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THE TRUE HISTORY AND LEGAL MEANING OF COLONIALISM IN THE HOLY LAND: THE 2042 B.C.E. PROJECT

Marc A. Greendorfer*

Abstract: One of the most inexplicable uses of certain Marxist terms, such as colonialism, imperialism and settler-colonialism is with regard to the State of Israel, a frequent target of Marxists, and ethnic Jews, the descendants of the indigenous people of the modern State of Israel, who are often referred to as Zionists. Though there are no logical connections between the policies and acts of the State of Israel or Israeli citizens, on the one hand, and the complaints of Marxists regarding domestic American strife and discrimination, on the other hand, that has not stopped Israel from being a prominent target of Marxist groups like Black Lives Matter. In fact, anti-Israel activism, and castigating Israel as a settler-colonialist entity, have become central planks of the Black Lives Matter movement and even radical American politicians such as Ilhan Omar, Rashida Tlaib and Alexandria Ocasio-Cortez. Because Marxist terms are now being weaponized in ways that are utterly at odds with the history and meanings of these terms, and those weaponizing the terms allege that they have legal import in questions as to the legitimacy of the State of Israel, this article will explore the most frequently used terms and how such terms have been historically applied in various situations. After providing definitions for the terms, this article will apply these terms to the history of the Jewish claim to Israel to determine whether there is any basis for theories of colonialism, imperialism and settler-colonialism being applicable to Israel and Zionism. Finally, the history of those who make competing claims to the land, including Palestinian Arabs and Muslims generally, will be reviewed to determine whether these parties are more properly characterized as colonialists, imperialists, or settler-colonialists. The purpose of this article is not to present a Marxist point of view about the three terms, colonialism, imperialism, and settler-colonialism; rather, this article intends to take a legal view of these non-legal terms to determine whether the terms should have any legal effect vis a vis the rights of people to self-determination and also to examine the internal consistency of the use of these terms by Marxist activists and Marxist scholars across different peoples and states.

Keywords: Israel; Palestine; Colonialism; Settler; Islam

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INTRODUCTION

"Israel is a colonialist/imperialist/settler-colonialist entity"

This phrase is one that is being repeated increasingly on university campuses and elsewhere, but what does it mean and is it accurate?

As counter-revolutionaries[1] make their latest push to eliminate the traditions and institutions of the United States, including the Constitution, law enforcement and the economic system, and replace them with new systems and institutions more to their liking, they have found new appeal for the language of Marxism. From Black Lives Matter to Antifa to the halls of Congress, the language of counter-revolutionary Marxism is now widely embraced. Indeed, concepts such as "colonialism", "imperialism" and "settler-colonialism" form the platform for counter-revolutionary demands to fundamentally destroy our systems and replace them with a neo-Marxist system of governance and society.[2]

While Marxist concepts languished for decades in the United States as they were embraced in other parts of the world, they nonetheless have existed in certain fringe constituencies such as radical academia, the American Communist Party, anti-Semitic groups such as Palestinian Arab nationalists and other extremists who label themselves "Democratic Socialists" and "progressives".[3]

Because many of those promoting the new radical anti-Westernism embodied by Black Lives Matter, Antifa and aligned groups are not necessarily formal organizations and they tend to deny that they are of any particular ideology, this article will use the term "Marxist-

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[1] The American revolution of 1776 resulted in the establishment of the United States of America and, ultimately, the Constitution and American systems of liberty, government and society. Today, those on the left seek to undo most of what has resulted from the 1776 revolution and thus, they are properly deemed counter-revolutionaries.

[2] https://thefederalist.com/2020/09/16/study-up-to-95-percent-of-2020-u-s-riots-are-linked-to-black-lives-matter/

[3] *See, e.g.*, Felicity Barringer, "*The Mainstreaming of Marxism" in U.S. Colleges*, N.Y. TIMES, Oct. 25, 1989, at 7 ("As Karl Marx's ideological heirs in Communist nations struggle to transform his political legacy, his intellectual heirs on American campuses have virtually completed their own transformation from brash, beleaguered outsiders to assimilated academic insiders."). For example, the Palestinian Arab terrorist groups Popular Front for the Liberation of Palestine, Popular Front for the Liberation of Palestine-General Command and Democratic Front for the Liberation of Palestine are each openly Marxist organizations. Aaron D. Pina, *Palestinian Factions*, CONGRESSIONAL RESEARCH SERVICE RS21235 (June 8, 2005), available at https://sgp.fas.org/crs/mideast/RS21235.pdf. Further, to the extent other Palestinian Arab groups such as Hamas and Fatah are not openly Marxist, their charters are based on Marxist principles. *See* Samir Franjieh, *How Revolutionary Is the Palestinian Resistance? A Marxist Interpretation*, 1 J. of Palestine Studies no. 2 at 52–60 (1972).

Adjacent" to describe the overall philosophy of these groups and their alter-egos in the American left generally.[4]

Today, these counter-revolutionary American movements posit that America's ills stem from a variety of causes, from so-called "White supremacy" to the oft-repeated but rarely defined "settler-colonialism" theory of national development.

One of the most inexplicable uses of the term is with regard to the State of Israel, a frequent target of Marxist-Adjacents, and ethnic Jews,[5] the descendants of the indigenous people of the modern State of Israel, who are often referred to as Zionists.[6] Though there are no logical connections between the policies and acts of the State of Israel or Israeli citizens, on the one hand, and the complaints of Marxist-Adjacents regarding domestic American strife and discrimination, on the other hand, that has not stopped Israel from being a prominent target of Marxist-Adjacent groups like Black Lives Matter. In fact, anti-Israel activism, and castigating Israel as a settler-colonialist entity, have become central planks of the Black Lives Matter movement[7] and even radical American politicians such as Ilhan Omar, Rashida Tlaib and Alexandria Ocasio-Cortez.[8]

Because Marxist terms are now being weaponized in ways that are utterly at odds with the history and meanings of these terms, and those weaponizing the terms allege that they have legal import in questions as to the legitimacy of the State of Israel, this article will explore the most frequently used terms and how such terms have been historically applied in various situations. After providing definitions for the terms, this article will apply these terms to the

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[4] Some use the term "post-colonialism" to describe this philosophy, but that term is somewhat circular when discussing colonialism itself.

[5] A distinction must be made between Judaism and Jews. This topic is worthy of volumes on its own and has been handled by others in great detail. In short, Jews are a race and ethnic group while Judaism is a religion. Not all who adhere to Judaism are racial or ethnic Jews. *See, e.g.,* Kenneth L. Marcus, JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA (2010). *See, also*, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (holding that while some consider Jews to be White under modern standards, they have always been a distinct race and under law, are still a distinct race).

[6] *See, generally,* Walter Laqueur, A HISTORY OF ZIONISM: FROM THE FRENCH REVOLUTION TO THE ESTABLISHMENT OF THE STATE OF ISRAEL (2003).

[7] https://twitter.com/blklivesmatter/status/1394289672101064704?lang=en ("Black Lives Matter stands in solidarity with Palestinians. We are a movement committed to ending settler colonialism in all forms and will continue to advocate for Palestinian liberation. (always have. And always will be). #freepalestine"). There are many other less prominent groups that are aligned with Black Lives Matter, many of them radical antizionist organizations, that for purposes of this article will be subsumed under the Black Lives Matter entity.

[8] *See, e.g*., Editorial, *The Squad's anti-Semites carry the day among House Democrats yet again,* N.Y. POST, Sept. 22, 2021 and James S. Robbins, *Will an increasingly progressive Democratic Party become steadily more anti-Semitic?*, USA TODAY, Feb. 14, 2019 ("Progressives see Israel as an occupying power, an apartheid state, and fundamentally illegitimate. Furthermore, the concept of "intersectionality" forces them to put the Jewish state in the "bad" category.")

history of the Jewish claim to Israel to determine whether there is any basis for theories of colonialism, imperialism and settler-colonialism being applicable to Israel and Zionism. Finally, the history of those who make competing claims to the land, including Palestinian Arabs and Muslims generally, will be reviewed to determine whether it is these parties who are more properly characterized as colonialists, imperialists or settler-colonialists.

The purpose of this article is not to present a Marxist point of view with regard to the three terms, colonialism, imperialism and settler-colonialism; rather, this article intends to take a legal view of these non-legal terms to determine whether the terms should have any legal effect *vis a vis* the rights of people to self-determination and to also examine the internal consistency of the use of these terms by Marxist-Adjacents and Marxist scholars across different peoples and states.

I. DEFINING TERMS

While terms such as "colonialism", "imperialism" and, to a lesser extent, "settler-colonialism" have long been used, they do not have a single, universally-accepted definition. The only consistent pattern that these phrases have is that they are often used to denigrate. In part, this is due to the fact that groups that deal in these words avoid set-in-stone definitions and instead use evolving definitions to suit their agendas and support their arguments.[9] Just as gender has become a self-defined concept, rather than a scientific fact, so too have terms that are used by Marxist-Adjacents to delegitimize anything that relates to their grievances against the western first-world.

Much of the difficulty in defining terms stems from the evolution of Marxist theory and modern attempts to apply Marxist terms, most of which originated in nineteenth century economic theory, to modern non-economic topics, such as political power and social order.[10]

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[9] Satirist Bill Maher recently noted this phenomenon on his weekly show, Real Time: "And finally, new rule, instead of putting a Bible in hotel rooms, we should start putting a dictionary in there because apparently nobody knows what words mean anymore. George Carlin famously had the seven words you can't say on TV. Well, here are my eight words people need to stop redefining: hate, victim, hero, shame, violence, survivor, phobic, and white supremacy." "*Maher Torches People Who Change Words Because They Can't Deal With Reality: 'Repeat Kindergarten,'"* DAILY BEAST, Oct. 30, 2021, available at https://www.dailywire.com/news/maher-torches-people-who-change-words-because-they-cant-deal-with-reality-repeat-kindergarten

[10] There is a frequently used term, "cultural Marxism", to describe the allegation that a small group of European Marxists imported a form of Marxism that focuses on cultural, rather than economic, matters and intended to undermine American society by spreading this form of Marxism. This theory, debunked as an antisemitic conspiracy theory, is similar to actual Marxist theory in name only. *See, generally*, Jerome Jamin, CULTURAL MARXISM: A SURVEY, RELIGION COMPASS (2018), available at https://onlinelibrary.wiley.com/doi/pdf/10.1111/rec3.12258.

By way of example, traditional Marxist theory takes the form of the following analytical sequence, focusing on modes of economic production first:

> Until recently, most Marxists thought of modes of production as successive stages in the evolution of human society, following each other in a predestined order. In a transitional period, the old mode decays, while the new mode first emerges within the previous system, and then replaces it. The development of new forms of organization actively under-mines the old and accelerates their decay. At some stage, a revolution reconstructs the political and legal superstructures to fit the needs of the new mode of production. The relation between the two modes is therefore one of contradiction, and the new ruling class establishes itself through class struggles in which it is irreconcilably opposed to the old order. Each nation must go through the sequence of stages, though external influences may accelerate or slow the process, or even allow a stage to be skipped. This brief summary is, of course, a caricature, but I think it brings out the key ideas that underlie more sophisticated accounts. There is some warrant for it in Marx's own writings (especially the Preface to the Critique of Political Economy).[11]

As this passage indicates, under Marxist theory the first area of focus is economic, and then social and legal matters follow the revolutionary roadmap, inseparable from the underlying economic conditions.

What has happened of late, though, is that armchair counter-revolutionaries in the form of Marxist-Adjacents have disregarded the underlying economic analyses that Marxism is supposed to focus on to instead leapfrog into conclusory statements that deal in buzzwords with little substance on their own, such as colonialism, imperialism and settler-colonialism.[12] What they have done is the equivalent of using scientific terms, assigning them new meanings that have only a superficial relationship to their actual meanings and then weaponizing them to

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[11] Brewer, *infra* note 24, at 226.

[12] *See, e.g.*, Maktoob Staff, *Rashida Tlaib hails Democrats who called on Biden adm to oppose Israeli "settler colonialism" in Palestine*, Apr. 5, 2021 ("Referring to a recent letter in which a dozen House Democrats called on the Biden administration to oppose Israeli "settler colonialism" in Palestine, Rep. Rashida Tlaib on Friday said that support is growing like never before in Congress for Palestinian human rights."), available at https://maktoobmedia.com/2021/04/05/rashida-tlaib-hails-democrats-who-called-on-biden-adm-to-oppose-israeli-settler-colonialism-in-palestine.

have negative meanings in relation to things that the groups oppose, and then sanitizing this bastardization of language by arguing it is all a matter of science.[13]

Professor Akbar Rasulov neatly summarized the common usage of Marxist-Adjacent terms in a recent book but acknowledged that there has never been an agreed upon international law definition of "colonialism" or "imperialism"[14], while radical scholars including Edward Said and James Thuo Gathii have provided guidance on the contours of these terms. Settler-colonialism is a term that may have had a basis in Marxist theory at some point but is now simply a form of verbal graffiti. What follows is a review of the three terms, colonialism, imperialism and settler-colonialism, based on their original use in Marxist ideology and recent attempts to weaponize the terms.

A. Colonialism

As Professor Rasulov pointed out recently, while "…terms and phrases like 'colonial rule,' 'colonial territories' and 'colonial domination' have long been referenced and invoked in numerous international law documents over the years, the concept of colonialism itself has never been given a formal legal definition for international law purposes."[15]

While many references to colonialism tie into theories of Marxism, Marx himself had a rather narrow use of the term. As Professor Anthony Brewer explained, "Marx did not have a generic term to describe the rule of a more advanced nation state over a more backward area. I have used the term colonialism, which has been widely adopted since. When Marx himself

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[13] For example, an agreed-upon definition for osmosis is "the spontaneous passage or diffusion of water or other solvents through a semipermeable membrane" (https://www.britannica.com/science/osmosis). If this term were to be used in the same manner that Marxist-Adjacents use colonialism, for example, osmosis would take on a new definition, such as "a liquid that moves to facilitate racism" and then it would be used to describe how water flows through poorly designed drainage pipes to cause intentional flooding of black neighborhoods, with a conclusion that drainage pipes are racist as a matter of science. If this sounds utterly non-sensical, welcome to Marxist-Adjacent logic, where the indigenous people of a land can become settler-colonialists simply because they are the wrong religion. Using the term colonialism, which generally means one country spreading its influence to other areas to control the indigenous population for its own benefit, Marxist-Adjacents simply refuse to consider that non-European or non-white populations can be colonial, even though the agreed upon definition of the term is not limited in such a manner. Thus, the indigenous people of the land of Israel are deemed colonialists when they reclaim their homeland from the Arab populations that stole the land hundreds of years prior.

[14] Akbar Rasulov, *The Concept of Imperialism in the Contemporary International Law Discourse* (July 21, 2017) in Jean d'Aspremont and Sahib Singh (eds.), CONCEPTS FOR INTERNATIONAL LAW (Edward Elgar; 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006655.

[15] Rasulov, *supra* note 15, at 1.

used this term it was usually to refer to European settlement in areas from which the indigenous inhabitants had been expelled (such as Australia and America)."[16]

Professor Rasulov posits that a usable working definition of colonialism can be found in the works of Professor Edward Said, who defined colonialism in his seminal work, "Culture and Imperialism" as "the implanting of settlements on distant territory."[17] Said concluded that direct colonialism, a term that he did not define but that likely means one nation explicitly settling another nation, has "largely ended."[18]

Others have described colonialism as "direct political and military control over subject territories" and thus "is a specific stage of imperialism."[19] A number of Marxist scholars even recognize the benefits that accrue from colonialism, from improvements in health and education, while still describing it as nothing more than a stage in the development of society.[20] The bottom line being that even Marxists acknowledge that colonialism has a place in the world, even if they also believe it ultimately must give way to post-colonial ways.

In many ways, Professor Said's definition is vague enough that it raises more questions than it answers. Professor Said was not only one of the preeminent scholars in the field of Marxist-Adjacent study, he was a harsh critic of the west and Israel. Viewing colonialism in the Middle East through the lens of Professor Said's writings should provide context and a sense of transparency to the history of colonialism in the region.

Widely accepted examples of colonialism:

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[16] Brewer, *infra* note 24, at 25-26; *see also* Brewer at 48 ("Marx did not discuss colonialism in general terms; his views must be deduced from scattered references in his major writings and from articles about special cases, notably about Ireland, about the British empire in India and (much more superficially) about western, particularly British, dealings with China").

[17] *Id*. (quoting Edward Said, CULTURE AND IMPERIALISM, 9 (1994)).

[18] Said, *supra* note 18, at 9. While Professor Said was well-known for his studies on colonialism, he was not without scandal. As described in Yotav Eliach's book, *infra* note 60 "…[Said] was a member of the Palestinian National Committee and a friend of Yasser Arafat. Many people believe he developed his agenda before writing Orientalism and that he bent and tortured the facts to fit his preconceived narrative." Eliach, *infra* note 60 at xxiv.

[19] Brewer, *infra* note 24, at 277.

[20] *Id*. (describing the theories of Bill Warren).

The most well-known example of colonialism in modern times is likely a tie between the colonization of Africa and Asia by the British and the colonization of North America by European settlers in the 16th and 17th centuries.[21]

B. Imperialism

As with so many other terms used by Marxists, there is no hard and fast definition of many fundamental terms such as imperialism. Marxism started as an economic theory (or theories), focusing on societal classes, the accumulation of wealth by a small segment of the population, treatment of labor and the interaction between workers and those who own the means of production. Modern Marxism, though, is less about the economic theories and more about social (particularly social classes) and political matters.

When it comes to imperialism, Professor Said has referenced the work of noted poet T.S. Eliot to declare that the word "imperialism" is resistant to definition.[22] Professor Brewer, an expert on Marxist theory and author of, *inter alia*, "Marxist Theories of Imperialism, A Critical Survey" agreed with Said, writing as a prelude to his discussion of others' theories of imperialism, "I shall not attempt to define 'imperialism' at this stage; indeed, I shall not present a final definition at any stage. Different writers used the word differently, and I shall follow the usage of the writer under discussion."[23] In other words, Professor Brewer apparently found imperialism to be so incapable of having an objective definition he chose to simply examine the internal consistency of each scholar's use of the word.

Later in his book, though, Brewer did introduce a relatively cogent functional description of imperialism:

> It is easy to misunderstand the classical Marxist theories of imperialism, since the very word has expanded and altered its meaning. Today, the word 'imperialism' generally refers to the dominance of more developed over less developed countries. For the classical Marxists it meant, primarily, rivalry between major capitalist countries, rivalry expressed in conflict over territory, taking political and military as well as economic forms, and tending, ultimately, to inter-imperialist war. The dominance of stronger countries over weaker is certainly implicit in this conception, but the focus is on the

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[21] *See, e.g.,* Wolfgang Rheinhard, A SHORT HISTORY OF COLONIALISM (2011). *See, also*, Matthew Lange, James Mahoney, and Matthias vom Hau. *Colonialism and Development: A Comparative Analysis of Spanish and British Colonies*, 111 AM. J. OF SOCIOLOGY no. 5 (2006) at 1417-1418 for a table of European colonies organized by date of onset of colonization and date of the end of colonization for each colony.

[22] Said, *supra* note 18, at 5.

[23] Anthony Brewer, MARXIST THEORIES OF IMPERIALISM, A CRITICAL SURVEY, SECOND EDITION (1990) at 2.

> struggle for dominance, a struggle between the strongest in which the less developed countries figure mainly as passive battlegrounds, not as active participants.[24]

In fact, Marx never defined "imperialism", nor did he appear to use the term.[25] In the same vein, declining to provide a definition of imperialism due to its varied usage, Gathii wrote that the best way to understand imperialism is to see it as a means of an empire expanding capitalism through, *inter alia*, domination of another people, a definition that is dangerously close to commonly used definitions of colonialism.

> Thus I hesitate to present an encompassing definition of imperialism. Instead, I will be addressing imperialisms. The central themes tying these imperialisms together in the colonial context are the different modes of "dominating, restructuring and having authority" over colonial peoples both by European and other invaders as well as by these outsiders in conjunction with local ruling elites. One important dimension of the imperialisms I discuss is that the relations between colonial peoples and their dominators or overlords cannot be understood outside the prism of power, domination, hegemony and control. Thus the culture, economy, politics and entire complex of ideas of the colonial relation are seen or regarded in light of the power of the force of these complex of ideas or "more precisely their configurations of power.[26]

John Anthony Hobson, a scholar who influenced a significant amount of Vladimir Lenin's views, described the symbiosis among imperialism, capitalism, and colonialism in the following manner (as summarized by Professor Brewer in reviewing Hobson's book, "Imperialism"):

> (1) monopoly increases the share of profit, and concentrates it into fewer hands; (2) a large fraction of monopoly profit is saved, so saving tends to increase; (3) domestic investment opportunities are limited (it is sometimes also argued that monopoly reduces investment), so saving tends to outrun investment; (4) excess saving produces a chronic lack of demand, unless some outlet is found; (5) capital export can provide an outlet for excess saving; (6) a pressure for annexation of territory emerges, to safeguard existing

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[24] *Id*. at 88-89. From this, one can legitimately question how some states can be described as imperialist when they are of a socialist nature with limited resources and no development to speak of. For example, at its founding as a modern state, Israel was a barren land with no real resources or development and a focus on an agrarian system with a very strong Socialist influence and structure, yet its founding has been deemed to be an imperialist endeavor by many Marxists and Marxist-Adjacents. To the extent such an argument is based on the fact that before Israel was founded as a modern state, it was a British territory and the resulting state of Israel was an alter ego of Britain, that argument fails as a matter of history. Israel was founded in spite of British preferences for the future of the land and the Jewish founders of the modern state went to war against the British as a prelude to the founding.

[25] Brewer, *supra* note 24, at 25.

[26] James Thuo Gathii, *Imperialism, Colonialism and International Law*, 54 BUFF. L. REV 1013, 1016 (2007) (emphasis added).

> investments or to open the way for new investment. A second, related, line of argument links demand deficiency to a search for external markets, and hence to annexation.[27]

In essence, Hobson's description is one of pure (or nearly pure) economic theory, tracing how market power ultimately leads to a need for territorial annexation (i.e., imperialism or even colonialism) as a means to stave off economic stagnation under capitalism.

Professor Gathii's carefully chosen words in discussing "imperialisms" should be noted for their applicability to less-discussed examples of imperialism, such as Islamic imperialism (discussed starting at page 28 herein). Furthermore, Gathii discusses imperialism as the control of a colonized people by "European and other invaders", which shows that non-European entities can be just as much of an imperial force over an indigenous people. In other words, early Islamic proselytizers who spread Islam throughout Arabia, the Levant and into other parts of Asian and Europe can be just as much an imperialist force as the more often used example of the Christian British empire.

Professor Said went as far as allowing for an informal description of imperialism as "thinking about, settling on, controlling land that you do not possess, that is distant, that is lived on and owned by others"[28] and then provided a more formal definition for the term: "…the practice, the theory and the attitudes of a dominating metropolitan center ruling a distant territory…."[29] Summarizing his views on the relationship between empires and imperialism, Said explained that "[i]mperialism is simply the process of policy of establishing or maintaining an empire."[30] Said further declared that "classical" imperialism entered a waning period after World War Two. [31] Said quantified the scope of imperialism prior to its apogee by positing that Europe controlled 85% of the land mass of the planet as colonies of some sort. It is this type of imperialism, where one economic power obtains control over vast swaths of the planet's population, that is the typical use of the term imperialism in Marxist theory.

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[27] Brewer, *supra* note 24, at 73 (summarizing the arguments in John Anthony Hobson's *Imperialism*: *A Study* (1902)). It is important to note that Hobson was openly anti-Semitic, blaming Jewish financiers for the negative impacts of imperialist economic activity, something very much in line with the current crop of those who deal in allegations of imperialism and colonialism. *See, e.g.,* John Allett, *New Liberalism, Old Prejudices: J. A. Hobson and the 'Jewish Question'*" 49 Jewish Social Studies, no. 2 at 99–114 (1987).

[28] Said, *supra* note 18, at 7.

[29] *Id*.at 9.

[30] *Id*.

[31] *Id*. at 7. It is interesting to note that Said seems to have acknowledged the inevitability, and perhaps acceptability, of imperialism by noting "…people have planned to have more territory and therefore must do something about its indigenous residents." What is to be done with the indigenous residents, however, is unstated. *Id*.

As a qualitative matter, Said described the mindset of imperial forces as one where western values were elevated over those of the indigenous culture, which was considered inferior or subordinate.[32]

Ultimately, as Professor Brewer noted, there is no definitive definition of imperialism, just a continuum of often conflicting descriptions: Marxist luminary Nikolai Bukharin deemed imperialism to be a policy of "finance capital" (the process of focusing on profit over production), while Vladimir Lenin went a step further and described imperialism as a stage in the development of capitalism. In each case, though, the concept of imperialism as an expression of conquest and domination (in addition to a purely economic theory) exists in most Marxist theories, with the theme of national domination and conquest taking precedence over the purely economic theories in recent times.[33]

While some Marxists have conflated imperialism with colonialism, Lenin considered the two concepts separate, with some elements of similarity.[34] And Bill Warren, an accomplished Communist politician in the United Kingdom and Marxist scholar, in his book "Imperialism: Pioneer of Capitalism", curiously described capitalism as a progressive means of production that promotes equality, justice and generosity as it also transitions society into socialism.[35] Warren ultimately defined imperialism as "…the penetration and spread of the capitalist system into non-capitalist or primitive capitalist areas of the world."[36] To deem Israel, especially at and for decades after its re-establishment as a nation, a purveyor of capitalism simply is at odds with the fact that it was founded as a socialist system and until recently, remained as such.[37]

Widely accepted example of imperialism:

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[32] *Id*. at 9.

[33] Brewer, *supra* note 24, at 110-111. *See, also, id*. at 200 ("'imperialism', in this context, refers to exploitation and inequality, but not (as it usually does) to military or political domination of some countries by others") (describing the theories of Arghiri Emmanuel).

[34] *Id*. at 123 ("For Lenin, in particular, imperialism did not specifically refer to the possession of colonies. He explicitly recognized that earlier stages of capitalism also involved colonial expansion, but for different reasons and with different results.")

[35] Bill Warren, IMPERIALISM: PIONEER OF CAPITALISM, at 30-39 (as described by Brewer, *supra* note 24, at 276-277).

[36] *Id*. at 3.

[37] *See* Lee Edwards, *Three Nations That Tried Socialism and Rejected It*, NATIONAL REVIEW (Oct. 14, 2019) ("Israel is unique, the only nation where socialism was successful — for a while. The original [inhabitants], according to Israeli professor Avi Kay, "sought to create an economy in which market forces were controlled for the benefit of the whole society." Driven by a desire to leave behind their history as victims of penury and prejudice, they sought an egalitarian, labor-oriented socialist society. The initial, homogeneous population of less than 1 million drew up centralized plans to convert the desert into green pastures and build efficient state-run companies."), available at https://www.nationalreview.com/2019/10/failure-of-socialism-israel-india-united-kingdom-adopted-free-market-policies-and-prospered/.

Professor Said, in Culture and Imperialism, focuses on western imperialism and lists Britain, France and the United States as imperial forces, with Canada, Australia, New Zealand, much of Africa, the Middle East, Far East, Indian subcontinent and various regions of North and South America as examples of their colonies.[38] In addition, Said lists Russia, Japan and Turkey as imperialist forces.[39]

C. Settler-Colonialism

Putting together concepts of colonialism and imperialism, we arrive at settler-colonialism.

Or, perhaps, not.

While colonialism and imperialism have fairly well-developed meanings among Marxist scholars (even if those who use the terms tend to define and redefine them to suit their arguments), settler-colonialism is, in the world of Marxism, a shapeshifter, meant to disparage any system that doesn't quite fit into the categories of colonialist or imperialist systems. The theory of settler-colonialism is also one of the most recent Marxist inventions, coming into concerted focus only in the latter part of the 20th Century (much of the writing on settler-colonialism is from the 1990s and later).

If there is a scholar who can be seen as the preeminent expert on settler-colonialism, Lorenzo Veracini appears to fill that role.[40] On the jacket to his book "Settler Colonialism: A Theoretical Overview" Professor Veracini described settler-colonialism as distinct from colonialism while acknowledging that the two theories "co-define" one another.

In Veracini's own words, settler-colonialism, which describes situations where a foreign power migrates to a location and imposes its will on a native society to plunder its resources while replacing the existing indigenous systems with those of the settlers, is "inherently characterized by both [settler and colonialist] traits" but "not all migrations are settler migrations and not all colonialisms are settler colonial".[41] As will be shown later in this article, a hallmark of the founding and expansion of Islam was the quest for "booty", where conquering

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[38] Said, *supra* note 18, at 5.

[39] *Id*. at 6.

[40] Unlike matters that can be studied in a manner that tests static theories, such as chemistry or physics, Marxist theories are mutable and reflect the point of view of the scholar. There is no consistent framework with which to understand Marxist theories and even the most committed Marxist scholar would admit that terms tend to evolve and are subject to redefinition at random times. As such, it is difficult, if not impossible, to point to any individual as the preeminent voice of Marxist ideology. There are many scholars other than Professor Veracini who deal in settler-colonialist studies, but Professor Veracini's works are the most accessible for purposes of this analysis.

[41] Lorenzo Veracini, SETTLER COLONIALISM: A THEORETICAL OVERVIEW (2010) 3.

Muslims looted the indigenous peoples of their natural resources and, indeed, their own freedom.

Veracini defines migrants as those who have moved to a country or place other than the one of their origin (i.e., a diasporic person) while a settler is someone who has conquered a location and converted it into that person's sovereign locale, even though it is not necessarily the person's country of origin.[42] In particular, Veracini states that "settlers are made by conquest, not just by immigration…[and are] founders of political orders [who] carry their sovereignty with them."[43] Migrants, on the other hand, tend to not have inherent rights or sovereignty, according to Veracini and become, for lack of a better word, subjects of another peoples' country until they move on to their next destination. As Veracini described,

> whereas migration operates in accordance with a register of difference, settler migration operates in accordance with a register of sameness, and one result of this dissimilarity is that policy in a settler colonial setting is crucially dedicated to enable settlers while neutralizing migrants…refugees, the most unwilling of migrants, can be seen as occupying the opposite end of a spectrum of possibilities ranging between a move that can be construed as entirely volitional-the settlers'-and a displacement that is premised on an absolute lack of choice.[44]

Further muddying the waters, while scholars such as Veracini often pair discussions of colonialism with settler-colonialism as though they are naturally coexisting theories, Veracini insists that his initial study of settler-colonialism was meant to "emphasize dialectical opposition: colonial and settler colonial forms should not only be seen as separate but also construed as antithetical…."[45]

To the extent there is an unambiguous and coherent definition of settler-colonialism, the underlying circumstances are not static. According to Veracini, settler-colonialism is "…premised on the domination of a majority that has become[46] indigenous (settler are made

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[42] *Id*.

[43] *Id*.

[44] *Id*. at 4.

[45] *Id*. at 11-12.

[46] It is important to note the use of "has become" rather than "was" or "had been". Veracini is using the term indigenous in this context in a way the conflicts with the standard definition of the term. Merriam-Webster Dictionary, for example, defines indigenous as "of or relating to the earliest known inhabitants of a place and especially of a place that was colonized by a now-dominant group." https://www.merriam-webster.com/dictionary/indigenous. If Veracini is right in the use of terms, any later-arriving population in a territory can become indigenous, which is circular and makes the standard understanding of this term at odds with how Marxists use the term.

by conquest and by immigration) …colonizers cease being colonizers if and when they become the majority of the population."[47]

Since Veracini makes every effort to insist that colonialism and settler-colonialism are entirely separate concepts, it is telling that he (frequently) uses the two terms either interchangeably or uses them in ways that make it difficult to discern any substantive differences between the terms. In many ways, the difference between settler-colonialists and migrants boils down to whether the persons have been successful in their new land. In other words, Veracini's arguments seem to be that those arriving in a new land who fail to achieve sovereignty or even representation are deemed mere migrants, while those thrive and assume power are settler-colonialists, notwithstanding the fact that both groups are newly arrived and had the same opportunity to rise to power.

Even Veracini noted that varied definitions apply to settler-colonialism, explaining that some scholars, such as Professor Emeritus David Prochaska, a historian who focuses on colonialism, deemed settler-colonialism as "a discrete form of colonialism in its own right" that should be seen as "an important subtype of imperialism and colonialism."[48] This obviously contradicts Veracini's own definition.

If the inherent contradiction in defining terms is causing your head to spin, it means you understand the slapdash and agenda-oriented nature of the vocabulary used by Marxist-Adjacent activists. While Veracini and other scholars are adept at telling the reader what settler-colonialism is not, they rarely make succinct, affirmative statements as to what it is.

By way of example, Veracini describes the purpose of settler-colonialism as "turning indigenous peoples into refugees"[49] as he also describes Zionism as one of the ultimate examples of settler-colonialism.[50] In making these conflicting statements, he either ignores or disputes the historical fact that Zionism is the movement of the indigenous people of the region to end their refugee status and return to their homeland of Israel and further implicitly denies or ignores the historical facts that Christian and Islamic conquests ended the original sovereignty of Zionists in their homeland. Veracini compounds his agenda-driven descriptions by declaring Palestinian Arabs, whose predecessors expelled the Jewish natives of the land the Palestinian Arabs now claim as their own, to be the indigenous people of the Jewish homeland.[51]

Ultimately, as with other theories embraced by Marxist-Adjacents, the key to the weaponization of words such as settler-colonialism for use against an identified target is to arbitrarily establish a dividing line that allows for one group to be described as a usurper and

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[47] Veracini, *supra* note 42, at 5.

[48] *Id*.at 8.

[49] *Id*. at 35.

[50] *Id*. at 18.

[51] *Id*. at 26.

the other group to be labeled a benevolent indigenous people. In the case of Israel, as will be discussed later in this article, there is no question that as between Jews and Muslim Arabs, it was the Muslim Arabs, coming into existence thousands of years after the establishment of the Jewish people, who were the settler-colonizers of the land of Israel.

One only need look at the Temple Mount in Jerusalem to see a physical manifestation of this, where foreign conquerors destroyed the Jewish temple, the holiest site in Judaism and Muslims then built their own shrines atop the ruins to not only erase Jewish history but also to create "facts on the ground" on which they base their claims to the land.

Only by denying history and imposing an arbitrary timeline where thousands of years of Jewish civilization are erased to coincide with the establishment of a new group (Muslims, and then Palestinian Arabs), can Marxist-Adjacents claim that Jews are the foreigners in their own homeland.

Under classical Marxist theory, where theories of colonialism and imperialism flourish, much depends on an economic perspective, but settler-colonialism theory often evades this element. The closest any scholar comes to positioning the analysis of settler-colonialism in the traditional Marxist sense is Patrick Wolfe, a historian who was widely known for his expertise on settler-colonialism, who wrote

> [t]he primary object of settler-colonialism is the land itself rather than the surplus value to be derived from mixing native labour with it. Though in practice, indigenous labor was indispensable to Europeans, settler-colonization is at base a winner-take-all project whose dominant feature is not exploitation but replacement. The logic of this project, a sustained institutional tendency to eliminate the indigenous population, informs a range of historical practice that might otherwise appear distinct-invasion is a structure, not an event.[52]

As will be demonstrated later herein, Wolfe's description precisely fits the history of the Islamic conquest of the Jewish homeland.

Widely accepted examples of settler-colonialism:

Veracini uses the examples of France and Algeria, Italy and Libya as well as a number of western states such as the United States, Canada and Australia, on the one hand, and the native populations of those lands.[53]

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[52] Patrick Wolfe, SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY, at 163.

[53] Veracini, *supra* note 42, at 24.

D. Summary of Terms

Thus, we have the following summary definitions of the three operative terms discussed in this article:

Colonialism: direct political and military control over subject territories that is a specific stage of imperialism.

Imperialism: the practice, the theory and the attitudes of a dominating metropolitan center ruling a distant territory. The process of policy of establishing or maintaining an empire.

Settler-Colonialism: where a foreign power migrates to a location and imposes its will on a native society to plunder its resources while replacing the existing indigenous systems with those of the settlers.

