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Protecting Expression from the Protectors:¹
Balancing Freedom of Expression with Public Sensitivities and Social Order in Western Nations

Introduction

On February 21, 2012, members of the all-female Russian feminist group Pussy Riot staged a brief but incendiary “punk prayer service” on the altar of the Cathedral of Christ the Savior in Moscow.² The performance consisted of five members of the group, dressed in brightly colored outfits with balaclavas covering their faces, bursting into the cathedral to give an a cappella performance of their song entitled “Virgin Mary, Put Putin Away.”³ The song included cries of “Holy Sh*t!” and “B*tch, better believe in God” as well as more obscenities and mocking statements directed at President Vladimir Putin and the Russian Orthodox Church.⁴ The performance did not last longer than a minute, as officials quickly escorted the women out of the cathedral.⁵ While the group escaped without arrest, several suspected members were later detained by the police, and on March 3rd two were arrested – Maria Alyokhin and Nadezhda Tolokonnikova.⁶ A third member, Yekaterina Samutsevich, was arrested on March 15th.⁷ This “punk prayer” was the last of a number of provocative public protests held by Pussy Riot

¹ “I need someone to protect me from all the measures they take in order to protect me.” Banksy, street artist (source unknown).

² Robert Mackey & Glenn Kates, *Russian Riot Grrrls Jailed for ‘Punk Prayer’*, N.Y. TIMES, Mar. 7, 2012, thelede.blogs.nytimes.com/2012/03/07/Russian-riot-grrrls-jailed-for-punk-prayer/.

³ Id.; *Police Detain two More Pussy Riot Activists*, RIA NOVOSTI, Mar. 4, 2012, <http://en.rian.ru/Russia/20120304/171715882.html>. See also a video of the event taken by a viewer’s cell phone at <http://www.youtube.com/watch?v=grEBLskpDWQ>.

⁴ For a full translation of this song and others, see “Lyrics of Songs of Pussy Riot” available at freepussyriot.org/content.lyrics-songs-pussy-riot.

⁵ YouTube video, *supra* note 3.

⁶ Jen Carlson, *A Timeline Of The Russian Punk Band Pussy Riot’s Arrest And Trial*, GOTHAMIST, Aug. 8, 2012, gothamist.com/2012/08/08/a_timeline_of_the_russian_punk_band.php.

⁷ Id.

preceding the Russian presidential election, in which Putin sought and won his third term as the Kremlin.⁸

Alyokin, Tolokonnikova, and Samutsevich were arrested for “gross violation of public order and religious hatred”⁹ and were subsequently charged with hooliganism motivated by religious hatred,¹⁰ a crime punishable by up to seven years in prison.¹¹ After a high-profile trial before Moscow District Court Judge Marina Syrova, the three women were convicted of hooliganism on August 17th, and sentenced to two years in a penal colony.¹² Judge Syrova stated that the women posed a danger to society through their “grave crimes,” including “the insult and humiliation of the Christian faith and inciting religious hatred.”¹³

The “punk prayer” was internationally publicized via a video posted by Pussy Riot on the media website YouTube.¹⁴ The video, a doctored version of the event with a recording of the group’s anti-Putin song dubbed over and clips of another church performance spliced in,¹⁵ made its way across the globe almost instantly. Reactions to the event, both national and personal, quickly followed.

Western government officials, organizations, celebrities, and citizens flooded the press with criticisms of Pussy Riot’s censorship and punishment, citing freedom of expression and fundamental human rights. Protests and rallies in support of Pussy Riot were held in dozens of

⁸ See Mackey, *supra* note 2, and *Police Detain two More Pussy Riot Activists*, *supra* note 3. Pussy Riot had previously held a musical protest against Putin in Red Square in January, calling for “Revolt in Russia” before being detained by the police. *Id.*

⁹ *Police Detain two More Pussy Riot Activists*, *supra* note 3.

¹⁰ Hooliganism is punishable criminal conduct defined broadly as “a gross disturbance of public order that expresses obvious contempt for society.” See Section III(A) *infra* for a more detailed discussion on Hooliganism.

¹¹ *Pussy Riot Declare Hunger Strike*, RIA NOVOSTI, May 3, 2012, en.rian.ru/society/20120305/171750445.html?id=.

¹² David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES, Aug. 17, 2012, www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html?pagewanted=all.

¹³ *Id.*

¹⁴ See <http://www.youtube.com/watch?v=GCasualAczKY&feature=youtu.be>.

¹⁵ See YouTube video, *supra* note 3, for a more accurate representation of the event.

cities globally, including New York, Paris, London, Vienna, and Helsinki.¹⁶ In the United States, the Obama administration was “disappointed” by the verdict,¹⁷ and voiced concerns about the negative impact on freedom of expression in Russia.¹⁸ The New York Times portrayed Pussy Riot as a feminist punk band inspired by the American “riot grrl” movement of the 90’s, and likened them to the famed Guerilla Girls of the American art world.¹⁹ One young supporter was both inspired and astonished by the situation: “It’s cruel—they’re in jail for two years, and they just spoke their minds [...] I feel like if people did this more ... women would be more respected.”²⁰ The U.S. News presented a romanticized portrayal of the jailed Pussy Riot members and their participation in both Pussy Riot and the even more extremist protest group Voina, lauding the women as brilliant and brave artists fighting against a repressive government machine.²¹

Across the Atlantic, Western European countries also vocalized their dissent. British Foreign Minister Alistair Burt questioned Russia’s commitment to protecting fundamental rights and freedom, citing repeated requests by the British for “the Russians to protect human rights, including the right to freedom of expression, and apply the rule of law in a non-discriminatory and proportionate way.”²² France expressed disapproval via an official statement on its Diplomacy website: “France supports worldwide principles of freedom of expression and opinion. In this context, the verdict so far seems particularly disproportionate, considering the

¹⁶ See Herszenhorn, *supra* note 12. See also *Up to 3 years: Pussy Riot copycats booted from German cathedral may face jail*, REUTERS, Aug. 20, 2012, rt.com/news/pussy-riot-support-germany-111/.

¹⁷ Greg Otto, *Pussy Riot Receives Worldwide Attention After Prison Sentence*, U.S. NEWS, Aug. 17, 2012, www.usnews.com/news/articles/2012/08/17/pussy-riot-receives-worldwide-attention-after-prison-sentence.

¹⁸ *Pussy Riot trial reaction: band members’ convictions criticised by EU, US*, thejournal.ie, Aug. 18, 2012, www.thejournal.ie/pussy-riot-trial-reaction-band-members-conviction-criticised-by-eu-us-562953-Aug2012.

¹⁹ See Mackey, *supra* note 2. See also Melena Ryzik, *Pussy Riot Was Carefully Calibrated for Protest*, N.Y. TIMES, Aug. 22, 2012, <http://www.nytimes.com/2012/08/26/arts/music/pussy-riot-was-carefully-calibrated-for-protest.html>.

