female Experience in the Criminal Justice System

169 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 128.
170 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 130.
171 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 131-132.

Although men are perceived as more aggressive and there are overall higher numbers of male offenders,[172] the socialization of these beliefs alone cannot explain the gender disparity found in criminal arrests. The rising crime rates for women on average nationally suggest a missing link that the existing system has failed to address adequately.[173] One example found that 100% of women in a Framingham, Massachussetts facility reported experiencing at least one of these situations during their time in rehabilitation: sexual or physical abuse, rape, forced prostitution, or separation from children.[174] Over time, treatments have rarely focused on female interests which means that women are deprived of services to resolve traumatic experiences in their past simply because they obtained shorter terms of incarceration. Intentionally or not, criminal law has focused on and reflected male interests for too long. We have only recently begun to notice the enduring effects of this systemic flaw.

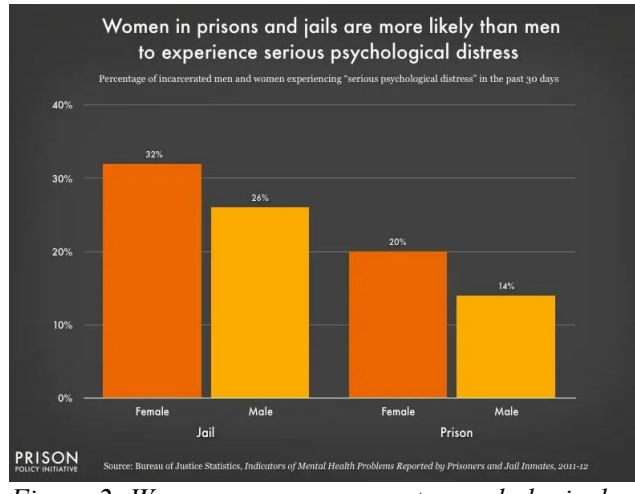

Figure 2: Women are more prone to psychological distress

Female offenders usually lack the typical factors used to predict criminal activity. Instead, criminal cases often describe women as ill and pathological, reinforcing the stereotype that psychological hysteria explains all abnormal female behavior.[175] The reliance of our justice system on these explanations reflects society's unwillingness to address female problems as anything other than illness. Although some criminal cases do have a basis in psychological disorders and mental health can play a role, we must also

172 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 124.

173 "Crime in the United States: Five-Year Arrest Trends by Sex 2013-2017," (2017).

174 Abrams & Greaney, "Report of the Gender Bias Study," (1989): 118.

175 Dorothy E. Roberts. "The Meaning of Gender Equality in Criminal Law." *Journal of Criminal Law and Criminology* 85 no. 1 (1994): 10.

consider the pathways that have led women into recidivism. The previously discussed traumatic situations many women trapped in crime face may explain why 66% of incarcerated women currently report a history of general mental unwellness.[176] A larger percentage of females than males in both prisons and jails meet the threshold for serious psychological distress regardless of their crime or sentence length (Figure 2).[177] As recently as 2017, two-thirds of women in US prisons reported also suffering from mental disorders, and many experienced distress such as feelings of worthlessness or anxiety within a month preceding the survey.[178] These statistics indicate most rehabilitation that women currently receive has been unsuccessful because they are often provided poorer quality support services compared to men in the same facilities.

The root cause of increased female crime rates lies in the incongruent pathways to crime between men and women. Women experience different risk factors in entering crime compared to men,[179] especially upon receiving one conviction, because they are more susceptible to harm from backgrounds of instability. Mental illness, past trauma, and substance abuse are all capable of kindling an onset to crime and are subsequently worsened by incarceration.[180] Victimization from abuse in particular is a good predictor of mental health complications which in turn predicts entrance into criminal activity.[181] Those with severe psychological distress usually experience higher rates of victimization, more extensive histories of prior offenses, and increased probability of violent crime.[182] As such, correctional programs should recognize the female experience of victimization in combination with mental health as an influence on entering crime.

176 Roberts. "The Meaning of Gender Equality in Criminal Law." (1994): 10; Jennifer Bronson & Marcus Berzofsky. "Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12." *Bureau of Justice Statistics Special Report*, (2017): 7.
177 Bronson & Berzofsky. "Indicators of Mental Health Problems." (2017): 10-11.
178 Bronson & Berzofsky. "Indicators of Mental Health Problems." (2017): 14.
179 Anonymous Prosecutor in a survey response to the author, May 2021.
180 Shannon M. Lynch, et al. "Women's Pathways to Jail: Examining Mental Health, Trauma, and Substance Use." *Bureau of Justice Assistance Policy Brief* (2013).
181 Lynch, et al. "Women's Pathways to Jail," (2013).
182 Lynch, et al. "Women's Pathways to Jail," (2013).