II. HOW DID OBSCURE MARXIST TERMS BECOME A WEAPON OF THE LEFT?

Even before the modern state of Israel was established in 1948 as the successor nation for the indigenous people of the land of Israel there was a long history of attempts to delegitimize Jews as a nation with a homeland and to rewrite the history of the Jewish ethnicity and nationality. After failing to defeat the Jewish nation in modern times through the use of military action and terrorism, Arab countries, most of them with the backing of Marxist states such as the former Soviet Union, pivoted to a two-prong approach. First, they continued to launch terror attacks against Israel and Jews worldwide, and then they paired the violent approach with a campaign to isolate and marginalize Israel, invoking terms like settler-colonialism to try to convince an ill-informed audience that Jews were Europeans who sought to perpetuate the colonial and imperial objectives of European countries. In large part, this propaganda campaign was led by, or at least inspired by the work of, Professor Said and his followers, such as Professor Hatem Bazian.[54]

The result of this was the creation of the so-called Boycott, Divest and Sanction ("BDS") Movement.[55] While supporters of BDS claim that they are only interested in human rights for Palestinian Arabs, the overwhelming evidence shows that BDS has the same objectives as its terrorist partners: the destruction of the Jewish homeland.

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[54] *See* Cynthia Ozick, *Antisemitism and the Intellectuals*, WALL ST. J. (June 14, 2020), available at https://www.wsj.com/articles/anti-semitism-and-the-intellectuals-11592171963. *See, also*, Bazian's own writing on the topic of Marxist terminology and Israel, Hatem Bazian, ANNOTATIONS ON RACE, COLONIALISM, ISLAMOFOBIA, ISLAM AND PALESTINE (2017).

[55] For a full history and description of the BDS movement, see Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1 (2017) ("RWU Article").

To sanitize a genocidal movement seeking to eliminate the right of self-determination in the historic home of the Jewish people and ethnically cleanse an entire geographical region, promoters of BDS resort to the discredited position that there is a distinction between antizionism and antisemitism.[56] There is, in fact, no substantive difference between the two.[57]

Zionism is the movement advancing the right of the Jewish people, a distinct nation with a history stretching over three millennia, to self-determination in their historic homeland of Israel. Zionism represents the intersection of the Jewish religion with the Jewish nation. BDS supporters claim there is only a Jewish religion and not a Jewish nation, a claim empirically at odds with history and the scientific fact of a distinct Jewish genetic identity.[58] Scholars explain the Jewish bible, an indisputably religious text, "…is the basis for a constitution for running a Jewish State."[59] A British Prime Minister expanded upon this in 1931, stating "This was [Jews] first, this has been their only home; they have no other home."[60]

The United States defines antisemitism as animus towards Jews and uses the specific example of "[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor."[61] Under this globally-accepted definition,[62] BDS is *prima facie* antisemitic. Indeed, the world's foremost authority on antisemitism has found antizionism to have effectively merged with antisemitism.[63] It would be impossible, as a matter of history and theology, to do as BDS proponents suggest and

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[56] The BDS Movement was established pursuant to "GRASSROOTS PALESTINIAN ANTI-APARTHEID CAMPAIGN, TOWARDS A GLOBAL MOVEMENT: A FRAMEWORK FOR TODAY'S ANTI-APARTHEID ACTIVISM" (June 2007), https://bdsmovement.net/files/bds%20report%20small.pdf (hereinafter, "BDS Charter"). The BDS Charter tracks the language of the organizing document of the Palestine Liberation Organization, THE PALESTINIAN NATIONAL CHARTER, RESOLUTIONS OF THE PALESTINE NATIONAL COUNCIL, Art. 22 (July 1968), which states "…Israel is the instrument of the Zionist movement…the liberation of Palestine will destroy the Zionist and imperialist presence…."

[57] French President Macron recently stated "Anti-Zionism is one of the modern forms of anti-Semitism." Richard Lough, *France's Macron says anti-Zionism is a form of anti-Semitism*, *REUTERS*, (Feb. 21, 2019), https://uk.reuters.com/article/uk-france-antisemitism-idUKKCN1QA1GX

[58] *See* Gil Atzmon, et al., *Abraham's Children in the Genome Era: Major Jewish Diaspora Populations Comprise Distinct Genetic Clusters with Shared Middle Eastern Ancestry*, AM. J. OF HUM. GENETICS (June 2010), https://www.cell.com/ajhg/fulltext/S0002-9297(10)00246-6 ("Jews originated as a national and religious group in the Middle East during the second millennium BCE and have maintained continuous genetic, cultural, and religious traditions since that time…") (emphasis added).

[59] YOTAV ELIACH, JUDAISM, ZIONISM AND THE LAND OF ISRAEL 5 (2018).

[60] *Id*. at 168 (emphasis added).

[61] U.S. DEPARTMENT OF STATE, OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM, DEFINING ANTI-SEMITISM, https://www.state.gov/defining-anti-semitism/.

[62] This definition has been adopted by the European Union and a number of member states.

[63] Robert Wistrich, *Anti-Zionism and Anti-Semitism*, 16 JEWISH POL. STUD. REV. 3-4 (Fall 2004).

separate Judaism from Zionism and the re-establishment of a sovereign Jewish state in the land of Israel.

Before there was a modern state of Israel, there were organized campaigns to boycott, marginalize and intimidate Jews from participating in commercial, academic and cultural matters.[64] These campaigns trace back over 2,000 years to the Jewish exile from their historic homeland of Israel,[65] beginning with the Romans, then as part of the creation and spread of Islam, into 15th century Europe to the 17th century Russian Empire pogroms to Nazi Germany. A campaign by Arabs against Jews began in the 1920s.[66]

Complimenting the Nazi campaign against Jews, a pan-Arab organization known as the League of Arab States implemented its own boycott to prevent the modern state of Israel from being formed.[67] The Arab League focused its attacks on Zionists and stipulated that its campaign was intended to "…make the boycott of Zionist goods a creed of the Arab nations."[68]

As the Arab League boycott peaked in the 1970s, crippling the United States economy, American politicians realized the Arab League boycott was not only harming American commercial interests, it was also an unconscionable global campaign to spread anti-Semitic discrimination in the United States.

In response, the United States enacted a prohibition on participation in the Arab League's boycott of Israel (the "Federal Anti-Boycott Law").[69]

At Senate hearings leading to the adoption of the law, then-Senator Adlai Stevenson described the boycott of Israel as "[intruding on] American sovereignty. It interferes with basic human rights and religious freedom. It impedes free competition in the marketplace and systematically enlists American citizens against their will in a war with Israel. It excludes other Americans from economic opportunities. Such behavior cannot be tolerated."[70]

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[64] *See, e.g.*, GIL FEILER, FROM BOYCOTT TO ECONOMIC COOPERATION: THE POLITICAL ECONOMY OF THE ARAB BOYCOTT OF ISRAEL 9, 21-27 (1998).

[65] *See* Eliach, supra note 60 at 50-84, and WALTER LAQUEUR, A HISTORY OF ZIONISM: FROM THE FRENCH REVOLUTION TO THE ESTABLISHMENT OF THE STATE OF ISRAEL 3-39 (2003).

[66] AARON J. SARNA, BOYCOTT AND BLACKLIST: A HISTORY OF ARAB ECONOMIC WARFARE AGAINST ISRAEL 5 (1986).

[67] Edy Cohen, *How the Mufti of Jerusalem Created the Permanent Problem of Palestinian Violence*, THE TOWER MAGAZINE (Nov. 2015), http://www.thetower.org/article/how-the-mufti-of-jerusalem-created-the-permanent-problem-of-palestinian-violence/.

[68] *See* Feiler, supra note 65, at 25.

[69] 50 U.S.C. § 4607.

[70] *Foreign Investment and Arab Boycott Legislation: Hearing on S. 69 and S. 92 Before the S. Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous. and Urban Affairs, 95th Cong. 446–47 (1977).*

Thanks to the effectiveness of this law, by the 1990s the Arab League boycott had been weakened such that it was no longer a prominent element of the Arab world's war against Israel.

This remained the case until the early 2000s when a new call for a global boycott of Israel was issued. This boycott campaign was led by those who believed the Arab League had abandoned its goal of destroying Israel and needed to be supplanted by a new generation of leaders who sought to implement radical opposition to Israel and reenergize the movement to replace the Jewish State of Israel with a Palestinian Arab state.

By 2007, the Arab League's boycott had been effectively replaced by the terror-backed BDS Movement.[71]

Concurrent with the spread of BDS in the United States, there has been a significant rise in anti-Semitism. Anti-Semitic incidents spiked from a low of 751 incidents in 2013 to nearly 2,000 in 2017.[72] Jews made up over half of the victims targeted in religion-based hate crimes in 2017.[73] It's no coincidence that the spread of a movement demonizing Jews has had the same effect similar campaigns have had over the prior 2,000 years. While not all the increase in anti-Semitism is directly attributable to BDS, loud, persistent voices on campuses and even in government spreading BDS bigotry make it no surprise to see a concomitant increase in anti-Semitic events.

Former Congressman Tom Lantos, the founder of the Congressional Human Rights Caucus, was present at the conference leading to the creation of BDS and described it as "an

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[71] S*ee* Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018) ("Campbell Article") at 48-54. *See, also*, Eliana Rudee, *Sixth BDS National Conference Sheds Light on Movement's Intentions and Terrorist Affiliates*, JEWISH NEWS SERVICE (April 25, 2019), https://www.jns.org/sixth-bds-national-conference-sheds-light-on-movements-intentions-and-terrorist-affiliates/, Peter Hasson, *Inside the Ties Between Anti-Israel BDS Groups and Palestinian Terror Orgs.*, THE DAILY CALLER NEWS FOUNDATION (May 18, 2019), https://dailycaller.com/2019/05/08/anti-israel-bds-palestinian-terrorist-pflp-hamas/ *and* Sean Savage, *The Literal Case Against BDS*, THE JEWISH PRESS (May 6, 2019), https://www.jewishpress.com/indepth/opinions/the-literal-case-against-bds/2019/05/06/.

[72] ANTI-DEFAMATION LEAGUE, ANTI-SEMITIC INCIDENTS SURGED NEARLY 60% IN 2017, ACCORDING TO NEW ADL REPORT (Feb. 27, 2018) https://www.adl.org/news/press-releases/anti-semitic-incidents-surged-nearly-60-in-2017-according-to-new-adl-report?fbclid=IwAR0UMk9g7BLYp8GjHrorGaImNByKD9qgOPcKhNDQ9B72rkza8H_U6rc_h38. Matthew Dalton, *Anti-Semitic Acts 'Spreading Like a Poison' in France*, WALL ST. J., Feb. 19, 2019 at A9 and Jake Wallis Simons, *British Jews in Fear After Pro-Palestine Group Supported by Corbyn Forces Jewish Shops to Close with 'Campaign of Intimidation'*, THE DAILY MAIL (May 31, 2019), https://www.dailymail.co.uk/news/article-7087929/Pro-Palestine-group-supported-Corbyn-forces-Jewish-shops-close.html.

[73] FEDERAL BUREAU OF INVESTIGATION, 2017 HATE CRIME STATISTICS (Nov. 13, 2018), available at nhttps://ucr.fbi.gov/hate-crime/2017/topic-pages/victims

anti-American, anti-Israeli circus" at which there were "transparent attempt[s] to de-legitimize the moral argument for Israel's existence as a haven for Jews."[74]

The purpose of BDS is to be a companion to antisemitic violence. The founding document of BDS does not mince words when it comes to this goal: "The Palestine struggle cannot be so simply defined as violent or non-violent; it brings together a variety of strategies in its path of resistance to advance national goals."[75]

Far from rejecting violence, BDS doubles down on it. The BDS Charter affirms BDS is a movement to disenfranchise Jews, stating "…opposition to Zionism as an ideology forms the major impetus for the struggle"[76] and admitting the boycott movement exists "…as a means to cripple the Zionist movement within Palestine and…**to bring about Israel's demise**."[77]

Omar Barghouti, co-founder of the BDS Movement, stated the goal of BDS is to realize a "one-state" solution that "end[s] Israel's existence" and reiterated the position of BDS as "… most definitely we oppose a Jewish state in any part of Palestine." BDS repeatedly rejects the right of Israel to exist as an independent state, and even prominent critics of Israel, such as Norman Finkelstein, concede the goal of BDS is the destruction of Israel"[BDS promoters] think they're being very clever…. We want the end of the occupation, we want the right of return, and we want equal rights for Arabs in Israel…What's the result? You know and I know what's the result: there's no Israel."[78]

With this as background on the goals of BDS, and the Marxist-Adjacents who promote BDS by claiming that Israel is an illegitimate state that was founded on, and engages in, settler-colonialism, the history of the Jewish nation must be explored.

A. The History of Zionism is the History of the Jewish Nation

The observant reader will note that this article, like the Palestinian National Charter, refers to "Palestinian Arabs" rather than Palestinians.

The reason for this is that the history of the term "Palestine" is also the history of the indigenous Jewish population of that region, and the dueling claims of Arabs and Jews to the land. For generations, Palestine referred to what is now called Israel and surrounding states,

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[74] Unless otherwise cited, the contents of this section have been derived from the Campbell Article at 45-54.

[75] BDS CHARTER at 11. *See, also*, the RWU Article at 19-33.

[76] BDS Charter at 13.

[77] *Id*. at 18 (emphasis added).

[78] RWU Paper, *supra* note 56, at 34-35.

and Palestinians were either Arabs or Jews.[79] Ultimately, Palestinian Jews were granted independence in the State of Israel while Palestinian Arabs were given what is currently the Kingdom of Jordan.[80]

In many ways, and according to many experts, Palestinian Arabs already have their own sovereign state, and it is Jordan.[81] The issue has been that Jordan was created as a monarchy, and the ruling family (who are Hashemites of Saudi Arabian origin) chose to retain the state as a monarchy for the benefit of the Hashemites and their allies rather than a sovereign state for Palestinian Arabs.

To understand the nuances and varied meanings of the term "Palestine", one must first review the history of the word. Professor Emeritus of Near Eastern Studies at Princeton University and noted expert on Islam as well as the Arab world, Bernard Lewis engaged in a

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[79] Indeed, the Palestinian National Charter uses this terminology, stating in Article I "Palestine is the homeland of the Arab Palestinian people…." Obviously, this wording makes it clear that there are more than one Palestinian people, with Jews being the unmentioned constituency. Article VI of the charter further amplifies this distinction by declaring that "…Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians." This not only ignores the fact that Palestine was never a recognized state or territory and all ethnic Jews originated in the land claimed by Palestinian Arabs. One can only imagine the outrage if Israel were to exclude religious minorities who didn't have ties to the land in the past from the possibility of citizenship today or agreed to cede territory to Palestinian Arabs but only to the extent they lived in the territory after 1948, when many Palestinian Arabs fled to neighboring states. Palestinian National Charter, *supra* note 57.

[80] The history of the creation of formal states in the Middle East, and, in particular, the creation of the modern state of Israel, Jordan, Lebanon and Syria, among others, is outside the scope of this article and could fill several volumes of books, even if dealt with in a summary fashion. Matters such as the Balfour Declaration and the formal declaration of statehood are best dealt with by reference to articles such as Martin Kramer, *The Forgotten Truth about the Balfour Declaration,* MOSAIC MAGAZINE (June 5, 2017), available at https://mosaicmagazine.com/essay/israel-zionism/2017/06/the-forgotten-truth-about-the-balfour-declaration/. .

[81] *See, e.g.*, Steve Kramer, *Is Jordan Palestine?*, THE TIMES OF ISRAEL (Nov. 15, 2018), available at https://blogs.timesofisrael.com/is-jordan-really-palestine/ ("When the Balfour Declaration was promulgated in 1917 during WWI, it included all of today's Israel and Jordan, with the idea that the "National Home" for the Jews would be established 'in' "in Palestine. But, in the 1916 Ḥussein-McMahon correspondence, Britain had already promised an independent Arab state in Palestine to the Hashemite clan, for its assistance in opposing the Ottoman Empire. In the Churchill White Paper of 1922, it was stipulated that the whole of Palestine west of the Jordan was excluded from Sir Henry McMahon's pledge to the Hashemite rulers. Thus, when the British Mandate for Palestine was instituted soon after, only about 22% of Palestine, just the land west of the Jordan River, was available for Jewish settlement. The case thus can be made that the Arab area for settlement was east of the Jordan River and that the area west of the Jordan River was for "close settlement" by the Jews. This is the genesis of the statement that Jordan is Palestine and the remaining 22% is Jewish") and Mudar Zahran, *Jordan is Palestinian*, MIDDLE EAST QUARTERLY (Winter 2012) at 3-12.

detailed study of this issue and his work sets the stage for a proper understanding of the tangled history of "Palestine".[82]

Lewis engaged in an easily understood discussion of how the term "Palestine" came into existence, what it was meant to convey and what it meant in history, explaining[83]

> [t]he official adoption of the name Palestine in Roman usage to designate the territories of the former Jewish principality of Judea seems to date from after the suppression of the great Jewish revolt of Bar-Kokhba in the year 135 C.E. After this revolt, which caused great trouble to the Roman Empire, the Emperor Hadrian made a determined attempt to stamp out the embers not only of the revolt but of Jewish nationhood and statehood. The city of Jerusalem was destroyed and then rebuilt with a new name, as Aelia Capitolina; it would seem that the name Judea was abolished at the same time as Jerusalem and the country renamed Palestina or Syria Palestina, with the same intention—of obliterating its historic Jewish identity. The earlier name did not entirely disappear, and as late as the 4th century C.E. we still find a Christian author, Epiphanius, referring to "Palestina, that is, Judea." It had, however, ceased to be the official designation of the country.

As is evident from the historical study of "Palestine", it is a name that has long been used as an attempt to deny the Jewish history of the area that includes the modern state of Israel, a practice that continues to the current day with the BDS Movement and Palestinian Arab nationalists. This is a classic tactic of settler-colonialists, to erase the history of the indigenous people and replace it with their own.

The absence of a historic state of Palestine is in line with the history of nations, states, and borders. As Professor Lewis pointed out

Precisely demarcated frontiers, with lines on a map, are a modern idea, and with few exceptions were unknown to antiquity or the Middle Ages, when "frontiers" meant the range of armed power on the one hand and the reach of tax collection on the other. Closer definition was usually the expression of natural features and lines of fortifications. From the end of the Jewish state in antiquity to the beginning of British rule, the area now designated by the name Palestine was not a country and had no frontiers, only administrative boundaries; it was a group of provincial subdivisions, by no means always the same, within a larger entity.

Thus, to the extent there could have been a Palestinian Arab identity, it was subsumed within the borders of other states. Professor Lewis explained[84]

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[82] *See, generally*, Bernard Lewis, *Palestine: On the History and Geography of a Name*. THE INTERNATIONAL HISTORY REVIEW, vol. 2, no. 1, Taylor & Francis, Ltd., 1980, pp. 1–12, available at http://www.jstor.org/stable/40105058.

[83] The following discussion is derived from Bernard Lewis, *The Palestinians and the PLO*, COMMENTARY (Jan. 1975), available at https://www.commentary.org/articles/bernard-lewis/the-palestinians-and-the-plo/.

[84] Id.

> Until World War I, the greater part of the Middle East was divided between two great traditional monarchies, those of Turkey and of Iran, with most of the Arab world coming under the former. After the breakup of the Ottoman Empire, a series of new states was established, mostly through the decisions and actions of Britain and France. These were designated by names of various kinds, some based on geographical features like Lebanon, some names revived from classical antiquity like Syria and Libya, some the names of medieval provinces like Jordan and Iraq. Almost all were new, and at first meant little to their inhabitants.

Prominent Palestinian Arab lawyer, politician and activist Musa Alami acknowledged this in a 1949 article, "The Lesson of Palestine", where he attempted to explain the defeat of Arab armies, and, in particular, Palestinian Arab militias, by Jews returning to their homeland. Referring to the Arab people, and the Palestinian Arabs in particular, Alami explained "[t]he people are in great need of a 'myth' to fill their consciousness and imagination: a myth of which they dream in times of peace and in times of trouble, because it gives their life meaning and gives them self-respect and freedom."[85] And in 1946, historian Philip Hitti reiterated that Palestine was never a separate entity in the Arab world:

> There is no such thing as 'Palestine' in history, absolutely not…[It is but] a very small tiny spot there on the southern part of the eastern shore of the Mediterranean Sea, surrounded by a vast territory of Arab Muslim lands, beginning with Morocco, continuing through Tunis, Tripoli and Egypt, and going down to Arabia proper, then going up to Transjordan, Syria, Lebanon, and Iraq — one solid Arab-speaking bloc — 50,000,000 people.[86]

One of the apocryphal claims made by Marxist-Adjacents, and BDS supporters in general, is that Israel, as a Jewish state, was a creation of European Whites after the Holocaust (a slaughter of millions of Jews at the hands of actual European Whites) and as such, it is a colonial endeavor, with the Jews who returned to their homeland being settler-colonialists who have oppressed and appropriated the land of the native Palestinian Arabs. What Lewis'

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[85] Musa Alami, *The Lesson of Palestine*, 3 MIDDLE EAST J. NO. 4, 373, 396 (1949). This article is important in many ways, not the least of which is that it shows the thinking of Palestinian Arab leaders immediately after Israel was recognized as a state. Throughout the article, Alami refers to Jews, rather than Zionists, as the threat to Palestinian Arabs and Arab nationalism generally, though he also attacks Zionism. For example, on page 374, Alami states "…we found ourselves face to face with the Jews, and entered into battle with them to decide the future…" and then devotes an entire section to a matter he refers to as "The Jewish Danger" on pages 386-387, where he states "[t]he ambitions of the Jews are not limited to Palestine alone, but embrace other parts of the Arab world…Palestine will then become the base for exploiting all of the East and for extending the economic interests of the Jews…they dream of a 'greater Jewish state between the Nile and the Euphrates." While modern antisemites try to claim that they only oppose Zionists and not Jews, the history of opposition to Israel's existence clearly shows that there was no distinction made between Jews and Zionists.

[86] Alex Safia, *Judi Rodorer Won't Be Schooled*, ALGEMINER (June 3, 2013), available at https://www.algemeiner.com/2013/06/03/jodi-rudoren-wont-be-schooled//

historical research shows, though, is that most of those who today claim to be Palestinian Arabs were likely Syrians, Lebanese or Jordanian Arabs prior to World War I, and even then, had very little interest in being considered citizens of those states. In other words, if Jews being displaced from their homeland into the diaspora obviates their claim to the land, then the same logic should apply to the Arabs who subsequently occupied the Jewish homeland and were later displaced (either through migration or refugee status). This is particularly relevant in light of the fact that the Jewish population of Israel is over 50% Mizrahi, representing a plurality of all ethnic groups comprising the population of Israel and definitely disproving the claim that Israel is a white European colony.[87]

B. The Jewish Claim to the Land of Israel

Over a thousand years before the creation of Islam and many hundreds of years before there was a "Palestine", there was Psalm 137[88]

> By the rivers of Babylon, there we sat, we also wept when we remembered Zion.
>
> On willows in its midst we hung our harps.
>
> For there our captors asked us for words of song and our tormentors [asked of us] mirth, "Sing for us of the song of Zion."
>
> "How shall we sing the song of the Lord on foreign soil?"
>
> If I forget you, O Jerusalem, may my right hand forget [its skill].

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[87] *See* Noah Lewin-Epstein & Yinon Cohen, *Ethnic Origin and Identity in the Jewish Population of Israel*, J. OF ETHNIC AND MIGRATION STUDIES at 8 (2018), available at https://people.socsci.tau.ac.il/mu/noah/files/2018/07/Ethnic-origin-and-identity-in-Israel-JEMS-2018.pdf and Hen Mazzig, *Op-Ed: No, Israel is not a Country of Privileged and White Europeans*, L.A. TIMES (May 20, 2019), available at https://www.latimes.com/opinion/op-ed/la-oe-mazzig-mizrahi-jews-israel-20190520-story.html ("I am Mizrahi, as are the majority of Jews in Israel today. We are of Middle Eastern and North African descent. Only about 30% of Israeli Jews are Ashkenazi, or the descendants of European Jews. I am baffled as to why mainstream media and politicians around the world ignore or misrepresent these facts and the Mizrahi story. Perhaps it's because our history shatters a stereotype about the identity of my country and my people.")

[88] *See* TEHILLIM - PSALMS - CHAPTER 137, available at https://www.chabad.org/library/bible_cdo/aid/16358/jewish/Chapter-137.htm#lt=primary. Much of the material in this section is derived from religious sources due to the paucity of modern methods of documenting matters from before the common era (and in many cases, hundreds of years after the commencement of the common era). Furthermore, this article is not intended to be a comprehensive study of the history of religion, so much detail unrelated to the major premises of this article will not be covered. Dates are approximate.

> May my tongue cling to my palate, if I do not remember you, if I do not bring up Jerusalem at the beginning of my joy.
>
> Remember, O Lord, for the sons of Edom, the day of Jerusalem, those who say, "Raze it, raze it, down to its foundation!"
>
> O Daughter of Babylon, who is destined to be plundered, praiseworthy is he who repays you your recompense that you have done to us.
>
> Praiseworthy is he who will take and dash your infants against the rock.

Psalm 137, written around the 6th century B.C.E.[89], is a lamentation by Jews who had just suffered defeat at the hands of the Babylonian empire and were forcibly removed from their homeland of Israel[90] and their capital, Jerusalem, into captivity in Babylon.[91] This, of course, was not the first time the Jewish people had been conquered and forced into captivity: Approximately 1,000 years before the Babylonian conquest, long after Abraham founded Judaism in approximately 2000 B.C.E., at which time G-d promised the land of Israel to the children of Abraham, Jews were held captive in Egypt until they were led back to the land

[89] This article uses the abbreviations "B.C.E" and "C.E.," rather than B.C. and A.D., in line with accepted scholarly practice (see "Should We Use B.C.E. instead of B.C.," Dictionary.com (Jan. 13, 2021), available at https://www.dictionary.com/e/should-we-use-bce-instead-of-bc/). Historians and Bible scholars set 2042 B.C.E. as the date the Jewish patriarch, Abraham, arrived in what is now the State of Israel after receiving it as a covenant from G-d. As such, this article is a reflection of that as the beginning of Judaism. Any similarity to the 1619 Project is incidental. https://bibletopicexpo.wordpress.com/2017/01/30/chronology-abraham-to-the-exodus/

[90] Israel is the name of the modern state that exists on the land promised to the Jews in the Bible though it has been called any number of other names over the course of history, as detailed later herein.

[91] John Ahn, *Psalm 137: Complex Communal Laments*, 127 J. OF BIBLICAL LITERATURE no. 2 at 267–289 (2008).

promised to them in approximately 1300 B.C.E., [92] thus fulfilling G-d's promise to Abraham.[93]

Once the Jewish people arrived in their promised land, the first temple was built in Jerusalem in approximately 950 B.C.E..[94] As historian Hillel Cohen describes,

> Jewish sacred history of the Temple Mount has both universal and Jewish dimensions. According to accepted Jewish tradition, Jerusalem is the center of the world. It contains the Foundation Stone, from which, according to the Babylonian Talmud (Yoma 54:2), the creation of the world began. For that reason, all human beings have a link to the place. But on this same stone, Maimonides notes, adducing an ancient tradition, Isaac was bound by his father, Abraham, and was saved by an angel sent by God. This latter story is one of God choosing Isaac as the son to be sacrificed, rather than Abraham's other son, Ishmael. Isaac is the beloved son, and according to the most fundamental Jewish

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[92] M. H. Segal, *The Religion of Israel before Sinai*, 52 THE JEWISH QUARTERLY REVIEW 1 41–68 (1961). *See, also*, D.C. Rapoport, *Moses, Charisma, and Covenant*, 32 THE WESTERN POLITICAL QUARTERLY 2 at 123–143 (1979) and E. Leach, *The Legitimacy of Solomon: Some Structural Aspects of Old Testament History*, 42 EUROPEAN J. OF SOCIOLOGY / ARCHIVES EUROPÉENNES DE SOCIOLOGIE / EUROPÄISCHES ARCHIV FÜR SOZIOLOGIE, 1 at 131–174 (2001).

[93] "And Abram [Abraham's name prior to the covenant] passed through the land [of Canaan], unto the place of Shechem [Nablus], unto the terebinth of Moreh. And the Lord appeared unto Abram, and said 'Unto thy seed will I give this land'". *Genesis* 12:6-7. Later in Genesis, as Abram is in Beth-el, a small town several miles north of Jerusalem, G-d again promises "look from the place where thou art, northward and southward, and eastward and westward; for all the land which thou seest, to thee I will give it, and to thy seed forever." *Genesis* 13:14-15. When Abram then made the covenant with G-d, G-d informed Abram that his name henceforth would be Abraham (translated to mean "father of the multitudes") and G-d then established the covenant between Himself and Abraham "and to [Abraham's] seed after thee. And I will give unto thee, and to they seed after thee, the land of the sojournings, all the land of Canaan, for an everlasting possession.". *Genesis* 17:7-8. The land of Canaan, promised to Abraham, is larger than the land of Israel, as it reaches from modern Egypt across modern Israel, north to Lebanon, east to Syria and Jordan, to the Euphrates. *See* Zecharia Kallai. *The Patriarchal Boundaries, Canaan and the Land of Israel: Patterns and Application in Biblical Historiography*. 47 ISRAEL EXPLORATION JOURNAL no. 1/2 at 69–82 (1997) ("…from Egypt to the river Euphrates, and from the Mediterranean Sea to the desert east of the sedentary country, thus clearly including Transjordan. This region comprises, therefore, the land of Canaan, as defined in biblical historiography….") *Id*. at 76.

[94] The first temple was built by Jewish King Solomon. The site of the temple in Jerusalem was and continues to be the holiest place in Judaism. For background on the first temple era, including mapping and detailed descriptions of the structures, *see* J. Patrich and M. Edelcopp, *Four Stages in the Evolution of the Temple Mount*, 120 REVUE BIBLIQUE 3 at 321–361 (2013). For background on the second temple era, *see* J.L. Rubenstein, THE SECOND TEMPLE PERIOD IN A HISTORY OF SUKKOT IN THE SECOND TEMPLE AND RABBINIC PERIODS (2020) at 31–102. For estimates of the population of Jerusalem during the second temple era, *see* R. Reich, *A Note on the Population Size of Jerusalem in the Second Temple Period*, 121 REVUE BIBLIQUE 2 at 298–305 (2014).

> understanding of the story, Isaac's descendants are the followers of Abraham and the worthy heirs of the holy site.
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> The universalist outlook is preserved in the Utopian vision, "In the days to come, the Mount of the Lord's House shall stand firm above the mountains ... and all the nations will flow to it" (Isaiah 2:2). But the Jerusalem that was fixed in the hearts of Jews was and remains the Jewish Jerusalem: Jerusalem as the center of the Jewish people, a place holy both nationallyand religiously. It is the Jerusalem that King David established as his capital and to which he brought the ark of God - the Jerusalem in which King Solomon built the Temple, where foreigners were prohibited from entering, and received God's blessings.
>
> In the traditional Jewish view, the people of Israel and city of Jerusalem merged into a single whole; the chosen people were united in the chosen place under the shelter of the one God. The authors of the Bible interpreted the attacks on Jerusalem in the ancient Middle East as battles against God, the purpose of which was to defile the sacred site: "O God, foreigners have entered your domain, defiled your holy Temple" (Psalms 79:1). The process that forged such a potent interdependence between the Jewish people and Jerusalem began with the concentration of the sacrificial service in Jerusalem during the time of the First Temple and grew stronger during Second Temple times when, according to Moshe Weinfeld (1984), Jerusalem became a Temple City' on which the life of the nation depended.[95]

While many anti-Zionists base their views on the claim that there is no Jewish nationality,[96] scholars, both religious and political, make the facts clear. As Rabbi Yotav Eliach wrote,

> Zionism and Judaism are intertwined in the texts that make up the main sources of the religion: The Tanach/Jewish Bible (Old Testament); the Mishna, the Torah passed down from Sinai and the oral law written down from the first century B.C.E., until its codification in the 2nd century C.E., and the Talmud, completed in the 6th century C.E. containing Jewish Law/Halacha, which explains the Mishna in great detail. Scholars agree that the Jewish Bible is at the very least 2,100 years old—the age of the Dead Sea Scrolls. The same is true of Judaism. It is defined by looking at the ancient Jewish sources

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[95] Hillel Cohen, *The Temple Mount/al-Aqsa in Zionist and Palestinian National Consciousness: A Comparative View*. ISRAEL STUDIES REVIEW 32(1) at 1–19 (2017).

[96] *See, e.g.,* the Palestinian National Charter, Article 20, *supra* note 57, which explicitly rejects historical facts to unilaterally deem that the Jewish people do not exist:

"The Balfour Declaration, the mandate document and what has been based upon them are considered null and void. The claim of a historical or spiritual tie between Jews and Palestine does not tally with the historical realities nor with the constituencies of statehood in their true sense. Judaism in its character as a religion of revelation, is not a nationality with an independent existence. Likewise, the Jews are not one people with an independent personality. They are rather citizens of the states to which they belong."

> and studying Jewish history and Jewish archaeology, all still relevant to millions of Jews today.[97]

In fact, as Rabbi Eliach explained, Jews were not only unequivocally a nation, the nation's physical boundaries are documented in the Bible

> The boundaries of Israel are readily found in the book of Genesis. The most specific geographic lesson in the Torah is in the 34th chapter of Bamidbar/Exodus in the chapter Mas'a'ey. The boundaries of Israel start at the bottom of the Dead Sea and move clockwise—spelled out over 12 verses in the chapter. There can be no mistake that the Torah does not see Judaism implemented in its entirety in any piece of real estate that the Jews happen to control other than in the holy boundaries of Israel.[98]

There can be no disputing the fact that over the centuries, Jews have been forcibly removed from their homeland and thus were not present in the land, as a nation-state or similar entity, for large stretches of time until the re-establishment of their homeland as the state of Israel in 1948. But being forcibly removed from land, and prevented from returning, does not invalidate history nor does it provide a basis for subsequent colonizers to claim indigenous status.

History also shows a long line of colonizers of Jewish lands and/or oppressors of the Jewish people who prevented them from returning to their land, from the Egyptian Pharoah who enslaved the Jewish population of Egypt before allowing them to be free, leading to Moses bringing his people to the land of Canaan (which includes present-day Israel) in approximately 1300 B.C.E. to Babylonian Nebuchadnezzar II, who destroyed the most sacred Jewish spot in existence, the first temple, in the 6th century B.C.E., resulting in the first mass expulsion of Jews from their homeland in the approximately 700 years that lapsed after the exodus out of Egypt. Once Persian King Cyrus granted the Jews freedom to return to their homeland approximately 50 years after the Babylonian exile (in approximately 540 B.C.E.), Jews rebuilt the temple in Jerusalem and it stood, and the Jewish people remained in their homeland with a capital in Jerusalem,[99] for another 400 years until 70 C.E., when the Romans, under Titus, conquered the Jewish land, destroyed the temple in Jerusalem, plundered the wealth of the Jews and began an occupation of Jerusalem that included destroying Jewish holy sites and replacing them with Roman religious symbols, including a temple to the Roman god Jupiter that was

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[97] Eliach, *supra* note 60, at 3.

[98] *Id*. at 7. Rabbi Eliach also expounds on the idea of Jewish nationhood, where he first explains the traditional hallmarks of nationhood (a group with a common language, common culture and a common land of origin) and then reviews the status of Jews under this definition to conclude that with Hebrew as a common language, Judaism as a common culture and the Land of Israel as a common land of origin, Jews are a nation. *Id*. at 10-20.