²⁰ *Id.*

²¹ Nataliya Vasilyeva, *Women behind the mask of Russia’s Pussy Riot band*, U.S. NEWS, Aug. 16, 2012, <http://www.usnews.com/news/world/articles/2012/08/16/women-behind-the-mask-of-russias-pussy-riot-band>.

²² See *Pussy Riot trial reaction*, *supra* note 18.

minor facts alleged against them.”²³ In Germany, Chancellor Angela Merkel described the womens’ sentence as “excessively harsh” and “not compatible with the European values of the rule of law and democracy to which Russia, as a member of the Council of Europe, has committed itself.”²⁴

International organizations had even stronger reactions to the verdict. The European Union foreign policy chief Catherine Ashton called the verdict “politically motivated intimidation,”²⁵ and in response nominated Pussy Riot for the Sakharov Prize for Human Rights.²⁶ Amnesty International called the court’s decision “a bitter blow for freedom of expression in the country,” showing that “the Russian authorities will stop at no end to suppress dissent and stifle civil society.”²⁷ The organization stated that it considers the three women to be “prisoners of conscience, detained solely for the peaceful expression of their beliefs.”²⁸ Amnesty International subsequently co-sponsored a “Free Pussy Riot” public reading in New York City, where they and Yoko Ono presented the Russian group with the LennonOno Grant for Peace.²⁹ The Organization for Security and Cooperation in Europe (OSCE) viewed the verdict as part of a growing tendency towards curbing freedom of expression, as “authorities, social and religious groups and courts are taking a more restrictive stance on content considered to be offensive,

²³ France Diplomacy website (translated), Aug. 17, 2012, <http://www.diplomatie.gouv.fr/fr/pays-zones-geo/russie/la-france-et-la-russie/evenements-3040/article/russie-condamnation-des-membres-du>.

²⁴ Justyna Pawlak and Piya Sinha-Roy, *Russian punk band verdict draws criticism around globe*, REUTERS, Aug. 17, 2012, <http://www.reuters.com/article/2012/08/17/us-russia-pussyriot-sentence-reaction-idUSBRE87G0NN20120817>.

²⁵ *Pro-Pussy Riot demonstrators arrested in Marsseille*, RFI, Aug. 18, 2012, <http://www.english.rfi.fr/europe/20120818-pro-pussy-riot-demonstrators-arrested-marseille>.

²⁶ Robert Bridge, *Pussy Riot shines in EU despite orgies, blasphemy and hooliganism*, REUTERS, Sept. 25, 2012, <http://rt.com/politics/pussy-riot-russia-eu-sakharov-955/>. The prize “comes with a 50,000 euro purse ... awarded to individuals and organizations that made a special contribution to the protection of human rights [...] Past recipients of the Sakharov Prize have included Kofi Annan, Nelson Mandela, and Reporters without Borders.” *Id.*

²⁷ Otto, *supra* note 17; Herszenhorn, *supra* note 12.

²⁸ Pawlak *supra* note 24.

²⁹ David Remnick, *Married to Pussy Riot*, THE NEW YORKER, Sept. 21, 2012, <http://www.newyorker.com/online/blogs/newsdesk/2012/09/pussy-riot-receives-lennonono-grant-for-peace.html>.

morally questionable or dangerous for children [...] Most of the time it is a pretext for censoring content that is simply not mainstream and critical”³⁰

Many Western celebrities in addition to Yoko Ono vocalized their strong disagreement with the verdict both in person and via the social media site Twitter. Madonna urged the release of the women during her recent Moscow concert, performing with “Pussy Riot” stenciled on her back.³¹ Musician Bryan Adams tweeted “Outrageous ... Russian singers jailed just for speaking their mind?”³² Other celebrity supporters included the musicians Paul McCartney, Bjork, Peter Gabriel, and Sting.³³

In Russia, however, support for the women was not easily found. In a highly religious nation with strong ties to the patriarchal Russian Orthodox Church, activist women are often met with discomfort. The idea that someone has the right to do or say something that is personally offensive to others is an exotic notion in post-Communist Russia.³⁴ Pussy Riot’s choice of venue for its performance packed a particularly potent punch; the Cathedral of Christ the Savior, Moscow’s largest cathedral, is where Patriarch Kirill I celebrates Christmas and Easter services, usually accompanied by Putin, and the cathedral is considered a symbol of the ties between church and state in the post-Soviet era.³⁵ Many Orthodox Russians called for a stricter punishment, and some recommended public floggings.³⁶ For older high churchmen, Pussy Riot’s performance awakened uneasy memories of the desecration of churches under

³⁰ Pawlak, *supra* note 24.

³¹ Herszenhorn, *supra* note 12.

³² Pawlak, *supra* note 24.

³³ Herszenhorn, *supra* note 12; Tessa Stuart, *Who Is Pussy Riot, and Why Do So Many Western Musicians Care?* LA WEEKLY, Aug. 27, 2012, http://blogs.laweekly.com/westcoastsound/2012/08/pussy_riot_is_not_a_band.php.

³⁴ Michael Idov, *Putin v. the Punk Rockers*, N.Y. TIMES, Aug. 7, 2012, <http://www.nytimes.com/2012/08/07/opinion/on-trial-putin-v-pussy-riot.html?pagewanted=all>.

³⁵ Sophia Kishkovsky, *Punk Riffs Take on God and Putin*, N.Y. TIMES, Mar. 20, 2012, www.nytimes.com/2012/03/21/world/europe/21iht-letter21.html.

³⁶ *Id.*

Communism,³⁷ and church representatives immediately demanded the criminalization of blasphemy.³⁸ Reverend Vsevolod Chaplin, a senior Orthodox cleric, stated that the women “have declared war on Orthodox people, and there will be a war [...] If the blasphemers are not punished, God will punish them in eternity and here through people.”³⁹

Even Russia’s own musicians were skeptical of Pussy Riot’s actions. While many liberal Russian rockers remained silent on the subject, some more mainstream conservative stars spoke out: “What’s so great about Pussy Riot that all these international stars should support them?” asked pop singer Valeria.⁴⁰

When given serious thought, that same question gives this Western author pause—indeed, how did Pussy Riot become such a grand cause célèbre in the West when our own controversial artists are consistently subject to censorship for the sake of politics and public sensitivities? While Western nations and organizations are quick to cry out in support of freedom of expression when matters of international diplomacy are at play, they are often tentative to do the same when their own artistic citizens threaten the domestic norm of their nation’s public sensitivities and moral expectations. In the wake of Pussy Riot’s performance and incarceration, some are finding the West’s reactions to be hypocritical and politically and culturally designed to portray Putin and the Russian Orthodox Church as sinister powers attempting to theocratise Russian society; “a patriarchal order swinging his baton down on the pussies that dared riot.”⁴¹

³⁷ *Id.*

³⁸ *Pussy Riot Declare Hunger Strike*, *supra* note 11.

³⁹ Kishkovsky, *supra* note 35.

⁴⁰ Idov, *supra* note 34.

⁴¹ Anatoly Karlin, *A PR disaster: Five views on Pussy Riot’s war*, Al Jazeera, Aug. 23, 2012, <http://www.aljazeera.com/indepth/opinion/2012/08/2012823795897200.html>, suggesting that “Russia’s prosecution of the feminist, anti-Putin punk group is much more complex than portrayed by Western media.”