Suggested Upgrades in Rehabilitation Services for Women

Women face different difficulties within the criminal justice system because it neglects the uniqueness of the female gender. Thus, women's rehabilitation services need to implement gender-specific treatment to optimize care and prevent future recidivism.[183] For example, Women Overcoming Recidivism Through Hard Work (WORTH), a program in Connecticut, recognized this necessity and established a prison intended for women.[184] There, incarcerated women created a community that fostered accountability and healing rather than punishment.[185] The program included youth mentoring opportunities, which were restorative and gave them the positive outlook they needed to change their lifestyle.[186] Given that women have significantly different experiences with the traditional criminal justice system and its prisons, if rehabilitation strategies are not gender-specific, they may not function the same way for women as for men. To continue reducing crime, our correctional systems must emphasize the importance of supporting women to prevent reentry.

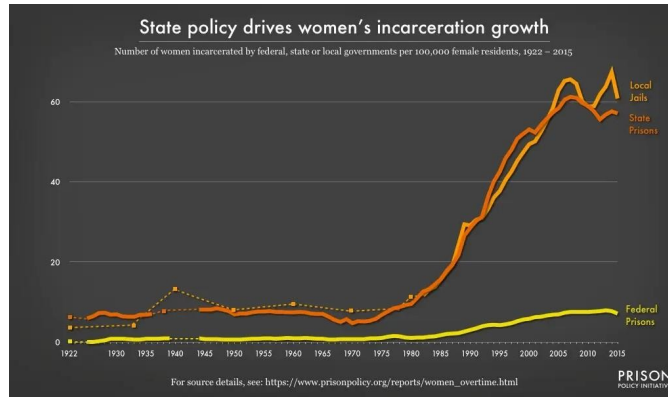

Figure 3: States drive the gender disparity in incarceration rates

Such modifications should be applied to individual state programs to address the complex needs for women in the criminal justice system, such as parent-child relationships, reunifying families, as well as unique mental and physical health concerns. Until recently, statistics for incarcerated women have been obscured by total rates. Society must work to reduce criminal offenses for both sexes, not exclusively males. The rate of women in federal

183 Anonymous Prosecutor in discussion with the author, May 2021.
184 Ryan Shanahan, et al. "How Young Women are Building Promise in a Connecticut Prison." *Vera Institute of Justice* (2018).
185 Shanahan, et al. "How Young Women are Building Promise in a Connecticut Prison." (2018).
186 Shanahan, et al. "How Young Women are Building Promise in a Connecticut Prison." (2018).

prisons has remained relatively constant, but the average rate of all 50 states' prisons illustrates a much steeper and more rapid rise (Figure 3).[187] Since national statistics show that specific states are driving this gender disparity, the changes will be most effective if enacted at both state and local levels. Some states' efforts to reduce the population of offenders may have ended up benefitting men significantly more.[188] Other states whom we ought to make an example of, such as New York and California, have inverted the course of female incarceration with rates lower than the calculated average by implementing programs that cater to women.[189]

Proposal for Change

Ultimately, the criminal justice system should focus on treating female pathways to crime including mental health, past trauma, and substance use in lieu of criminalizing women merely because they do not conform to the expected gender norms. In their efforts to reduce crime, states can advocate for initiatives that will assist and enhance opportunities for former inmates. While it is true that female convicts returning from prison need housing, employment, and financial support, they also would benefit greatly from a higher availability of guided strategies to overcome trauma and stress that they may have experienced before and during incarceration.

Gender-focused programs are the best option to address the reentry needs of women in crime because they strive for life-changing goals such as family reunification and treatment for mental and physical health. Women can benefit from resources which focus on reconnecting them to society, aiding in breaking these cycles of crime. Our traditional programs place the larger male prison population as a priority and deny adequate services to women,[190] but the continually rising female crime rate demonstrates that it is necessary to shift attention toward this underrepresented group. Through tackling the gender disparities of incarcerated women, our criminal justice system could develop the appropriate tools to also address unique needs of non-binary, non-conforming, and transgender identities.

187 Sawyer. "The Gender Divide." (2018).
188 Anonymous Prosecutor in discussion with the author, May 2021.
189 Sawyer. "The Gender Divide." (2018).
190 Wendy Sawyer. "Who's Helping the 1.9 Million Women Released from Prisons and Jails Each Year?" *Prison Policy Initiative Report* (2019).