[99] Persia occupied the Land of Israel during this period, collecting taxes and stationing soldiers in Israel, though it was by many measures a benevolent occupation. In approximately 330 B.C.E., Alexander the Great led the Greeks in replacing Persia as the occupier of Israel, with Jewish control resuming for approximately 100 years between 165 and 63 B.C.E. as a result of the Maccabee revolt. *Id*. at 27-28.

built by Roman emperor Hadrian on the remains of the Jewish temple as a way to eliminate the history of the Jewish people in Jerusalem, which would later be replicated by Muslims when they built the Dome of the Rock and then the al Aqsa mosque on the site of the Jewish temple. Not content with simply razing Jewish shrines and exiling Jews to the diaspora, the Romans renamed Jerusalem "Aelia Capitalina" and ultimately banned Jews from entering Jerusalem in the aftermath of a failed Jewish revolt against the Roman colonization of the land and renamed the land from Israel to Syria-Palestinia, as a way to permanently end the Jewish tie to the land and replace it with the identity of a sworn enemy of the Jewish people, the Philistines.[100]

While Palestinian Arabs often point to the similarity of the name "Palestine" to "Philistine" in an attempt to prove that they, rather than Jews, have longstanding ties to the land, the Philistines were not Arabs nor were they indigenous to the Land of Israel, and have no connection to modern Arabs who claim Palestinian identity. Rather, the Philistines were people from the area of Greece or Cyprus who haven't existed since the 6th century B.C.E.[101]

From the time of the Roman conquest through the creation of Islam in the 7th century C.E., Jerusalem (as a proxy for the Jewish nation) was Christianized, with long periods where Jews were banned outright from stepping foot in the land.[102]

Once Islam was founded in approximately 610 C.E. in what is now Saudi Arabia, it rapidly spread, sometimes by willing adoption among a population but often by sword, and Muslim invaders conquered modern day Israel and Jerusalem = by the late 600s. Taking a page from prior conquering entities, Muslims put their own imprimatur on the site of the Jewish temples by building the Dome of the Rock atop the Jewish ruins.[103] Islamic colonization of

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[100] *See* L.H. Feldman *Some Observations on the Name of Palestine*, HEBREW UNION COLLEGE ANNUAL, 61, 1–23; *see, also*, Hayim Hillel Ben-Sasson, A HISTORY OF THE JEWISH PEOPLE (Harvard University Press) 1976 and L.H. Schiffman, *Jerusalem: Twice Destroyed, Twice Rebuilt*, 97 THE CLASSICAL WORLD 1 at 31–40 (2003) and Eliach, *supra* note 60, at 38.

[101] Carlos J. Moreu *The Sea People and the Historical Background of the Trojan War*, 16 MEDITERRANEAN ARCHAEOLOGY at 116 (2003).

[102] Oded Irshai, *The Christian Appropriation of Jerusalem in the Fourth Century: The Case of the Bordeaux Pilgrim*, 99 THE JEWISH QUARTERLY REVIEW at 465–486 (2009) and Rendel Harris, *Hadrian's Decree of Expulsion of the Jews from Jerusalem,* 19 THE HARVARD THEOLOGICAL REVIEW at 199–206 (1926). Even with this attempt at ethnic cleansing, Jews remained the majority of the population until Islamic invaders arrived in the Land of Israel. Eliach, *supra* note 60, at 39.

[103] According to Muslims, the Dome of the Rock was built upon the location where Mohammed ascended to heaven. Historians, however, assert that the Dome of the Rock was built to Islamize the Jewish history of Jerusalem and, in particular, the Temple Mount. *See* Nasser Rabbat, *The Meaning of the Umayyad Dome of the Rock*, 6 MUQARNAS 14 (1989) ("In the beginning, then, Jerusalem and the Rock held primarily Judaic associations which the Muslims had adopted at the time as part of the religious heritage to which Islam laid claim. However, these first transmitters [of Jewish religious tradition into Islam] played a decisive part not only in the recognition of the sanctity of Jerusalem and the eminence of the Rock's site, but also in the Islamization of these beliefs."). *See, also,* Cohen, supra note 68.

the region, including the Land of Israel, continued with an epochally brief interruption of 200 years starting around 1099 C.E., when European Christian crusaders defeated Islamic forces and ruled the land, only to be vanquished by Muslim armies.[104] To solidify their claims to the land, and, in particular, the holiest site in Judaism, Muslims have repeatedly expanded the al Aqsa mosque, originally built in the 8th century C.E. atop the ruins of the Jewish temples as a companion to the Dome of the Rock,[105] and now make exclusive claims to the entire Temple Mount. The strategy of destroying physical representations of the history of non-Muslims to create a narrative of Muslim indigeneity is certainly not limited to Jerusalem or even Medina; indeed, in recent years Muslim extremists in Afghanistan went so far as to demolish two Buddhist statues carved into a hillside prior to the founding of Islam to erase the Buddhist history of the region.[106]

The series of colonial attacks on the Jewish nation from the period of the Roman occupation through Islamic occupation had a devasting impact on Jewish population in the land. According to Josephus, an advisor to the Roman general Titus, there were four million Jews in the Land of Israel prior to the Jewish rebellion in the first century C.E., and by the time that the Jewish warriors at Masada were defeated only one million remained. By the end of the Crusades, after 1,000 years of foreign invasions and genocide of the Jewish people, fewer than 35,000 Jews were present in the land.[107]

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[104] *See, generally*, Paul E. Chevedden, *The Islamic View and the Christian View of the Crusades: A New Synthesis*. 93 HISTORY 2, at 181–200 (2008).

[105] *See* John Giebfried, *The Crusader Rebranding of Jerusalem's Temple Mount,* 44 COMITATUS: A JOURNAL OF MEDIEVAL AND RENAISSANCE STUDIES at 77-94 (2013).

[106] *See* Benita Fernando, *Explained: The Legacy and Return of the Bamiyan Buddhas, Virtually*, THE INDIAN EXPRESS (Mar. 12, 2021), available at https://indianexpress.com/article/explained/bamiyan-buddhas-3d-projection-taliban-7223686/ ("The hardline Taliban movement, which emerged in the early 1990s, was in control of almost 90 per cent of Afghanistan by the end of the decade. While their governance supposedly curbed lawlessness, they also introduced so-called "Islamic punishments" and a regressive idea of Islamic practices, which included banning television, public executions, and lack of schooling for girls aged 10 and above. The destruction of the Bamiyan Buddhas was part of this extremist culture. On February 27, 2001, the Taliban declared its intention to destroy the statues, despite condemnation and protest from governments and cultural ambassadors world over.") As another example, the Hagia Sophia in Constantinople (Istanbul) was originally built as a church but after Muslim forces conquered Constantinople, it was converted to a mosque, and continues as such today (after a short period as a museum). *See* William Emerson and Robert L. van Nice, *Hagia Sophia and the First Minaret Erected after the Conquest of Constantinople*, 54 AMERICAN J. OF ARCHAEOLOGY no. 1 at 28–40 (1950) and Gavin D. Brockett, *When Ottomans Become Turks: Commemorating the Conquest of Constantinople and Its Contribution to World History*, 119 THE AMERICAN HISTORICAL REVIEW no. 2 at 399–433 (2014).

[107] Anthony Byatt, *Josephus and Population Numbers in First Century Palestine*, 105 PALESTINE EXPLORATION QUARTERLY at 51-60 (1973). *See, also*, Eliach, *supra* note 60, at 37-43.

C. Islamic Imperialism

Contrary to conventional wisdom, it is the Middle East where the institution of empire not only originated (for example, Egypt, Assyria, Babylon, Iran and so on) but where its spirit has also outlived its European counterpart.[108]

The founding of Islam is a microcosm of the longstanding dispute between Jews and Muslims over indigenous status in the Middle East. Approximately 600 years after Romans dispossessed Jews from their homeland, Mohammed founded Islam in the Jewish city of Yathrib. Now called Medina, in Saudi Arabia, Yathrib was well known as a city home to a large Jewish population (many of them refugees from the Jewish/Roman wars in the land of Israel) and was likely the region from which those who would become the Jewish people lived prior to their arrival in the land of Israel.[109] While some historians indicate that Mohammed and his followers were initially friendly to the local Jewish population that controlled Yathrib, the situation soon changed and Mohammed and his forces waged war on the Jews of Yathrib, defeated them, beheaded hundreds of his Jewish male captives (known as *Banu Qurayza*) and then forever changed the name of the city, which had its origins in the Hebrew bible, to erase its non-Islamic identity and history. On his deathbed, Mohammed admonished his followers to dispossess all Jews and Christians from the land, saying "Two faiths will not live together in

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[108] Efraim Karsh, ISLAMIC IMPERIALISM: A HISTORY 2 (rev. ed. 2013). The discussion of the history of Islam herein, like the discussion of the history of the Jewish people, is necessarily a very general summary meant to provide the reader with a basic understanding of the history of each group.

[109] *See* Josef Horovitz, *Judæo-Arabic Relations in Pre-Islamic Times*, 52 ISLAMIC STUDIES no. 3/4 at 357-391 (2013) (originally published in 1929 in *Islamic Culture*, 3 THE HYDERABAD QUARTERLY REVIEW at 161-199 (1929). *See, also*, Shari L. Lowen, '*A Prophet Like Moses'? What Can We Know About the Early Jewish Responses to Muḥammad's Claims of Mosesness?* 90 HEBREW UNION COLLEGE ANNUAL at 227–55 (2019). For an analysis of Mohammed's admonition to expel non-Muslims from the land that takes a contrary view, *see* Harry Munt, *'No Two Religions': Non-Muslims in the Early Islamic Ḥijāz*, 78 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, UNIVERSITY OF LONDON no. 2 at 249–69 (2015) ("[the article] concludes that the widely attested classical prohibition on non-Muslims residing in the Ḥijāz rather had much more to do with the gradually evolving need to draw up firmer communal boundaries, which could help distinguish Muslims from others, and the role played by sacred spaces in doing so."). Even with Munt's more forgiving analysis of Mohammed's command, it is still an unequivocal directive to cleanse all non-Muslims from any lands claimed by Arabs (whether in the Arabian peninsula or other lands that were controlled by Arabs, though there is some uncertainty as to whether only the Hijaz was subject to the command), which has two important elements. First, it makes clear that Arab lands inhabited by Jewish Arabs (e.g., Palestinian Jews) are to be cleansed of non-Muslims, something that modern-day Palestinian Arabs advocate, even if they are willing, for the moment, to allow Christian Arabs amongst them. Second, it makes clear that among Arabs, only Muslim Arabs will be accepted, something that informs the historic and current conflict between Palestinian Arabs (who are mostly Muslim) and Jews.

the land of the Arabs"[110] This story would repeat itself once Muslim forces reached the land of Israel and, in particular, the Jewish holy city of Jerusalem.

In creating the Islamic belief system, Mohammed made a decision that literally changed the world: He created a series of myths that made Islam the most approachable monotheistic religion for his followers across Arab lands. Initially, Mohammed had adopted a number of Jewish rituals and beliefs into Islam as a way to encourage Jews to convert, including praying towards Jerusalem and not eating pork or blood. When this failed to achieve Mohammed's goals, Islamic practice was changed to pray to Mecca and a number of other revisions to the religion were made:

> The substitution of Mecca for Jerusalem was Islam's holiest site was also a shrewd piece of political expediency that allowed Mohammed to tie his nascent religion to pagan reverence of [Mecca]. He further reinforced this link by endorsing the annual pilgrimage to the Kaaba, Mecca's central shrine containing the images of the local gods [like Mohammed prior to founding religion, most of the population were polytheists who worshipped idols], and by sanctifying the fetish of kissing the shrine's Black Stone, the source of Mecca's holiness. By way of giving this pragmatic move an ideological grounding, he claimed that the Kaaba had been built by the biblical figure of Abraham, together with his son Ishmael, to whom many Arabians traced their descent. In doing so, Mohammed tapped into prevailing Arabian practices and beliefs by conferring a monotheistic status on ancestral practices. He moreover disassociated Abraham, whom he presented as the first monotheist (or hanif), from Judaism and Christianity, and linked him to Islam and more specifically to himself by creating a direct line of succession in the development of monotheism.[111]

The die had been cast: Islam would not only be a new monotheistic religion, it would be structured and promoted in such a way that it superseded existing monotheistic religions (Judaism, in particular, but also Christianity and Zoroastrianism) and deemed all other attempts

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[110] *See* Michael Lecker, *Judaism among Kinda and the Ridda of Kinda*, 115 J. OF THE AMERICAN ORIENTAL SOCIETY no. 4 at 635–650 (1995). *See, also*, M.J. Kister, CONCEPTS AND IDEAS AT THE DAWN OF ISLAM (1997), 92-95.

[111] Karsh, *supra* note 108 at 15.

to supersede Islam as heresy, as the Quran states that Mohammed was and always will be the last prophet after Moses and Jesus (i.e., "The Seal of the Prophets").[112]

With this kind of power, one that can't be questioned or subjected to new claims of divinity by subsequent prophets, and that by its own terms renders all that came before it no longer operative, Mohammed set up an empire that could not be replaced by any other religious or nationalist movement (Islam being both).[113]

Mohammed's life ended in 632 C.E., while his religion was in its infancy, but Islam was nonetheless an incredibly powerful force and Mohammed's successors turned Islam into an empire. Prior to the widespread adoption of Islam, the Arabian Peninsula was populated by a number of polytheistic people as well as Jews and Christians. Though Mohammed's initial attempts to establish Islam were not widely embraced, and in fact were rejected by polytheistic tribes indigenous to the region (including the clans grouped under the Quraysh tribe, from which Mohammed came), within several years the indigenous peoples were converted (often

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[112] *See* QURAN, SURAH 33:40 ("Muhammad is not the father of [any] one of your men, but [he is] the Messenger of Allah and last of the prophets. And ever is Allah, of all things, Knowing.") *See, also*, Albert Hourani, A HISTORY OF THE ARAB PEOPLES (2010) at Chapter 2 ("The Formation of an Empire" and "The succession to Muhammad: the conquest of an empire."). *See, also* Uri Rubin. *The Seal of the Prophets and the Finality of Prophecy. On the Interpretation of the Qurʾānic Sūrat al-Aḥzāb* (33) ZEITSCHRIFT DER DEUTSCHEN MORGENLÄNDISCHEN GESELLSCHAFT 164, no. 1 at 65–96 (2014) ("The assertion that Muḥammad is "the seal of the prophets", which appears in the second half of the same verse, is designed to demonstrate that Muḥammad brings the successive chain of prophetic revelations to its final manifestation. This notion implies that Muḥammad enjoys God's protection like any other prophet before him, especially Moses whose contemporaries criticized him for having married a black woman. They were punished for their criticism, and so will be those who doubted the lawfulness of Muḥammad's own marriage with Zayd's divorcee. As for the specific significance of the qurʾānic seal metaphor, this article goes on to show that it denotes confirmation as well as finality of prophecy. This means that the finality of prophecy is a qurʾānic idea, not a post-qurʾānic one, as maintained by some modern scholars.")

[113] Zhongmin Liu *The Relations between Nationalism and Islam in the Middle East*, 2 J. OF MIDDLE EASTERN AND ISLAMIC STUDIES (IN ASIA) at 69-78 (2008) ("The nationalism in the Islamic countries in the Middle East sprouted after the invasion of Western colonists and the fall of the Ottoman Empire. John Esposito, the reputed American scholar of Islam, believed that the rise of Islamic nationalism in the Middle East was a result of the interaction of the following forces: the breaking up of the Ottoman Empire after World War I and the emergence of modern nation-states; the development of independence movements that aimed at casting off the political and religious control of Western imperialism; the 'Salafiyya' (ancestor in Arabic, means religious reform and resurgence.) movement started by Jamal al-Din al-Afghani and his followers Muhammad Abduh and Rashid Rida.") *Id*. at 71. Granted, many Islamic scholars would dispute that Islam is a nationalist movement simply because the concept of "*umma*" in Islam, which is analogous to a global Islamic community *sans* borders, is not compatible with nation-state principles, but the Islamic *umma* can also be seen as a supra nation-state, with Islam as the political system. *See, also*, S. A. Morrison, *Arab Nationalism and Islam*. 2 MIDDLE EAST J. at 147-159 (1948).

by threat of force), including the Quraysh tribe.[114] Far from being an inclusive movement among the Arab people who founded Islam, early Islam spread among Arabs at the risk of death for those who did not embrace the new religion.[115] The imperialist/colonialist spread of Islam would be repeated across the Arab world and into Europe and Africa, targeting Christian territories in particular and forcing the conquered to either convert to Islam, become slaves or face death.[116]

In fact, within a decade or so of Mohammed's death, Muslim forces expanded their territory from portions of the Arabian Peninsula to Persia, Egypt, Syria[117] and then, within several more decades, Central Asia, parts of the Indian subcontinent (approaching China), Constantinople, North Africa and Spain.[118]

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[114] Raymond Ibrahim, SWORD AND SCIMITAR: FOURTEEN CENTURIES OF WAR BETWEEN ISLAM AND THE WEST, Hachette Books, Kindle Edition, at 3.

[115] *Id*. at 12 ("On [Mohammed's] death, some [Arab] tribes sought to break away, including by remaining Muslim but not paying taxes (zakat) to Abu Bakr, Muhammad's father-in-law and successor, or caliph. Branding them all apostates, which in Islam often earns the death penalty, the caliph initiated the Ridda ('apostasy') Wars, which saw tens of thousands of Arabs beheaded, crucified, and/or burned alive. In 633 these wars—and in 634 the life of Abu Bakr—were over; Arabia's onetime factious tribes were once and for all united under the banner of Allah.")

[116] *Id*. at 8-9 ("…what is now referred to as the West was for centuries known and demarcated by the territorial extent of its religion (hence the older and more cohesive term, 'Christendom'). It included the lands of the old Roman Empire—parts of Europe, all of North Africa, Egypt, Syria, and Asia Minor—which had become Christian centuries before Islam arrived and were part of the same overarching civilization. In other words, the West is what remained of Christendom after Islam conquered some three-fourths of its original territory. As historian Franco Cardini puts it: 'If we… ask ourselves how and when the modern notion of Europe and the European identity was born, we realize the extent to which Islam was a factor (albeit a negative one) in its creation. Repeated Muslim aggression against Europe… was a 'violent midwife' to Europe.'").

[117] *Id*. at 13 ("When the Arabs invaded Roman Syria in 634, it was much larger than today and encompassed modern-day Israel, Jordan, and Palestinian territories. It was also profoundly Christian.") (emphasis added).

[118] *See, generally*, Peter Sarris, EMPIRES OF FAITH: THE FALL OF ROME TO THE RISE OF ISLAM, 500-700 (2013). The rise of the Islamic empire certainly coincided with the fall of the Roman empire in many respects. *See, also*, Karsh, *supra* note 108, at 23 ("Within 12 years of Muhammed's death in June 632, Iran's long-reigning Sasanid Empire had been reduced to a tributary, and Egypt and Syria has been wrested from Byzantine rule. By the early eighth century, the Muslims had extended their domination over Central Asia and much of the Indian subcontinent all the way to the Chinese frontier, had laid siege to Constantinople, the capital of the Byzantines, and had overrun North Africa and Spain."); R. Suleimanov, *On Relicts of Ancient Culture and Ideology of Islam in Central Asia* 87 ORIENTE MODERNO no. 1 at 203–23 (2007); Thomas A. Carlson, *Contours of Conversion: The Geography of Islamization in Syria, 600–1500*, 135 J. of the American Oriental SOCIETY, no. 4, 791–816 (2015); Fred McGraw Donner, THE EARLY ISLAMIC CONQUESTS (1981); and J. W. Jandora, *Developments in Islamic Warfare: The Early Conquests*, 64 STUDIA ISLAMICA at 101–113 (1986).

Though it is impossible to know the guiding principles of early Muslims as they conquered territory, other than that they did what many others had done before them in building empires, the result can only be described in modern terms:

> Whether the conquests were an opportunistic magnified offshoot of small raiding parties or a product of a preconceived expansionist plan is immaterial. Empires are born of chance as well as design. What counts is that the Arab conquerors acted in a typically imperialistic fashion from the start, subjugating indigenous populations, colonizing their lands and expropriating their wealth, resources and labor.[119]

Perhaps the best example of Islam spreading by means of imperialist methods can be found in the Battle of the Yarmuk, where Roman forces were defeated in 636 C.E. and "[t]he Arabs' victory gave them permanent control of Syria-Palestine…" and "led to other victories by which the Muslim dominion was extended to the Pyrenees and Central Asia."[120]

Immediately prior to the commencement of hostilities at the Yarmuk, an emissary of the Romans attempted to negotiate peace with the Muslim armies, proposing that the Muslims end their imperial adventure, leave the lands of modern-day Israel, Jordan and Syria and return to their own lands of the Arabian Peninsula:

> [r]eturn to your lands for you have reached the maximum limit of what you can conquer of Caesar's Empire. Our Caesar is so generous that he is prepared to gift you the area you have taken in the past three years. You have also looted much gold, silver and weapons

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[119] Karsh, *supra* note 108, at 25 (emphasis added). Karsh has been accused of dealing in polemics with his work. For example, in reviewing Karsh's book, Columbia University history professor Richard W. Bulliet took issue with the characterization of Islam as an imperial force by noting "Muhammed as Prophet never set foot in a 'foreign land.' Saladin chased crusaders from lands that Muslims had ruled for five centuries and never crossed a sea. Khomeini fought back when Saddam Hussein attacked, but Saddam was the subjugator of Iraqi Shi'a…. Neither the Qur'an nor Muhammed's traditional biography mention conquering the homeland of imperial masters. As independent polities, Mecca and Medina had no imperial master…." Richard W. Bulliet, *Efraim Karsh, Islamic Imperialism: A History (New Haven, Conn.: Yale University Press, 2006)*, 40 INT'L. J. OF MIDDLE EAST STUDIES no. 3 at 485–86 (2008). While there are always at least two sides to every issue, the fact that Bulliet mentions Iran's Ayatollah Khomeini as simply responding to Iraq's aggression, while ignoring the fact that Khomeini created proxy militaries, including Hezbollah, to spread his form of Islamic revolution to other lands and eliminate the Jewish state of Israel, seems to be something approaching historical amnesia when discussing imperialist tendencies in Islam. *See, e.g.*, Marc R. DeVore, *Exploring the Iran-Hezbollah Relationship: A Case Study of How State Sponsorship Affects Terrorist Group Decision-Making*, 6 Perspectives on Terrorism, no. 4/5 at 85–107 (2012). Further, Islam countenances using war to obtain wealth, referred to as *ghanima*, which is a classic element of imperial conquest. *See* Ziauddin Ahmad and Ziauddin Ahmed, *Financial Policies of the Holy Prophet — A Case Study of the Distribution of Ghanima in Early Islam*, 14 ISLAMIC STUDIES no. 1 at 9–25 (1975). Finally, as is discussed herein, Muhammed intentionally established Islam in a city, Yathrib (now known as Medina), that was historically Jewish as a way to begin the Islamic empire by repudiating Judaism.

[120] *See* John W. Jandora, *The Battle of the Yarmuk: A Reconstruction*, 19 J. OF ASIAN HISTORY, no. 1 at 8 (1985).

> although you came naked to Syria running away from your land. Accept what I offer or face utter destruction.[121]

The Muslim commander Abu Ubaydah responded by reminding the Romans' Arab representative of the record of Muslim imperial conquests:

> You say that the Romans will never retreat? They will tum on their heels as soon as they see the blades of our swords. As for threatening us with your great numbers you have already seen how we kill double our number and you have seen how we meet your great armies with all their equipment and weapons and all the things we love on the day of battle until it becomes clear which of us is firm in war… We have tasted the blood of Rome and find nothing sweeter. 0 Jabalah, I invite you to the Din of Islam. Enter together with your people into our Din. That will bring you honour in this world and the next. Stop being a servant to that Christian of Rome for whose sake you are destroying yourself.[122]

After some period of negotiations between Muslim and Christian forces, the following exchange took place between Jabalah, an Arab Christian representative of Roman forces, and Jabir, a Muslim representative, when Jabir demanded that the Christian Arabs abandon their Roman comrades to convert to Islam:

> Jabalah: I do not like that religion or any other. I am attached to my religion. You, O Aws and Khazraj, are pleased with a thing for yourself while we are pleased with something else. You keep to your religion while we keep to ours.
>
> Jabir: If you will not leave your religion then at least refrain from fighting us. Wait and see who is victorious. If we are victorious and you want to accept Islam we will still welcome you and you will be a brother unto us. If however you wish to remain as a Christian then we will be satisfied with Jizyah [a tax on non-Muslims] from you and will leave you in control of your lands and the lands of your ancestors as well.[123]

In essence, early Muslims acquired territory by first invading and threatening death or confiscatory taxation if those from the invaded lands would not convert to Islam and become an Islamic colony and then delivering upon the threat.

When the Roman forces refused to surrender to Islamic forces at the Yarmuk, they were slaughtered and Islam's domination outside of the Arabian Peninsula, and in the Levant in particular, was firmly established. Shortly after their victory at the Yarmuk, Muslim forces

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[121] al-Imam al-Waqidi, THE ISLAMIC CONQUEST OF SYRIA: A TRANSLATION OF FUTUHUSHAM, THE INSPIRING HISTORY OF SAHABAH'S CONQUEST OF SYRIA at 267, translated by Mawlana Sulayman al-Kindi, available at https://www.kalamullah.com/conquest-of-syria.html.

[122] *Id*. at 267-269.

[123] *Id*. at 271-272.

conquered Jerusalem in 637 C.E. and then proceeded to capture Egypt (which, at the time, had a strong Christian presence)[124] and cleanse it of its non-Islamic nature.[125]

Over the course of the approximately 400 years following Mohammed's death, Islam spread throughout Asia, Africa and parts of Europe, establishing governmental entities (caliphates) that endured for centuries.[126] Some scholars have even described the power structure of early Islamic communities after Mohammed's death as one of "apartheid".[127] In fact, under Caliph Umar, the practice of setting up garrison settlements in foreign lands (*Amsar*), a classic example of colonialism, became common and was instrumental in the rapid spread of Islam.[128] As Islam matured in the years following the death of Mohammed, it became

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[124] Ibrahim, *supra* note 114, at 27-29.

[125] *Id*. at 31. Ibrahim also argues that after the Yarmuk victory, "…the Arabs further imposed their creed and language onto the conquered peoples so that, whereas the 'Arabs' once only thrived in the Arabian Peninsula, today the 'Arab world' consists of some twenty-two nations spread over the Middle East and North Africa." *Id*. at 43. In other words, from a relatively small territory in the Arabian Peninsula, Arabs, through the force of Islamic military action, colonized the rest of the Middle East and parts of Africa.

[126] Bawar Bammarny, *The Caliphate State in Theory and Practice*" 31 ARAB LAW QUARTERLY no. 2 at 163–86 (2017). Starting in the 7th century C.E., Islam was propagated from Egypt through the land of Israel, Jordan, Syria, Iraq and Persia, in addition to the rest of the Arabian Peninsula. *See, also*, Fred M. Donner, *The Formation of the Islamic State*, 106 J. OF THE AMERICAN ORIENTAL SOCIETY no. 2, at 283–96 (1986). For details on the spread of Islam in North Africa, *see* Ibrahim, *supra* note 114, at 34-38 ("As for the last vestiges of Christian power, in 698, Carthage fell to Islam, bringing a close to centuries of Roman rule in North Africa. Musa 'cruelly laid it to waste and leveled it [by fire] to the ground,' writes Paul the Deacon. Once the jewel of North Africa, Carthage was left desolate for two centuries, as Tunis became the new center of orbit. By 709, the whole of North Africa was under Muslim rule."). *Id* at 38. *See also*, *Id*. at 42-43 ("Just seventy-three years after Yarmuk, all ancient Christian lands between Greater Syria to the east and Mauretania (Morocco) to the west—approximately 3,700 miles—were forever conquered by Islam. Put differently, two-thirds (or 66 percent) of Christendom's original territory—including three of the five most important centers of Christianity—Jerusalem, Antioch, and Alexandria—were permanently swallowed up by Islam and thoroughly Arabized.")

[127] Karsh, *supra* note 108, at 28 ("Unlike Mohammed's umma, where Dhimmis [non-Muslims, primarily Jews and Christians, who were of lesser status and were required to pay special taxes and deprived of basic rights] constituted a negligible minority, in Umar's [Mohammed's father in law and a successor to Mohammed] empire the Arab colonizers were themselves a small island surrounded by a non-Muslim and non-Arab ocean, something that condemned their apartheid policy to assured failure.") (emphasis added) and *id*. at 40 ("It was in Khurasan [a Muslim area in Persia] that the apartheid wall built by the Arabs was becoming most comprehensively demolished and a mixing of colonizer and colonized was taking place.") (emphasis added). Unlike *Dhimmis*, the status of *Mawali* (non-Arab converts to Islam) in Islam was initially that of an inferior people, but over time *Mawali* become important and, indeed, essential, members of the *umma*. *See, e.g.,* Elizabeth Urban, *The Foundations of Islamic Society as Expressed by the Qur'anic Term Mawlā*, 15 J. OF QUR'ANIC STUDIES no. 1 at 23–45 (2013).

[128] *See, generally*, Hugh Kennedy, THE ARMIES OF THE CALIPHS: MILITARY AND SOCIETY IN THE EARLY ISLAMIC STATE (2001); Fred M. Donner, THE EARLY ISLAMIC CONQUESTS (1981); and Jacob Lassner, *Provincial Administration under the Early 'Abbāsids: The Ruling Family and the Amṣār of Iraq*, 50 STUDIA ISLAMICA, at 21–35 (1979).

a more distinctly colonial system, uprooting the traditional social and political structure of numerous small, sovereign tribes and replacing it with a centralized structure where the caliph, and his affiliates, were the primary source of governance and control.[129] Indeed, the practices of taxing non-Muslims as a condition to allowing them to live among Muslims (*Jizya*) as well as the Islamic institution of treating non-Muslims as having lesser rights in Islamic communities (*Dhimmi*) may well be the most blatant and obvious forms of apartheid as well as colonialism in the history of the world.[130]

Just as Christians engaged in a scorched earth policy to rid the land of Israel, and Jerusalem in particular, of its indigenous Jewish character, so did Muslims, but since the land had been Christianized, the target was Christians and Christian shrines. As one historian recounts,

> Similar bouts of persecution regularly erupted under other Muslim peoples and dynasties from the very start. Thus, in the early eighth century under the Umayyads, some Arabs—described as "untamed and beastly, illogical in mind and maniacs in their desires"—captured, tortured, and executed seventy Christian pilgrims in Jerusalem for refusing to convert to Islam (minus seven who complied under torture). Shortly after that, another sixty pilgrims were crucified in Jerusalem. In the late eighth century, under the Abbasids, Muslims destroyed two churches and a monastery near Bethlehem and slaughtered its monks. In 796, Muslims burned another twenty monks to death. In 809, and again in 813, multiple monasteries, convents, and churches were attacked in and around Jerusalem; Christians of both sexes were gang raped and massacred. In 929, on Palm Sunday, another wave of atrocities broke out; churches were destroyed and Christians slaughtered. In 936, "the Muslims in Jerusalem made a rising and burnt down the Church of the Resurrection [the Holy Sepulchre] which they plundered, and destroyed all they could of it," records one Muslim chronicler. As Rodney Stark puts it, "Almost generation after generation, Christian writers recorded acts of persecution and harassment, to the point of

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[129] *See, generally*, Patricia Crone, FROM ARABIAN TRIBES TO ISLAMIC EMPIRE: ARMY, STATE AND SOCIETY IN THE NEAR EAST C. 600–850 (2008) and Khalil Athamina, *A'rāb and Muhājirūn in the Environment of Amṣār*, 66 STUDIA ISLAMICA, at 5–25 (1987) ("The creation of a Muslim community during the life of Muhammad in al-Madina was considered the first attempt to bend the tribesmen to the control of some kind of central authority represented by Muhammad himself.") *Id*. at 5. *See, also*, Ibrahim, *supra* note 114, at 39 (quoting Emmet Scott, THE IMPACT OF ISLAM (2014) ("The arrival of Islam upon the stage of history was marked by a torrent of violence and destruction throughout the Mediterranean world. The great Roman and Byzantine cities, whose ruins still dot the landscapes of North Africa and the Middle East, were brought to a rapid end in the seventh century. Everywhere archeologists have found evidence of massive destruction; and this corresponds precisely with what we know of Islam as an ideology.")

[130] The institutions of dhimmi and jizya are no longer as prominent in Muslim states as they once were, but they are still practiced widely. *See* Ovamir Anjum, *Dhimmi Citizens: Non-Muslims in the New Islamist Discourse*, 2 REORIENT, no. 1 at 31–50 (2016). For a more traditional view of these practices, *see* A.D. Muztar, *Dhimmis in an Islamic State*, 18 ISLAMIC STUDIES no. 1 at 65–75 (1979).

> slaughter and destruction, suffered at the hands of Muslim [Arab, Persian, and Turkish] rulers.[131]

European Christians ultimately pushed back against Muslim conquests starting in the 11th century C.E., launching crusades to recover holy lands lost to Muslims.[132] What followed was over 300 years of bloodletting throughout the holy lands with both Christian and Muslim forces engaging in horrific atrocities.[133]

Islam ultimately prevailed over the Crusaders by the end of the 13th century C.E. and Islamic imperialism dramatically expanded with the birth and growth of the Ottoman empire, which lasted for six centuries and included the capture of lands stretching from North Africa to Bulgaria and Romania, Greece and Turkey and parts of Arabia, and including all of what

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[131] Ibrahim, *supra* note 114, at 127.

[132] *See* Lisa Blaydes and Christopher Paik. *The Impact of Holy Land Crusades on State Formation: War Mobilization, Trade Integration, and Political Development in Medieval Europe*, 70 INTERNATIONAL ORGANIZATION, no. 3 at 551–86 (2016) ("The rise and spread of Islam took place so rapidly that in the century following the death of the Muslim prophet, Mohammed, large parts of the Mediterranean basin — much of which previously had been under Roman rule — came under the leadership of Muslim caliphs. Islam's success as a political-religious movement brought the Muslim religion to the Iberian peninsula in Western Europe and, eventually, to the Byzantine capital of Constantinople in Southeastern Europe. In response to a plea from the Byzantine emperor under threat of being overrun by invading Muslim Turks, in 1095 CE Pope Urban II appealed to Christians in the west to assist their eastern brethren, with a further goal of recapturing Jerusalem and the Holy Land from Muslim control. The military mobilization that followed came to be known as the Crusades, which took place for the next two centuries.") *Id*. at 551. *See, also*, Chevedden, *supra* note 104; Khurram Qadir, *Modern Historiography: The Relevance of the Crusades*, 46 ISLAMIC STUDIES no. 4 at 527–58 (2007) and Peter Charanis, *Aims of the Medieval Crusades and How They Were Viewed by Byzantium*, 21 CHURCH HISTORY, no. 2 at 123–34 (1952) ("The history of medieval crusading may be conveniently divided into two chapters. The first of these chapters would end with 1291 when Acre was lost by the Christians and would cover the period extending backward to 1095 when the first crusading expedition was launched. During this period the western Christians conquered and lost the Holy Lands. They also established themselves in Greece and the Greek archipelago. The second chapter would come down to 1395, the year of the battle of Nicopolis, or possibly 1444, the year of Varna. During this period, though there is considerable talk and some action for the recovery of the Holy Land, the struggle has really become one for the defense of Europe against the invading Turks.")

[133] While the crusades were an important part of the history of Europe and the Middle East, as well as being a pivotal epoch in the history of Christianity and Islam, they were not particularly relevant in the context of this article's focus on colonialism, imperialism and settler-colonialism as those terms relate to the question of Israel, Palestinian Arabs and indigenous peoples, though some have argued that the Vatican's purpose in launching the crusades was to colonize, rather than liberate, the holy land. Charanis, *supra* note 132, at 124 ("Some believe that what the pope wanted was the establishment of a feudal state in Palestine under the suzerainty of Rome…"). As such, details of the crusades will not be discussed herein. For further information on the crusades, *see* the six volumes of A HISTORY OF THE CRUSADES, Madison: University of Wisconsin Press, 1989 (Setton, Kenneth, ed).

was known as Palestine.[134] Ultimately, the long-sought prize of Constantinople (now Istanbul) was conquered by Muslim forces. As with prior Muslim conquests, the vanquished lands were Islamized with great loss of life for anyone who refused to convert.[135]

After the fall of Constantinople, Muslim hegemony over the area from North Africa to Arabia and beyond solidified as the Ottoman Empire established its invincibility, reaching as far north as parts of Russia.[136] As part of this, Muslims held the land of Israel, and Jerusalem, for hundreds of years more until the fall of the Ottoman Empire in the early 20th century C.E.[137] and the subsequent re-establishment of Israel as a Jewish nation in 1948. The end of the Ottoman Empire ushered in a period of decolonization of portions of the Islamic empire that started with the founding of Islam, including the partition of colonized lands in the Levant into the modern states that exist today, including Israel, Jordan and Syria from what used to be referred to as Palestine. As part of this decolonization, the Jewish people finally had sovereignty and self-determination after over a thousand years of being denied its historical homeland. It is this reversal of conquest and empire that informs the modern claims of Muslims that they are the ones who have been subject to colonial expansion.