Pussy Riot's "punk prayer" offers us an opportunity to reflect upon our Western notions of freedom of expression, and whether or not these freedoms are sufficiently protected against efforts to skew their breadth to support a specific political or social agenda. Part One of this paper will analyze the various constitutional promises of freedom of expression and their limits in a selection of countries, including Russia, the United States, the United Kingdom, Germany and the Scandinavian countries of Sweden, Denmark and Norway. Each nation—or grouping of nations, in the case of Scandinavia—employs a different method of governing this human right, depending on their specific constitutional model and the particular historical and cultural significance of freedom of expression in that nation. Part Two will compare and evaluate these different approaches to freedom of expression, using their resulting effects on the arts to evaluate whether the model is beneficial or detrimental to society. Part Three suggests a model of freedom of expression which would foster both the progress of the arts and the communication between cultures, while maintaining a safe level of protection for citizens from imminent harm and lawlessness.

I. Legal Analysis of the “Freedoms” of Expression and the Limitations

The most widely accepted formulation of the right to freedom of expression is Article 19 of the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948 in the aftermath of World War II.⁴² Article 19 states that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁴³ The rights enumerated in the UDHR also appear in treaty form within the International Covenant on Civil and Political Rights, ratified by the General Assembly in

⁴² Universal Declaration of Human Rights, Art. 19, *available at* <http://www.un.org/en/documents/udhr/index.shtml#a19>.

⁴³ *Id.*

1966.⁴⁴ All three regional human rights treaties protect freedom of expression in similar terms, found in Article 10 of the European Convention on Human Rights (ECHR) (of which all European countries discussed here are signatories), Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on Human and Peoples' Rights.⁴⁵

While these treaties proudly boast freedom of expression for all of humanity, they also recognize that freedom of expression is not absolute and can be limited by law “(a) For respect of the rights or reputations of others” and “(b) For the protection of national security or of public order (ordre public), or of public health or morals.”⁴⁶ This vague formation allows states broad discretion as to how they might wish to restrict freedom of expression, depending on the unique culture and history of each state. Responsibility is placed both in the hands of the state’s legislators in creating laws fitting for their state, and in the state’s judiciary in maintaining a proper balance between the freedom of expression and the limits on that freedom.⁴⁷

The process of weighing such a balance differs only slightly amongst most democracies. In general, democratic states which use a positive-rights constitution (a model which guarantees specific rights on the face of the constitution) and proportionality review on alleged constitutional violations endorse a three part test; a restriction on a constitutional right is legitimate if: (1) the restriction is provided for by a law that is accessible and precise enough for a citizen to understand and regulate his conduct; (2) the restriction pursues a legitimate aim, such as public order, morals, or other aims enumerated in the various international treaties and the state’s constitution; and (3) the restriction is necessary to secure one of those aims, meaning that

⁴⁴ International Covenant on Civil and Political Rights, *available at* www2.ohchr.org/English.law/ccpr.htm.

⁴⁵ Dr. Agnes Callamard, *Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, ARTICLE 19, at 4, *available at* <http://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf>.

⁴⁶ See note 44 *supra*. A similar formation can be found in the ACHR and ECHR. Callamard, *supra* note 45, at 4.

⁴⁷ Paul Sturges, *Limits to Freedom of Expression? Considerations Arising From the Danish Cartoons Affair*, 32 IFLA Journal 181, 184 (2006).

the restriction is relevant to the aim, sufficient to achieve the aim, and proportional to the aim.⁴⁸

The United States' negative-rights constitution (a model which assumes general rights already exists, and guarantees protection of these rights from government intrusion) and tiered review of alleged constitutional violations encapsulates the same spirit of fair balancing. If a law is claimed to intrude upon a constitutional right, the law must pass one of three levels of review; here specifically, if (1) the right is protected by the First Amendment, the law in question must be (2) narrowly tailored to achieve (3) a compelling government interest—the highest level of review.⁴⁹

A. Russia

Article 29 of the Constitution of the Russian Federation states that “Everyone shall be guaranteed freedom of thought and speech.”⁵⁰ This avowal, however, is limited by the second part of Article 29, which dictates that “Propaganda or agitation, which arouses social, racial, national or religious hatred and hostility shall be prohibited,”⁵¹ and by numerous federal laws made in accordance with those limitations.⁵²

The law prominent in the Pussy Riot case, which prohibits hooliganism, is a prime example of such a limitation on Article 29(1). Under Article 213 of Russia's Criminal Code, hooliganism is defined as “‘a gross disturbance of public order’ that expresses ‘patent contempt for society’ on ‘motives of political, ideological, racial, national, or [religious hatred or enmity]’,

⁴⁸ Callamard, *supra* note 45, at 5.

⁴⁹ Strict Scrutiny, LEGAL INFORMATION INSTITUTE, Cornell U. Law School, http://www.law.cornell.edu/wex/strict_scrutiny.

⁵⁰ KONSTITUTSIYA ROSSIYSKOY FEDERATSII [KONST. RF] [CONSTITUTION] art. 29(1) (Russ.).

⁵¹ KONSTITUTSIYA ROSSIYSKOY FEDERATSII [KONST. RF] [CONSTITUTION] art. 29(2) (Russ.).

⁵² “Human and civil rights and freedoms may be limited by federal law only to the extent necessary for the protection of the basis of the constitutional order, morality, health, rights and lawful interests of other people, and for ensuring the defense of the country and the security of the State.” KONSTITUTSIYA ROSSIYSKOY FEDERATSII [KONST. RF] [CONSTITUTION] art. 55(3) (Russ.).

and that is ‘committed by a group of people by prior agreement or by an organised group.’”⁵³ Hooliganism that does not involve weapons, as was the case with Pussy Riot, is punishable as “petty hooliganism” for the use of “uncensored expressions” in public.⁵⁴

Similar to hooliganism is the crime of hatred on grounds of religion, found in Article 282 of the Criminal Code.⁵⁵ This provision criminalizes public “[a]ctions aimed at inciting national, racial or religious hostility, humiliation of national dignity and propaganda of superiority or inferiority of citizens on the basis of their religious, national or racial affiliation.”⁵⁶

The seemingly conservative enforcement of these limitations, as seen with the Pussy Riot case, arguably reflects the country’s strong ties to its totalitarian Soviet and imperial history and the traditions of the Russian Orthodox Church.⁵⁷ While Russia’s legal system has come far from the Communist age of the Soviet Union in its adaptation of a democratic Constitution in 1993,⁵⁸ the concept of protecting one person’s publically insulting expression over the sensitivities of the public is still an unpopular concept amongst Russian citizens.⁵⁹

B. United Kingdom

The United Kingdom presents the curious example of an established democracy with no written constitution. Rather than being guided by an official document, the British Parliament and its laws are sovereign;⁶⁰ it may enact any law that it desires, and instead of being checked by a strong judicial review, the laws are checked by cultural norms, international treaties, and

⁵³ Karlin, *supra* note 41, *quoting* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 213 (Russ.).