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An Exploration of Justice in the Context of Ethical Guidelines

Emily Bar-Mashiah[191]

An appellate court in Missouri has decided to uphold a 2.1 billion dollar judgment against Johnson & Johnson (J&J) over the presence of asbestos in their baby powder, despite being unable to directly link the asbestos to the development of ovarian cancer in J&J consumers. By exploring the meaning of 'justice,' this paper will defend the court's decision that J&J owes its consumers punitive damages for the physical and emotional distress caused by exposure to asbestos. This paper will draw comparisons between the case in question and the Anderson v WR. Grace and Beatrice Foods case from A Civil Action, by Jonathan Harr, to reinforce the ways ethics should be considered in litigation involving public health risks.

In June 2020, the appellate court of Missouri upheld a 2.1 billion dollar judgment against Johnson & Johnson (J&J), a company that manufactures and sells healthcare-related products, in *Ingham v Johnson and Johnson*. A class action suit was filed by a group of women who claimed that the use of J&J's baby powder in the genital region contributed to the development of ovarian cancer due to the ingredient asbestos, which is a known carcinogen. However, a study from the *Journal of the American Medical Association* (JAMA) highlights that the chances of women developing ovarian cancer that is linked to Johnson & Johnson's Baby Powder are not compelling, as the risk-ratio between the women exposed to the baby powder and those not exposed to the baby powder was below 2 (in other words, the studies failed to show that, as a legal matter, it was more likely than not that levels of asbestos in J&J's led to plaintiffs' cancers).[192] Despite this research, the court upheld the multi-billion dollar verdict against J&J, reinforcing that the verdict against J&J is both fair and just. According to the legal dictionary, justice can be defined as one of three things including "fairness, moral rightness, and a scheme or system of law in which every person receives his/her/their due from the system, including all

191 Brandeis University Undergraduate, Class of 2023.
192 Gianna Melillo, "JAMA Study Finds No Significant Link Between Talc Powder, Ovarian Cancer", *American Journal of Managed Care,* (January 2020).

rights, both natural and legal."[193] Although these definitions seem different from one another, at their core they all indicate a goal of protection from various threats. Consumers' safety and security were threatened by J&J, and this breach of trust damages the informal agreement of trust between consumers and manufacturers. Through this understanding, the verdict of the case was, indeed, "just."

The concept of justice is crucial in justifying the appellate court's ruling. The appellate court was upholding the standard and goal of justice by reinforcing protection for consumers from being taken advantage of. It is important for the law not only to create order, but to set precedents that will ensure the safety of the people who are governed by it. While courts should use reliable scientific evidence and expert testimony to make an informed decision, which is demonstrated in the following cases, it's important that the evidence is considered within the context of justice so that decisions can support the greater good.

First of all, multiple labs were able to confirm the presence of asbestos. A representative from the Materials Analytical Sciences lab surveyed containers of baby powder to check for traces of asbestos and found that twenty of the thirty-six containers randomly sampled did contain asbestos. Although the defendants attempted to invalidate these claims based on the procedures the lab used during testing, the court found the evidence to be reliable. In addition to these findings, other experts testified that there was asbestos in J&J's baby powder after reading nearly 1,400 studies conducted by the FDA and several other sources[194].

The verdict of the J&J case can be compared to the similar *Anderson v WR. Grace and Beatrice Foods* in 1986. Similar to J&J's behavior, the defendant Grace and Beatrice Foods in the Woburn, MA case allowed civilians to use municipal water wells that were negligently contaminated with trichloroethylene (TCE). Children in Woburn developed leukemia, in unexplainably high numbers. While we do not know if the TCE caused these cancers, there is no doubt that Grace helped pollute the wells, and was very slow to acknowledge this. J&J has also been less forthcoming than Grace; they even went so far as to try to prevent the publication of medical literature on the topic. For instance, when Mount Sinai School of Medicine

193 "Justice", dictionary.law.com, https://dictionary.law.com/Default.aspx?selected=1086&bold=

194 *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020).

published findings of asbestos in J&J's baby powder, J&J requested that the literature be removed from materials that were being made public, and pressured them to take back the results of their studies. Extensive evidence proved there were multiple attempts on J&J's part to conceal the health risks of their products from consumers. Similarly, in the Woburn case the defendant Grace did not disclose the fact that they were dumping dangerous substances into wells of municipal water G and H outside of their factory and put consumers at an unknown risk. Cheeseman, Grace and Beatrice Foods' lawyer, had said that TCE was kept in the plant's paint shop so it could be used to clean machinery, but then eventually admitted that the company had dumped cleaning solvents into a drainage ditch behind the plant.[195] In both of these cases, the defendants posed physical threats to their consumers while concealing the safety hazards of their behavior to the public. Under the definition of justice, this was immoral and unethical. Upon exposure to these details, the consumers of J&J, like the families in Woburn, experienced emotional stress due to concerns regarding their wellbeing.