III. HISTORY REPEATS ITSELF

The story of Israel emerging from a long history of colonialist usurpations is not one unique to history. At roughly the same time that Israel was established as a modern state, the modern states of India and Pakistan also emerged from British decolonization. Much like the history of Jews and Arabs in Israel, the history of Hindus and Muslims in India/Pakistan[138] is complex and subject to competing narratives.[139] At their core, though, the stories are similar: two peoples, with two dominant religions, seeking sovereignty in lands they each claim to be

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[134] *See* Alan Mikhail and Christine Philliou, *The Ottoman Empire and the Imperial Turn*. 54 COMPARATIVE STUDIES IN SOCIETY AND HISTORY no. 4 at 721–45 (2012) and Halil Inalcik, *Ottoman Methods of Conquest*,2 STUDIA ISLAMICA at 103–29 (1954).

[135] *See* Ibrahim, *supra* note 114 at Chapter 7.

[136] *See* THE RUSSO-TURKISH WARS: THE HISTORY AND LEGACY OF THE CONFLICTS BETWEEN THE RUSSIAN EMPIRE AND OTTOMAN EMPIRE (2021) (Charles River, ed.).

[137] *See* Ibrahim, *supra* note 114, at 289 ("Although colonialism and 'the whole complex process of European expansion and empire' is often presented today in a historic vacuum, it too 'has its roots in the clash of Islam and Christendom,' explains Bernard Lewis: 'It began with the long and bitter struggle of the conquered peoples of Europe, in east and west, to restore their homelands to Christendom and expel the Muslim peoples who had invaded and subjugated them.… The victorious liberators, having reconquered their own territories, pursued their former masters whence they had come.'" (quoting Bernard Lewis).

[138] To say that there are only Hindus and Muslims in pre-partition, colonial India is akin to saying that there are only Jews and Muslims in the land of Israel. Clearly, there are many other constituencies and religions in play in both locations, but for purposes of this article we will focus on the primary competing claimants.

[139] *See, e.g.,* Jalal, Ayesha. *Conjuring Pakistan: History as Official Imagining*, 27 INTERNATIONAL J. OF MIDDLE EAST STUDIES no. 1 at 73–89 (1995).

historically their own, with Islamic colonialism as a predominant force in each.[140] It is this elemental similarity that makes the comparison of how India and Israel, on the one hand, and Pakistan and Arab Palestine, on the other hand, worthy of consideration.

Like the conflict between Palestinian Jews and Palestinian Arabs over Israel, the birth of modern India and Pakistan, as separate countries, involved the displacement of some people. The scale of the displacement, however, was much larger in India/Pakistan, where between 1947 and 1965, approximately 9,000,000 Hindus and Sikhs relocated to India and approximately 5,000,000 Muslims relocated to what was then Pakistan.[141] While the partition of India and Pakistan was met with extreme violence that continues to this day, the two countries ascended to their rightful places as independent nations and their respective legitimacies are not challenged by any other than fringe extremists.

Likewise, while violence still results from the displacement of approximately 1,500,000 Christians from Turkey in exchange for approximately 500,000 Muslims from Greece in the aftermath of the Treaty of Lausanne, which created the modern boundaries of Greece and

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[140] For a discussion of the history of how Islam arrived and spread through the Asian subcontinent, *see* M. Eaaswarkhanth, B. Dubey, P. Meganathan, *et al., Diverse genetic origin of Indian Muslims: evidence from autosomal STR loci*, 54 J. HUM GENET. at 340–348 (2009) ("Islamic influence first came to be felt in the Indian subcontinent during early seventh century with the advent of Arab military forces into Sindh, the lower part of the Indus valley, and included it into the Arabian empire. Subsequently, an Indo-Islamic state was established in Sindh and thereafter the region served as an Islamic outpost where Arabs established their trade links with the Middle East. For the next two and half centuries Islamic presence was hardly felt throughout the subcontinent. By the end of tenth century spectacular changes took place when Turkic tribes embraced and took up the mission of propagating Islam. These assertively expansive invaders initially began to move into Afghanistan and Iran and later into India through the northwest. In the thirteenth century, a Turkic kingdom was established in Delhi, which facilitated Persian and Afghan Muslim invaders to further spread across India. In the following 100 years, the Muslim empire extended its influence east to Bengal and south to the Deccan regions. Muslim sultanates ruling from Delhi, beginning in the eleventh century, and the great Mughal Empire (1526–1707 CE) that followed created a substantive Islamic legacy before India fell under British colonial rule. Thus the emergence of Islam in the region is concurrent with the Turko-Muslim invasion of medieval India (which includes large parts of present day Pakistan and India), where these rulers took over the administration of large parts of Indian subcontinent.")

[141] Haimanti Roy, PARTITIONED LIVES: MIGRANTS, REFUGEES, CITIZENS IN INDIA AND PAKISTAN, 1947-65 (2012).

Turkey, the legitimacy of each state is not questioned.[142] In fact, the existence of Turkey as an Islamic country is directly the result of Islamic colonialization.[143]

Approximately 900,000 Jewish citizens of Arab countries were displaced starting in 1948 as a result of the Arab rejection of the establishment of the modern state of Israel while a slightly smaller number of Palestinian Arabs were displaced from Israel in the same period.[144]

In each of the scenarios set out above, Muslim populations that resulted from early Islamic colonialism were displaced in one manner or another and provided with a religious state of their own, yet only in the case of Israel and Palestinian Arabs has there been not only a refusal to accept the compromises involved in the establishment of independent states based on the religious affiliation of those involved, but a concerted and international effort to delegitimize the rights of one religious population and to deny them a sovereign state of their own.

All of this is not to provide a rationalization for population transfers in the abstract, nor is it to say that simply because Islam colonized the Middle East that Muslims should be dispossessed of the homes that they've had for hundreds of years, nor is it to argue that the history of Islam as a colonial and imperial force means that Muslims today are engaging in the same type of violence that, over the course of more than 1,000 years resulted in genocide of indigenous people (such as Jews) or ethnic cleansing of thousands of square miles of territory (including modern Israel). It is to say, however, that as a matter of fairness through the lens of *realpolitik*, if there is an aggrieved people in the region who were subjected to violent usurpations that deprived them of basic rights, including the right to peaceful existence, cultural integrity and legal right to self-determination, it is the Jewish people. Just as Jews have generally given up claims to the entirety of the historic land of Israel (e.g., Gaza and even some of the most important places in Jewish history, such as Hebron, where the patriarch Abraham first lived and where Jewish shrines still exist), it is incumbent on Palestinian Arabs to accept that history shows Jews as the indigenous people of the land and if there is to be a lawful

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142 *See, generally*, Spyridon Sfetas, *The legacy of the Treaty of Lausanne in the light of Greek-Turkish relations in the twentieth century: Greek perceptions of the Treaty of Lausanne*, BALCANICA at 195-218 (2015).

143 *See* W. G. Brice, *The Turkish colonization of Anatolia*, 38 BULLETIN OF JOHN RYLANDS LIBRARY 18–44 (1955) ("In the middle of the eleventh century A.D. the population of Anatolia [Turkey] was predominately Christian, Greek-speaking and sedentary. The tribes which moved into the country after the battle of Manzikert were, by contrast, Moslems of Turkish speech, who practiced an economy of pastoral nomadism. What follows is a study of the Turkish colonization, with the aim of understanding how the two populations, native and immigrant, were merged.") Even in modern times, the fact that Turkey was colonized by Muslims is celebrated. *See* Ibrahim, *supra* note 114, at 122 ("when the nine hundredth anniversary of Manzikert was held on August 26, 1971, it 'was heralded by widespread jubilation in Turkey' and correctly portrayed as 'the beginnings of Turkification and Islamification of Anatolia.' Prime Minister Recep Tayyip Erdoğan and other top-ranking officials continue participating in Manzikert celebrations, and the battlefield is treated as sacred.")

144 *See* Samuel G. Freedman, *Are Jews Who Fled Arab Lands to Israel Refugees, Too*? N.Y. TIMES (Oct. 11, 2003).

resolution to the dispute, it will involve Palestinian Arabs coming to terms with the historical and legal facts that Jews have a right to self-determination in their historic homeland.

The issue, of course, is that one peoples' self-determination often comes at the price of another people's desire for self-determination. The right of self-determination is generally understood to mean that a people have a right to decide their own political fate and govern themselves. For centuries, the Jewish people were denied this basic right by those who colonized them, from Babylonians to Romans to Muslims. This right is enshrined in both the United Nations Charter, at Chapter 1, Article 1 ("To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace") as well as in numerous declarations and other instruments of international law, such as the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV) of 14 December 1960 ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."). If the argument against Jewish self-determination is that Jews are a religion rather than a people,[145] that argument fails *ab initio*, as it ignores the distinction between the religion of Judaism and the Jewish people.[146]

The traditional two-part test of peoplehood, as described by Professor Michael Scharf, is

> For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a people.
>
> The traditional two-part test examines first "objective" elements of the group to ascertain the extent to which its members share a common racial background, ethnicity, language, religion, history and cultural heritage. Another important objective factor is the territorial integrity of the area the group is claiming.
>
> The second "subjective prong" of the test requires an examination of the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct "people."' It necessitates that a community needs to explicitly express a shared sense of values and a common goal for its future.[147]

Examining the Jewish people under this test, there clearly is a common racial background, ethnicity, language, religion, history and culture as well as a defined territory that

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[145] This is the position taken by Palestinian Arabs when they adopted their national charter in 1968, in Article 20: "Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong." Palestinian National Charter, *supra* note 57.

[146] *See, e.g.*, Marcus, *supra* note 6 and Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, (2003).

[147] Scharf, *supra* note 146, at 379.

they possess, and the second prong of the test is self-proving by the fact that ethnic Jews have always considered themselves to be, and have been treated by others as, a distinct people.

In the case of Israel and Palestinian Arabs, while Palestinian Arabs have rights to citizenship (and self-determination) in Israel, they generally seek not just self-determination, but a political monopoly that is independent of a Jewish nation. As a matter of history, the Palestinian Arabs were provided with their own homeland, one parallel to the Jewish state, in Jordan, when the British partitioned Palestine (which was split between Jews and Arabs, with Arabs receiving the majority of the land mass). The fact that Hashemites deprived those Arabs seeking their own state of Palestine from obtaining their own state cannot justify the current insistence that Jews give up their homeland. Whether Palestinian Arabs wrest control of their promised state from the Hashemite rulers of Jordan is a separate issue, and one with great political risk, but risky questions do not justify ethnic cleansing (as Marxist-Adjacents argue for through the BDS movement) nor do they give rise to the denial of self-determination of other people (Jews, in this case).

For those who claim that Zionism is illegitimate because it merges religion with nationalism, Article 16 of the charter of the designated terror organization Hamas, which controls Gaza and is considered by many Palestinian Arabs to be their government, makes it clear that religious nationalism is the centerpiece of the Palestinian Arab cause:

> When an enemy occupies some of the Muslim lands, Jihad becomes obligatory forevery Muslim. In the struggle against the Jewish occupation of Palestine, the banner of
>
> Jihad must be raised. We must instill in the minds of the Muslim generation that the Palestinian cause is a religious cause. It must be solved on this basis because it contains Islamic sanctuaries where Masjid al-Aqsa is tied firmly to Masjid al-Haram (in Mecca) never to be released, as long as the heavens and the earth last, by way of the night journey ('Isra) of Rasulallah (Saas) and ascension (Mi'raj) to the heavens from there (al-Aqsa).[148]

If religious nationalism renders Zionism illegitimate, then the same must be said of the movement to create a Palestinian Arab state.

In fact, if the borders of modern Israel represent nothing more than a colonial affront to the Middle East, how is one to describe the borders of modern Jordan, Lebanon, Syria, Turkey and Iraq, all of which were established at approximately the same time as those of modern

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[148] Muhammad Maqdsi, *Charter of the Islamic Resistance Movement (Hamas) of Palestine*, 22 J. OF PALESTINE STUDIES no. 4 at 122-134 (Summer 1993).

Israel?[149] In each case, the creation of modern states in the Middle East from the former Islamic colonies resulted in religious states, all of them Muslim (Lebanon being an exception, as the Constitution of Lebanon requires Christian representation along with Muslim, even though Hezbollah, an Islamic terror organization created by Iran to colonize Lebanon, has de facto control of the government) with one exception: Israel. In each other state, Islam is either designated as the state's religion (which governs the rights of each resident, whether or not they are Muslim) or it is built into the governmental structure, as is the case in Lebanon and Syria.

There are many states that can and do provide Muslim Arabs (including those who assert Palestinian identity) with self-determination (not limited to but including Jordan, Lebanon and Syria, all part of historic Palestine) but none other than Israel that provide self-determination for the indigenous Jewish people. Through the rubric of fairness and *realpolitik*, it would be manifestly unfair for the sole Jewish state to be denied the right to exist. Fairness is not dispositive under law, but if Israel were to be eliminated as a state, this, under international law, would mean that the Jewish people have been denied a fundamental right. And the goal of BDS is indeed to eliminate the entirety of Israel, notwithstanding claims that all they want is an end to Israel's existence as a Jewish state.[150]

When viewed through history, which shows that there has never been a state of Palestine, let alone an Arab Palestine, and the states in the region that made up what was known as the territory of Palestine (including Israel, Jordan and parts of Lebanon and Syria) only being formed as modern states in the 20th century, the fact that Israel's existence as a state dates to the late 1940s is certainly not a basis for eliminating it and turning it into a new and ahistorical Palestinian Arab state. In point of fact, all of the modern states in the region sprung from the decolonization of the Ottoman and British empires in the 20th century and Israel is simply one of those states, albeit one with the longest historical ties to its people. Put another way, since Palestine was historically known to be the region that includes parts of Lebanon, Syria, Jordan and Israel, there already are three Palestinian Arab states.

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[149] Turkey was founded in 1923, Saudi Arabia in 1932, Lebanon in 1943, Syria in 1944, Jordan in 1946, Iraq and Egypt in 1947, Israel in 1948, Kuwait in 1961, Oman in 1970, Qatar and the United Arab Emirates in 1971 and Yemen in 1990. For additional information on the creation of modern states in the Middle East, *see* Lisa Anderson, *The State in the Middle East and North Africa*, 20 COMPARATIVE POLITICS no. 1 at 1–18 (1987) and Jonathan Endelman, *In the Shadow of Empire: States in an Ottoman System*, 42 SOCIAL SCIENCE HISTORY no. 4 at 811–834 (2018).

[150] *See, e.g.*, Dan Diker, *The World from Here: Hamas and BDS*, JERUSALEM POST (Mar. 4, 2014) ("Rather, [BDS] is largely a Muslim Brotherhood—and Hamas—fueled network that supports the same radical Islamic agenda of destroying Israel.")

IV. COLONIALISM, IMPERIALISM AND SETTLER-COLONIALISM AS APPLIED TO MIDDLE EASTERN STATES AND PEOPLES

Returning to the start of this article, it is important to look at the modern states of the Middle East, including Israel as well as each Muslim country that surrounds Israel, to determine whether the terms Colonialism, Imperialism and Settler-Colonialism apply.

A. Who Are the Settler-Colonialists?

Since recent claims mostly involve allegations that Israel is a Settler-Colonialist endeavor that has usurped the rights of the indigenous Palestinian Arabs, this is the best starting point for discussion.

As described earlier, there are many definitions for Settler-Colonialism, often conflicting with one another, but historian Patrick Wolfe's description is the best synthesis of the various theories:

> [t]he primary object of settler-colonialism is the land itself rather than the surplus value to be derived from mixing native labour with it. Though in practice, indigenous labor was indispensable to Europeans, settler-colonization is at base a winner-take-all project whose dominant feature is not exploitation but replacement. The logic of this project, a sustained institutional tendency to eliminate the indigenous population, informs a range of historical practice that might otherwise appear distinct-invasion is a structure, not an event.[151]

At its core, then, Settler-Colonialism, if viewed from the perspective of its effects, is to replace an indigenous population with a population from elsewhere. The threshold question, then, is what is an indigenous population? The answer, as with some many other terms relating to settler-colonialism, colonialism and imperialism, is that there is no formal definition. The United Nations Declaration on the Rights of Indigenous Peoples was adopted in 2007, yet it did not provide a definition for Indigenous Peoples.[152] A manual co-authored by the United Nations Office of the High Commissioner for Human Rights and the Asia Pacific Forum[153] in 2013 acknowledged that there is no international law definition for the term indigenous peoples and noted "… no formal definition has been adopted in international law. A strict definition is seen as unnecessary and undesirable.

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[151] Wolfe, *supra* note 53.

[152] G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Dec. 13, 2007).

[153] The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, HR/Pub/13/2 (Aug. 2013), available at https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf. .

The Martinez Cobo Study, referenced in the United Nations Declaration on the Rights of Indigenous People provided the most widely cited "working definition" of indigenous peoples:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them.
>
> They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

It also notes that an indigenous person is:

> …one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.[154]

Alternatively, on its website for its Department of Economic and Social Affairs, Indigenous Peoples, the United Nations described indigenous peoples as

> …inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, indigenous peoples from around the world share common problems related to the protection of their rights as distinct peoples.[155]

Under either description (neither of which have the legal effect of a binding definition), the basic elements of an indigenous population are that they have unique social and cultural characteristics as well as distinct ethnicity as well as social and legal systems that are not reflected in the societies where they live. Importantly, indigenous peoples have "…a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them."

In the case of Jews and their homeland of Israel, all of the basic elements of the description of indigenous peoples apply.

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[154] *Id*. at 6.

[155] Available at https://www.un.org/development/desa/indigenouspeoples/about-us.html.

Unique social, ethnic and cultural characteristics of Jews: Part of Judaism, as a religion and basis for Jews as a unique race and ethnicity, is the social and cultural traditions and codes that have been preserved among Jews over the millennia. A Jewish Israeli today adheres to many of the important social and cultural traditions of Jews who lived in the land of Israel thousands of years ago, from religious holidays and observances to traditions such as circumcision, dietary laws to codes of conduct with respect to others, animals and the environment, all of which are unique (to the extent they were not copied by subsequent peoples) to Jews.

Unique legal system: Scholars have explained that the Jewish bible, an indisputably religious text, "…is the basis for a constitution for running a Jewish State [and contains] a) criminal law, b) property law, c) liability law, d) business law, e) family law, f) rules regarding social welfare, g) governance and h) military law…[t]hey are laws meant to be kept by a society that runs its own state, laws for a Jewish republic."[156] No state or people, other than Jews and Israel, have this legal system.

Historical continuity with pre-invasion and precolonial societies on the territory: There has always been a Jewish presence in the land of Israel, even after waves of invasions by colonial powers (Babylonian, Persian, Roman, Muslim and others) that decimated the Jewish population and eliminated many of the important monuments, shrines and other evidence of Jewish history.

Distinction from other societies that were prevailing on the territory: Jews preceded both Muslim and Christian populations that subsequently colonized the land and have a multi-thousand-year history of distinguishing themselves from those colonizing societies.

Under any commonly accepted and used description of indigenous peoples, Jews are clearly indigenous to the land of Israel. As this article has already documented, the colonization of the land of Israel was undertaken by a series of foreign powers over millennia, which powers include the predecessors of the current Palestinian Arab population that falsely claims to be the

[156] Eliach, *supra* note 60, at 5.

original inhabitants of the land.[157] The fact that over half of Israel's population is Mizrahi (i.e., Jews who originated and remained in the region from biblical times) demonstrates this.

Thus, as the threshold question in determining whether a population can be described as settler-colonialist is whether that population has displaced an indigenous population, there can be no way for Israel to be deemed a settler-colonialist endeavor. Rather, Israel is a modern example of an indigenous people decolonizing its homeland from a series of colonizers. If there are any settler colonialists in the land of Israel, that title would have to go to the Palestinian Arab population (whether Christian or Muslim) who occupied the land after Christian and Muslim imperial forces dispossessed the indigenous Jewish population.

Certainly, Arabs who resided in the territory of Palestine might qualify as an indigenous population, but they would be part of the indigenous Arab people who already have self-determination in the many Arab states that composed the territory of Arab Palestine (Syria, Jordan and Lebanon). Since one hallmark of being an indigenous population is that the people represent something unique in comparison to other people in the region, it would be hard for Palestinian Arabs to fulfill that requirement since there is little, other than a claim to being Palestinian, that would distinguish a Palestinian Arab from a Jordanian or Syrian Arab. Further, since Jewish culture, society and presence in the land predate any reference to Palestine as a territory or Palestinian as a unique and separate Arab people by millennia, it would be contrary to the commonly accepted description of indigenous people to deem Palestinian Arabs, rather than ethnic Jews, the indigenous people of this particular land. The concept of an Islamic *umma*, of which the Palestinian Arabs claim to be a part, illustrates the fact that there is little to satisfy

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[157] The counterpoint to this statement is likely to be something along the lines of "today's Israelis are European colonists who have no connection to historic Jews." For example, an aide to Democratic Congresswoman Alexandria Ocasio-Cortez, a member of the so-called "Squad" of progressive anti-Zionists in the United States Congress, claimed"Israel is a racist European ethnostate built on stolen land from its indigenous population!" Houston Keene, *Ocasio-Cortez staffer calls Israel a 'racist European ethnostate' that was built on 'stolen land'*, FOX NEWS (Dec. 30, 2021). This argument originates among Palestinian Arab activists and has been repeated numerous times by American anti-Zionists, even though it is demonstrably false. *See, e.g.,* Hen Mazzig, *Are Jews Indigenous People? Here's What a Native American Jew Thinks*, NEWSWEEK (Oct. 15, 2020) ("Thousands of years of archaeological and historical evidence shows that Judaism and the beginnings of Jewish people, began in Judea—known today as the state of Israel. Through conquests and imperialism, ethnic Jews have been exiled from their ancestral homeland and subsequently settled in every corner of the world, from Eastern Europe to the Peruvian Amazon. The people who came from that place, what is today called Israel, are referred to, even by people who think we do not belong there, as Jews. Even adversaries like Hamas and Hezbollah do not dispute our right to call ourselves Jews—or, in Arabic, "Yahud" ("Yehuda" meaning Judea)") and Yoram Ettinger, *Palestine Claim Examined*, THE ETTINGER REPORT (Sept. 10, 2020), available at https://theettingerreport.com/palestinian-claim-examined/.

the requirement of a unique social, political and cultural characteristics for Palestinian Arabs to be deemed indigenous to Israel rather than to the umma as a whole.[158]

One other element of settler-colonialism is that the settler-colonialists exploit the natural resources of the land they settle. In the case of Israel, which was generally bereft of natural resources when it was re-established as the Jewish homeland in 1948, it would be difficult to point to any natural resource that was exploited. Unlike neighboring lands that had significant stores of oil, gas and minerals, the land of Israel was never known to have such resources and even to this day, other than some natural gas fields in the Mediterranean, Israel remains dependent on imports of most natural resources.[159]

B. Who Are the Colonialists?

Using "direct political and military control over subject territories that is a specific stage of imperialism" as the definition of colonialism, it becomes clear that there is a very serious issue with deeming Israel to be a colonial entity: controlling your own territory is not colonialism.

If Israel were to invade and occupy, say, Turkey, then it could certainly be deemed a colonial power. But the only territory that Israel has direct political and military control over is Israel. There are certainly areas that Israel exerts political and military control over that are disputed territories, such as the areas known as the West Bank or Judea and Samaria, but those territories are also under the political and military control of the Palestinian Authority, based in Ramallah, and the status of those territories continues to be negotiated between the parties. The only areas that Israel exerts sole political and military control over are areas not under dispute with the Palestinian Arabs. Thus, one could argue that if Israel having a security apparatus in places such as Hebron (one of the holiest sites in the world for Jews and a part of historic Israel) makes it a colonial entity, then the same must be said of the Palestinian Arabs having political and military influence over the same territory.

Professor Edward Said's definition of colonialism, "the implanting of settlements on distant territory", makes for an even less compelling case in deeming Israel a colonial entity. The only territory Israel has "settled" is its own historic territory, that which is within its own borders than distant. It would be ludicrous to argue that a nation has colonized itself.

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[158] Article 1 of the Palestinian National Charter makes this clear: "Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation." Palestinian National Charter, *supra* note 57.

[159] *See, e.g.*, Clifford Krauss, *Israel's Energy Dilemma: More Natural Gas Than It Can Use or Export*, N.Y. TIMES (July 5, 2019) ("For decades, Israel was an energy-starved country surrounded by hostile, oil-rich neighbors."). Only in recent years, decades after Israel's re-establishment as a Jewish state, were natural resources like natural gas discovered. Certainly, in the 1940s, these resources were unknown and the primary impetus for Jewish sovereignty had nothing to do with exploiting resources.

The classic examples of colonialism in the land of Israel, though, would be the Ottoman Empire, the British Empire or even the Islamic empire, where the colonial power invaded and took control of a land they had no other connection to. In each case (Ottoman, British and Islamic empires), the foreign power implanted settlements in the historic homeland of the Jews, a distant territory from the seat of each empire. Using the Islamic empire as an example, the use of the *Amsar*, armed garrisons that Muslims implanted on territory they had invaded as a way to secure that territory for Islamic control, is pure colonialism, as was the British practice of establishing protectorates and dependencies for territories that they included in their empire.[160]

The only argument for Israel being a colonial entity would be that today's Jews are not history's Jews, that Israeli Jews are Europeans who had no historical connection to the land and they came in to dispossess the indigenous Arabs. This argument is fatally flawed due to the fact that most Israelis are of Middle Eastern descent, rather than European and they are the Jews of history, who were first in time (relative to Christian and Muslim Arabs) inhabitants of the land.

C. Who Are the Imperialists?

Of the three Marxist terms discussed herein, imperialism is the one that is most difficult to apply to the situation in the Middle East due to it having a primarily economic, rather than social, definition.

As Israel was founded as a socialist country, the view of imperialism as being part of the economic development of a capitalist system simply doesn't apply to the claims made by Marxist-Adjacents. Professor Brewer's description of imperialism being "the dominance of more developed over less developed countries" and "rivalry between major capitalist countries" makes this clear.

As discussed earlier, Professor Gathii used a functional definition for imperialism as the control of a colonized people by "European and other invaders" while Professor Said described imperialism as "thinking about, settling on, controlling land that you do not possess, that is distant, that is lived on and owned by others" and further explained that imperialists elevate western values over those of the indigenous culture. Put another way, to be an imperialist power, one must have control over another people's land and have no inherent claim to the land other than as part of your own western, capitalist empire.

Again, here we have the question of who the indigenous people of Israel are.

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[160] *See, e.g.,* E.O. Egboh, *British Colonial Administration and the Legal Control of the Forests of Lagos Colony and Protectorate 1897-1902: An Example of Economic Control under Colonial Regime*, 9 J. OF THE HISTORICAL SOCIETY OF NIGERIA no. 3 at 70–90 (1978).

Using the commonly accepted definition of indigenous people, discussed *supra*, there is a strong argument to be made that Jews are the indigenous people of Israel and the Palestinian Arabs are the non-indigenous colonialists who disenfranchised the indigenous Jews and acted as the agents of the Islamic *umma* (as successor to the long string of other usurpers, from the Babylonians to the Romans to the Ottoman empire) in conquering the land of Israel for the benefit of the expansive Islamic empire.

If there is an argument to be made that Israel is an imperial entity, it has to be based on the discredited and factually absurd claim that Israeli Jews are European Whites who went to Israel at its founding to establish it as an outpost for European colonization. On its face, this argument is without basis due to the fact that a majority of Israel's population has no connection to Europe and is, instead, native to the Middle East. Further, European Jews, far from being White, have been shown to have a direct genetic connection to the Jewish ethnicity, stretching back thousands of years from the time of the first conquest of the land of Israel.[161] During the centuries that Jews lived in Europe as a result of the various conquests of the land of Israel, there certainly was a physical change in the population due to differing climates, some intermarriage and the natural impact of assimilation. This, however, does not make Jews any less a distinct people with common roots in the Levant than the fact that many Africans who were enslaved and brought to America are of lighter skin than those who remained in Africa or have western surnames would make them less African.

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[161] *See* Kevin A. Brook, *The Origins of East European Jews*, 30 RUSSIAN HISTORY, no. 1/2 at 13 (2003) ("…Jews around the world, both Sephardic and Ashkenazic, are more closely related to one another than to non-Jews, and also found a close Y-chromosomal connection between Jews and Palestinian Arabs, Lebanese and Syrians.") and Sala Levin, *The Biggest Jewish Genetic Myths of All Time*, MOMENT MAGAZINE, (July 28, 2012), available at https://momentmag.com/the-biggest-jewish-genetic-myths-of-all-time/ ("For centuries, rumors have circulated that Ashkenazi Jews are the descendants of Khazars, a medieval confederation of semi-nomadic Turkic tribes—a view famously articulated in The Thirteenth Tribe, the 1976 book by Arthur Koestler, the well-respected author of Darkness at Noon. The Khazars were led by a semi-religious figure called the khagan, who, according to sources, converted to Judaism along with much of the ruling class around 740 CE, a decision possibly motivated by political expedience in a region flanked by Muslims and Christians. The conversion is documented in Sefer HaEmunot, a 15th-century text by Rabbi Shem Tov ibn Shem Tov, and the philosopher and poet Yehuda HaLevi's 12th-century book, The Kuzari, which tells of a dialogue between the Khazar king and a Jew asked to guide him through the basic tenets of Judaism. When the Khazar empire collapsed, Koestler argues, the new Jews migrated west—to places like Lithuania, Ukraine, Germany and others, giving birth to Ashkenazi Jewry. Basing his theory on the work of earlier scholars, he hoped to counteract anti-Semitism, but his book was derided by critics. They argued that the theory—which called into question historic claims to the land of Israel—was unsound. Genetic mapping has since laid the controversy to rest. Though the history is murky, it's clear that all Jews originated in the Eastern Mediterranean, and that over centuries some migrated. 'It's all very speculative,' says [Dr. Neil] Risch [director of the University of California, San Francisco's Institute for Human Genetics]. 'There's not a lot of actual history written down, but the belief is that the Ashkenazis derived from settlers who probably came into the Rhineland around the 9th or 10th century and formed this distinct endogamous group.' The 14th-century founder effect was likely also the result of immigration, largely to Lithuania and the surrounding region.")

The distinction between Ashkenazi and Sephardic (or Mizrahi) Jews is something of a red herring, because as much as there are some physical differences, those differences are superficial and do not obviate the fact that there is an unbroken genetic history linking ethnic Jews to one another and to the land of Israel. For people who adhere to Judaism without being ethnic Jews, of course there is no connection to the land of Israel other than Israel being the locus of much of the traditions and practices of Judaism. Those individuals, though, would claim neither Ashkenazi nor Sephardic or Mizrahi lineage, which further demonstrates the stark difference between being an ethnic Jew and being an adherent of the faith of Judaism *sans* ethnicity.

Consequently, Jews, and the modern state of Israel, can't be deemed to be imperialist under any definition or commonly-accepted usage of the term.

The same cannot be said of those entities that conquered and occupied the land of Israel over the millennia. Whether looking at the Babylonians, Persians, Romans, early Muslims, the Ottomans or the British, all were empires that fit the definition of imperialists, especially as the term relates to each entity's activities in historic Israel.

CONCLUSION

Stereotypes often persist for reasons that range from being based on a kernel of a fact to being an attempt to misinform. In the case of ethnic Jews, the stereotype promoted by Marxist-Adjacents is that Jews, and Israeli Jews in particular, are White. While some ethnic Jews do indeed appear to be White, the majority of Israeli Jews are from lands now deemed to be Arab lands and are no more White than anyone claiming Palestinian-Arab ethnicity. To say that simply because most ethnic Jews were forced out of their homeland over 1,000 years ago and lived among other peoples they are now not entitled to their land is akin to saying that native Americans have no claim to land now controlled by the United States government because many native Americans went on to have lives in the United States after the settlement of those lands by Whites who arrived from Europe over 600 years ago.[162]

If an indigenous people who lost their land to colonists 600 years ago are still entitled to assert grievances for their land today, why should an indigenous people who lost their land to colonists 2000 years ago not have the same right? For those who say that if this were countenanced, we'd have to weigh claims of Jews to the land of Israel against the Philistines or Canaanites or even Babylonians, the answer is that there is an identifiable nation of Jews that still exist and trace their ancestry to the land while there are no longer any people who

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[162] *See, e.g.,* Sam Levin, *This is all stolen land: Native Americans want more than California's apology*, THE GUARDIAN (June 21, 2019) and Harmeet Kaur, *Indigenous people across the US want their land back -- and the movement is gaining momentum*, CNN (Nov. 26, 2020) ("Their fight is one in a broader movement by indigenous people across North America to reclaim their lands -- a movement that is gaining steam as the nation grapples with injustices committed against marginalized communities.").

assert that they are Philistines, Canaanites, or Babylonians. Were there to be such a people, their claims would have to be examined to determine who the true indigenous people are.

The Palestinian National Charter from 1968 makes the agenda clear. Article 5 states "The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father - whether inside Palestine or outside it - is also a Palestinian." Article 6 states "The Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians." By setting a random cutoff of 1947 to determine who is a Palestinian, and then excluding any Jew who returned to the land upon the establishment of Israel while giving every Arab who claims Palestinian origin status as a Palestinian, even if they have never been in the land, the Palestinian Arabs effectively have disenfranchised the indigenous people of the land.

Some argue that resolving modern border disputes based on religious texts such as the Bible is unacceptable on many levels, from elevating stories that may be myth to the status of fact to questions as to the veracity of translations. Yet using Biblical history to judge the claims of competing peoples is an important tool, along with scientific methods that can discern the age of structures and remains. In fact, archeologists working in Jerusalem have discovered a wide range of artifacts that definitely show a continuous Jewish presence in the region dating back to the time of the first and second temples.[163] Without resorting to the Bible, we would have to use other sources of history that have been subject to far lower levels of scrutiny and study.

There is no basis in fact or history to deem the modern State of Israel, and its Jewish citizens, to be either colonialists, imperialists or settler-colonialists and those terms have no legal effect in any case. Pursuant to international law, Jews, the indigenous people of the land of Israel, have a fundamental right to self-determination and any act that would disenfranchise them from that right would and should be null and void as a legal matter.

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[163] David Billet, *Archeology Proves Jews are Indigenous to the Land of Israel*, ISRAEL NATIONAL NEWS (Feb. 13, 2022), available at https://www.israelnationalnews.com/news/322187 ("Finally, countless other Jewish artifacts have been uncovered dating to both the First and Second Temple, and to the centuries that followed. In 2016, the New York Times reported that the Israel Antiquities Authority uncovered a rare piece of Papyrus that dated to 2,700 years ago, which stated the Hebrew word for 'Jerusalem' … The historical connection of the Jewish people to the land of Israel is undeniable, as seen from the countless artifacts which have recently been discovered.")

A NEW CYBERBULLYING LAW? EXTENSION OF LEGAL INTERPRETATIONS IN CHINA AND RUSSIA

Alexey Ilin*

Abstract: Cyberbullying is a form of psychological violence that is intentional, repeated, characterized by power imbalance, and uses cyberspace as its medium. Cyberbullying can be much more vicious than the 'traditional' face-to-face bullying because it is not limited by time and space, difficult to detect, and the aggressors often enjoy anonymity and impunity. Moreover, cyberbullying can exist as a self-contained phenomenon in cyberspace, which means that the aggressor and the victim may not know each other in the real world. Bearing these facts in mind, we need to answer two important questions: 1) Is cyberbullying a new type of offense? 2) Do we need a new anti-cyberbullying law? Scholars around the world are divided on these issues. While some countries, like the United States and New Zealand, have directly criminalized cyberbullying, others, like Australia and Canada, are simply amending their existing laws or extending their interpretations. This paper examines the legal situation in China and Russia, the two countries which do not have any specific laws regarding cyberbullying. The research is built upon the analysis of applicable laws and judicial decisions. The case studies overview the situations when victims of cyberbullying sought legal protection in court. The paper concludes that neither China nor Russia needs to pass a new anti-cyberbullying law. They are already doing adequate work to amend and interpret the existing civil, administrative, and criminal laws in order to counter cyber-offenses. However, more effort needs to be done to remove procedural barriers to litigation and prosecution, such as the costly and cumbersome notarization process in Russia, or the private character of the prosecution of defamation in China.