⁵⁴ WILLIAM BURNHAM, PETER B. MAGGS, & GENNADY M. DANILENKO, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 564 (3rd ed. 2004) *quoting* UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 158 (Russ.).

⁵⁵ UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 282 (Russ.).

⁵⁶ *Id.*

⁵⁷ BURNHAM, MAGGS & DANILENKO, *supra* note 54, at 6-7.

⁵⁸ *Id.* at 169.

⁵⁹ In an April Levada poll, 42-47% of Russians said that several years of imprisonment would be a just punishment for Pussy Riot. Karlin, *supra* note 41.

⁶⁰ RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* 189 (2006).

common law from a history of judicial decisions.⁶¹ This arguably reflects the United Kingdom's historical attempt to foster a distinct concept of Britishness—as compared to Europeanism—after World War II and the loss of the British Empire.⁶²

In fact, a formal textual guarantee of freedom of expression did not exist under domestic British law until 2000, when Parliament's Human Rights Act of 1998 took effect.⁶³ This act codified domestic procedure for enforcing Article 10 of the European Convention on Human Rights, explicitly providing everyone the limited right to freedom of expression set forth by the ECHR.⁶⁴ However, in accordance with Article 10 (and thus, the British Human Rights Act) limitations to this freedom, Parliament has enacted a number of statutes to maintain its desired level of protection; these acts include the Obscene Publications Act of 1959 (regulating obscene literature and pornography), the Public Order Act of 1986 (regulating disorderly or harassing words and behavior), and the Racial and Religious Hatred Act of 2006 (regulating racial and religious hate speech).⁶⁵

In spite of the deeply rooted history of the British court system, the presence of the judiciary does little to change the existing landscape of British freedom of expression. The invocation and abuse of the right is still, for the most part, monitored by weak courts following

⁶¹ ID. at 186-87.

⁶² Ivan Hare, *Method and Objectivity in Free Speech Adjudication: Lessons from America*, 54 Int'l and Comp. L. Quarterly 49 (2005).

⁶³ KROTOSZYNSKI, *supra* note 60, at 183.

⁶⁴ Article 10 of the ECHR provides: "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...] (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputations or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." European Convention of Human Rights, Art. 10, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf.

⁶⁵ See Obscene Publications Act, (1959), *available at* <http://www.legislation.gov.uk/ukpga/Eliz2/7-8/66/introduction>; Public Order Act, (1986), *available at* <http://www.legislation.gov.uk/ukpga/1986/64/introduction>; Racial and Religious Hatred Act, (2006), *available at* <http://www.legislation.gov.uk/ukpga/2006/1/introduction>.

British cultural and community norms in making their decisions with minimal power to overrule an Act of Parliament.⁶⁶ The courts may only go as far as to reinforce the balancing of rights, and determine whether a restriction is in line with Parliament's acts. For example, in determining the legality of a speech restriction in *Regina v. Secretary of State of the Home Dep't, Ex parte Brind*, the House of Lords considered community tradition in asking whether the restriction furthered an important public interest, and whether a reasonable administrator could make that judgment.⁶⁷ This is not a definite test that will be applied in all future British free speech cases, but is, assuming no drastic changes in community norms or parliamentary acts, telling of future results in similar cases.⁶⁸

C. Germany

Germany's "militant democracy" method of regulating freedom of expression reflects the nation's reaction to a history under the shadows of Hitler's Nazi-Socialism and the Holocaust.⁶⁹ The term "militant democracy" refers to constitutional democracies which seek to protect civil and political freedom by preemptively restricting its exercise.⁷⁰ Under this model, German government hopes to keep a very dark time in its history from repeating itself.

The Basic Law for the Federal Republic of Germany is centered on upholding human dignity,⁷¹ a concept strongly embraced by many Western European nations at the end of World War II.⁷² The Basic Law promises freedom of expression and no censorship in Article 5(1), and promptly limits this freedom in 5(2) "in the provisions of general laws, in provisions for the

⁶⁶ KROTOSZYNSKI, *supra* note 60, at 187.

⁶⁷ ID., at 195, citing *Regina v. of State of the Home Dep't, Ex parte Brind*, [1991] 1 App. Cas. 696, 748-49, 750-51.

⁶⁸ KROTOSZYNSKI, *supra* note 60, at 212.

⁶⁹ ID., at 94.

⁷⁰ Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, page 1, Strasbourg Consortium, <http://www.strasbourgconsortium.org/document.php?DocumentID=3870>.

⁷¹ This is shown in Article 1 of the Basic Law: (1) Human dignity shall be inviolable." GRUNDEGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

⁷² Guy E. Carni, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. Int'l L.J. 277, 283-84 (Fall 2008).

protection of young persons, and in the right to personal honour.”⁷³ The right to freedom of expression must also be balanced against the right to human dignity outlined in Article 1,⁷⁴ a right far more valued than freedom of expression in the “objective order of values” established by the Basic Law and enforced by Germany’s Federal Constitutional Court.⁷⁵ This model played a powerful role in the well-known 1994 *Auschwitz Lie* case, where the Court held that Holocaust denials will not be protected by Article 5 due to their factual inaccuracy and personal harm caused to the reputation and dignity of Holocaust survivors and their families: “[w]here an expression of opinion must be viewed as a formal criminal insult or vilification, protection of personality routinely comes before freedom of expression.”⁷⁶

Additionally, following the “militant democracy” model, the Basic Law explicitly denies constitutional protection for political expression against democratic self-government in Articles 9, 18, and 21.⁷⁷ Enforcement of these provisions is seen in statutory bans against socialist and communist organizations, and use of Nazi iconography by those who appear to sympathize with Third Reich ideals.⁷⁸

Germany’s preference for human dignity over freedom of expression is further emphasized in a series of landmark opinions from its Federal Constitutional Court. In the *Mephisto*, *Soraya*, *Lebach*, and *Strauss* cases, the Court consistently upheld Article 1 interests over any claims stemming from Article 5, regardless of whether the individual harmed was dead

⁷³ GRUNDEGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

⁷⁴ See note 71, *supra*.

⁷⁵ KROTOSZYNSKI, *supra* note 60, at 95.

⁷⁶ *Id.* at 95, quoting *Auschwitz Lie*, 2 *Federal Constitutional Court, Decisions of the Bundesverfassungsgericht—Federal Constitutional Court—Federal Republic of Germany (Part II)* 626 (1998).

⁷⁷ Specifically: Article 9 denies protection to associations “whose purposes or activities ... are directed against the constitutional order”; Article 18 denies protection to speech used “to combat the free democratic basic order”; Article 21 prohibits political parties “that, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany.”

KROTOSZYNSKI, *supra* note 60, at 94, quoting GRUNDEGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 9, 18, 21 (Ger.).