In addition to the fact that the presence of asbestos in the baby powder was confirmed, it should also be reiterated that asbestos is a known carcinogen. According to expert testimony, "...asbestos causes or significantly contributes to causing ovarian cancer... because it is microscopic in size, can travel throughout the bloodstream and the body, and can be found in every organ in the body, including the ovaries."[196] This notion is corroborated by the International Agency for Research on Cancer ("IARC"), the American Cancer Society, the U.S. Department of Health and Human Services, the Environmental Protection Agency, and the National Cancer Institute. Additionally, the EPA has "...classified asbestos as Group A, human carcinogen."[197] Similar to the J&J case, the TCE in the water wells of Woburn was found to be a harmful chemical. According to the Minnesota Department of Health, TCE can affect both immune and reproductive systems, liver, kidneys, the central nervous system, and fetal development during pregnancy.[198] In addition to the burden of their physical

195 Harr, Jonathan. *A Civil Action*. Firsted. New York: Random House, 1995.
196 *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020).
197 "Learn About Asbestos", Environmental Protection Agency, last modified February 3, 2021, https://www.epa.gov/asbestos/learn-about-asbestos#asbestos.
198 "Trichloroenthelyne and Your Health", Minnesota Department of Health, https://www.health.state.mn.us/communities/environment/hazardous/topics/tce.html#health

conditions, the women may also be concerned about other aspects, such as what the implications of their diagnoses will mean for their families, careers, and social life. It is unfair for J&J to threaten consumers and compromise their health and safety without paying them damages.

Although the *JAMA* research claims that there was not a great difference between women who were and were not exposed to J&J baby powder and their risks of developing cancer, one can not say that any amount of asbestos should be considered "safe." While the risk of cancer in women exposed to J&J baby powder only increased by 8% compared to those who were not, there is no way to prove that the exposure was not a contributor to the development of ovarian cancer, even if it was not the one main cause. Experts have stated that they believe that asbestos could facilitate the development of cancer that would have occurred from pre-existing conditions and perhaps even make cancer more aggressive against treatment. The EPA has stated that "[i]n general, the greater the exposure to asbestos, the greater the chance of developing harmful health effects."[4] One of the doctors at the trial testified that the more bottles of baby powder a woman was exposed to, the higher chance she had of being exposed to asbestos which implies that over time, the plaintiffs had a high likelihood of being exposed to asbestos, due to the frequency with which they used the powder. Similarly, the risk of developing an illness was correlated with the amounts of exposure to TCE in the Woburn case. Even though the TCE was not directly linked to the development of leukemia, it was a contributor that may have facilitated or triggered pre-existing health conditions in children. In both the J&J case and in the Woburn case, the company's actions may well have been catalysts for the development of the illnesses they are believed to have induced.

The expert testimony representing J&J would say that the verdict was unjust because general causation, which addresses whether or not a substance can cause an illness, could not be established and it is not "more likely than not" that the asbestos had caused cancer, as required by the legal standard. However, this employs an unfair understanding of what justice means in cases of this nature. Based on the insufficient causal relationship, the concept of justice would be limited to palpable evidence and hard, concrete claims of physical damage. This is not a sufficient definition of justice because it excludes emotional burdens, threats posed to plaintiffs by defendants, and overall allows people to take advantage of others, which

favors companies over individuals. This is extremely unjust because consumers are being taken advantage of and deceived about the safety of the products they are using. This could harm many people as individuals have their own respective preferences and pre-existing conditions. Justice should protect consumers from all threats, including both emotional and physical. It should not come as a shock to consumers that the products they are purchasing contain dangerous substances. Rather, the presence of toxins should be disclosed in advance so that each consumer can make the best decision for themself.

The similarities in behavior between J&J in *Ingham v Johnson and Johnson* and Grace and Beatrice Foods in *Anderson v WR. Grace and Beatrice Foods* are very clear. Both defendants violated public trust by not being transparent about posing threats to health and safety, causing an undue burden of emotional and physical threats and stress. Since the public had to suffer under the conditions that J&J put upon them unknowingly, the verdict of the Missouri appeals case was just. It is unjust and immoral to purposefully deceive consumers about health threats. This breaks consumer trust and the implied social contract a company has with the public. The distress caused by the knowledge that the baby powder contains asbestos, in addition to the development of ovarian cancer, justifies the need for J&J to pay damages.

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