Keywords: Cyberbullying, Bullying, Defamation, Legal Interpretation, Civil Litigation, Criminal Prosecution, China, Russia

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INTRODUCTION

In Joanne Rowling's Hogwarts School of Witchcraft and Wizardry, one of the most important subjects was Defense Against the Dark Arts. In our modern world where technology, in Arthur Clarke's words, becomes sufficiently advanced to be indistinguishable from magic,[1] the most similar subject would be Defense Against Cybercrimes, and among them cyberbullying would bear the utmost relevance to the schoolchildren. In a civilized society, the most appropriate way to defend oneself is to seek legal protection. Therefore, this paper examines the adequacy of legal protection against cyberbullying in order to answer a central question: do we need a new anti-cyberbullying law?

A. Research Design and Method

This paper consists of an introduction, conclusion, and four parts in between. The first part traces the origins of cyberbullying research in the academia, summarizes scholarly definitions of cyberbullying and provides a classification of cyberbullying offenses. The second part summarizes legal definitions of cyberbullying and observes the current achievements, as well as gaps, in legal research. The third part observes cyberbullying-related laws in China and Russia. The fourth part provides a study of cyberbullying-related legal cases in China and Russia. Case studies are followed by a discussion of results and a conclusion.

This paper relies on case studies, legal, statistical, and comparative analysis, as well as a review of literature. Its primary sources are judicial decisions, laws, writings of legal scholars, psychologists and law practitioners. There are two hypotheses this paper looks at. First, existing laws are not adequate to protect the victims of bullying in cyberspace, and a new cyberbullying law is needed. Second, legislators can amend the existing laws and/or extend their interpretation, therefore, a new cyberbullying law is not needed. The conclusion shows which hypothesis turns out to be the correct one.

B. Research Limitations

This research is limited in scope, time, and space. First, it is primarily concerned with the legal aspects of countering cyberbullying. Psychological aspects of this behavior and technical issues of network operation may be examined only to promote the primary research objective and answer the central question. In addition, this paper does not limit cyberbullying to any age group. Second, this paper examines contemporary legal situation and court decisions of the last five years (2017-2021). Third, this research is focused on studying the laws and legal cases of China and Russia. Laws and cases of other countries will be reviewed only for illustrative purposes.

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[1] Andrew Z. Jones, "What Are Clarke's Laws," *ThoughtCo.,* https://www.thoughtco.com/what-are-clarkes-laws-2699067.

The Chinese and Russian legal systems were chosen as objects of this research due to their similar characteristics. First, both China and Russia belong to the civil law system, also known as the continental system. Their legal systems are unitary, which means individual provinces cannot enact their own civil or criminal laws. Second, China and Russia are developing countries with an explosive growth of network coverage and similar legal problems arising from this rapid digitalization. Over the last ten years, the number of internet users has grown by 109.7% in Russia[2] and 231.9% in China.[3] By contrast, in the United States, the growth was only 42.6%.[4] Third, cyberbullying research in China[5] and Russia is in its early stages, and more work needs to be done to catch up with our western colleagues.

I. THE CYBERBULLYING PHENOMENON

In this part we shall trace the emergence of cyberbullying as a social phenomenon and an object of scholarly research. We will highlight core elements of cyberbullying among the numerous definitions in academic writings, draft a classification of cyberbullying, summarize its key features, and explain its detrimental effect on the person and society.

A. The Origins of Cyberbullying Research

The social phenomenon of bullying has existed for centuries before it received the prefix *cyber* in the late 20th century, but it has not always been an object of scrupulous research. Encyclopedia Britannica gives a clear and succinct definition of bullying: *"intentional harm-doing or harassment that is directed toward vulnerable targets and typically repeated."*[6] A definition by Dan Olweus, an authoritative Norwegian scholar and a pioneer in bullying research, allows to reduce all other definitions of bullying to a common denominator: bullying is (1) intentional; (2) repeated; and (3) characterized by power imbalance.[7]

Throughout the history, bullying has been viewed as an accepted and normalized experience in children, until its perception started to change in the late 20th century. Scandinavian scientists made the first attempts at systematic research in bullying in the 1970s, and in 1980s their colleagues from the United Kingdom, the Netherlands, the United States and Japan followed suit.[8] By the end of the 20th century, scientists started to seriously challenge

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[2] Statistics of Internet Users in Russia, *Rusind.Ru*, https://rusind.ru/polzovateli-interneta-v-rossii.html.

[3] Number of Internet Users in China from 2008 to 2020, *Statista*, https://www.statista.com/statistics/265140/number-of-internet-users-in-china/.

[4] Number of Fixed Broadband Subscriptions in the United States from 2000 to 2020, *Statista,* https://www.statista.com/statistics/183614/us-households-with-broadband-internet-access-since-2009/.

[5] Jiaming Rao et al., "Cyberbullying Perpetration and Victimisation Among Junior and Senior High School Students in Guangzhou, China," *Injury Prevention* (2017): 6, doi:10.1136/injuryprev-2016-042210.

[6] Diane Felmlee, "Bullying," *Britannica,* https://www.britannica.com/topic/bullying.

[7] Dan Olweus, "Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program," *Journal of Child Psychology and Psychiatry* 35, no. 7 (1994): 1173.

[8] Olweus, "Bullying at School," 1171.

the conventional wisdom about the 'normality' of bullying.[9] Columbine High School Shooting on April 20, 1999 was the turning point. This tragic event, in words of Rodkin and Fischer, "exposed a narrative of marginalized youth lashing out indiscriminately against a tormenting popular peer culture,"[10] which in turn triggered a surge of bullying research.

Eight days after Columbine, a copycat shooting happened in a high school in rural Alberta, Canada. This induced a Canadian IT teacher Bill Belsey to start working on a separate field of bullying research – cyberbullying. Belsey noticed that the majority of mass shooting perpetrators were victims of school bullying. He also noticed that as school violence traversed borders and ceased being an exclusively "American problem,"[11] so did the bullying. As more teenagers were getting access to mobile phones and Internet, bullying was also moving from classrooms and playgrounds to a new realm of cyberspace. Shortly after launching his first project, bullying.org, Belsey received reports about the emerging phenomenon from all over the world. In response, he created www.cyberbullying.ca, the world's first website specifically dedicated to cyberbullying.[12]

Developed countries witnessed an unprecedented growth of information and communication technology (ICT) in the late 1990s and early 2000s, which was inevitably followed by an increase in internet offense cases, cyberbullying among them. With many reports coming from the United States, Canada, the United Kingdom, Scandinavia, Japan, Australia and New Zealand, by 2005 cyberbullying was recognized as a global problem.[13] Scholars, policymakers and legislators faced a list of tough questions. What is cyberbullying? Is it a new form of violence or just a variation of face-to-face bullying? Is it less or more harmful? And do we need to enact new laws to counter it?

B. Scholarly Definitions of Cyberbullying

Scholars have given many definitions of bullying and cyberbullying, some of them broad, others narrow, but all of them sharing a number of similar characteristics. Bullying is viewed in a broad sense as a form of intentional, persistent and malicious violence directed against people of all age groups, and in a narrow sense – exclusively against children. Although popular culture associates bullying with school students, it also occurs in adults' workplaces and beyond, and research by Kowalski, Toth, Morgan, as well as Duggan proves this

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[9] Aiman El Asam and Muthanna Samara, "Cyberbullying and the Law: A Review of Psychological and Legal Challenges," *Computers in Human Behavior* 65 (2016): 128.

[10] Philip C. Rodkin and Karla Fischer, "Cyberbullying from Psychological and Legal Perspectives," *Missouri Law Review* 77, no. 3 (2012): 621.

[11] Bill Belsey, "Cyberbullying: An Emerging Threat to the "Always On" Generation*," Bill Belsey's Personal Website,* March 24, 2019, https://billbelsey.com/?p=1827.

[12] Belsey, "Cyberbullying."

[13] Marilyn A. Campbell, "Cyber Bullying: An Old Problem in a New Guise? *Australian Journal of Guidance and Counselling* 15, no. 1 (2005): 68-76.

phenomenon to be massive.[14] The same assumption is likely to be true about the cyber form of bullying. Therefore, this paper shall investigate cyberbullying without prejudice to the age of victims and perpetrators.

The first and the most often cited definition of cyberbullying was given by Bill Belsey at dawn of the 21st century: *"Cyberbullying involves the use of information and communication technologies to support deliberate, repeated, and hostile behavior by an individual or group, that is intended to harm others."*[15] It can be compared with a recent definition by a Chinese scholar Xu Junke (2020): *"This behavior is defined as cyberbullying, in which the perpetrator persistently carries out an aggressive, intentional act using electronic forms of communication such as cell phone and the Internet, with intent to torture, threaten, hurt, harass or humiliate the victim."*[16] There is no universally accepted definition of cyberbullying, though the majority of scholarly definitions contain four core elements: cyberbullying is (1) intentionally harmful, (2) repeated, (3) characterized by an imbalance of power between the aggressor and the victim, and (4) uses electronic means of communication.[17] This succinct and logical definition can be found in the works of El Asam and Samara,[18] as well as Pennell et al.[19] Evidently, it shares 3 out of 4 of its characteristics with the classic bullying definition given by Olweus in 1990s: (1) intentional; (2) repeated; and (3) characterized by power imbalance.[20] This takes us to the next question: is cyberbullying so much different from the 'traditional' face-to-face bullying?

Scholars tend to support the thesis that cyberbullying is a direct extension of face-to-face bullying.[21] In other words, the same aggressor that has been previously harassing the

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[14] Up to 30% Americans reported being bullied at work, see Robin M. Kowalski, Allison Toth, and Megan Morgan, "Bullying and Cyberbullying in Adulthood and the Workplace," *The Journal of Social Psychology* 158, no. 1 (2018): 64-81; up to 65% young Internet users reported being harassed online, see Maeve Duggan, "Online Harassment," *Pew Research Center*, October 22, 2014, https://www.pewresearch.org/internet/2014/10/22/online-harassment/.

[15] Belsey, "Cyberbullying."

[16] Xu Junke, "Legal Regulation of Cyberbullying – From a Chinese Perspective," Paper presented at 2020 IEEE Intl Conf on Dependable, Autonomic and Secure Computing, Intl Conf on Pervasive Intelligence and Computing, Intl Conf on Cloud and Big Data Computing, Intl Conf on Cyber Science and Technology Congress (DASC/PiCom/CBDCom/CyberSciTech), August 2020: 322.

[17] These electronic means of communication include but not limited to: mobile communications, instant messengers, e-mail, forums and chats, social networks, webcams, video hosting services, gaming sites and virtual worlds – see Aliya Kintonova, Alexander Vasyaev and Viktor Shestak, "Cyberbullying and Cyber-Mobbing in Developing Countries," *Information & Computer Security* 29, no. 3 (2021): 439.

[18] El Asam and Samara, "Cyberbullying and the Law," 128.

[19] Donna Pennell et al., "Should Australia Have a Law Against Cyberbullying? Problematising the Murky Legal Environment of Cyberbullying from Perspectives Within Schools," *The Australian Educational Researcher* (2021): 1, https://doi.org/10.1007/s13384-021-00452-w.

[20] Olweus, 1173.

[21] El Asam and Samara, 128; Junke, "Legal Regulation of Cyberbullying," 327.

victim in the physical space continues to do so in the cyberspace.[22] Interestingly enough, the same scholars (e.g. El Asam and Samara, Junke) equally admit that cyberbullying can happen anytime and anywhere,[23] and victims can be anyone,[24] which implies that the aggressor and the victim may not necessarily know each other offline. The coronavirus pandemic has dramatically altered the offline-to-online ratio of human interaction, and the digitalization of society is likely to continue in the future. Today, a student can earn a university degree without actually showing up on campus for the whole duration of one's studies. In the same fashion, online violence will probably not require an offline trigger. After all, the numbers of the 'old-fashioned' physical bullying cases are declining, while cyber-violence is on the rise. The data from the 2014 Report by ChildLine (the largest counseling service for children in the UK) is particularly significant as it shows an 18% decrease in physical abuse[25] against an 87% increase in the number of counselling sessions about online bullying.[26] In addition, I would like to confess that I have also been a target of verbal offense from people I have never met in the physical world. These encounters mainly happened in Chinese messenger WeChat and Russian social network vk.com. Nevertheless, my confession should not be regarded as credible evidence (since personal experience does not count as a scientific source) and was given here exclusively for illustrative purposes.

C. Classification and Features of Cyberbullying

The greatest difficulty in defining cyberbullying is the volatility and elusiveness of its medium, the cyberspace. Scholarly articles may contain a long list of cyberbullying varieties, each of them showing a different aspect of this multifaced phenomenon. For this reason, cyberbullying is sometimes regarded as an 'umbrella term' that includes various offenses perpetrated with the use of ICT.[27]

Since different scholars view the problem from different angles, there is no single article or book to include a complete and comprehensive typology of cyberbullying. Bearing that in mind, I have analyzed the lists of cyberbullying offenses that were already published in scholarly articles and tried to compile a classification that would be as full and inclusive as possible. The articles I relied on were written by Kintonova, Vasyaev, and Shestak,[28] Azimov,

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[22] Jaana Juvonen and Elisheva F. Gross, "Extending the School Grounds? – Bullying Experiences in Cyberspace," *Journal of School Health* 78, no. 9 (2008): 497.

[23] El Asam and Samara, 130; Junke, "Legal Regulation of Cyberbullying," 323.

[24] El Asam and Samara, 130.

[25] ChildLine, "ChildLine Annual Review: Under Pressure" (2014): 11, available at: https://letterfromsanta.nspcc.org.uk/globalassets/documents/annual-reports/childline-review-under-pressure.pdf.

[26] ChildLine, "Childline Annual Review" (2014), 7.

[27] Nikola Paunovic, "Cyberbullying of Children: Challenges of Victim Support," *Temida* 21, no. 2 (2018): 253.

[28] Kintonova, Vasyaev, and Shestak, "Cyberbullying and Cyber-Mobbing," 440.

Gorshkova, and Karasyova,[29] El Asam and Samara,[30] Xu and Trzaskawka.[31] I have identified twelve different types of cyberbullying and listed them in alphabetical order.

1. *Assisted cyber suicide* is a form of psychological abuse when a perpetrator brings the victim to suicide through psychological manipulations or psychological pressure.[32] The abuser often controls the victim's actions via the Internet. A notorious example is the 'Blue Whale' game.
2. *Catfishing (Impersonation)* means creating a fake account using another person's photo and personal data without the person's consent. The perpetrator often uses this page to post malicious content thereby damaging the victim's reputation. [33]
3. *Cyber-mobbing* is a form of offensive behavior which manifests itself in insulting, threatening, or humiliating a person by a group of people using electronic communication. In China, a large-scale form of cyber-mobbing is known as '*human flesh search engine'* (*Chinese* 人肉搜索 – rén ròu sōu suǒ).
4. *Cyberstalking* is a systematic deliberate persecution of an individual, group of people, or organization. Cyberstalkers obsessively monitor the victim's activities in cyberspace, collect and/or steal confidential information to intimidate, blackmail and make claims.[34] Unlike trolls, some cyberstalkers may never initiate a direct contact.
5. *Defamation (Denigration)* is an offence of deliberately posting or sharing online information about an individual which was known to be false by the person who disseminated it. Such acts are usually motivated by a desire to psychologically suppress the victim, ruin his/her reputation and destroy social connections.[35]
6. *Fraping* means illegally obtaining control over the victim's account and using it for disseminating malicious content in the name of the victim.[36] While *catfishing* involves creating a fake account, *fraping* goes further and hijacks the victim's real account.
7. *Griefing* is a form of in-game hooliganism by online game players who intentionally hunt down other players within the virtual reality with a purpose of making their gaming experience painful and unbearable.[37] Imagine a group of players attacking and trying to kill the avatar (in-game character) of the same player again and again every time he or she enters the game – this is *griefing.*

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[29] Eldar M. Azimov, Maria V. Gorshkova, and Rosa E. Karasyova, "Legal Aspects of Countering Cyberbullying," *Zametki Uchenogo* 3 (2021): 80-81.

[30] El Asam and Samara, 129.

[31] Youping Xu and Paula Trzaskawka, "Towards Descriptive Adequacy of Cyberbullying: Interdisciplinary Studies on Features, Cases and Legislative Concerns of Cyberbullying," *International Journal for the Semiotics of Law* 34 (2021): 932-933.

[32] Kintonova, Vasyaev, and Shestak, 440.

[33] Azimov, Gorshkova, and Karasyova, 81.

[34] Kintonova, Vasyaev, and Shestak, 440.

[35] El Asam and Samara, 129.

[36] Azimov, Gorshkova, and Karasyova, 81.

[37] Azimov, Gorshkova, and Karasyova, 80.

8. *Harassment* is a repeated psychological cyberattack aimed at a certain person. It is manifested by stubborn insults, claims and verbal aggression and usually takes the form of "numerous messages, intrusive round-the-clock calls and conversations of a humiliating and offensive nature."[38]
9. *Ostracism (Exclusion)* means intentionally excluding an individual from online groups, such as games, messaging, chat, or social network groups. For instance, students of the same class can create an online group in a certain social network but refuse to add one of their classmates, thereby ostracizing him or her.
10. *Outing* is a form of cyberbullying when aggressors publicly and deliberately share private information about an individual (usually sensitive or embarrassing) without one's consent.[39] *Trickery* is essentially the same offense, but with a difference that the victim shares embarrassing information about oneself voluntarily, only to find out later that it has been shared further without one's consent.
11. *Sexting* (also called *cyber-grooming*) is sending pictures of naked people or pornographic images using means of electronic communication, often accompanied by obscene and sexually harassing messages.
12. *Trolling (Flaming)* is a form of aggression in cyberspace which usually creates severe social provocation and conflict situations.[40] Messages may contain an "aggressive, hostile, intimidating, insulting, sarcastic, unfriendly and uninhibited content."[41] In most cases, the purpose of trolling is to provoke an aggressive response from the opponent.

This classification by no means claims to be full and complete. In fact, a rapid evolution and sophistication of the ICT renders any classification obsolete[42] in a relatively short period of time. Instead of trying to catalogue all possible forms and instruments of cyberbullying, it would rather make sense to distinguish its key features which all of the aforementioned types may contain.

1. Cyberbullying is not limited by space or geography, it transcends the national borders,[43] and the offender could "conceivably be halfway across the globe from the victim of harassment."[44]
2. Cyberbullying is not limited by time. It can happen 24/7, as long as both the aggressor and the victim have access to electronic means of communication. Unlike the victims of 'traditional' bullying, cyber-victims cannot be at ease even at home, which renders their privacy practically nonexistent. Cyberbullying can potentially last infinitely long. In some cases, harassment has been carried out for years.

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[38] Kintonova, Vasyaev, and Shestak, 440.

[39] Xu and Trzaskawka, "Towards Descriptive Adequacy of Cyberbullying," 933.

[40] Kintonova, Vasyaev, and Shestak, 440.

[41] El Asam and Samara, 129.

[42] Paunovic, "Cyberbullying of Children," 252.

[43] Juan Huang, "On the Status Quo of Network Defamation Crimes and Preventive Strategies," *Oriental Enterprise Culture* 19 (2013): 172.

[44] Rodkin and Fischer, "Cyberbullying from Psychological and Legal Perspectives," 622.

3. Cyberbullies are likely to have a piece of strong technology knowledge and skills. Some of them use spyware and hacker programs[45] to steal the personal information and inflict more damage on their victims.
4. Cyberbullying can be anonymous and pose a difficulty to establish a link between the offender's online profile and the physical person who owns it, unless the aggressor openly shows one's identity, or the rules of the service provider strictly oblige to reveal the user's credentials.
5. Cyberbullying is hard to detect[46] and hard to prove. Due to the vastness and volatility of cyberspace, it may be hard to track the actions of a certain person. It may be even harder to retain the evidence because online content is being constantly altered.
6. The Internet is plagued with impunity, both perceived and practical. The difficulty of holding cyberbullies accountable makes the victims abandon their hope for justice and gives their offenders a false feeling of being invincible before morality and law.
7. Moral disengagement[47] prompts the person to show one's 'dark side' which is more often kept private in a face-to-face interaction.[48]
8. Imbalance of power buttressed by the superiority of aggressor's technological skills, the anonymity,[49] and the perception of impunity.
9. Unknown and potentially infinite audience, as the information in cyberspace can spread rapidly and unrestrictedly, and the victim may never know the circle of individuals who has or will witness his/her harassment and humiliation.[50]

D. The Severity of Cyberbullying

The severity of cyberbullying is often underrated due to its detachment from the real world. Cyberbullying does not headline the criminal news that often since it is usually shadowed by more physical and definitely more heinous crimes, such as robbery, rape and murder. Nonetheless, cyberbullying is far from being a petty offense, as its viciousness, anonymity, and 24/7 pervasion make it even more devastating than 'traditional' bullying.[51] The victims of online violence can develop depression, stress, loneliness, anxiety, low self-esteem, suicidal thoughts, and even commit suicide.[52] Some of them may lead a wretched

[45] Kintonova, Vasyaev, and Shestak, 445.

[46] Rodkin and Fischer, 621.

[47] See Lin Wang and Steven Sek-yum Ngai, "The Effects of Anonymity, Invisibility, Asynchrony, and Moral Disengagement on Cyberbullying Perpetration Among School-Aged Children in China," *Children and Youth Services Review* 119 (2020): 1-9.

[48] Paunovic, 256.

[49] El Asam and Samara, 128.

[50] Rodkin and Fischer, 622.

[51] Kathleen Conn, "Cyberbullying and Other Student Technology Misuses in K-12 American Schools: The Legal Landmines," *Widener Law Review* 16, no. 1 (2010): 99.

[52] El Asam and Samara, 128; Pennell et al., "Should Australia Have a Law Against Cyberbullying?" 2.

existence later in their lives suffering from emotional traumas and having a higher tendency to abuse drugs or alcohol.[53]

The majority of young people in developed countries are already being affected by cyberbullying. To illustrate, the 2014 Report by ChildLine indicated that 60% of British teenagers aged 13-18 reported being asked for a sexual image or video of themselves (an example of sexting).[54] In China and Russia, the figures are also rising to alarmingly high levels. There are multiple sociological reports about cyberbullying in Chinese schools with rates of victimization ranging from 8% to 20% in Taiwan (TW), from 13% to 62% in Hong Kong (HK), and from 3% to 69% in Mainland China (CN), as summarized by Ji-Kang Chen and Li-Ming Chen.[55] Using their own questionnaires, Chen and Chen found that 33.0%, 23.8%, and 31.7% of students from HK, CN, and TW, respectively, reported experiencing at least one form of cyberbullying.[56] A study by Jiaming Rao et al. shows that 44.5% of junior and senior high school students of China's southern city of Guangzhou reported being victims of cyberbullying within the previous 6 months.[57] Zongkui Zhou et al. revealed that cyberbullying is also common in central China, where 56.88% of high school students reported having been bullied online.[58] Anna Kuznetsova, Russian Presidential Commissioner for the Rights of the Child, estimated that about 30% of Russian children have been bullied on the Internet.[59] Rossiyskaya Gazeta ('Russian Newspaper'), an official newspaper of the Russian Government, reports that 48% of Russian children aged 14-17 have been blackmailed, and 44% received aggressive electronic messages. Only 17% of teenagers asked their parents for help.[60]

In addition, cyberbullying is becoming increasingly common among grown-ups. At least 20% of Americans are being cyberbullied at work,[61] and the total share of adults who have experienced at least one type of online harassment has reached 44% for men and 37% for women overall, with the highest percentage in the 18-24 age category – 70%.[62] Evidently,

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[53] Xu and Trzaskawka, 934.

[54] ChildLine, 44.

[55] Ji-Kang Chen and Li-Ming Chen, "Cyberbullying Among Adolescents in Taiwan, Hong Kong, and Mainland China: A Cross-National Study in Chinese Societies," *Asia Pacific Journal of Social Work and Development* (2020): 3. https://doi.org/10.1080/02185385.2020.1788978.

[56] Chen and Chen, "Cyberbullying Among Adolescents," 5.

[57] Rao et al., "Cyberbullying Perpetration and Victimisation," 6.

[58] Zongkui Zhou et al., "Cyberbullying and Its Risk Factors Among Chinese High School Students," *School Psychology International* 34, no. 6 (2013): 634.

[59] "Zhertvami travli v internete stali okolo 30% detei, zayavila Kuznetsova (About 30% of children have been bullied on the internet, says Kuznetsova)," *RIA Novosti*, January 26, 2017, https://ria.ru/20170126/1486543536.html.

[60] Natalia Kozlova "Travlya pod stat'yei (Bullying to be indicted)," *Rossiyskaya Gazeta* federal issue 176, August 10, 2020, https://rg.ru/2020/08/10/zakonoproekt-o-borbe-s-travlej-v-seti-vnesut-v-gosdumu-oseniu.html.

[61] Kowalski, Toth, and Morgan, "Bullying and Cyberbullying in Adulthood," 64.

[62] Duggan, "Online Harassment."

cyberbullying has ceased to be a strictly 'school problem.' As our entire society enters the danger zone, we must examine the legal base and question its adequacy for our protection.

II. LEGAL DEFINITIONS AND LEGAL RESEARCH

In this part, we will be looking at how cyberbullying is defined in legal systems around the world, and in China and Russia in particular. We will also examine the state of affairs in legal research on cyberbullying, outline its progress and detect the gaps.

A. Legal Definitions of Cyberbullying

There is no universally accepted legal definition of cyberbullying.[63] The United Nations system of conventions and treaties does not offer one. The 1989 UN Convention on the Rights of the Child (UNCRC) does not contain any specific provision on cyberbullying of children, because, as we know, at that moment scholars and legislators were not yet fully alarmed at this problem. Nevertheless, Article 19(1) of the Convention obliges States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."[64] Cyberbullying can surely be interpreted as "mental violence," which means it is not necessary to amend the document to include a new definition. Instead, the UN bodies and officials responsible for the Convention implementation remain seized of the matter and regularly publish reports on the bullying and cyberbullying situation.[65] As the majority of countries (including China and Russia) have ratified the UNCRC, State parties are expected to keep their laws and practices up to date to adequately counter cyberbullying.[66] This, however, does not explicitly require them to define cyberbullying in a separate legal term or enact a special 'cyberbullying law.'

Most countries do not have a legal definition of bullying or cyberbullying. In the UK, "there is no specific law criminalizing bullying, whether it be offline or online."[67] Due to a lack of clarity, British scholars El Asam and Samara describe the legal status of cyberbullying in their country as "an area of legal limbo."[68] There is no single definition of cyberbullying agreed upon at the European Union level either.[69] Australia does not have a specific law devoted to cyberbullying as well,[70] but Australian federal laws, such as *Enhancing Online*

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[63] Paunovic, 252.

[64] The United Nations Convention on the Rights of the Child (1989), Art. 19(1).

[65] "Bullying and Cyberbullying," *UN Special Representative of the Secretary-General on Violence Against Children,* https://violenceagainstchildren.un.org/content/bullying-and-cyberbullying-0.

[66] Paunovic, 258.

[67] El Asam and Samara, 131.

[68] El Asam and Samara, 131.

[69] Paunovic, 252.

[70] Hannah Young et al., "Cyberbullying and the Role of the Law in Australian Schools: Views of Senior Officials," *Australian Journal of Education* 60, no. 1 (2016): 87.

Safety Act (2015) and *Australian Student Wellbeing Framework* (Australian Government Department of Education, Skills and Employment, 2020) can "enable take-down notices to be issued to social media platforms if they fail, following a complaint, to remove cyberbullying material targeting an Australian child."[71] Moreover, some Australian states are updating their existing laws to define and target certain types of cyberbullying behavior from the aforementioned classification. For example, in the State of New South Wales, the *Crimes (Domestic and Personal Violence) Amendment Act 2018 (NSW)* has recently updated its definitions of 'stalking' and 'intimidation' in order to include online versions of such behaviors.[72]

New Zealand was one of the first countries to take firm steps in order to rigorously counter cyber-offenses. In 2015, the New Zealand Parliament passed the Harmful Digital Communications Act,[73] which allowed the victims of cyberbullying to apply for civil remedies, and the government – to criminally prosecute the acts of cyberbullying. Although the Act does not contain an explicit definition of cyberbullying, it lays down ten communication principles, among them – prohibition of threatening, intimidating, menacing, harassment, indecency, obscenity, as well as false allegations.

The Criminal Code of Canada does not contain a specific provision for cyberbullying, but Canadian legislators are taking efforts to keep the Code up to date with the latest developments in the ICT and its usage by the criminals.[74] Its close neighbor, the United States, has taken its legislative initiative to define and combat cyberbullying further than any other developed country. Currently, all 50 American states have already enacted anti-bullying laws, 48 of them including definitions of 'cyberbullying' or 'electronic harassment' with 44 states stipulating criminal sanctions for these offenses.[75] There is an overall trend in developed countries to criminalize cyberbullying,[76] both directly and indirectly, with legislators on the North American continent being the most proactive. The reason for that might be that the public opinions in the U.S. and Canada were shocked and outraged over such tragic events as the

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[71] Pennell et al., "Should Australia Have a Law Against Cyberbullying?" 2.

[72] Pennell et al., 2.

[73] Harmful Digital Communications Act 2015, *New Zealand Legislation*, Version as at 9 March 2022: https://www.legislation.govt.nz/act/public/2015/0063/latest/whole.html.

[74] See Bill C-13: An Act to Amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act (Assented to 9th December, 2014), available at: https://www.parl.ca/DocumentViewer/en/41-2/bill/C-13/royal-assent/page-27.

[75] Sameer Hinduja and Justin W. Patchin, "A Brief Review of State Cyberbullying Laws and Policies," *Cyberbullying Research Centre* (updated January 2021): http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf. This document is a comparison table briefly representing the status of anti-cyberbullying legislation in each of the 50 American states.

[76] Xu and Trzaskawka, 936.

suicide of the American teenager Megan Meier in 2006 and the Canadian teenager Amanda Todd in 2012.[77]

Massive internet and mobile network coverage came to developing countries about a decade after its emergence in the West, which brought the problems previously experienced in the developed world, and even more. An infamous online game 'Blue Whale' allegedly originates from Russia,[78] where it was first spotted in 2013. 'Blue Whales' were also reported in Arab countries, Eastern Europe, and South America. In this game, teenagers are enlisted in closed groups or forums in social networks. Then, they get in touch with their online curator, someone they have never met in real life and whose true identity they do not know. After that, the curator urges them to perform a long list of tasks using different forms of mind control, such as persuasion and intimidation. Some tasks involve harmful and dangerous actions like self-mutilation. The final 50th task is to commit suicide.

The 'Blue Whale' caused a serious disturbance in the Russian society. What was first considered a 'city legend' later resulted in real convictions when the 'curators' got arrested and confessed.[79] Up to date, Russia has still not passed or amended any law to include specific definitions of cyberbullying or its elements. Nevertheless, the interest in cybersecurity in Russia is on the rise, and an initiative group of State Duma (the lower chamber of Russian Parliament) is already working on a bill[80] which, if passed, will define cyberbullying and enable the courts to protect the victims and penalize the offenders.

China has also been working on improving its citizens' cybersecurity. In 2021, the Standing Committee of the National People's Congress (NPC) enacted the new Personal Information Protection Law of the PRC. And a year before, it amended the Law on the Protection of Minors (2020 Amendment) to include a new chapter on internet protection.[81] Worthy of note, this is the first law in China to directly mention the term 'cyber bullying' (written in two words in the English version), or 网络欺凌(wǎng luò qī líng) in Chinese, which can be found in Article 77(1):

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77 Xu and Trzaskawka, 934.

78 Jan Lindenau, "Hinter dem Hashtag #BlauerWal Steckt Eine Verstörende Geschichte," *Die Welt* (May 18, 2017): https://www.welt.de/vermischtes/article164709981.

79 "Kuratorov "gruppy smerti" osudili za pokusheniye na ubiystvo shkol'nitsy (Curators of the "death group" were convicted of an attempted homicide of a schoolgirl)," *Investigative Committee of the Russian Federation,* September 30, 2020, https://sledcom.ru/news/item/1504092/; "Administratora gruppy smerti "More kitov" otpravili v koloniyu-poseleniye (Administrator of the death group "Sea of whales" was sent to a penitentiary settlement)," *Tyumen Regional Court* press-release of July 18, 2017. http://oblsud.tum.sudrf.ru/modules.php?name=press_dep&op=4&did=1025.

80 Kozlova, "Travlya pod stat'yei."

81 Law of the People's Republic of China on the Protection of Minors (2012 Amendment) [CLI Code] CLI.1.188544(EN), Chapter V, date Issued: 10-26 2012, effective Date: 01-01-2013, available at PKU Law: https://pkulaw.com/en_law/5b242b5a062cc53bbdfb.html.

No organization or individual shall insult, slander, or threaten minors, maliciously damage the image of minors, or conduct other cyber bullying acts against minors through the Internet in the form of text, picture, audio and video, among others.

We can actually derive the first legal definition of cyberbullying from this article: "Cyber bullying is an act of insulting, slandering, or threatening minors, maliciously damaging the image of minors, or conducting other acts against minors through the Internet in the form of text, picture, audio and video, among others, individually or by an organization." Nevertheless, this is not an official definition, and it is not used in court practice, whether in civil litigation or criminal prosecution. Chinese Criminal Law still does not contain a definition of cyberbullying, however, it penalizes its certain elements – insult and slander. We shall talk about these provisions in the next part of this article.

To sum up, the United States has already incorporated definitions of cyberbullying into the legal systems of all of its 50 states, and New Zealand has codified and criminalized the main behavioral patterns of cyberbullying (e.g., harassment, intimidation, or menacing) without directly mentioning the term 'cyberbullying.' Other developed countries, e.g., Australia and Canada, are close to adopting a clear and comprehensive definition of cyberbullying, while Russia and China do not have any specific laws regarding cyberbullying and are only making first steps in this direction. This, however, does not indicate any inferiority or backwardness of Russian and Chinese legal systems. New laws do not necessarily solve new problems. Sometimes they only bring more confusion into the legal practice, while existing laws can be adjusted to mitigate the new challenges.

B. Progress and Gaps in Legal Research

We have previously encountered two different legislative approached to handling cyberbullying. The first one is to enact new laws and legal definitions. The second one is to amend already existing laws and extend their interpretations. Just like the legislators in the world are divided, so are the scholars. Therefore, we need to review what has already been studied, what positions the scholars hold, and what gaps the body of legal research of cyberbullying reveals.

First, a purely legal research of cyberbullying is rare, if we talk strictly about the term 'cyberbullying' and not its substitutes. The field is dominated by psychologists and education methodologists, not lawyers. If we look at the bibliography list of this paper and count the articles with the term 'cyberbullying' in their titles, we will find that there are twice as many papers from journals on psychology,[82] education,[83] and childhood,[84] than the papers from

[82] El Asam and Samara; Juvonen and Gross, "Extending the School Grounds?"; Kowalski, Toth, and Morgan; Olweus; Rao et al.; Zongkui Zhou et al., "Cyberbullying and Its Risk Factors."

[83] Chen and Chen; Pennell et al.; Wang and Sek-yum Ngai, "The Effects of Anonymity, Invisibility, Asynchrony, and Moral Disengagement"; Young et al., "Cyberbullying and the Role of the Law."

[84] Marilyn A. Campbell, "Cyber Bullying."

legal journals[85] (among primary scholarly sources the count is 10 vs. 5), without prejudice to papers on other topics of course. Psychological research of cyberbullying is usually more profound and detailed, while legal research is often limited to the review of existing laws in a certain country, and it takes a minor portion of the paper simply to accompany and reinforce the major psychological part of it.

Second, cyberbullying legal research in China and Russia is normally substituted by studying the crime of defamation. Both Chinese Criminal Law and Russian Criminal Code do not contain a legal definition of cyberbullying, so defamation (also translated as slander) is the most similar *corpus delicti*. The Chinese term is 诽谤罪 (fěi bàng zuì), and the Russian – *клевета* (kleveta).

Chinese scholars have written numerous papers on the prosecution of defamation, with most articles written in Chinese and published in domestic journals. Judicial case analysis is a commonly used method, for instance, it can be found in the works of Young[86] and Huang.[87] A method of linguistic analysis is also used to determine the admissibility of certain cases.[88] Ye Wentao believes that conviction and punishment standards for the crime of network defamation in China are slightly inadequate.[89] Furthermore, Yang,[90] as well as Ding, Kong, and Zhou[91] suggest to transfer the crime of defamation from private prosecution (when the victim files a complaint on one's own account) to public prosecution (when a government prosecutor initiates the investigation). They believe that such a reform will solve the problem of difficulty for parties in private prosecution cases to obtain evidence, strengthen the governance of online illegal crimes, therefore, it will help to purify the cyberspace.[92] Jin Honghao proposes to divide defamation into three modes through legislative amendment, namely the crime with no serious circumstance, the crime with serious circumstance and the

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[85] Kathleen Conn, "Cyberbullying and Other Student Technology Misuses"; Paunovic; Rodkin and Fischer; Xu and Trzaskawka; Shaomin Zhang, "From Flaming to Incited Crime: Recognising Cyberbullying on Chinese WeChat Account," *International Journal for the Semiotics of Law* 34 (2021): 1093-1116.