⁷⁸ See KROTOSZYNSKI, *supra* note 60, at 124-28.

or alive, a private or public figure, and whether the expressive vehicle of harm was truthful or false.⁷⁹ The Justices explained that “[t]he personality and dignity of an individual, to be freely enjoyed and developed within a societal and communal framework, stand at the very center of the value order reflected in the fundamental rights protected by the Constitution.”⁸⁰ This right includes the ability to “shield hurtful truths from public scrutiny in order to safeguard reputation or other personality interest,” and thus eclipses any Article 5 expression guarantees.⁸¹

D. Scandinavia

The Scandinavian nations of Denmark, Norway and Sweden have a reputation for staunch support of freedom of expression, despite the public sensitivities that may be offended along the way. Scandinavians are also strong supporters of the American “marketplace of ideas” concept, and believe in discourse among competing ideas regardless of an idea’s popularity or rightfulness.⁸² All three nations promote a unique standard of openness and transparency within their societies, setting Scandinavia apart from other Western European democracies. This northern territory prides itself as a longtime frontrunner in the area of free expression; Sweden was the first country in the world to permit freedom of the press in 1766, and Denmark (along with Norway then under Danish rule) was the first to abolish censorship in 1770.⁸³ As such, all three countries constitutionally permit a very broad range of expressions with very limited censorship.⁸⁴

⁷⁹ See Mephisto, 30 BVerfGE 173 (1971), Soraya, 34 BVerfGE 269 (1973), Lebach, 35 BVerfGE 202 (1973), and Strauss, 75 BVerfGE 369 (1987), cited by KROTOSZYNSKI, *supra* note 60, at 104-114.

⁸⁰ ID. at 108, *quoting* Soraya, 34 BVerfGE 269 (1973).

⁸¹ KROTOSZYNSKI, *supra* note 60, at 108, *quoting* Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 Utah L. Rev. 963, 1009 (1997).

⁸² Jens Barland, *Press Freedom and Globalisation: Scandinavia and East Africa Compared* at 62, available at http://www.freemedia.at/fileadmin/import/media/CMS1141647315174_r_jb_thesis1.pdf.

⁸³ See <http://www.sweden.se/eng/society/government-politics/facts/openness/>, and www.beaonforfreedom.org/liste/html?tid=415art_id=552.

⁸⁴ Denmark’s Constitution states that “Any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law. Censorship and other preventive measures shall

One debated restriction to Scandinavian freedom of expression is hate speech. Each Scandinavian country has a law criminalizing public hate speech against one's race, sexuality, ethnicity, faith, or sexual orientation in an effort to maintain solidarity with the ECHR.⁸⁵ How narrowly the Scandinavian judiciary will interpret this restriction, however, is still developing. One example of this is Sweden's treatment of hate speech directed towards homosexuals. In 2005 the Swedish Supreme Court held permissible a preacher's anti-homosexual church sermon, but it punished those who distributed anti-homosexual flyers within a secondary school in 2006 (later upheld by the ECHR).⁸⁶ While the holdings seemed to inherently differentiate between the circumstances of each case, neither pointed to specific factors a court should consider when making such a decision. Additionally, Scandinavia's lenient censorship policy may shift in response to Norway's horrific 2011 massacre of young Labor Party activists by an anti-Islam extremist.⁸⁷ Support now grows in Norway for stricter censorship on hate speech, particularly anti-Islam advocacy, using the 2011 massacre as an example of what can happen when critical words are allowed to evolve into dangerous actions.⁸⁸

never again be introduced." GRUNDLOVEN [GRL] [CONSTITUTION] § 77 (Den.). Sweden's Fundamental Law of Freedom of Expression states that "Every Swedish citizen shall be guaranteed the right under this Fundamental Law, vis-à-vis the public institutions, publicly to express his ideas, opinions and sentiments on sound radio, television and certain like transmissions, films, videograms, sound recordings and other technical recordings, and in general communicate information on any subject whatsoever." YTTRANDEFIHETSGRUNDLAGEN [YGL] [CONSTITUTION] 1:1 (Swed.). Norway's Constitution states that "Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression. Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures." GRUNDLOVEN [GRL] [CONSTITUTION] § 100 (Nor.).

⁸⁵ See STRAFFELOVEN [STRFL] [Criminal Code] § 135(a) (Nor.); BROTTSBALKEN [BrB] [Criminal Code] 16:8 (Swed.); STRAFFELOVEN [STRFL] [Criminal Code] § 266 B (Den.).

⁸⁶ Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 B1050-05 (Swed.), available at http://www.hogstodomstolen.se/Domstolar/hogstodomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf; Case of Vejdeland and Others v. Sweden, Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>.

⁸⁷ Bruce Bawer, *After the Oslo Massacre, an Assault on Free Speech*, THE WALL STREET JOURNAL, Feb. 7, 2012, at <http://online.wsj.com/article/SB10001424052970204369404577206972422374842.html>.

⁸⁸ *Id.*

E. United States of America

The United States' unique constitutional system of "negative rights" affords its citizens arguably the most leeway in expressing themselves without fear of censorship. This system is a result of America's historical retaliation against the over-bearing hold of the British Empire. While the phrase "freedom of expression" does not explicitly appear in the First Amendment of the U.S. Constitution,⁸⁹ it is still commonly used to summarize all forms of constitutionally protected activity, including "speech, press, assembly, and the satellite communicative activities that have been wisely included within the amendment's reach – association, art, and music."⁹⁰ With the American "negative rights" system, it is assumed that the right to freedom of expression exists for all citizens, and any challenged government intrusion must pass strict scrutiny review by the judiciary.⁹¹

Over the years, strong precedent has developed in American case law, helping to clarify what types of expression will and will not be protected by the First Amendment based upon both the face and the content of the expression. In the realm of unprotected speech, the focus is on harm. Speech made to intentionally incite imminent lawless action—"fighting words"⁹²— was officially classified as unprotected by the Supreme Court in *Brandenburg v. Ohio*.⁹³ Similarly, speech which seems to threaten national security will only be prohibited if the silencer can prove the speech would surely result in direct, immediate, and irreparable harm to the nation.⁹⁴

Also historically unprotected is obscenity, a category of expression with more fluid parameters than the other others, shifting with the social norms of the public throughout

⁸⁹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." US CONST., Amend. I.

⁹⁰ MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 1 (1984).

⁹¹ See the beginning of section I *supra* for a description of the strict scrutiny process.

⁹² *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).

⁹³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁹⁴ *New York Times Co. v. U.S.* 403 U.S. 713 (1971)

American history. Present-day obscenity law is largely shaped by the Supreme Court's holding in *Miller v. California*, which provides a three-part test to determine if an expression is legally obscene: that which, taken as a whole, (1) appeals to the prurient interest, (2) is patently offensive, and (3) lacks any serious literary, political, artistic, or scientific value.⁹⁵ Censorship of this category of expression remains hotly contested by artists and those supporting the arts, who claim that the *Miller* standard is too subjective, inviting abuse by conservative groups and judges who wish to censor works personally obscene to them.⁹⁶

II. Theories in Practice: The Enforcement of the Free Expression Right and Its Limits

The most effective way of determining the effects of a country's free expression model is to observe its enforcement in practice. In the past decade, each democracy discussed here has witnessed a diverse collection of opinions expressed in varied—and at times shocking—ways. While some governmental reactions drew criticism both nationally and internationally, almost all the final decisions regarding the protection of the expression were properly within the country's laws.