[86] Yuqing Yang, "From the Perspective of Online Public Opinion, Why the Crime of Defamation Can Be Transferred from Private Prosecution to Public Prosecution," *Guangxi Quality Supervision Guide Periodical* 5 (2021): 221-223.

[87] Juan Huang, "On the Status Quo of Network Defamation Crimes and Preventive Strategies," *Oriental Enterprise Culture* 19 (2013): 172.

[88] See Zhang, "Recognising Cyberbullying on Chinese WeChat Account."

[89] Wentao Ye, "Analysis on the Standards of Conviction and Punishment of Network Defamation Crime," *Legal System and Society* 4 (2021): 187.

[90] Yang, "From Private Prosecution to Public Prosecution."

[91] Lingmin Ding, Fanyu Kong, and Xingwen Zhou, "Jurisprudence Analysis of "Private Prosecution to Public Prosecution" of Network Defamation Crimes – From the Perspective of Hangzhou Defamation Case," *The Chinese Procurators* 10 (2021): 8-14.

[92] Ding, Kong, and Zhou, "Jurisprudence Analysis."

crime with especially serious circumstance.[93] The first mode will entail no criminal charges, while the third one will be publicly prosecuted. While all the aforementioned Chinese authors urge amending the existing laws, Huang Juan endorses the idea to enact a new cybercrime law, which will be modelled on the relevant provisions of foreign laws and regulations on cyber defamation.[94]

The scholarly research on internet defamation in Russia is less plentiful, there are just a handful of journal and conference papers reviewing the current legal practice. Bezuglaya and Bezuglyi,[95] as well as Grachev and Barinov observe the contemporary legal basis and distinguish particular difficulties in obtaining evidence of internet defamation and proving guilt.[96] Aniskina ran a questionnaire of Russian judges regarding their interpretation of the crime of defamation.[97] Azimov, Gorshkova, and Karasyova observe the court practice in regard to cyberbullying phenomenon as a whole[98] and not just defamation as a criminal code article. This trio of authors also suggests promulgating a legal definition of cyberbullying and introducing appropriate amendments to the Criminal Code and the Code on Administrative Offenses.[99]

To sum up, legal aspects of cyberbullying are studied irregularly in China and Russia, and there is a lack of unanimity among scholars on the question of necessity of a new law.

III. THE LAWS

In this part, we shall examine the legal basis in China and Russia. We will juxtapose the relevant provisions of constitutional, civil and criminal law, and the definitions of different cyberbullying types elaborated in Part I.

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[93] Honghao Jin, "On the Scope of Public Prosecution for the Crime of Defamation in the Internet Age," *Political Science and Law* 3 (2021): 149-161.

[94] Juan Huang, "On the Status Quo of Network Defamation Crimes and Preventive Strategies." Oriental Enterprise Culture 19 (2013): 172.

[95] Anna A. Bezuglaya and Sergei N. Bezuglyi, "Freedom of Speech in Cyberspace: Criminal-law Measures Against Slander," *Nauka i Obrazovaniye* 8 (2021): 89-93.

[96] Valery S. Grachev and Sergey V. Barinov, "Problems of Criminal Liability for Libel in the Information and Telecommunications Network of the Internet," paper presented at the XXII International Conference "Civilization of Knowledge: Russian Reality": 490-496.

[97] Evelina G Aniskina, "Cyber-Slander: Problems of Qualification," paper presented at the 2021 Conference "Criminal Law in the Times of Artificial Intelligence and Digitalization": 130-133.

[98] Azimov, Gorshkova, and Karasyova, "Legal Aspects of Countering Cyberbullying."

[99] Azimov, Gorshkova, and Karasyova, 88.

A. Laws of the People's Republic of China

The Constitution of the People's Republic of China (PRC)[100] grants its citizens' freedom of speech (Article 35), protects their personal dignity and prohibits to "use any means to insult, libel or falsely accuse citizens" (Article 38) thus manifesting a fundamental legal principle, "a person's freedom ends where another person's freedom begins." Certain forms of cyberbullying, especially cyber-harassment and trolling, can surely be interpreted as "insult, libel, or false accusations," which deems this behavior unconstitutional. It is also important to note that while many other countries' constitutions use the wording "the rights of human and the citizen,"[101] which applies to nationals of all countries and even stateless persons, Chinese Constitution only lists the rights of the PRC citizens.

Civil Code of the PRC (2020)[102] elaborates some of those rights, also prohibiting certain types of malicious cyber-behavior and obliging the network provider to cooperate in good faith. Worthy of note, Civil Law of the PRC uses the term 'natural person' and not 'citizen,' which means that all people enjoy those rights and are entitled to legal protection regardless of their nationality. Article 990 endorses, among others, the person's rights of reputation, honor, and privacy, as well as personal dignity. Article 1032 grants a natural person a right to privacy, which it defines as "the tranquility of the private life of a natural person, and the private space, private activities, and private information that he is unwilling to be known to others." Personal information, which includes electronically recorded information, is also protected by the new 2021 Personal Information Protection Law of the PRC, Articles 2 and 4 specifically defining such information and its status under the law.[103] If personal information of a citizen has been sold to a third party, and the circumstances are serious, the offender can be punished under Article 253(I) of the PRC Criminal Law and serve up to seven years of imprisonment.

Article 1033 of the Chinese Civil Code provides a list of activities which infringe upon a person's right to privacy:

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[100] Constitution of the People's Republic of China, *the National People's Congress of the People's Republic of China,*
http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml.

[101] For example, Chapter 2 of the Russian Constitution is titled "Rights and Freedoms of Human and the Citizen," France's Constitution of the Fifth Republic also uses the term "Rights of Man and the Citizen." See: Constitution of the Russian Federation (with 2020 Amendments), *The State Duma of the Federal Assembly of the Russian Federation*, http://duma.gov.ru/news/48953/; France's Constitution of 1958 with Amendments Through 2008: 31, 33, 34, available at: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en.

[102] Civil Code of the People's Republic of China. [CLI Code] CLI.1.342411(EN). Date Issued: 05-28-2020. Effective Date: 01-01-2021. Available at PKU Law: https://pkulaw.com/en_law/aa00daaeb5a4fe4ebdfb.html.

[103] Personal Information Protection Law of the People's Republic of China. [CLI Code] CLI.1.5055321(EN). Date Issued: 08-20-2021. Effective Date: 11-01-2021. Available at PKU Law: https://pkulaw.com/en_law/d653ed619d0961c0bdfb.html.

(1) Invading the tranquility of the private life of any other by phone calls, SMS, instant messaging tools, emails, leaflets, or any other means.

(2) Entering, photographing, or peeping at any other's residence, hotel room, or any other private space.

(3) Photographing, peeping at, eavesdropping on, or disclosing to the public the private activities of any other.

(4) Photographing or peeping at any private part of any other's body.

(5) Handling the private information of any other.

(6) Infringing upon the right of privacy of any other by other means.

In this article's list of violations, no. 1 can apply to *cyber-harassment*, no. 3 and 4 can relate to *sexting*, no. 5 – to *catfishing* and *trickery*, while no. 6 reserves the possibility to adjudicate other types of cyber-offenses if they violate the right to privacy.

According to Article 1194 of the Civil Code, "a network user or network service provider who infringes upon the civil right or interest of another person through network shall assume the tort liability, unless otherwise provided by law." This means that in civil litigation, a cyberbully will have to compensate the victim for any damage inflicted by one's actions.

The Criminal Law of the PRC (2020 Amendment)[104] deals with cybercrimes of the most serious circumstances. Article 246 is the most relevant for the prosecution of cyberbullying since it deals with the crimes of defamation, slander, and insult.

Article 246 Those openly insulting others using force or other methods or those fabricating stories to slander others, if the case is serious, are to be sentenced to three years or fewer in prison, put under limited incarceration or surveillance, or deprived of their political rights.

Those committing crimes mentioned above are to be investigated only if they are sued, with the exception of cases that seriously undermine social order or the state's interests.

Where the victim files a complaint with the people's court on the commission of the conduct as provided for in paragraph 1 through the information network, but it is indeed

[104] Criminal Law of the People's Republic of China (2020 Amendment). [CLI Code] CLI.1.349391(EN). Date Issued: 12-26-2020. Effective Date: 03-01-2021. Available at PKU Law: https://pkulaw.com/en_law/39c1b78830b970eabdfb.html.

difficult to provide evidence, the people's court may require the public security authority to provide assistance.

This article tells us several important points about the criminal prosecution. First, victims of defamation should file a lawsuit themselves if they believe their right of reputation has been seriously damaged. Unlike the crimes of physical violence, crimes of insult and defamation are generally not subject to public prosecution, unless there is a threat to social order or the state's interests. Jin Honghao believes that paragraph 2 of Article 246 poses a risk of abuse of power by public prosecution. Any insult of a government official can be interpreted as undermining state's interests, which creates inequality in legal protection between local government officials and ordinary citizens.[105] Second, paragraph 3 provides extra assistance to those citizens who are not technologically savvy and struggle to collect evidence of cybercrimes. This is important, since we know that retaining evidence is one of the hardest tasks when combating cyberbullying. Third, there is a notion of a 'serious case,' sometimes also translated from Chinese into English as 'serious circumstances.' Before 2013, the court would determine the seriousness of the case at its own discretion, until the Supreme People's Court and the Supreme People's Procuratorate stepped in and clarified this issue. Article 2 of the Interpretation on Several Issues concerning the Specific Application of Law in the Handling of Defamation through Information Networks and Other Criminal Cases (The Interpretation), provides that:

Any of the following circumstances of defaming another person through an information network shall be deemed as a serious circumstance as mentioned in paragraph 1, Article 246 of the Criminal Law:

(1) The same defamatory information is actually clicked or browsed for more than 5,000 times or is forwarded for more than 500 times;

(2) causing derangement, self-mutilation, suicide or any other serious consequence to the victim or his or her close relative;

(3) defaming another person after being subject to administrative punishment due to defamation within two years; or

(4) any other serious circumstance.[106]

From this point on, the courts had a clear and quantifiable standard of the case seriousness: 5000 views, or 500 reposts, speaking in the internet language. The "Two Highs

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[105] Honghao Jin, "On the Scope of Public Prosecution," 149.

[106] Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in the Handling of Defamation Through Information Networks and Other Criminal Cases. [CLI Code] CLI.3.209618(EN). Date Issued: 09-06-2013. Effective Date: 09-10-2013. Available at PKU Law: https://pkulaw.com/en_law/885545890beddb64bdfb.html.

Interpretation" was welcomed by Chinese legal scholars as a measure that would "help to improve the fairness and accuracy of judicial organs."[107]

B. Laws of the Russian Federation

The Constitution of the Russian Federation[108] guarantees freedom of speech to all people (Article 29) regardless of their nationality. It also protects personal dignity and prohibits "torture, violence and other cruel or humiliating treatment or punishment" (Article 21). In essence, both Russian and Chinese constitutions utilize the same 'golden rule': a person is allowed to say or write anything as long as it does not affect the rights of others. It is also highly possible that cyberbullying can be interpreted as 'humiliating treatment,' which consequently deems it unconstitutional within the Russian legal field.

In Russia, a natural person may rely on civil, administrative, and criminal law to protect one's rights and lawful interests in court. First, Article 150(1) of the Civil Code of the Russian Federation[109] defines life, health, personal dignity and integrity, honor and good name, business reputation, inviolability of private life, inviolability of home, individual and family privacy and several other values as 'intangible benefits,' which belong to the person naturally or *ipso jure,* inalienable and untransferable. Article 150(2), referring to Article 12 of the Civil Code, enables a person to sue for judicial protection of these intangible benefits, so the court can recognize the fact of violation, issue an order to stop the violation, and restore the damages or *status quo ante.* Any person can file a civil lawsuit directly to the court. This makes civil litigation a more convenient procedure than criminal prosecution, which can only be launched by the Investigative Committee.

Insult and defamation are offenses often confused in Russian legal practice.[110] They both can be elements of cyberbullying, but they are defined and prosecuted differently. An insult is defined and punished in accordance with Article 5.61 of the Code of the Russian Federation on Administrative Offenses (CoAO).[111] An insult is a "humiliation of honor and dignity of another person expressed in an obscene form or in another way contrary to the established norms of morality and ethics." The penalty for a physical person can range between 3000 and 5000 Russian rubles (app. 40 to 70 USD). Defamation is a more serious offense as it

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[107] Chen Chen and Jiang Ying, "On the Alteration of Crime Threshold of Cyber Defamation: Tendency and Significance," *Journal of Railway Police Academy* 25, no. 1 (2015): 91-95.

[108] Constitution of the Russian Federation.

[109] Civil Code of the Russian Federation, 30 November 1994 N 51-FZ, available at ConsultantPlus: https://www.consultant.ru/document/cons_doc_LAW_5142/.

[110] Grachev and Barinov, "Problems of Criminal Liability," 493.

[111] Code of the Russian Federation on Administrative Offenses dated 30.12.2001 N 195-FZ (01.07.2021 edition, as amended of 09.11.2021) (as additionally amended and going into effect on 01.12.2021). Available at ConsultantPlus: https://www.consultant.ru/document/cons_doc_LAW_34661/.

comes under Article 128.1 of the Criminal Code of the Russian Federation (CC RF).[112] Defamation means "spreading false facts, which make an imputation against another person's honor and dignity or derogating his reputation." Paragraph 2 of Article 128.1 actually provides for a more severe punishment for defamation if it was committed "publicly using information and communication networks, including "Internet" network." As we remember, Chinese criminal law defines serious circumstances sufficient for the criminal prosecution of defamation as 5000 views or 500 acts of forwarding of the same defamatory information. By contrast, Russian criminal law keeps a much lower threshold. In 2005, Plenum of the Supreme Court of the Russian Federation determined that "spreading false facts" means transferring the information containing such facts to at least one person. Therefore, a malicious message published on the Internet and clicked, viewed, or forwarded at least once will already count as an act of defamation under Russian criminal law. The maximum penalty can be three years of imprisonment or 2,000,000 rubles of penalty (app. 27,000 USD).

CC RF also contains other *corpus delicti* which can be possibly associated with cyberbullying. For instance, incitement to suicide (Article 110), insulting a public official (Article 319), defamation of a judge, prosecutor, investigator, or bailiff (Article 298). Worthy of note, the instigators of the 'Blue Whale' suicide game were convicted of an attempted murder of a minor (Article 105(2) of CC RF).[113]

IV. LEGAL CASES AND DISCUSSION

In this part we will review one significant case from each of the two countries, China and Russia respectively. Each case will undergo a four-step analysis: facts, issues, judgment, and rationale. After that, we will examine opinions of jurists and references to other relevant cases in order to further explain the logic of the major case and reveal the established court practice.

A. Tan's Case of Insulting and Slandering (China)[114]

1. Facts

This is a private prosecution case brought up by Jiang Moumou (private prosecutor, hereinafter – Jiang) against Tan Mou (defendant, hereinafter – Tan) in Shanghai Putuo District

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[112] Criminal Code of the Russian Federation dated 13.06.1996 N 63-FZ (01.07.2021 edition) (as amended and additionally, going into effect on 01.12.2021). Available at ConsultantPlus: https://www.consultant.ru/document/cons_doc_LAW_10699/.

[113] Investigative Committee of the Russian Federation, September 30, 2020, https://sledcom.ru/news/item/1504092/.

[114] Tan's case of insulting and slandering - the criminal law regulation of insulting and slandering the deceased and his mother on the Internet (Chinese 谭某侮辱、诽谤案——在网络上侮辱、诽谤死者及其母亲的刑法规制). Jiang Moumou v. Tan Mou, 02672 People's Justice: cases, No. 8, 2021 19-22 (Shanghai Second Intermediate People's Court 2020).

People's Court, with an appeal later handled by Shanghai Second Intermediate People's Court. This case was distinguished as a 'classic case' by China's major legal portal PKU Law, meaning that it is of great importance for understanding the prosecution of network defamation in China.

Jaing had a daughter named Jiang Mou who was a student in Japan and lived with her roommate Liu. On November 3, 2016, Jiang's daughter was killed by Chen Shifeng, Liu's ex-boyfriend, while she was trying to protect Liu against Chen. Both Tokyo local magistrate and Chinese Embassy in Japan later confirmed that Chen's target was Liu, not Jiang Mou. The latter did not have any previous conflict with Chen, so her murder was accidental, not intentional. The incident attracted great attention and extensive comments on the Internet from the people of both China and Japan. Jiang started a fund-raising campaign on her microblog in order to alleviate her family's difficulties.

Tan started to insult Jiang on February 25, 2018, when he first published a series of comics entitled "sweetheart Miss award @ b! TCH" on Sina Weibo account "Posh-Bin" depicting Jiang with an ugly image and exposing clothes. Further posts contained statements like "Jiang MouMou killed her daughter and can't blame anyone" and "you deserve to die," as well as allegations that Jiang's daughter was Chen's rival, and that Jiang's fund-rising was a fraud. From February 18, 2018 to March 17, 2019, Tan published at least 28 essays, articles, and microblog posts, continuously abusing Jiang, both verbally and graphically. This information has been notarized by Chengyang Notary Office of Qingdao City, Shandong Province, and Beijing Dongfang Notary Office. According to the investigation of Sina Weibo company, netizens have visited Tan's posts for more than 340,000 times. Moreover, Tan's behavior has caused great psychological trauma to Jiang, causing her to suffer from severe depression and have a high tendency to commit suicide.

2. Issues

Jiang claimed that:

1. Tan derogated personality and damaged reputation of Jiang and her daughter.
2. Tan fabricated lies about Jiang Mou's rivalry with Chen and Jiang Moumou's fund-raising fraud.
3. The circumstances are serious. Tan should be punished for several crimes and sentenced to a fixed-term imprisonment.

Tan claimed that:

1. The comics were not original, and most of the articles and comments were copied, pasted and forwarded.
2. The deceased have no right of reputation.
3. The amount and expenditure of the self-raised money was not provided with evidence.
4. Jiang must withdraw the case.

3. Judgment

Shanghai Putuo District People's Court held that Tan openly belittled others' personality and damaged others' reputation through microblog, cartoon and text, which constitutes a crime of insult under serious circumstances. He also deliberately used the information network to fabricate facts to slander others. With a total number of 340,000 views, the circumstances are serious and his behavior has constituted the crime of defamation. However, the Court did not find sufficient evidence to disprove Tan's allegations about fund-rising fraud. In the end, Tan was sentenced to a fixed-term imprisonment of one year and six months. After the first instance of judgment, Jiang and Tan appealed. Shanghai Second Intermediate People's Court ruled to reject the appeals of Jiang and Tan and upheld the original judgment.

4. Rationale

This decision has been interpreted by Shen Yan and Zhu Yinping of Shanghai Second Intermediate People's Court.[115] They justified the use of criminal law because the civil law could not provide sufficient relief for private rights in this case. Shen and Zhu also pointed out that there are not many cases of internet language violence due to several reasons.

First, it is difficult to determine the subject of responsibility. Second, it is difficult for an individual to protect one's rights in criminal cases. The crimes of insult and defamation generally belong to private prosecution cases, and private prosecutors need to bring a lawsuit to a People's Court in time. Third, it is difficult to obtain and retain evidence. It must be notarized in time. Finally, the law might be lenient on cyber offenses, but their violation of other people's rights and interests may be actually deeper, the consequences more serious, and the impact wider with the help of the function of the network magnifying glass. Shen and Zhu also pointed out that "Internet users behind the screen have the psychological protection that the law is not responsible for the public, and the ideas that they dare not or cannot express in reality will appear."[116] The opinion of Shen and Zhu converges with the moral disengagement model developed by Wang and Sek-yum Ngai and based on a social study of 1103 participants. According to their findings, anonymity, invisibility and asynchrony of cyberspace cause moral disengagement, which in turn leads to the perpetration of cyberbullying.[117]

Obtaining and retaining evidence can be a key factor in successful prosecution of cyber-offenses. A remarkable case is *Tuniu v. Tongcheng,*[118] even though the target of cyberbullying

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[115] Yan Shen and Yinping Zhu, "Criminal Regulations for Insulting and Slandering the Deceased and Her Mother on the Internet," *People's Justice (Cases)* 8 (2021): 19.

[116] Shen and Zhu, "Criminal Regulations," 19.

[117] Wang and Sek-yum Ngai, "The Effects of Anonymity, Invisibility, Asynchrony, and Moral Disengagement," 1-9.

[118] Nanjing Tuniu Technology Co., Ltd. v. Tongcheng Network Technology Co., Ltd., 13 ning zhi min chu zi (Nanjing Intermediate People's Court of Jiangsu Province 2016).

was not a natural person, but a company, Nanjing Tuniu Technology. In order to defend the company's reputation, the representatives of Tuniu notarized all the messages where their competitor, Tongcheng, verbally insulted, defamed and belittled them. As a result, Tuniu won the case and a 2,000,000 RMB (app. 314,000 USD) compensation from Tongcheng.

On the other hand, if the plaintiff only provides his own copies of evidence, sometimes incomplete and not properly verified, he may fail. This happened in *Luo Guihua v. Chen Guohua* case.[119] The plaintiff and the defendant lived in the same residential compound and had a verbal dispute about a new equipment installations in a WeChat group with 374 observers. Luo claimed that Chen had insulted him. He tried to prove some instances with his own screenshots, and others – with a testimony of two witnesses. However, the court found Luo's evidence insufficient and dismissed the case.

B. Ivus v. Voronov Case (Russia)[120]

1. Facts

Irina A. Ivus (hereinafter – Ivus) served as a head investigator of the police department in the urban settlement of Smidovich, which is located in Russia's Far East. She was also engaged in a private law practice. The information about her service was published in a WhatsApp messenger group to which Andrey A. Voronov (hereinafter – Voronov) was also a member. Between April 19, 2020 and April 28, 2020, Voronov published several statements in the group calling Ivus "former mediocre investigator and even a more mediocre head investigator of Nikolayevskoye police department comrade Ivus," "brat," "stinky snitch" and accusing her of fabricating a criminal case. This caused a moral damage to Ivus manifested in declining health and emotional stress. Furthermore, one of Ivus's clients terminated a lawyer's contract with her after reading Voronov's statement. Ivus filed a complaint to the local police office, but the police commissioner did not find sufficient grounds to launch a criminal investigation. Thus, Ivus filed a civil lawsuit against Voronov.

2. Issues

Ivus claimed:

1. Voronov spread false facts about her, which damaged her honor, dignity, and business reputation.
2. Voronov must publicly disprove these false facts before those individuals who previously read his messages.

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[119] Luo Guihua v. Chen Guohua, Shanghai 0115 Minchu 16424 (People's Court of Shanghai Pudong New Area 2020).

[120] Ivus v. Voronov, 23892020 (Smidovich District Court of Jewish Autonomous Region 2020).

3. A moral damage compensation of 50,000 rubles must be paid, as well as a compensation of notary fees and legal expenses (9,295.1 rubles), total amount 59,295.1 rubles (app. 800 USD).

Voronov claimed:

1. A WhatsApp group is not a public space, it is not open to all Internet users, and it is not a mass media.
2. He did not spread false facts.
3. The account from which the facts were spread is not registered with his mobile phone number.

3. Judgment

Smidovich District Court of Jewish Autonomous Region ruled that Voronov was the one spreading messages about Ivus in WhatsApp group. Voronov's messages contained false facts, and Voronov must disprove these facts by posting the court's judgment in the same WhatsApp group within ten days after the judgment was pronounced. The Court partially satisfied Ivus's compensation claim and ruled that Voronov must pay her 30,000 rubles of moral damage and 9,295.1 rubles of other costs.

The Court also found that Voronov's actions contained elements essential to the crime of defamation (Article 128.1 CC RF). Nevertheless, the Court did not launch a criminal investigation.

4. Rationale

The court recognized plaintiff's rights of honor, dignity and reputation. It has thoroughly examined the notarized copies of electronic correspondence, questioned the witnesses from the same WhatsApp group, and sent an inquiry to the network provider in order to verify that the mobile number indeed belonged to the defendant. The court's ruling ensured the restoration of *status quo ante,* and the compensation amount was decided on a fair and equitable basis. Even though the defendant's actions qualified for criminal charges, the court did not press them in order to give him a chance to repair the damage and deserve a redemption.

It is important to understand that even if the court detects certain elements of the crime of defamation, it may still declare an absence of *corpus delicti.*[121] Apparently, the court estimates the gravity of the offense and dismisses the cases without a substantial threat to the person or society. Another important factor is the judge's evaluation of the defendant's statements. There was a judicial precedent when a judge found the statement "I wish you to die

[121] Azimov, Gorshkova, and Karasyova, 88.

soon" to be in no violation of the established norms of behavior and morality.[122] Consequently, the judge dismissed the plaintiff's appeal.

C. Discussion

We have examined the judicial decisions in insult and defamation cases from China and Russia. The offenses prosecuted in Tan's defamation case and Ivus v. Voronov case were not legally classified as 'cyberbullying,' but they meet all four essential elements of cyberbullying. First, there was a use of electronic communication means – Sina Weibo network and WhatsApp group. Second the actions of the offenders intended to harm the plaintiffs. Third, the offenses were repeated over a period of time. Fourth, there was an imbalance of power between the aggressor and the victim, since the aggressor had the wherewithal to induce multiple observers against the victim (e.g. termination of Ivus's contract). Therefore, we can conclude that in principle cyberbullying cases can be determined as either civil torts or criminal offenses in both Chinese and Russian legal systems.

We must also admit that there are certain procedural barriers to the effective prosecution of cyberbullying. First, there is a threshold to a criminal case initiation. In China, it is clearly defined and quantified (5000 views or 500 reposts) while in Russia the courts still have a leeway in determining the admissibility of the case. Both approaches have their advantages and disadvantages. On the one hand, clearly defined standards make the adjudication a fair and precise mechanism. On the other hand, the true purpose of justice is protection and correction, not punishment. It will be beneficial for the accused person and the society at large if one still has a chance to repent, restore the damage and change one's behavior without suffering a criminal record. It is especially important to understand that criminalization of children (in cases when they are the perpetrators of cyberbullying) will significantly and negatively affect their future.[123]

Second, the costs of obtaining and retaining evidence of cyberbullying may be high in terms of both time and monetary expenses. We have seen that a victory in court heavily depends on notarizing the evidence from the electronic sources. In China, public security authorities can provide assistance with collecting evidence,[124] but in Russia the victims need to collect and present the evidence by themselves, and the evidence must meet certain admissibility criteria, ideally – it must be notarized. This process may take up to five stages. First, the victim identifies the malicious content. Second, he/she applies for notarization service (usually a notary is a private practitioner). Third, the notary needs to draft a protocol of inspection, but they usually do not have sufficient technical expertise to do that, so they outsource this task to a specialized company. Fourth, the notary gets the protocol back from the company, signs it, and hands it back to the client. A notarized protocol has a higher evidential value in courts and it is also not

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[122] Judgment of the Supreme Court of Republic of Altai in case № 21-81/2017, November 30, 2017.

[123] El Asam and Samara, 138.

[124] Criminal Law of the People's Republic of China (2020 Amendment), Article 246(3).

subject to expiration.[125] The victim can also take the fifth step and hire an expert linguist who will analyze and interpret the statements of the offender. This step is not a necessary one, as the court can run a linguistic expertise on its own account, but as we know, in this scenario even a blatant insult can be dismissed as inadmissible (remember the case when the phrase "I wish you to die soon" was interpreted as harmless[126]). The evidence obtaining process in Russia is evidently long and cumbersome. It is also quite expensive, just one page of the protocol of inspection costs 3,000 rubles (app. 40 USD).[127] In cases when cyberbullying has been perpetrated repeatedly over a long period of time, and there are dozens (or even hundreds) of pages of electronic content, the sheer amount of evidence to be notarized may cause the litigation costs to soar.

Third, neither Chinese nor Russian cases mentioned the offense duration. As we know, cyberbullying is a repeated offense, but for the law and the court it actually makes no difference whether it took place over a long period of time or just within one day. A questionnaire of Russian judges showed that 93.3% of them narrowly interpret defamation as an act of publishing false facts on the Internet, while only 6.7% take into account the continued spreading of these facts through the network after the initial publication.[128]

The aforementioned barriers and uncertainties can be overcome by further amendments to the existing civil and criminal laws. First, Russia will need to simplify its procedure on obtaining evidence of cyber offences. Most importantly, the notarization of all pieces of evidence should not be seen as a compulsory precondition to the litigation process, and it should be waived when possible. It also makes sense to simplify the notarization process and make it more affordable, e.g. notarize only key samples of the electronic materials, and not all the related pages. Second, both Russia and China need to introduce a legal definition of 'offense duration.' It is absolutely necessary to establish a clear distinction between singular and repeated cyber offences, because one of the core features of cyberbullying is its repetition.

CONCLUSION

We found that both China and Russia do not need a new cyberbullying law. Substantial work has already been done to amend and interpret the existing civil, administrative, and criminal laws in order to adequately address the offenses committed in cyberspace. The real work needs to be done not in lawmaking, but in removing the procedural barriers to litigation and prosecution. These barriers, such as the costly and cumbersome notarization process, or

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[125] "Obespecheniye dokazatel'stv – zashchita ot travli v seti (Obtaining evidence – protection from cyberbullying)," *Federal Notary Chamber.* March 19, 2020. Available at: https://notariat.ru/ru-ru/news/obespechenie-dokazatelstv-zashita-ot-travli-v-seti.

[126] Judgment of the Supreme Court of Republic of Altai in case № 21-81/2017, November 30, 2017.

[127] Osmotr saitov i internet-stranits notariusom (Inspection of websites and internet pages by a notary), *Igor V. Kolganor, Notary of the City of Moscow,* available at: https://notkolganov.ru/notarialnye-deystviya/obespechenie-dokazatelstv/osmotr-saytov-i-zaverenie-internet-stranits/.

[128] Aniskina, "Cyber-Slander," 132.

the private character of the prosecution of defamation, prevent many victims of cyberbullying from restoring their lawful rights and holding their offenders accountable. These barriers can be alleviated by further amendments and the extension of interpretation of the existing laws.

Researchers from Australia were also asking a question of whether or not their country needed a new cyberbullying law.[129] They came to a similar conclusion with us. Pennel et al. and Young et. al. ran questionnaires among education system executives, school leaders, teachers, parents, and students, asking them a question whether or not Australia needed a new cyberbullying law. The answers were divided, but those who insisted on enacting such a law were usually less aware of the existing legal remedies. Therefore, a conclusion was made that a new cyberbullying-specific law was not wanted since it would only increase litigiousness.[130] Rather than that, it would be more fruitful to raise public awareness of the existing laws, as well as "digital wisdom" of the elder generation.[131]

Legal research on cyberbullying in China and Russia surely needs to be continued. Further progress can be achieved in analyzing a greater number of judicial cases, interviewing judges and victims, as well as looking more closely at some particular aspects of cyberbullying.

[129] See Pennell et al.; Young et al.

[130] Pennell et al., 14-15.

[131] Young et al., 99.

List of Abbreviations

CN	Mainland China
CC RF	Criminal Code of the Russian Federation
CoAO	Code of the Russian Federation on Administrative Offenses
HK	Hong Kong
ICT	Information and Communication Technology
NPC	National People's Congress
NSW	New South Wales
PRC	People's Republic of China
RMB	Renminbi, Chinese yuan
TW	Taiwan
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
US	United States
USD	United States Dollar

FROM *DAZIBAO* TO TWITTER: THE POLITICAL FUNCTION OF SHAMING

Rodrigo L. Canalli*

Abstract: The paper explores shaming as a central feature of public humiliation rituals across history: in every relatively complex human society, some form of shaming performs a role in social cohesion. One of the most recent iterations of a social shaming ritual is the phenomenon that has been labelled "cancel culture", characterized by an emphasis in shaming as a means of social and political action. This paper identifies and addresses similarities between the use of big-character posters (*dazibao*) in China during the Cultural Revolution (1966-1976) and the"cancel culture" of contemporary social media environments. By advancing the understanding of the role of shame and shaming in different cultural and historical contexts –acknowledging that we are a gossip species – it is intended as a contribution for the comprehension of law as a toolbox for the mediation of human relations, as well as of its potentials and limitations.

Keywords: *Dazibao*; Cultural Revolution; Cancel Culture; Social Media; Public Sphere

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INTRODUCTION

For good or evil, shaming is a central feature of public humiliation rituals across history. In every relatively complex human society, shaming of some form performs a role in social cohesion. One of the most recent iterations of a social shaming ritual is the relatively recent phenomenon that has been labelled "cancel culture" and is characterized by an emphasis in shaming as a means of social and political action. In this particular use of the term, which is typically but not exclusively related to social media, to cancel someone is to "reject them, to ignore, to publicly oppose their views or actions and to deprive them of time and attention."[1] Cancel culture describes a collective display of moral outrage through posts and comments in social media, blogs, videos, memes, that has also been characterized as the expression of a "cyber mob."[2] Sometimes, that means even depriving the target of the cancelation of their means to make a living (think of a professor "cancelled" by his or her own university, peers or students). The same can be also said of the use of *dazibao* (大字報: "big-character posters"), in China during the period known as Cultural Revolution. In this paper, I intend to identify and address similarities between the big-character posters' use in the Cultural Revolution and the cancel culture of contemporary social media environments, as distant as both phenomena are in time, geography and culture.

My starting point is the depiction of dazibao in the films HIBISCUS TOWN[3] (1986), by Xie Jin, and THE BLUE KITE[4] (1993), by Tian Zhuangzhuang.

The Cultural Revolution, China's historic tragedy, is depicted in HIBISCUS TOWN through the personal dramas and misfortunes of families inhabiting a small and once peaceful fictional town. Xie Jin's film exposes how the ordinary lives of common people, who have no greater ambition than to take care of their own simple lives and of those in their families, are severely impacted by socioeconomic and political events beyond their control e for which they are oblivious. HIBISCUS TOWN's walls and fences are filled with political statements, accusations, and forced confessions. A couple forced to hold posters on their house's facade with defamatory remarks about their relationship ("Black husband and wife, a devil's nest," as an allusion for an illegitimate relationship status) is the image of political issues encompassing and subordinating almost all aspects of private life. The private life is then subordinated to the public discourse, and the provincial is subordinated to the total.[5]

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[1] Susannah Goldsbrough, *Cancel culture: what is it, and how did it begin?*, THE TELEGRAPH (Jul. 30, 2020, 4:16 PM), https://www.telegraph.co.uk/music/what-to-listen-to/cancel-culture-did-begin/.

[2] JULIAN PETLEY, MEDIA AND PUBLIC SHAMING: DRAWING THE BOUNDARIES OF DISCLOSURE 91 (I.B. Tauris, 2013).

[3] 芙蓉鎮, *FÚRÓNG ZHÈN* (Shanghai Film Studio 1986).

[4] 藍風箏, *LÁN FĒNGZHENG* (Beijing Film Studio, Longwick Film 1993).

[5] Gabriel F. Y. Tsang, *Place and the Representation of the Self: Milan Kundera's Prague and Gu Hua's Hibiscus Town, in* SPACES OF LONGING AND BELONGING: TERRITORIALITY, IDEOLOGY AND CREATIVE IDENTITY IN LITERATURE AND FILM. 252, 261 (Brigitte le Juez & Bill Richardson eds., 2019).

Dazibao are a major part of the landscape also in THE BLUE KITE, in which, following the Hundred Flowers Campaign, posters falsely claim that the characters Shaolong and Liu Yunwei are rightist, anti-party elements. Eventually, they are both sent to reeducation camps, as if *dazibao* served as evidence for their own allegations. In a scene a few years later, the boy Tietou is reprehended by his mother after arriving at home from school and telling her about his participation in an episode of rebellion in which a crowd of teenage students, led by the Red Guards, wrote posters against the school principal, cut her hair, and spat her, in a public ritual of humiliation and shaming. That was the brink of the Cultural Revolution.