A. Orthodox Russian Expression

While Pussy Riot's performance and the crime of hooliganism enjoyed overnight fame and international commentary, the same level of international support is not found for many of Russia's controversial artists, such as Oleg Yanushevski and his "cosmopolitan icons" in the early 2000's.⁹⁷ These works, which used the traditional art form of the religious icon to frame images of consumer goods, film stars, and politicians, were branded as blasphemous by

⁹⁵ *Miller v. California*, 413 U.S. 15, 24 (1973).

⁹⁶ *Freedom of Expression*, ACLU, Oct. 31, 2005, <http://www.aclu.org/free-speech/freedom-expression>.

⁹⁷ See pgs. 7-9 in *Art, Religion and Hatred: Religious Intolerance in Russia and its Effects on Art*, ARTICLE 19, 2005, <http://www.article19.org>.

Orthodox religious groups within Russia.⁹⁸ Soon after the “icons” were displayed at a Saint Petersburg gallery in 2001, they were vandalized by a group of masked men and a campaign of harassment and bashing by the media began against Yanushevski and his family. The exhibition of his works was cancelled, supposedly under pressure from Russia’s Ministry of Culture, and the Yanushevski family, fearful of more harassment and possible persecution, found asylum in the United Kingdom.⁹⁹

Similar attacks occurred at Moscow’s Sakharov Museum, a human rights museum which organized the controversial *Caution, Religion!* exhibition in 2005, displaying bold works connecting religion with politics, commercialism, and popular culture.¹⁰⁰ After an attack of vandalism, the show’s organizers were charged with violating Article 282, and two of them were eventually convicted of incitement to religious and ethnic hatred, further aggravated because the show was “carried out in public and with the use of their official positions.”¹⁰¹

The internal national reaction did little to help the case of the artists. The widespread climate of intolerance in Russia, particularly towards unorthodox or radical views, is significant. This relatively new democracy has a long history of oppression, from Mongol rule to the tyrannical Tsar Ivan IV to the communist Soviet Union. Throughout this tumultuous history, the Orthodox Church has remained the one constant cultural icon for many of the Russian people. As a result, a majority looks to the Church not just for spiritual guidance, but also for social and

⁹⁸ In fact, the works were created “to represent the absence of spiritual, non-material or meaningful values in contemporary society,” not to mock religion. *Id.* at 7-8.

⁹⁹ *Id.* at 9, 14.

¹⁰⁰ *Id.* at 9.

¹⁰¹ *Id.* at 9-10.

political approval;¹⁰² both the Russian government and the state-run media are known for espousing orthodox views above all others.¹⁰³

B. British Public Morals and Decency

British culture has undoubtedly come far since its days of condemning *Lady Chatterly's Lover* and censoring sexual discussion in art and entertainment.¹⁰⁴ However, upholding British morals and decency in public is still a prominent goal of the nation, and can be seen in the attempted censorship—and at times criminalization—of contemporary controversial art (also referred to as “shock art”).

Sculptor Richard Gibson tested the waters in 1990 when he, and the gallery exhibiting his work, were successfully prosecuted and fined for outraging public decency with *Human Earrings*.¹⁰⁵ The work consisted of a model head decorated with earrings made from a freeze-dried human fetus.¹⁰⁶ Gibson and the gallery were not able to rely on the defense of artistic merit, and it was not necessary for the prosecutor to show that they had intended to outrage public decency.¹⁰⁷

Few British artists have been prosecuted for their art since then, yet controversial works are constantly on the receiving end of public outrage or criminal damage. Photographer Tiernay Gearon and the Saatchi Gallery were also fined in 2001 for displaying Gearon's photographs of naked children.¹⁰⁸ The works were seized from the gallery under the 1978 Protection of Children

¹⁰² For a brief history of the Russian Orthodox Church, see The Russian Orthodox Church, *available at* <http://countrystudies.us/russia/38.htm>.

¹⁰³ *Art, Religion and Hatred*, *supra* note 97, at 11.

¹⁰⁴ See Geoffrey Robertson, *The trial of Lady Chatterly's Lover*, THE GUARDIAN, Oct. 22, 2010, <http://www.guardian.co.uk/books/2010/oct/22/dh-lawrence-lady-chatterley-trial>.

¹⁰⁵ Harbottle & Lewis, *How Effectively Can the Law Censor Art?*, http://www.harbottle.com/hnl/pages/article_view_hnl/1927.php.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Act for officials to determine whether they were indecent.¹⁰⁹ Marcus Harvey's *Myra*, a portrait of murderer Myra Hindley made from stenciled children's handprints, was splattered with ink and eggs before it was moved behind protective glass with a dedicated security detail.¹¹⁰ Currently, Londoners in the East End area of the city are fighting for the removal of a mural painting by graffiti artist Mear One. The mural depicts bankers playing Monopoly on a game board supported on the backs of the working class—to some, resembling the anti-Semitic propaganda of Nazi Germany.¹¹¹ The work is presently defended by both the artist and the owner of the property, who maintain that the mural is about class and privilege, and who deny any intent of anti-Semitism in the work.¹¹²

C. Germany's Militant Human Dignity

More than 60 years after the end of World War II, Germany's Nazi and Holocaust-related bans are not just for show—they are taken quite seriously and are an active limit to free expression. Because of the still-sensitive subject matter, these limits are rarely challenged or questioned by the general German public, and are readily supported by the European Union.¹¹³

In 2008, Germany's Holocaust denial law was called into play after citizens witnessed a broadcast of a Swedish television interview with British Bishop Richard Williamson.¹¹⁴ In the interview, Bishop Williamson denied the existence of the Nazi gas chambers and the extent of

¹⁰⁹ *Id.*

¹¹⁰ Alison Roberts, *Myra Myra on the wall: Marcus Harvey*, THE GUARDIAN, Apr. 20, 2003, <http://www.guardian.co.uk/artanddesign/2003/apr/20/thesaatchigallery.art17>.

¹¹¹ Hannah Roberts, *Banking protest mural resembling Nazi anti-Semitic propaganda to be removed from East End*, Daily Mail Online, Oct. 5, 2012, <http://www.dailymail.co.uk/news/article-2213536/Banking-protest-mural-resembling-Nazi-anti-Semitic-propaganda-removed-East-End.html>.

¹¹² *Id.*

¹¹³ See *EU adopts measure outlawing Holocaust denial*, N.Y. TIMES, Apr. 4, 2007, <http://www.nytimes.com/2007/04/19/world/europe/19iht-eu.4.5359640.html>.

¹¹⁴ *Holocaust-Denying Bishop Found Guilty In German Court*, THE HUFFINGTON POST, June 16, 2010, http://www.huffingtonpost.com/2010/04/17/holocaust-denying-bishop_n_541481.html.

the genocide.¹¹⁵ On two separate occasions, a German court in Regensburg found Bishop Williamson guilty first for violating the Holocaust denial law and second for incitement of hatred, both convictions carrying a significant fine.¹¹⁶

Well-known animal rights group PETA also experienced Germany's sensitivity to the Holocaust when the courts swiftly banned posters created as part of PETA's 2004 campaign before they were unveiled to the public.¹¹⁷ The posters set images of abused animals next to photographs of starving victims in Nazi extermination camps.¹¹⁸ The campaign was banned on grounds of trivializing the Holocaust and insulting the dignity of the victims, their families, and the Jewish community. The European Court of Human Rights agreed, concluding that the injunction did not violate freedom of expression.¹¹⁹

German authorities do, however, at times struggle with interpreting and upholding anti-Nazi laws in today's stable German democracy.¹²⁰ When artist Ottmar Hörl created gnome statues giving the Hitler salute in 2009, he immediately found himself at the center of a criminal investigation that gained national attention; since giving the Hitler salute is considered a crime, officials had to determine whether displaying the saluting gnome constituted a criminal act.¹²¹ Eventually it was decided that the gnomes were a work of satirical art, created to mock the Nazi ideology, yet the incident spurred some debate over the relevance of such strict anti-Nazi laws in contemporary society.¹²²

¹¹⁵ *EU adopts measure outlawing Holocaust denial*, *supra* note 104.

¹¹⁶ *Id.*

¹¹⁷ *Holocaust animal rights campaign ban upheld*, THE LOCAL, Nov. 8, 2012, <http://www.thelocal.de/national/20121108-46059.html>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Tristana Moore, *The Curious Case of the Nazi Gnome*, TIME, Aug. 12, 2009, <http://www.time.com/time/world/article/0,8599,1911626,00.html>.

¹²¹ *Id.*

¹²² *Id.*

In the southern state of Bavaria, controversy still surrounds the state's prohibition on reprinting Hitler's famed autobiography, *Mein Kampf*, despite arguments for the book's historical and academic value.¹²³ The weekly publication *Zeitungszeugen* was also banned for a time in Bavaria because it contained facsimiles of Nazi-era newspapers, and reprints of original Nazi and communist papers. The southern state accused the publisher of disseminating Nazi propaganda, a breach of German law; only after a noisy public debate and court case did the publication overcome the charges on educational grounds.¹²⁴

D. Scandinavian Openness

Scandinavia's historically ardent defense of free expression has faced deeply concerning challenges in recent events. In 2005, Denmark defended its free expression laws when the Danish newspaper *Jyllands Posten* published a group of satirical cartoons depicting the Prophet Muhammad.¹²⁵ As Muslims around the world gradually learned of the cartoons, angry opposition to the newspaper and the Danish government began to grow.¹²⁶ Public demonstrations and protests intensified (and some turned violent), both within Denmark and internationally.¹²⁷ Yet, even in the face of significant dangerous threats, Danish Prime Minister Anders Fogh Rasmussen refused to censor the Danish media in accordance with Denmark's broad free expression guarantee.

This principled stance for Scandinavian censor-less free expression was also exhibited by Sweden's Prime Minister Fredrik Reinfeldt in 2007 after conceptual artist Lars Vilks depicted

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Sturges, *supra* note 47, at 1.

¹²⁶ Opposition was largely on two grounds: "first that Muslim belief does not accept pictorial representations of the Prophet and second that the cartoons associated the Prophet, and Muslims generally, with terrorism." *Id.*

¹²⁷ *Id.*

the Prophet Muhammad as a dog in a street display.¹²⁸ Amongst reports of outraged mobs in Islamic countries, death threats from zealous Muslims, and a terroristic suicide bombing committed by an Islamic extremist in central Stockholm, Reinfeldt defended Vilks' Swedish right to freedom of expression without fear of censorship.¹²⁹ Outside of Scandinavia, only German Chancellor Angela Merkel expressed solidarity with the Scandinavian governments and artists, declaring when discussing the cartoons that "it is irrelevant whether his cartoons are tasteless or not Is he allowed to do that? Yes, he can."¹³⁰

E. America's Obscenity

Although the United States prides itself on its unique and strong freedom of expression rights, the fifty states also boast a notorious tendency to censor in response to the generally conservative public sensitivities of the populace. Many of the controversial works have been targeted for censure are viewed as promoting anti-Christian views. Perhaps the most well-known of these works is Andres Serrano's *Piss Christ*—a photograph of a wooden crucifix submerged in the artist's urine. The first display of this work in the late 1980's, partially funded by the federal government's National Endowment for the Arts (NEA), drew significant criticism both from the public and from members of Congress who requested that the NEA cease the government funding of the display.¹³¹ Many still demand censure of the work today, as *Piss Christ* once again makes an appearance in a New York City show.¹³²

Chris Ofili and his work *The Holy Virgin Mary* received their fair share of public outrage for the work's 1999 display as part of the Brooklyn Museum's "Sensation" exhibit, particularly

¹²⁸ Jagdish Bhagwati, *A Modest Proposal in Defense of Free Speech*, THE NEW REPUBLIC, Mar. 25, 2011, <http://www.tnr.com/article/world/85472/protest-denmark-muhammed-free-speech>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Jessica A. Newill, *A Dying Art: An Examination of the Death and Rebirth of Progressive Art Under United States Obscenity Law*, 76 UMKC L. Rev. 203, 217 (Fall 2007).

¹³² See Todd Starnes, *WH Silent Over Demands to Denounce 'Piss Christ' Artwork*, Fox News Radio, <http://radio.foxnews.com/toddstarnes/top-stories/wh-silent-over-demands-to-denounce-piss-christ-artwork.html>.

from New York City Mayor Rudolph Giuliani.¹³³ Mayor Giuliani deemed the collage of pornographic photos adorned with elephant dung “sick and disgusting,” and insisted that the Brooklyn Museum—partially funded by taxpayer dollars—remove the exhibit.¹³⁴ Giuliani went as far as bringing an action in state court against the Museum, threatening to evict the Museum from the city-owned building it occupies unless the exhibit was cancelled.¹³⁵ The court upheld the Museum’s First Amendment rights, but Ofili’s work remains vilified by conservatives and Christians alike.

The most recent example of controversial art under attack was the late David Wojnarowicz’s video *A Fire in My Belly*, displayed in a show at the National Portrait Gallery in Washington D.C. in 2010.¹³⁶ Conservative groups were particularly insulted by the brief image of ants crawling over a crucifix in the video.¹³⁷ After pressure from the Catholic League and several members of Congress, the Gallery removed the video in an act of self-censorship.¹³⁸

III. Free Expression and the Growth of Society: Reforming Limitations on Freedom of Expression

In the wake of Pussy Riot’s international fame—or perhaps, its infamy—it is easy for those living outside of Russia to hurl accusations of censorship and suppression. Growing up in today’s Western society, we mistakenly believe that our right to freedom of expression is absolute, and any limitation of that right becomes a danger to democracy.¹³⁹ The arrest and conviction of the Pussy Riot women arguably created an opportunity for the rest of the West to

¹³³ See Julianne B. Needle, *Brooklyn Institute of Arts and Sciences v. City of New York: Mayor of New York Violates First Amendment Right to Experience Sensation*, 10 DePaul-LCA J. Art & Ent. L. 77 (Fall 1999).