I. SHAME AND SHAMING

Shame has been a pervasive theme – and shaming a widespread social control tool – at least since the establishment of premodern, agricultural, societies, when shaming was "unhesitatingly viewed as a justifiable in enforcing community standards."[6] And it continues to be. While there are some studies pointing to some form of primordial shame already present in groups of primates,[7] the most stringent anthropological evidence suggests that sensitivity to shame, as we experience it, played a central role in shaping the social cohesion required by agricultural societies, more numerous and complex than the older groups of hunter-gatherers.[8] Early in human history, shame – and shaming – became prevalent as means of social conformity and enforcement of behavior rules.[9] Across the globe and throughout history, ostracism, gossiping and ridicule have always been cultural tools used to keep cohesion, reaffirm values and keep the powerful and leaders in check.

Particularly in China, shame is identified as a recurring topic of Confucius' writings, who saw shame as a source of discipline and conformity.[10] Likewise, the Greek philosophers Socrates, Plato, and Aristotle discussed shame in various ways: as part of the educational process, as an emotion connected to respect and guilty, and as a foundation of ethical behavior.[11] A clear example of shaming being used as a form of punishment is portrayed in the 1951 film adaptation of the Chinese opera WHITE HAIRED GIRL,[12] which ends with a triumphant scene of Hiang Shiren, the evil landlord who explores the peasants, being punished for his crimes with public humiliation by a mob of villagers. On the other hand, MINBO,[13] a 1992 Japanese film illustrates shaming being instrumentalized in different forms by the Yakuza

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[6] PETER N. STEARNS, SHAME: A BRIEF HISTORY 11 (University of Illinois Press, 2017).

[7] FRANS DE WAAL, THE BONOBO AND THE ATHEIST: IN SEARCH OF HUMANISM AMONG THE PRIMATES (W. W. Norton & Company, 2013).

[8] STEARNS, *supra* note 6, at 14.

[9] *Id*. at 16.

[10] *Id*. at 21.

[11] *Id*. at 20.

[12] 白毛女, *BÁI MÁO NǙ* (Changchun Film Studio 1951).

[13] ミンボーの女, *MINBŌ NO ONNA* (Itami Films 1992).

as means for exerting pressure and violence against the Hotel employees who do not bend to their interests.

Below, I explore how the use of *dazibao* during the Cultural Revolution and today's social media cancel culture share meaningful connections regarding the social and political operation of shame.

II. THE BIG-CHARACTER POSTERS (*DAZIBAO*) AND THE CULTURAL REVOLUTION

Literally meaning "big-character posters", as they are most frequently translated, *dazibao* date from Imperial China, when royal edicts, decrees and proclamations from the emperor were posted on village walls.[14] Local governments also used wall posters to "make announcements, disseminate information, or describe the appearance of criminals."[15] As a vehicle for informal popular communications, however, big-character posters (*dazibao*) first featured prominently during the years of the Japanese War, from the late 1930s.[16] More recently, the Chinese Red Army used wall posters to disseminate communist propaganda and, during the 1942 rectification campaign, for purging party officials.[17] An instance of this kind of use of *dazibao* in this period appears in CROWNS AND SPARROWS,[18] a 1949 Chinese film by Zheng Junli, made on the eve of China's takeover by the Communist Party. But it was during the Cultural Revolution that *dazibao* acquired a radically new function as a means of mass communication,[19] a modern use that seems to have been influenced by the Soviet method of erecting propaganda posters on the walls of clubs, factories, institutions etc. At this point, *dazibao* became China's most popular form of written communication.[20]

On May 16th, 1966, the Central Committee of the Communist Party issued an official announcement alerting the Chinese people that there were representatives of bourgeois and revisionist interests within the party, the army, and the government.[21] It was the beginning of the Cultural Revolution, a period of intense turmoil that would last for an entire decade and has

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[14] Barry M. Broman, *Tatzepao: Medium of Conflict in China's "Cultural Revolution",* 46 JOURNALISM QUARTERLY, 100, 100-104 (1969).

[15] XING LU, RHETORIC OF THE CHINESE CULTURAL REVOLUTION: THE IMPACT ON CHINESE THOUGHT, CULTURE, AND COMMUNICATION 74 (University of South Carolina Press, 2020).

[16] Geremie R.Barmé, *History Writ Large: Big-character Posters, Red Logorrhoea and the Art of Words*, 9 PORTAL JOURNAL OF MULTIDISCIPLINARY INTERNATIONAL STUDIES 2, 9 (2012).

[17] LU, *supra* note 15, at 74.

[18] 烏鴉與麻雀, *WŪYĀ YŬ MÁQUÈ* (Kunlun Film Company 1949).

[19] Broman, *supra* note 14.

[20] LU, *supra* note 15, at 73.

[21] *Id*. at 12.

since been depicted in novels, plays and movies. During this period, top-ranking officials, well-known intellectuals, writers, and artists were persecuted.[22]

According to Professor Xing Lu, from DePaul University's College of Communication, a wall poster placed at the campus of Beijing University on May 25, 1966, by faculty members is symbolically considered the first *dazibao* of the Cultural Revolution. The poster denounced university administrators for "not encouraging students and faculty members to participate in the Cultural Revolution," "repressing the masses and the revolution" and being "obstacles to the revolutionary cause."[23] This first poster, "not only ignited the fires of the Cultural Revolution but also established the tone, the structure, and the use of language for all subsequent wall posters."[24] Wall posters were soon heralded as a formidable weapon for the political struggle of the revolutionary masses, and people started to write and hang up their own *dazibao* in schools, universities, streets etc.

Authored by a single person or a group of people, signed or anonymous, *dazibao*, or Big-Character Posters, large posters placed on walls at universities, factories, schools, public squares in cities all across China are a distinctive element of these times. These were posters generally three feet (90 cm) wide by 8 feet (240 cm) high printed in stylized calligraphy.[25] Like public rallies and forced confessions, *dazibao* were one of many practices spreading during the Cultural Revolution aimed at shaming and humiliating people who were at any moment regarded as disloyal, subversive or counter-revolutionary. Dozens of these posters would appear overnight targeting alleged enemies of the people, who were then accused of being disguised capitalists, rightists, or enemies of the socialist society.[26] Although a *dazibao* could convey a proclamation, an announcement, a congratulation, or a news report, the most widely used and consequential use for a *dazibao* during the Cultural Revolution was the expression of accusation and denunciation.[27] By virtue of *dazibao*, countless people were charged not only with crimes they did not commit but were also the target of attacks to their reputation, false claims about their private lives and relations, as well as derogatory accounts of their character. Accusers were often relatives, coworkers, and friends.

Big-character posters became a key tool in the further radicalization of Chinese society and political discourse. *Dazibao* "soon covered walls not only in schools and on university campuses, but also in government offices, factories, farms, along street, places of worship and throughout the countryside." From mid-1966 until late 1967, the big-character poster was "a

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[22] *Id*. at 10.

[23] *Id*. at 75.

[24] *Id*.

[25] *Id*. at 73.

[26] *Id*. at 13, 81-82.

[27] *Id*. at 74.

ubiquitous form of political expression, one that combined wall art with the written word and deadly political purpose," [28] negatively affecting many individuals and families.[29]

Professor Xing Lu provides a very personal description of *dazibao* targeting her father, then a middle-rank official of the Communist Party. Posters hung in 1967 at the factory where he worked as head of the public security section would read:[30]

> "(1) Lu Rong [her father] acted in collusion with other capitalist roaders in protecting bad people and persecuting good people; (2) Lu Rong concealed the fact that he was from a despotic, landlord family and was never truthful to the party; (3) Lu Rong viciously attacked the party, Chairman Mao, and the goal of the Proletarian Cultural Revolution; (4) Lu Rong's behind-the-scene supporters were Chiang Kai-shek and Khrushchev, and he was the designated successor of Chiang and a follower of Khrushchev; and (5) Lu Rong created conflicts and factions among revolutionary comrades."

Dazibao reached a relatively wide audience at a low cost, with the additional benefit of ensuring virtual anonymity,[31] predicates that are also true in respect to internet and social media. Early in the 20th century, *dazibao* became prominent as a means of popular expression that, unlike the printing press, was accessible to virtually everyone, regardless of their economic and educational background: "a cheap, convenient, and popular means for communicating slogans, short messages and otherwise banned ideas."[32] From anonymous protests to call to arms, from revelations of intimate secrets to denunciations of crimes, all could be written with nothing more than ink, brush, paper and glue.[33] By means of *dazibao*, any idea could be made public regardless of it being deemed valuable by an editor.[34] This characteristic is especially meaningful where the state exercises intense control of the formal means of communication. [35] An accusation that someone was a counter-revolutionary,

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[28] Barmé, *supra* note 14, at 22.

[29] LU, *supra* note 15, at 73.

[30] *Id*. at 13.

[31] Hua Sheng, *Big Character Posters in China: A Historical Survey*, 4 J. CHINESE. L. 234, 234 (1990).

[32] Barmé, *supra* note 16, at 8.

[33] *Id*. at 9.

[34] Peter Lin, *Between Theory and Practice: The Possibility of a Right to Free Speech in the People's Republic of China*, 4 J. CHINESE L. 257, 270 (1990).

[35] Sheng, *supra* note 31.

tangential evidence backing the claim, and a call for action against the person were usual contents of dazibao.[36]

During the 1950s and 1960s, the writing and publishing of *dazibao* were not only endorsed but strongly encouraged by the party authorities as part of political strategies. Supporting the use of *dazibao* to attack his critics, Mao stated that dazibao "are something wonderful. In my opinion, they should become part of our heritage… The more *dazibao* the better."[37] With official sanction, the practice spread in a massive scale all across China, from urban centers like Beijing and Shanghai to remote villages.

Notably, *dazibao* were the means chosen by Mao to ignite, in 1966, the flames of the Cultural Revolution.[38] They were also a main tool in its further developments.[39] In a rhetoric that resembles some contemporary discourses about the internet and social media, *dazibao* were viewed as "a channel of direct communication to the masses"[40] as well as a "vehicle for the coherent communication of political ideas and the free expression by the masses of what they considered to be in their best interest."[41]

The right to write and publish *dazibao* was eventually explicitly enshrined in the 1975 People's Republic of China Constitution, which recognized, as the Four Great Freedoms, "speaking out freely, airing views freely, holding great debates, and writing big-character posters." [42] However, criticism of the government by the use of *dazibao* was outlawed in the Deng Xiaoping era, when government criticism had become widespread and they were no longer needed as a regime's instrument.[43][44] Indeed, big-character posters were formally banned by the Chinese government 1980 on the grounds that history had proven they were unable to contribute positively to the growth of 'popular democratic rights in China.'

The use of *dazibao* during the Cultural Revolution, whether critical or supportive of the regime, has been the subject of prolific scholarship along the years, but such literature only rarely explores the invasion of domestic, personal life, by accusatory content at dazibao during the Cultural Revolution. They began to be used to "spread rumors, intensify conflicts, evoke hatred, and threaten and bully people into submission."[45] The depiction of *dazibao* in HIBISCUS TOWN and THE BLUE KITE acknowledges that the messages written in them ranged from

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[36] TUO WANG, THE CULTURAL REVOLUTION AND OVERACTING DYNAMICS: BETWEEN POLITICS AND PERFORMANCE (Lexington Books, 2014).

[37] Mao Zedong, Address at the Shanghai Conference (Jul. 8, 1957) *apud* Sheng, *supra* note 31, at 238.

[38] Sheng, *supra* note 31, at 239.

[39] Lu, *supra* note 15, at 73.

[40] Sheng, *supra* note 38.

[41] *Id*. at 242.

[42] Lin, *supra* note 34, at 258.

[43] Sheng, *supra* note 31, at 248.

[44] Lin, *supra* note 34, at 272.

[45] LU, *supra* note 15, at 77.

hortatory political slogans to personal attacks and even gossip against purported "class enemies."[46]

During this turbulent period, specialists, scholars, authorities and other people in cultural positions deemed ideologically tainted were named "cow monsters and snake demons" (*niugui sheshen*),[47] in an effort to link the concepts of the Party's secular ideology to familiar images borrowed from traditional Chinese folklore. Significantly, an editorial titled "Sweep Away All Monsters and Demons," published in the People's Daily on June 1, 1966, under Mao Zedong's command, contained the following:

> "The exploiting classes have been disarmed and deprived of their authority by the people, but their reactionary ideas remain rooted in their minds. We have overthrown their rule and confiscated their property, but this does not mean that we have rid their minds of reactionary ideas as well."

Many people committed suicide during the Cultural Revolution, driven to this desperate act for not being able to bear further humiliation and violation of their dignity and intimacy.[48] Xing Lu points out that "[n]early everyone knew, directly or indirectly, someone who was driven to suicide by unwarranted charges."[49] A person against whom charges came out was avoided by coworkers, isolated from friends and rejected by relatives. People were required to attend *xuexi ban* (study groups) where they were expected to self-criticize their counter-revolutionary ideas and confess their "crimes."[50] *Dazibao* left those accused defenseless against relentless and often anonymous charges.[51] The practice of *dazibao* signed simply as "revolutionary masses" was justified as necessary to protect the authors from retaliation from the accused person. In practice, it contributed to create an atmosphere of unaccountability for accusers concerning the accuracy of their accusations. These typically did not require proof and no mechanism to access truth about innocence or guilt was in place: no due process, no procedure by which accused people could defend themselves.[52] As a result, dazibao were commonly used for spreading unsubstantiated rumors, assaulting a person's character, and

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[46] Eleanor Goodman, *When words kill: 'Big-character posters' are testament to tenacity and suffering in one of China's darkest periods*, THE CHINA PROJECT (Nov. 14, 2017), https://thechinaproject.com/2017/11/14/when-words-kill-big-character-posters-are-testament/.

[47] *Monsters and Demons (1966-1967)*, CHINESEPOSTERS.NET, https://www.chineseposters.net/themes/monsters-demons.

[48] LU, *supra* note 15, at 19.

[49] *Id*. at 20.

[50] *Id*.

[51] Broman, *supra* note 14, at 102.

[52] LU, *supra* note 15, at 20.

ruining a person's reputation.[53] In some cases, *dazibao* were the means by which accused parties answered the accusations or exercised self-criticism.

Xing Lu observes that "when rhetoric fails, violence becomes the order of the day."[54] In this context, although a communicative phenomenon, one that is carried out by words and language, *dazibao* affirmatively served a violent function in violent times, rather than a rhetoric function. Tens of millions of *dazibao* were produced during the Cultural Revolution, mobilizing millions of youth.[55] All this was justified and rationalized in "the interest of protecting Chairman Mao, preventing the spread of capitalism in China, and furthering the revolutionary cause."[56]

III. FROM DAZIBAO TO CANCELLING

The history of the Cultural Revolution is a cautionary tale revealing of how violent language leads to violent action. Before the Internet, the use of wall posters during the Cultural Revolution had been arguably the largest experience of mass communication for political mobilization in human society.[57] Yet, it produced widespread lying, rumors, and ruined the lives of many innocent people.

The official endorsement and encouragement of the use of *dazibao* originally intended, as was stated, allowing ordinary people to express different views "as a means of preventing corruption and the abuse of power." Instead, it produced standardized thinking and heard effect behavior, transforming a powerful communicational tool into a weapon for personal attacks, humiliation of innocent people, and social and political instability.

Similarly, back in Internet's early years, many believed that by allowing a free flow of different views, beliefs, and thoughts into the free market of ideas would bring the world closer to a kind of intellectual emancipation. Access to tons of information at a low or no cost, would foster truth, democracy, freedom, plurality and civility. This hope has been progressively frustrated by what now has become widespread dissemination of conspiracy theories, deliberate disinformation, rise of extremist political views, acute polarization, hate speech, mass surveillance, and intolerance.

Both *dazibao* and social media are branded as easy and convenient ways of voicing private views, complaints, blame, and accusation in the public sphere. In either, harsh, provocative language is widespread. Whether writing *dazibao* or cancelling someone via *tweets*, the revolutionary masses and the cyber mob use similar argumentative styles, play the same language, and employ similar linguistic processes. Once they learn the rules of

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[53] *Id*. at 85.

[54] *Id*. at 25.

[55] Broman, *supra* note 14, at 127.

[56] Lu, *supra* note 15, at 26.

[57] *Id*. at 92.

engagement, ordinary people become part of the public feast of self-expression, denunciation and cancelling.

Some patters seem to repeat in both cases: absolute moral certainty, promotion of dogmatic and polarized thinking, mythmaking, conspiracy theories, aggressive language and radicalism. But there are noticeable differences too. Despite the dissemination of its writing among ordinary people, standardized thinking ensured that *dazibao,* during the Cultural Revolution, were generally a tool by which those in positions of power were able to silence dissent. Contemporary cancel culture, in turn, frequently lets ordinary people to criticize and expose those who hold platform privileges (celebrities, politicians, corporations, intellectuals). An example of this potential for pressing for change and accountability is the #MeToo movement.

Nowadays, emotions associated to shame are largely explored by politics and politicians, and increasingly more in the current polarization of society and the political environment. From professors to prospective public office holders, from celebrities to reality show participants, all have their posting history in social media screened in search of ideological or political sins. And as with the "snakes and monsters" of the Chinese Cultural Revolution, today's cancel culture also has its own supernatural metaphors to label those who are or are believed to deserve being cancelled. Expressions like "red pilled", "troll" and "woke" evoke fairy tales' archetypes and images.

CONCLUSION

Technological transformations significantly changed, however, the landscape in which shaming processes occurs. Digital media has taken social shaming to a new dimension. Professor Daniel Solove claims that, because things can spread more widely and become more permanent, "Internet and social media makes ordinary gossip much more harmful."[58] The proverb "the Internet never forgets" and its variation "Google never forgets" capture the idea: the added risks derived from the fact that information on social media is recorded. As a consequence,

> "We may find it increasingly difficult to have a fresh start, a second chance, or a clean slate. We might find it harder to engage in self-exploration if every false step and foolish act is chronicled forever in a permanent record. This record will affect our ability to define our identities, to obtain jobs, to participate in public life, and more.

[58] DANIEL J. SOLOVE, NOTHING TO HIDE 146 (Yale University Press, 2011).

> Ironically, the unconstrained flow of information on the Internet might impede our freedom."[59]

Today, willful or coerced confessions of "wrongdoings" or "incorrect thoughts" take the form of public apologies on social media. Instead of being shamed by the tribe, humiliated before the village, or having the sins exposed to the other members of a church, a cancelled person is shamed virtually before the whole world. One of the features of this environment is the fact that, in many ways, social networks like Facebook or Tweeter perform roles more akin to governments than to traditional companies. Facebook alone accounts for online environments used by a number of users nearly twice the size of China's population.[60] Due to the lack of regulation of the digital environments, cancelling often emulates a condemnation in the absence of due process or even minimum legal procedures, as was the case with *dazibao* in the context of the Cultural Revolution. Here and then, presumption of innocence is relativized, punishment often becomes vengeance, discipline becomes bulling.

Understanding the role of shame and shaming in different cultural and historical contexts – acknowledging that we are a gossip species – can give an invaluable contribution for a better comprehension of law as a toolbox for the mediation of human relations, as well as its potentials and limitations. Shame as a theme should be incorporated into the study of jurisprudence, especially its correlations and implications to due process, privacy, freedom of speech, media regulation, criminology and criminal law.

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[59] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET (Yale University Press, 2007).

[60] ROB REICH, MEHRAN SAHAMI & JEREMY M. WEINSTEIN, SYSTEM ERROR: WHERE BIG TECH WENT WRONG AND HOW WE CAN REBOOT 189 (2021).

SHOULD CHINA CONCEPT STOCKS BE IDENTIFIED AS "CHINESE" OR "FOREIGN"?

Jing Leng; trans., by Yan Pan*

Abstract: Didi Global kept a low profile to get listed in the United States, but after a successful IPO on the New York Stock Exchange, it encountered a series of stringent regulatory sanctions in subsequent times, involving the regulatory concerns of cyber security and protection of personal information, etc. Then Didi Global announced its delisting from the United States and was considering listing on the Hong Kong Stock Exchange. The Didi Debacle reveals the trend that Chinese enterprises in specific industries and sectors, especially in those are defined as Key Information Infrastructures, are facing more and more stringent domestic compliance requirements. This trend, coupled with the regulatory movement of the United States starting to enforce the *Holding Foreign Companies Accountable Act*, increases the risks and uncertainties in offshore financing for China-Dimension Stocks. This article takes the Didi Debacle for example, reveals that the regulatory outlook and prospects for China-Dimension Stocks' overseas listings in the United States are undergoing drastic changes, and explains the reasons.

Keywords: China-Dimension Stocks; Didi; Key Information Infrastructures, Overseas Listing, Holding Foreign Companies Accountable Act

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INTRODUCTION

After Didi Global's successful but low-profile listing on the New York Stock Exchange on June 30, 2021, it encountered a cybersecurity review launched by the Cybersecurity Review Office affiliated to the Cyberspace Administration of China (hereinafter referred to as the "CAC") only three days later, followed by the rectification measures imposed by the CAC on Didi, including removing the "DiDi Chuxing" app (operated by Tianjin-registered DiDi Chuxing Science and Technology Co., Ltd.) from app stores and suspending the registration of new users, due to its serious violations of laws and regulations in collecting and using personal information. Didi's stock price has fallen in response and has so far fallen below the issue price. This has triggered a round of class actions of US stock market's investors called by Wall Street law firms, and has in turn dealt a heavy blow to the sector of US-listed China Concept Stocks as a whole, thus once again pushing the crisis of China Concept Stocks, which was triggered by the astonishing accounting scandal and fraud of Luckin Coffee since April 2020, to a new critical situation (see Jing Leng, *Beyond the Audit Dispute: What's the Solution to the Crisis of China Concept Stocks?*, CHINA LAW REVIEW 179 (2021).).

On July 8, 2021, Didi was again confronted the call launched by Democratic Senator Chris Van Hollen, one of the initiators of the *Holding Foreign Companies Accountable Act*, that the SEC should initiate an investigation on Didi. On July 9, 2021, the domestic regulatory storm escalated again: also due to serious violations in the collection and use of personal information, the CAC announced to notify app stores to remove 25 apps including "Didi Enterprise Version", which were all operated by Beijing Xiaoju Technology Co., Ltd. This company was under the control of Didi's founder Wei Cheng. And the CAC ordered all websites and platforms not to provide access or download services for these removed apps. This attracted the attention of all walks of life for its intensity of regulation and wide scope of rectification.

While the issues of data security, cyber security and national security risk prevention involved in the Didi Debacle are massively discussed from the perspective of cyber law and data law, this article focuses on the equally sensitive and important issue of cross-border securities activities regulation involved in this event: a major shift in China's domestic regulatory regime for red chip listings is about to take place, which will most likely incorporate the requirements of pre-registration approval and post-registration compliance, taking information security, data security and national security into consideration, and highlight the outlook that private China Concept Stock companies involved in sensitive industries will face the situation where both the securities regulatory authority and industry competent authority assert and tighten territorial jurisdiction when they go abroad for red chip listings.

I. LEGAL RISKS, MARKET RISKS, OR POLITICAL RISKS?

The direct legal basis for the cybersecurity review of Didi is the *Measures for Cybersecurity Review* (hereinafter referred to as the "Measures"), which came into effect on June 1, 2020. The Didi case is the first case since the introduction of the Measures. It is no coincidence that after the investigation of Didi, the Internet platform enterprise Full Truck

Alliance Group (formed by the merger of Yunmanman and Huochebang) and BOSS Zhipin also received the notice from the CAC to implement the cybersecurity review in accordance with the Measures, and stopped new user registration during the review period. Similarly, Yunmanman, Huochebang, and BOSS Zhipin got listed in the US in June, 2021, whose market values exceeded 10 billion US dollars respectively. Likewise, these companies are the leading Internet platform companies, and hold a huge number of users, vehicles, and road management network data. This is additional evidence that US-listed China Concept Stock companies operating in sensitive industries are increasingly being scrutinized closely by competent industry authorities in China, and are experiencing strict domestic compliance requirements and national security red lines from the precipitously tougher regulatory measures. Compliance matters include and are not limited to the legality and appropriateness of the collection and use of domestic users’ personal information, the maintenance of national data security, and anti-monopoly considerations. Like Didi, it is with high probability that these three companies will face the US stock market investor class actions resulting from the slump in share price triggered by the domestic regulatory measures encountered by them.

From this perspective, the legal and market risks among the multiple risks of listing China Concept Stocks in the US are showing a trend of mingling with the political risks in the context of international and domestic political and economic climate. Legal risks are mainly manifested in the enforcement measures taken by the US Securities and Exchange Commission (hereinafter referred to as the “SEC”) and the US Public Company Accounting Oversight Board (hereinafter referred to as the “PCAOB”) in terms of information disclosure and financial audit irregularities, as well as securities fraud class actions filed by the investors. Market risks include short-selling institutions’ sniping, business and stock price volatility due to adjustments in industry regulatory policies and competitive landscape, as well as investor confidence ebbs and flows and valuations rise and fall in case that the conceptual core of China Concept Stocks is reconfigured. Political risks include the restrictions, sanctions and “decoupling” measures taken by the US out of bilateral competition and its national security concerns in the midst of a severe test of US-China relations, with the *Holding Foreign Companies Acco1untable Act* promulgated at the end of 2020 to strengthen the disclosure obligations of China Concept Stocks and the PCAOB’s right of access to audit working papers as milestone events, as well as adjustments of China’s domestic regulatory laws and policies driven by its national security concerns.

Taking the Didi Debacle for example, in terms of the overall features of the crisis confronted by China Concept Stocks in the US, it is no longer uncommon for legal risks to be directly triggered by political risks, and the circumstances of each case are quite complex. That is often embodied in the model that the acts in violation of regulation occurred in the domestic product and service market trigger regulatory measures, with the effects of which spilling over to the foreign capital market, thus triggering regulatory measures and investor litigation on the other side of the Pacific Ocean. The two distinct markets—the domestic product and service market and the overseas capital market—are thus linked in a unique resonant and transmissive manner.

Just observing the origins of the multiple class actions filed against China Concept Stocks in the US stock market that happened from the outbreak of the Luckin Coffee fraud event in early 2020 till the first half of 2021, the author finds that in a considerable number of cases, due to the disadvantageous information position at the beginning of the litigation, the initial source of evidence for the plaintiffs’ filing is unearthed from regulatory and punitive measures taken by the domestic regulatory authorities of China, in addition to the short-selling reports of short-selling institutions (see Table I and Table II). The information in the tables proves that none of the following leading Internet companies are sued in the United States not in this way: iQIYI, Genshuixue, Baidu, Douyu, Qutoutiao, Alibaba, and Didi…

Another fairly prominent reason for the occurrence of lawsuits is that the offers to buy out US investors are allegedly to be low when China Concept Stocks choose to delist from the US market because of the high cost of maintaining listing status (especially after encountering the class actions for the first time). This type of lawsuits accounts for nearly a quarter of the cases in Tables I and II, and is a fairly mainstream category of legal risk in the US for China Concept Stocks. It can be concluded that it is “not difficult to go overseas”, “but difficult to exit”.

Table I: Summary of Class Actions Encountered by China Concept Stocks in the US in 2020

Data Source: Stanford Law School, Securities Class Action Clearinghouse: http://securities.stanford.edu/

No.	Filing date of the litigation	Name of China Concept Stocks	Cause of action
1	January 15, 2020	500.com Limited	500.com Limited (NYSE: WBAI) is alleged to have made false statements between April 27, 2018 and December 31, 2019, in terms of its Japanese branch’s action to bribe Japanese officials in violation of the US *Foreign Corrupt Practices Act*.
2	January 22, 2020	Qudian Inc.	Qudian Inc. (NYSE:QD) is alleged to have made materially false and misleading statements about the company’s business, operations and compliance policies, particularly with respect to the negative impact on its business and revenue of China’s tightening on online consumer lending regulations.

3	February 13, 2020	Luckin Coffee Inc.	Luckin Coffee Inc. (NASDAQ:LK) is suspected of falsifying transactions and committing massive financial fraud.
4	February 13, 2020	SORL Auto Parts, Inc.	SORL Auto Parts, Inc. (NASDAQ:SORL) is alleged to have omitted material information from the Proxy Statement submitted in connection with the solicitation of shareholder votes in its going private process.
5	March 4, 2020	Canaan, Inc.	Canaan, Inc. (NASDAQ:CAN) is alleged to have made false and/or misleading statements on, and/or have failed to disclose the following facts: (1) the purported “strategic cooperation” is actually a transaction with an affiliate; (2) the company’s financial condition is worse than what have been disclosed; (3) the company has recently removed a large number of distributors from its website right prior to the IPO, many of which are small or suspicious enterprises; and (4) the main business of the company’s several largest Chinese clients in previous years were not bitcoin mining, therefore they are unlikely to be long-term customers of the company.
6	March 24, 2020	DouYu International Holdings Limited	DouYu International Holdings Limited (NASDAQ:DOYU) is alleged to have made false/misleading/concealing disclosures regarding the company’s

			business, operations and compliance, specifically with respect to the compliance risks of top streamers’ live stream content, the financial costs of attracting top streamers to the site, as well as the negative financial consequences caused by the “lucky draw” event being removed due to gambling-related suspect.
7	April 9, 2020	E-House (China) Holdings Limited	E-House (China) Holdings Limited (NYSE:EJ) is alleged to have made numerous omissions, false and misleading statements with respect to its public solicitation of ADS holders’ voting rights in the going private transaction in 2016.
8	April 16, 2020	iQIYI, Inc.	iQIYI, Inc. (NASDAQ:IQ) is alleged to have made false/misleading/concealing statements when disclosing about the company’s business, operations and compliance, specifically overstating the number of subscribers, revenue and acquisition consideration, as well as misrepresenting the revenue.
9	April 17, 2020	GSX Techedu Inc.	GSX Techedu Inc. (NYSE:GSX) is alleged to have made false/misleading/concealing disclosures about the company’s business, operations and compliance, specifically misrepresenting the profits, revenue, number of enrolled students, teacher qualifications, and teacher selection procedures, with potentially negative financial consequences.
10	April 21, 2020	Jumei International Holding Limited	Jumei International Holding Limited (NYSE:JMEI) is alleged to have unfairly depressed the purchase price quoted to investors and

			undervalued the company in the going private transaction.
11	April 21, 2020	Baidu, Inc.	(NASDAQ:BIDU) is alleged to have made materially false and misleading statements about the company’s business, operations and compliance policies. The alleged undisclosed information includes that its feed services are deemed by the CAC to be “low-brow content” for failing to meet China’s regulatory standards, and it has received the order of rectification.
12	April 24, 2020	Phoenix Tree Holdings Limited	Phoenix Tree Holdings Limited (NYSE:DNK) is sued for allegedly failing to disclose poor performance due to the Covid-19 pandemic.
13	July 6, 2020	China XD Plastics Company Limited	China XD Plastics Company Limited (NASDAQ:CXDC) is sued for allegedly offering an unreasonably low price to investors in the going private transaction. The plaintiff dismissed the case voluntarily on October 16, 2020.
14	July 17, 2020	Sky Solar Holdings, Ltd.	Sky Solar Holdings, Ltd. (NASDAQ:SKYS) is alleged to have made material misrepresentation and inadequate disclosures in the going private transaction for the purpose of depressing the offer price to the investors.
15	July 24, 2020	Wins Finance Holdings Inc.	Wins Finance Holdings Inc (NASDAQ:WINS) is alleged to have made materially false and/or misleading statements, and/or have failed to disclose the following facts: (1) the loan to Guohong Asset Management Co., Ltd. in the amount

			of RMB 580 million (Guohong Loan) has a high probability of becoming a bad debt due to the high uncertainty of its ultimate repayment amount; (2) the Guohong Loan becoming a bad debt will have a material adverse impact on the financial and operating conditions of the company; (3) the company’s internal control over its financial reporting remains weak, despite its repeated assurances to investors that it is taking steps to remedy the weaknesses; and (4) it can be foreseen that the independent audit is probable to resign.
16	August 19, 2020	Baidu, Inc.	Baidu, Inc (NASDAQ: BIDU), as the controlling shareholder of iQIYI, is alleged to have made false and/or misleading statements, and/or have failed to disclose the following facts: (1) Baidu misrepresented iQIYI’s financial and operating conditions; and (2) iQIYI’s internal control over financial reporting is inadequate. This is the second round of class actions encountered by Baidu in 2020.
17	August 20, 2020	Qutoutiao Inc.	Qutoutiao Inc (NASDAQ: QTT) is alleged to have made materially false and/or misleading statements, or have failed to disclose the following material adverse facts: (1) Qutoutiao replaces the

			original advertising agent with an affiliate, thereby avoiding the third party’s overview of the content and quality of its advertisements; (2) the affiliate places advertisements on its mobile app for questionable products such as weight loss products and Viagra, which are deemed false advertisements under the relevant applicable regulations; (3) the company’s abovementioned actions will trigger increasing regulatory investigations and reputational damage; (4) the company’s advertising revenue may decline as a result; and (5) the company’s misrepresentation will cause losses to the investors due to the fall in share price when the truth should be revealed.
18	September 9, 2020	Lexinfintech Holdings, Ltd.	Lexinfintech Holdings, Ltd (NASDAQ: LX) is alleged to have made false and/or misleading statements, and/or have failed to disclose the following matters: (1) LexinFintech artificially reduced delinquency rates by providing working capital to borrowers to assist them in repayment; (2) the company’s business model caused significant losses to shareholders by prioritizing off-balance sheet lending to lenders in China and downplaying its default

			risk in its disclosures; (3) the company exaggerated the size of its user base; (4) the company facilitated P2P loans that violated Chinese law; (5) the company failed to disclose related transactions; and (6) the company lacks adequate internal controls.
19	September 29, 2020	Pintec Technology Holdings Limited	Pintec Technology Holdings Limited (NASDAQ: PT) is alleged to have filed a false and misleading IPO registration statement, omitting statements of material fact or failing to disclose the following matters: (1) the company incorrectly recorded revenue from certain technical service fees on a net basis instead of a gross basis; (2) material weaknesses exist in Pintec’s internal controls over financial reporting related to cash advance to related party, Jimu Group, outside the normal course of business, and non-conventional loan financing transaction with a third party, Plutux; (3) as a result of the aforementioned, the company’s financial statements for 2017 and 2018 were misstated, resulting in significantly lower true net income than the amounts previously disclosed; and (4) therefore, the affirmative statements made by defendant

			regarding the company’s business, operations and prospects were false and/or misleading.
20	November 13, 2020	Alibaba Group Holding Limited	Alibaba Group Holding Limited (NASDAQ: BABA), the majority shareholder of Ant Group, is alleged to have made materially false and/or misleading statements, or have failed to disclose the following matters: (1) Ant Group did not meet the qualifications for listing or disclosure requirements of the relevant market in respect of certain material matters; (2) certain upcoming changes in the fintech regulatory environment would affect Ant Group’s business; (3) the IPO of Ant Group on the SSE and HKSE was likely to be suspended due to the abovementioned reasons; and (4) as a result of the abovementioned, the defendant’s positive statements about the company’s business, operations and prospects were materially misleading and/or lacked a reasonable basis.
21	November 20, 2020	JOYY Inc.	JOYY Inc (NASDAQ: YY) is alleged to have made false and/or misleading statements, and/or have failed to disclose the following matters: (1) JOYY overstated its revenue from real-time streaming sources; (2) at any given time, the majority of users were bots;

			(3) the company utilized these bots to implement roundtripping schemes, thereby creating false revenue; (4) the company’s cash reserves were overstated; and (5) the company’s acquisition of Bigo was primarily for the benefit of the corporate insiders.
22	November 20, 2020	Berry Corporation	Berry Corporation (NASDAQ: BRY) is alleged to have included false statements of material facts in the offering documents, and have failed to make required disclosures. In addition, materially false and misleading statements were made regarding the company’s business, operations and compliance policies: (1) Berry materially overstated the efficiency and stability of its operations; (2) the company would have to make predictable improvements to its operational inefficiencies and lack of stability, which would result in productivity impacts and increased operating costs for the company; (3) the abovementioned situation would have a negative impact on the company’s revenue; and (4) therefore, the offering documents and the company’s public statements were materially false and/or misleading, and failed to disclose information that was required to be disclosed.