¹³⁴ *Id.* at 77.

¹³⁵ *Id.* at 77-78.

¹³⁶ Holland Cotter, *As Ants Crawl Over Crucifix, Dead Artist Is Assailed Again*, N.Y. TIMES, Dec. 10, 2010, <http://www.nytimes.com/2010/12/11/arts/design/11ants.html?pagewanted=all>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Ronald J. Rychlak, *Compassion, Hatred, and Free Expression*, 27 Miss. C. L. Rev. 407, 408 (2007/2008).

point fingers at Russia, reminding the new democracy that if it desired integration into our corner of the modern world, it must align itself with our Western cultural mores.

However, after consideration of the limitations of expression and their enforcement presented here, the need for reform and evaluation of freedom of expression limitations in the West is itself apparent. Despite the steady march of social advances and cultural changes throughout history, we are all still guilty, to some extent, of amplifying expressions which we prefer, and turning down the volume of those which take aim too close to our own sensitivities. In order to create a more receptive environment for less popular expressions, a shift towards minimizing restrictions on expression is recommended.

In considering which limitations to phase out, one limitation which arguably should remain in some form is that against expressions which incite violence or other unlawful action, as one of the underpinnings of the need for government and the rule of law is to preserve social order and avoid anarchy. Yet, the way this limitation is often enforced does invite reevaluation. There is a fine line between “incitement” of violence and mere “advocation” for a cause, which many tend to draw in a manner that can capture within a censorer’s net expressions that do not truly incite violence or lawlessness. Many mistake advocating for incitement, confusing a criticism for a command.¹⁴⁰ This suggests a need for more public education on what it means to be the match that purposefully lights the fire, rather than just one domino in a potential series of events, and more checks on government officials who seek to cry “incitement” for any expression with which they disagree.

¹⁴⁰ See Interview with Jacob Mchangama, *Freedom of expression in the unfree world*, THE VOICE OF RUSSIA, Sept. 19, 2012, <http://English.ruvr.ru/88574429.html>.

A. Effects of the Present Standard

Other limitations—those on blasphemy, obscenity, hate speech, political speech and moral depravity—are not as necessary as they may seem to some. Many of these limitations were put in place in order to avoid unpleasant controversy—for example, Germany’s restrictions on free expression in order not to insult others’ dignity, Russia’s strict monitoring of anti-religious sentiment, and the United States’ prohibition of obscenity in order not to offend those with more conservative values.¹⁴¹ While they appear to be a quick fix for social order and public sensitivities, these limits on expression are potentially doing more harm than good to our society in the long run.

The first victim of this harm is the speaker. He or she may be expressing themselves verbally, through the arts and sciences, or through other actions. Often, a silenced speaker is a member of a minority, or is one who holds a minority view. Regardless of the view, this is a case of subjecting the few to the will of the many—a tyranny of the majority at the most basic level.¹⁴² The easy argument that limitations can be fairly set by majority rule must be ignored, as “majority rule is only justified to the extent that it coheres with the principles of justice.”¹⁴³

The broad scope and vague nature of many present limitations do little to help one determine which expressions may or may not pass a nation’s litmus test. An effort to produce an entirely objective limitation will always be unsuccessful—one person’s harmless opinion is another person’s insult. Because speakers may not know where to draw the line, they risk falling victim to self-censorship.¹⁴⁴

¹⁴¹ See Section II above for discussion on these laws.

¹⁴² Newill, *supra* note 131, at 215.

¹⁴³ David A. J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45, 66 (1974).

¹⁴⁴ Newill, *supra* note 131, at 217-18.

Limits on free expression also harm the audience, although they may be unaware of this harm at the time. By refusing to allow certain expressions to exist in the public sphere, the audience limits itself from experiencing new and different ideas and opinions. This not only stunts the intellectual and social growth of individuals, but also of society in general. The most socially beneficial expressions may be the most controversial, “for those shocking works bravely force society to confront new challenges and answer the difficult questions.”¹⁴⁵ In effect, when an audience silences a speaker, all are deprived.

B. A Better Standard for the Future of Expression

In order to protect both our own expressions and our opportunity to experience others’, the existing standards for determining which expressions are allowed and which are taboo requires deliberate progression towards acceptance, since instant change is not often met with instant acceptance. It is the nature of our freedom of expression to be ever slowly evolving; the pace is necessary to allow the public time to grow accustomed to a more diverse landscape of expressions, and with patience we may foster even more ambitions for the future of personal expression. However, this slow and deliberate pace can stall, requiring an occasional push to catch up with society’s advances in thought and expression.

The change must begin at the top with members of the judiciary and the law makers in each nation. These leaders are called upon to set an example for the public, either through judicial opinions or legislation, by beginning to adapt more liberal stances on expression and questioning potentially outdated laws. They are asked to think very carefully about what

¹⁴⁵ Cara L. Newman, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America*, 53 DePaul L. Rev. 121, 156 (Fall 2003).

absolutely needs to be censored, and to ensure it is clearly and accurately defined; it is not enough to “know it when you see it” when “it” could be seen quite differently by many.¹⁴⁶

The effects of a more liberal standard, which allows all expressions short of those which incite violence or lawlessness, more accurately reflects the Western notion of freedom of expression. A broader unfiltered spectrum of ideas would become available to the public, stimulating society’s intellect, art, sciences, and culture in general. Through the dialogue this freedom would incite, the public would become more educated and aware of alternative views, inspiring deeper self-reflection and more analytical consideration of one’s own opinions, beliefs and world view. Speakers would no longer feel inhibited and threatened by obscenity or indecency charges, and audiences would be able to view expressions without shame or judgment. Furthermore, resources spent on ensuring compliance with censorship and limitations could be reallocated to be better spent on perhaps more pressing issues, such as poverty, violence, and health. A new standard would allow Western societies to refocus their energy on the physical wellbeing of their people, rather than on the annoyances of the sensitive and the fears of moral conservatives.

IV. Conclusion

Perhaps the notorious Oscar Wilde sums up our predicament best: “The public has always, and in every age, been badly brought up. They are continually asking Art to be popular, to please their want of taste, to flatter their absurd vanity, to tell them what they have been told before, to show them what they ought to be tired of seeing.”¹⁴⁷ Instead of opening the doors of dialogue and promoting exchange of ideas, Western laws and constitutional provisions actually limit one’s expression in accordance with outdated and unfair sensitivities. Whether officials are

¹⁴⁶ Referring to Justice Stewart’s famous line in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (J. Stewart, concurring).

¹⁴⁷ OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM*, (1891), *reprinted in* OSCAR WILDE: *COLLECTED WORKS* 1256-57 (Barnes & Noble ed., 2006).

arresting radical protestors in Russia or censoring an anti-religious artwork in the United States, Western democracies both old and new are saddled with the expressive challenges posed by these limitations. We cannot ask all expressions to be popular, but we can ask that our democracies also protect those which are not.