23	December 8, 2020	Changyou.com Limited	Changyou.com Limited (NASDAQ: CYOU) is alleged to have made in its 13E-3 trading statement filed for the going-private delisting transaction led by its majority shareholder, Sohu, false and misleading statements regarding dissenters’ rights (also known as appraisal rights) under the laws of the Cayman Islands, where it is domiciled. In particular, the notifications regarding certain important minority shareholder rights were overpassed.
24	December 10, 2020	Semiconductor Manufacturing International Corporation	Semiconductor Manufacturing International Corporation (OTC-BB: SMICY) is alleged to have made false and/or misleading statements, and/or have failed to disclose: (1) the existence of “unacceptable risk” that the equipment provided to SMIC would be used for military purposes; (2) foreseeable risk of facing legal restrictions from the US; (3) some of SMIC’s suppliers will have “difficulty obtaining” individual export licenses due to restrictions imposed by the US Department of Commerce; and (4) therefore, the company’s public statements were materially false and/or misleading.

Table II: Summary of Class Actions Encountered by China Concept Stocks in the US in 2021

No.	Filing date of the litigation	Name of China Concept Stocks	Cause of action
1	January 20, 2021	Lizhi Inc.	Lizhi Inc. (NASDAQ: LIZI) is alleged to have made false and/or misleading statements in a confidential registration statement on Form F-1 filed with the SEC on August 6, 2019, and/or have failed to disclose: at the time of the IPO, the coronavirus was already raging in China, affecting the company’s headquarters, major markets and key hubs, its employees and customers; Coronavirus-related complications have negatively impacted Lizhi’s business, as employees and customers have contracted the virus, lost their jobs, or experienced difficulties in producing and publishing content critical to the Lizhi platform; the complaints against the company by its employees and customers even before the IPO, have damaged the company’s reputation and financial position and prospects; and (4) therefore, the company’s registration statement was materially false and/or misleading.
2	January 20, 2021	9F Inc.	9F Inc. (NASDAQ: JFU) is alleged to have made false and/or misleading statements regarding the listing materials, and/or have failed to disclose: (1) in light of 9F’s ongoing contractual disputes with PICC Insurance Company of China (hereinafter referred to as the “PICC”) over the payment of service fees under the Cooperation

			Agreement, the value, benefits claimed by the company’s financial partners and its three-way cooperation business model did not actually exist, and/or were grossly exaggerated; (2) the recoverability of the service fees owed to 9F by PICC under the Cooperation Agreement was in doubt and there was a serious risk of rejection of payment; (3) there was a significant risk that PICC would no longer provide credit insurance and guarantee protection for the investors and institutional capital partners; (4) due to the abovementioned reasons, the company’s platform, business model, reputation and financial performance were materially damaged; and (5) therefore, the company’s statements regarding its business, operations and prospects were materially false and misleading, and/or lacked a reasonable basis.
3	February 17, 2021	Jianpu Technology Inc.	Jianpu Technology Inc. (NYSE: JT) is alleged to have made materially false and/or misleading statements, and have failed to disclose material adverse facts about the company’s business, operations and prospects, specifically: (1) some of the transactions conducted by the company’s Credit Card Recommendation Business Unit involved undisclosed relationships or lacked business substance; (2) as a result of the above, the

			company’s revenues and costs for fiscal years 2018 and 2019 were overstated; (3) significant deficiencies existed in internal controls over financial reporting; and (4) therefore, the company’s 2018 Financial Form 20-F could be reasonably required to be restated.
4	February 17, 2021	EHang Holdings Limited	EHang Holdings Limited (NASDAQ: EH) is alleged to have misled investors by misrepresenting and/or failing to disclose the following facts: the company claimed that the regulatory approvals obtained by EH216 in Europe and North America were actually for the purpose of drones rather than carrying passengers; the company’s relationship with its purported primary client was bogus; since its ADS began trading on Nasdaq in December 2019, EHang has actually collected only a small percentage of its reported sales; the company’s manufacturing facilities were barely unoccupied and lacked evidence of the presence of advanced manufacturing equipment or employees; and therefore, the company’s public statements were materially false and misleading.
5	March 1, 2021	MoneyGram International,	MoneyGram International, Inc. (NASDAQ: MGI) is alleged to have made false and/or misleading statements,

		Inc.	and/or have failed to disclose: (1) XRP, the cryptocurrency that MoneyGram used as part of its Ripple partnership, was considered unregistered, and therefore illegal under the SEC regulation; (2) if the SEC decided to enforce law and regulation against Ripple, MoneyGram could lose lucrative market development fees, which are critical to its financial performance; and (3) therefore, the company’s public statements were materially false and/or misleading.
6	April 8, 2021	Ebang International Holdings Inc.	Ebang International Holdings Inc. (NASDAQ: EBON) is alleged to have made materially false and/or misleading statements, and have failed to disclose material adverse facts about the company’s business, operations and prospects, specifically: (1) proceeds from the public offering of Ebang were used to repay low-yielding long-term bonds to an underwriter and related parties, but not to develop the company’s business; (2) Ebang’s sales were declining and the company inflated reported sales by including sales of defective products; (3) Ebang failed to go public in Hong Kong due to alleged embezzlement of investor funds and inflated sales figures; (4) so-called cryptocurrency transactions were simply cryptocurrency transactions purchased out of the box;

			and (5) therefore, positive statements about the company’s business, operations and prospects were materially misleading, and/or lacked a reasonable basis.
7	April 15, 2021	Canaan Inc.	Canaan Inc. (NASDAQ: CAN) is alleged to have issued materially false and misleading statements and omitting material facts, thus artificially inflating the prices: Canaan concealed that due to ongoing supply chain disruptions and the launch of the company’s next-generation A12 series of bitcoin mining machines, Canaan’s fourth quarter sales declined by more than 93% year-over-year compared to the sales of the fourth quarter of 2019, and by more than 93% year-over-year, compared to sales of the third quarter of 2020.
8	June 9, 2021	RLX Technology Inc.	In its F-1 registration statement (including all amendments thereto) and prospectus, RLX Technology Inc. (NYSE: RLX) is alleged to have made misrepresentation and/or have omitted the company’s then existing facts: Namely, the company was at the background of China’s ongoing efforts to establish national standards for e-cigarettes, which would align the e-cigarette regulations with the regular cigarette regulations. And the company’s reported financial performance was not as strong as projected in the offering materials. Therefore, investors allege that it artificially inflated the stock price.

9	June 22, 2021	Tarena International, Inc.	Tarena International, Inc. (NASDAQ: TEDU) is alleged to have made false and/or misleading statements, and/or have failed to disclose: (1) certain employees have interfered with the external auditing of financial statements during certain periods; (2) the company’s revenues and expenses were inaccurate; (3) the company entered into business transactions with organizations owned, invested in, or controlled by its employees or their family members, which was not properly disclosed by the company; (4) as a result of the abovementioned, the company’s financial statements since from 2014 were inaccurate; and (5) therefore, statements about the company’s business, operations and prospects were materially false and misleading, and/or lacked a reasonable basis.
10	To be determined	Didi	On July 4, 2021, Didi issued a press release announcing the “application removal in China”, which stated that “it is confirmed that the ‘Didi Chuxing’ application has the problem of collecting personal information in violation of the relevant laws and regulations of the People’s Republic of China.” Subsequently, a number of US law firms began scrambling to release information about the call for investors to file class actions.

			According to the law firms’ class litigation solicitation survey, the false and misleading statements made by the issuer or the accused company to the market are as follows: Didi might have “collected personal information in violation of relevant Chinese laws and regulations”. The company’s application will be subject to cybersecurity review by the CAC, and its applications has been removed from all app stores nationwide. Based on the abovementioned facts, the company’s public statements were misrepresented and materially misleading during the period of the IPO. The deadline for the call for investor information was September 7, 2021. On July 6, 2021 the class actions were filed with the Southern District of New York, captioned *Espinal v. DiDi Global Inc. f/k/a Xiaoju Kuaizhi Inc.*, No. 21-cv-05807, and the Central District of California, captioned *Franklin v. DiDi Global Inc.*, No. 21-cv-05486.

China’s change of the regulatory caliber after the Didi Debacle indicates that the regulatory picture of China Concept Stocks going public in the US will be dominated by several parallel scenarios as follows: first, it will be “difficult to go overseas” (the “travel permit” or “no objection letter” system for pre-registration approval of red chip listings may be reintroduced); second, it will be “difficult to stay” (the compliance cost of maintaining listed in the US exchange market is high, in particular, the compliance risks increase substantially in terms of the disclosure and audit working papers review under the *Holding Foreign Companies Accountable Act*); third, it is also “difficult to exit” (going private transactions are not easy). If this is the case, what will happen to China Concept Stocks as they do not only have an immediate need for industrial financing, but also contractual obligations to assist venture capitalists to exit for achieving reasonable financial returns in accordance with international

business and investment practices?

II. THE FOCUS SHIFT OF COMPLIANCE CONCERNS FOR CHINA CONCEPT STOCKS GOING PUBLIC OVERSEAS: FROM THE US EXTRATERRITORIAL ENFORCEMENT JURISDICTION TO CHINA'S TERRITORIAL JURISDICTION

The current round of China Concept Stocks turmoil triggered by the Didi Debacle has demonstrated new features: the hot legal and policy issues involved in the US listing of China Concept Stocks have evolved from the previously highlighted impediments to the US SEC's intention of extraterritorial jurisdiction enforcement and the impasse in cross-border securities regulatory collaboration between the US and China (especially embodied in cross-border audit disputes) (Jing Leng, *Beyond the Audit Dispute: What's the Solution to the Crisis of China Concept Stocks?*, CHINA LAW REVIEW 179 (2021).), into the question of whether the territorial jurisdiction of China's regulatory authorities to conduct qualification and compliance reviews on the overseas listing of China Concept Stocks is about to be fully activated and strengthened. Some commentators have even inferred that the "red chip listing travel permit" (the "no objection letter" issued by the China Securities Regulatory Commission (hereinafter referred to as the "CSRC") to approve the private companies to go public in overseas markets indirectly by means of small red chip listing), which has been suspended for 17 years, will soon return to the center of the domestic regulatory landscape. This is not alarmism: after the Didi Debacle, the General Office of the CPC Central Committee and the General Office of the State Council jointly issued the *Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law* (hereinafter referred to as the "Opinions") on July 6, 2021. This signals the irresistible trend of tightening the domestic approval and regulatory calibers for overseas listings of China Concept Stocks, with considerable urgency in the task of regulatory revision and institutional strengthening.

At the same time, in order to help China Concept Stocks to cope with the unprecedented and converging political, market and legal risks encountered in the overseas markets, (with the political risks being the most prominent and intractable one to deal with), it is not enough to only gatekeep or even lift the threshold of their overseas financing. It is necessary to start with strongly activating and expanding the financing function of domestic capital market and the Hong Kong stock market, so as to respond to the corporate financing needs of the industries involved in China Concept Stocks, and open up exit channels for domestic and foreign investors to obtain reasonable financial returns. This should effect a permanent cure. Otherwise, the measures taken for domestic regulation of China Concept Stocks' overseas financing would be not effective enough.

As to the listing of Didi, from submitting the Form-1 secretly to the SEC on April 9, 2021 to the listing on the NYSE on June 30, 2021, it took just over two months, setting a new record for the speed of listing China Concept Stocks in the US—the registration and approval process for Alibaba's listing on the NYSE in 2014 took a total of four and a half months, which was already astonishingly fast at the time. This terrifies from the other side that Didi's compliance with the US stock market regulatory authority and the exchange in terms of the registration application and listing application respectively is quite rigorous and standardized,

as evidenced by the fact that Didi has only amended its registration form twice at the request of the SEC (Alibaba's listing on the NYSE in August 2014 went through seven times of changes to its registration form). The total capital raised of more than 4 billion US dollars was fully subscribed on the first day of Didi's Bookkeeping. This also proved that in addition to the rigorous and standardized prospectus, the roadshow content presented by Didi to investors was also quite exciting and extremely convincing. For example, in the 17-minute roadshow video, Didi's founder Wei Cheng, President Qing Liu and Vice President and Head of International Business Jingshi Zhu (all three founders are the "partners" who will enjoy super voting rights in the post-IPO corporate governance structure to maintain their control right) appear in successive scenes. At the background of the interaction between real-life scenes and animated images, they introduced Didi's business model, corporate culture and development vision in fluent Chinese and English, in particular mentioning the future scenario of popularization of intelligent cars and self-driving travel ecology supported by artificial intelligence (AI) technology and massive traffic data, which was quite impressive to investors. Meanwhile, before the IPO, the official website of DiDi Science and Technology Co., Ltd., the operating entity of the domestic online car app "DiDi Chuxing", was upgraded from http://didichuxing.com to https://www.didiglobal.com/ with a bilingual interface.[1] In other words, the communication between Didi and the intermediary service institutions that assisted its listing and the regulatory authorities, exchanges and investors in the US stock market should be considered quite adequate and effective.

To step further, accompanying with the smooth communication with overseas regulatory authorities and investors, and strict compliance with overseas laws, how were Didi's communication with domestic regulatory authorities and its domestic compliance measures, as well as their effects, in the process of Didi's going public in the US? Two questions are involved

[1] According to a commentator, Didi adopted a business model that continues to burn money and is slow to turn a profit, relied on more than 20 rounds of equity capital raisings before listing, and raised more than 20 billion US dollars. The company has nearly 100 institutional shareholders, including Apple, Toyota, Alibaba, Foxconn and other well-known enterprises, along with Hillhouse, Sequoia and other venture capital organizations. The Softbank Vision Fund has been involved in several rounds of financing, investing 10.8 billion US dollars and owning 21.5% of the company's shares; while Uber has acquired 12.8% of Didi's shares through the sale of its Chinese operations; and Tencent also holds 6.8% of the company's shares. Such a large-scale financing process greatly diluted the shareholding percent of Didi founders. Wei Cheng, Chairman of the Board & CEO of Didi, owns 7% of the company's shares, while President Qing Liu owns 1.7%. Before the listing, the aggregate shareholding percent of the Directors and the Management was only 10.5%, and the 20.1% voting rights were nowhere near enough to balance out the external major shareholders. As to the post-IPO control issues, Didi intends to endure the Management's control in two ways. First, to endow Didi's Management more than 50% of the voting rights through the design of dual-class share structure with weighted voting rights, with Wei Cheng and Qing Liu holding more than 48% of the voting rights. Second, to establish the Didi Partnership with Wei Cheng, Qing Liu and Jingshi Zhu as Founding Limited Partners to exercise control over the company. A Partner in Didi is entitles to appoint or remove an Executive Director and has the right to nominate and recommend candidates for senior management positions. See Xin Chen, *The Value Game of Didi's IPO*, CAPITAL WEEK, 2021.

here. First, did Didi need to obtain permit and approval from China’s domestic securities regulatory authorities—mainly the CSRC—to go public in the US? This could be reflected in the form of a “hello” type of formal filing (after the listing) and a “getting permit” type of substantive review (before the listing). Second, before going public in the US, does Didi need to obtain the going-public-abroad approval from the competent authorities of its domestic business operators—such as the CAC, the State Administration for Market Regulation, and the Ministry of Transport—with the preconditions of meeting the legal compliance requirements of industry operations, make certain compliance commitments, and reflect those in the legal opinion issued by the issuer’s law firm? This can be reflected in compliance commitments at various stages of before, during and after the IPO.

An issue of more general significance for China Concept Stocks is that: if the Internet platform companies such as Didi, which may have the attribute of “key information infrastructure operator” under China’s *Measures for Cybersecurity Review*, and the companies operating in other sensitive industries, are characterized as “real foreign-owned” China Concept Stocks whose listed entity is domiciled outside of China and with foreign capital accounting for major proportion of its shareholding structure (classified as “foreign companies” under the Company Law of China and “overseas enterprises” under the Securities Law of China respectively), then do they need to report to the domestic regulatory authorities for approval of their overseas listing and to obtain approval as a pre-condition for overseas listing?

The reason why these companies are considered to be “real foreign-owned” rather than “sham foreign-owned” lies with their source of capital and equity structure. For instance, after several rounds of venture financing before listing, when Alibaba and Didi went public, the shareholding ratio of foreign investors in their shareholding structure far exceeded that of the management team. And the shareholding ratio of the management team was further reduced after the listing. This is also an important reason why both companies have adopted a “partnership” system distinguished from the dual-class share structure to maintain management team’s control right after the listing. Moreover, in the mechanism design of Didi, it even nests an extra dual-class share structure with weighted voting rights, which can be regarded as “double insurance”. However, as all of the critical main business, profit sources, consumers and product and service markets are located in the territory of China and are mastered by China’s domestically incorporated entities, do all such China Concept Stocks need to report to the domestic regulatory authorities for their overseas financing practices and to be approved as

a pre-condition for going public in the US?[2]

The second question is relatively simple. Because the competent authorities of the domestic entities in charge of China Concept Stocks like Didi actually hold the decisive power of industrial regulation, with Didi's attributes of being in the sensitive industry, it must proactively seek dialogue and communication with regulatory authorities such as the CAC before going public in the US, in order to reach consensus and obtain regulatory clearance (either explicitly or implicitly) as a prerequisite for laying out the operational aspects of the listing. Therefore, foreign medias such as the Wall Street Journal has carried reports that domestic regulatory authorities "want Didi to delay its listing." In this sense, it is not difficult to understand that industry regulatory authorities require commitments from domestic entities of issuers on compliance matters. Of course, such authority has not been clearly confirmed and sorted out in the current main securities laws and regulations, and is expected to be effectively integrated with the relevant system of securities law in the future based on the Opinions issued by the two general offices. If that system is established, the disclosure of information in the issuer's prospectus (including the legal opinion) must respond to this.

As to the first question, i.e., the jurisdiction issue of domestic securities regulatory authorities in terms of giving permit, the answer given by the relevant domestic securities laws and regulations and their applicable practices is relatively lenient, but at the same time relatively lacks clear guidelines. In practice, issuers and their listing service intermediary institutions mainly conduct case studies and make judgments referring to the leniency and strictness of the regulatory policies applicable at that time.

Be it the listing of Alibaba in the US during the effectiveness of the old Securities Law or the listing of Didi in the US during the effectiveness of the revised new Securities Law, the relevant provisions of neither Securities Law explicitly provide for pre-registration approval procedure with the CSRC for private China Concept Stock companies registered outside China to raise capital abroad in the red chip model. In contrast, the indirect listing of state-owned enterprises in the "big red chip" model has long been subject to the pre-registration approval jurisdiction of the Department of International Affairs at the CSRC. Indirect listing is a relative concept to direct listing (i.e., H-share listing). Table III presents a comparison of the characteristics of the H-share model for direct listing and the red chip model for indirect listing,

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[2] As to whether Didi is a "key information infrastructure operator" under the Measures for Cybersecurity Review, there are differentiated claims in practice and the regulatory authorities have yet delivered official replies. The measures simply state that "key information infrastructure operators who procure network products and services that affect or may affect national security" should be subject to a cyber security review under the measures. However, the launch of a review case does not necessarily involve procurement by the operator of the key information infrastructure. If a common product has a significant security risk, when used with the potential to seriously compromise national security, the product may fall under the jurisdiction of a cyber security review, even if it is not part of the procurement process described above. See Huanhuan Luo, *Zuo Xiaodong of China Information Security Research Institute: The Focus of the Censorship on Didi is on the Outbound Security Risks of Important Data*, SOUTHERN WEEKLY, July 4, 2021, http://www.infzm.com/content/209140.

reflecting the relative advantages and disadvantages of the two models for issuers.

Table III Comparison of the characteristics of direct and indirect listings

Comparative Aspects	H-Share Model	Red Chip Model
Offering Method	Operating assets and business as a joint-stock company established in Mainland China and applying for listing in overseas markets.	Taking control of the operating assets and business in Mainland China by way of direct establishment or return acquisition by companies established outside of China (Hong Kong, Bermuda, Cayman Islands, British Virgin Islands) and applying for listing in overseas markets.
Advantages	Not necessary to set up a company abroad for a return acquisition; free of tax burdens associated with inbound and outbound restructuring.	Existing major shareholders’ lock-up period is short (6-12 months), after which they are free to transfer, making it easy to exit; easy follow-up financing, the board of directors has the general authorization to issue a certain percentage of the total equity capital annually, and the flexibility of capital market operations such as share allotments and rights issues is relatively high; the approval process is relatively simple.
Disadvantages	The CSRC may require the company’s major shareholders to make a lock-up commitment of more than one year, which is not conducive to exit; the H-share full flow pilot bring in considerable risks for future exit of major shareholders in the short term; subsequent financing requires	For mainland shareholders, they need to set up a red chip structure that is not subject to the restriction of “Circular No. 10”; the approval and restructuring procedures for return acquisitions are cumbersome; and relatively high taxes and fees may occur upon restructuring.

	CSRC’s approval, which increases the difficulty and uncertainty of the offering.	
Domestic Approval Process and Requirements	Applications can be submitted directly to the CSRC, which has also simplified the requirements for application documents in recent years; approved documents are valid for 12 months.	According to the provisions of “Circular No. 10”, the return acquisition in the restructuring is subject to the approval of the Ministry of Commerce and the CSRC, and needs to meet the requirements of the permitted red chip structure.
Post-Listing Liquidity	Only H shares are circulating shares, the others are non-circulating A shares, until April 2018 when the H share full circulation pilot officially opened the gate.	All old and new shares are circulating shares, and major shareholders are free to buy and sell shares after expiration of the lock-up period.

With respect to the CSRC’s jurisdictional authority to approve the overseas red chip listing of private China Concept Stock companies, specifically, Article 238 of the old Securities Law, applicable at the point of Alibaba’s listing, provides that “domestic enterprises that directly or indirectly go abroad to issue securities or list their securities for trading abroad must be approved by the securities regulatory authorities of the State Council in accordance with the provisions of the State Council.” In other words, “overseas enterprises”—such as Alibaba Group Holding Limited and DiDi Global Inc., both registered in the Cayman Islands—as issuers, do not fall into the jurisdiction of this provision. At least in the literal sense of the provision, they are not required to file with the CSRC for approval of their IPO activities abroad. In contrast, Article 224 of the new Securities Law, applicable at the point of the Didi’s listing, provides that “domestic enterprises that directly or indirectly go abroad to issue securities or list their securities for trading abroad shall comply with the relevant provisions of the State Council.” This article is a delegative provision, which clarifies that the regulatory rules for the overseas financing activities of domestic enterprises in China are formulated by the State Council. Currently, the bodies of promulgating such rules include the State Council and its competent industry departments, mainly including the Ministry of Commerce, the State Administration of Foreign Exchange, National Development and Reform Commission, the State-owned Assets Supervision and Administration Commission of the State Council and the CSRC. Of course, whether the normative documents issued by the departments under the State

Council can be interpreted as “relevant provisions of the State Council” is disputable. But in practice, it is common that the principle and general regulations of the State Council would be detailed in the ministerial rules and norms, which are also important bases for securities regulation and law enforcement.

Article 224 of the new law has significantly loosened the control of cross-border financing activities of domestic enterprises—from “must be approved by the securities regulatory authorities of the State Council in accordance with the provisions of the State Council” under the old law to “shall comply with the relevant provisions of the State Council” under the new law. Despite the subtle textual change, it only deleting the word “must be approved” by the CSRC, the change is profound at the systematic reform level. On the one hand, Article 224 of the new law continues to confirm the institutional arrangement that cross-border financing activities of domestic enterprises should be subject to domestic supervision, with the State Council as the competent authority to promulgate the provisions as the basis for supervision. In other words, while Article 224 removes the word “must be approved” by the CSRC, it does not negate that the approval process still needs to be performed in accordance with the State Council’s provisions, involving various steps of submission, review and approval, as well as foreign exchange administration, taxation administration, state-owned equity administration, industry supervision, foreign capital M&A supervision, etc. On the other hand, this article lightens the compulsory color of the prior substantive review as the main method of domestic supervision (“must” is changed to “shall”), echoing the reform trend in practice of gradually shifting to ex post filing and ex ante reporting system. The purpose of the amendment of this article is to serve the goal of government reform and State Council’s institutional reform to streamline administration and delegate powers to lower levels, minimizing administrative licensing matters, or simplifying administrative licensing procedures as much as possible, so as to improve the business environment in the country, and at the same time encourage and facilitate domestic enterprises to carry out financing activities abroad, attracting abundant international capital for the development of China’s substantial economy and industrial structure transformation.

However, Article 224 of the new law has limitations, which are found by comparing it with Article 238 of the old law: it still inherits the structure of the old law (no separate chapter has been set up on cross-border securities regulatory matters, while relevant provisions exist mainly in the chapter of “Supplemental Provisions”) and the content of the old law (only covering cross-border and foreign-related securities activities of domestic enterprises, but not touching the securities offering, listing and trading activities of overseas enterprises in either domestic or foreign markets). In this regard, it is possible to provide in an interpretive sense that Article 2(4) of the new Securities Law for the first time incorporates provisions on the extraterritorial application in the field of securities law, providing a legal basis for domestic regulatory institutions, including the CSRC, to establish, assert and exercise jurisdiction over securities activities occurring in foreign markets, regardless of whether the relevant subject is registered in or outside China. As long as the application prerequisites of “disturbing” the order of the domestic market, and “damaging” the legitimate rights and interests of domestic investors are met, jurisdiction can be initiated, i.e., to be “handled” and “held liable” in

accordance with the relevant provisions of the securities law. However, Article 2(4) clearly configures the territorial jurisdiction of domestic institutions targeting at the ex post facto scenario where the fact of overseas listing has occurred—otherwise there would be no talk of the application prerequisites of "disturbing" and "damaging". This term is more suitable for the application in the factual scenario like Luckin coffee's fraud event which brought about negative consequences of the domestic market, but with no direct application of meaning for case like prior Didi's listing in the US, with regard to determining whether pre-registration approval jurisdiction is necessary out of national security and other regulatory considerations.

Similarly, the two concepts of "domestic enterprises" and "overseas" appear again in Article 224 of the new Securities Law, as they did in the old law. As with the old law, the new law still does not provide a clear definition of these two terms. To understand through the interpretation and application of the relevant provisions of the Supplemental Provisions before the amendment, the "domestic enterprises" in Article 224 mainly refer to the enterprises registered with the administrative department for industry and commerce according to the provisions of the laws of mainland China, and does not distinguish between state-owned enterprises and private enterprises. The question is whether those red chip enterprises which are not registered in Mainland China but whose core assets, main business profit sources and key senior management are located in Mainland China, even with the aforementioned "real foreign-owned" shareholding structure, should be considered as "domestic enterprises" under the securities law, and thus come under the scope of Article 224? If the legislative intent of Article 224 is not to extend the regulation to the overseas listing of these part of China Concept Stocks, should the "extraterritorial application provision" in Article 224 (which can hardly be interpreted as granting the CSRC pre-registration approval authority for overseas red chip listings) be supplemented by amendment to the Securities Law to incorporate provisions governing the domestic approval of the overseas listing of these China Concept Stocks?

III. SHOULD CHINA CONCEPT STOCKS BE IDENTIFIED AS "CHINESE" OR "FOREIGN": "FOREIGN COMPANIES" IN COMPANY LAW VS "DOMESTIC ENTERPRISES" IN SECURITIES LAW

In this article, the author believes that in terms of the red chip enterprises such as Didi, which are recognized as overseas legal entities or foreign enterprises in the sense of company law based on their place of registration, to identify them, or to identify them mutatis mutandis as "domestic enterprises" in the context of Article 224 of the Securities Law, and thus to subject their overseas listings to domestic territorial jurisdiction (approval and regulation) is a recommendable approach that takes into account the international experience in defining the true identity of issuers and the cost and fairness of regulating the domestic securities market. The major purpose is to prevent China-Dimension Stocks that are registered in offshore markets, under the effective control of Chinese legal or natural persons, and any of total assets, net assets, operating revenues, or profits of domestic entities exceed the critical ratio (some practical experts suggest 50%), especially those enterprises in the sensitive industries, such as the "key information infrastructure operator", "critical financial infrastructure operator", etc., from touching the red line of data security and national security in the process of going public

abroad under the situation of increasingly complex and severe international competition and geopolitical battle. In addition, it can also help such enterprises to understand the content, scope, standards and remedy channels of domestic compliance matters, so as to enhance the ability to prevent risks and respond to unexpected situations. In other words, "regulating" the overseas listings of such enterprises is not only a kind of restriction and supervision but also a kind of protection and help.

Therefore, given the difference in scope and effect of application, the manner in which "domestic enterprises" is defined in the context of Article 224 of the Securities Law should differ, in terms of criteria, from the manner in which "foreign companies" is defined in Article 191 of the current Company Law (i.e., "companies established outside of China according to foreign law"). In other words, the "domestic enterprises" in Article 224 shall include, in addition to the companies established in Mainland China according to the law of China, red chip enterprises with over 50% of their total assets, net assets, operating revenues and profit sources (as long as any of them meets the ratio requirement) located in or from Mainland China. If such criteria are adopted, then even if Didi's listing entity adopts a shareholding structure with foreign capital accounting for a major proportion, which qualifies the "real foreign-owned" standard, it can still be regarded as a "domestic enterprise" under the securities law and fall into the jurisdiction of overseas listing regulation.

Although Didi Debacle's facts have yet to be ascertained, it is difficult to imagine that enterprises would be reckless in their approach to the major issues of outbound data transfer security and national security. A more likely and realistic concern for regulatory authorities is the risk that the information and data related to national security may be leaked when the enterprises disclose relevant operational and financial information (e.g., supplier lists) under the requirements of the US securities laws and regulations, particularly the *Holding Foreign Companies Accountable Act*'s requirements for disclosure and audit working papers review, and in the chains of procuring key information infrastructure products and services from domestic and foreign suppliers. For example, it is not fictitious fear that an overseas supplier of a key component of Didi's internal data storage may, in some extreme cases, "open a back door" for accessing data related to China's national security at the request of overseas regulatory authorities. In other words, if Didi did not go public, it would not have the obligation to disclose information on relevant matters. Thus, overseas regulatory authorities would have no way to obtain the list of its suppliers, transaction entries or even details of financial transactions, much less possible to use them as a grip to gain access to Didi's data stored in China.

In fact, the legal opinion issued by lawyers attached to the Didi's prospectus also states that there is no illegality or non-compliance within the meaning of Chinese law in relation to the offering. It notes in particular that: (1) the CSRC has not yet issued any final rule or interpretation as to whether the offering is in compliance with the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors* (i.e., the "Circular No. 10" mentioned below in "Table III"); (2) According to *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors*, this offering does not need to obtain pre-

registration approval from the CSRC; (3) there is still uncertainty as to how to interpret and implement the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors*, and the above opinions are subject to any new laws, rules and regulations or any form of detailed implementing rules and interpretations relating to the M&A Rules.

Following the ferment of Didi Debacle, the debate is expected to heat up again on how to interpret the pre-registration approval provisions under the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors* ("Circular No. 10") and whether such provisions urgently need revising to accommodate the reality that is undergoing rapid and complex changes.

IV. FOUR STAGES OF DOMESTIC APPROVAL AND REGULATORY POLICIES ON RED CHIP LISTINGS

The regulatory authorities of the Ministry of Commerce, the State Administration of Foreign Exchange, National Development and Reform Commission and the CSRC, etc., have in different times imposed varying strictness and leniency scaled and dynamically adjusting regulatory rules for private enterprises going overseas to raise capital, or for China Concept Stocks to achieve overseas red chip listings through domestic return investments. To sum up, the attitude of the domestic competent authorities towards the indirect overseas listing of private enterprises (including private China-Dimension Stocks) in the red chip model (commonly known as the "small red chip" model, distinguished from the "large red chip" model of state-owned enterprises) has evolved through four stages, from almost complete permissiveness, to attempted strict regulation, to supporting for relaxation, and to expected tightening again after the Didi Debacle.

A. Differential Treatment, Preferential Treatment, "Barrier-Free Period" (1998-2005)

During this period, the documents related to overseas listings were only targeted at state-owned enterprises, and the regulation of overseas listings of private enterprises in red chip model was not clear, leaving room for manipulation. Therefore, from 1999 to 2005, there was a wave of private enterprises got listed overseas in red chip model, from Sina and Sohu in the earlier stage to Baidu and New Oriental in the later stage.[3]

It is noteworthy that during this period of light-touch regulation, the CSRC had issued the *Circular on Issues Concerning Stock Issuance and Public Offering Abroad of Overseas Companies Which Involve Domestic Equity* on June 9, 2000. This document regulates issuer's compliance in the process of issuing shares and listing on overseas markets such as the Hong Kong GEM and NASDAQ in the United States, by overseas companies involving domestic equity. It requires domestic lawyers to specify important matters concerning the issuer when making inquiries or filing legal opinions with the CSRC on such stock issuing and listing, and

[3] Yingmao Tang, *Why Private Companies Go Public Overseas--Regulation on the Red-Chip Model of Overseas Listing in Chinese Law*, 28 TRIBUNE OF POLITICAL SCIENCE AND LAW 163 (2019).

provides for a 15-day period for CSRC to issue "no objection letter" (i.e., approval for overseas listings).

However, with the introduction of the *Administrative License Law* in 2002, it provides that without the authorization of laws and administrative regulations, items for administrative licenses cannot be established. Therefore, the "no objection letter" was canceled, and the abovementioned circular was also abolished.[4] With the expiration of this circular, even after the introduction of the new Securities Law in 2019, the *Special Provisions of the State Council on the Overseas Offering of Shares and Listing of Joint Stock Companies* promulgated in 1997 remains the key domestic law and regulation effectively applicable in the cases of overseas issuance and listing of China-Dimension Stocks like Alibaba and Didi. It is also the law that needs major amendment according to the Opinions jointly issued by the General Office of the CPC Central Committee and the General Office of the State Council on strengthening the regulation of China Concept Stocks on July 6, 2021.

To conclude, the regulatory stance during this period can be summarized as the shift from the friendly implementation of the "no objection letter" system to the arrival of the "barrier-free period" when the "no objection letter" is completely abolished. During the barrier-free period, the overseas red chip listings of private enterprises were not subject to the approval of any domestic securities' regulatory authorities.[5]

B. Restrictions (2006-2013)

The regulatory stance during this period was marked by the *Provisions on Mergers and Acquisitions of a Domestic Enterprise by Foreign Investors* (hereinafter referred to as the "Circular No. 10") jointly issued by six ministries and commissions under the State Council in 2006. It required the approval of the CSRC (i.e., pre-registration approval) for overseas listings of special purpose companies. In this period, Article 238 of the Securities Law that came into effect in January 2006, assigned power to the CSRC to review the overseas listings; in September of the same year, with its promulgation, the Circular No. 10 became the operational measures for the CSRC to exercise this power: the core purpose of a domestic private enterprise to establish or control an offshore company is to purchase the equity of the shareholders of the domestic company or the additional shares issued by the domestic company so as to achieve the listing of the offshore company. Such operations shall company with the requirements of the Circular No. 10, as well as obtain the approval of the CSRC. In other words, logically speaking, under the requirements of Circular No. 10, Alibaba Group Holding Limited and DiDi Global Inc., both established in Cayman, would have to obtain the approval of the CSRC, if they were to list in the US as listing entities in that period. In fact, the Circular No. 10 has never

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[4] Yingmao Tang, *Why Private Companies Go Public Overseas--Regulation on the Red-Chip Model of Overseas Listing in Chinese Law*, 28 TRIBUNE OF POLITICAL SCIENCE AND LAW 163 (2019).

[5] Yingmao Tang, *Unicorn and Legal Cycle Theory in the Construction of Nation-State: A Preliminary Study on the Chinese Depositary Receipts System of Red-Chip Enterprises*, PEKING UNIVERSITY LAW JOURNAL 504 (2019).

been implemented since introduction, and there is no precedent of the CSRC approving the overseas listing of any Chinese company following this document to date. However, the lack of real implementation and no existing precedent of approval do not mean that this document is invalid. In a strict sense, the CSRC would have exercised its legitimate jurisdiction if it had exercised its pre-registration approval under the Circular No. 10 prior to Didi's listing in the US in June 2021.

C. Relaxing and Supporting Again (2014—June 2021)

There are two representative events in this period. One is the relaxation of control of the indirect listings of Chinese enterprises as reflected in the process revising the Securities Law. The Draft Revisions (First Deliberation Draft) released in April 2015 provided for a system of filing and reporting to the CSRC in Chapter IV "Cross-border Securities Issuance and Trading" in case of overseas listings of domestic enterprises, replacing the approval system. The other is that during the revision process of the *Foreign Investment Law*, the legislators tried to create the concept of "controlled by Chinese persons" in the draft—providing that the overseas entities controlled by Chinese persons, including "special purpose vehicles" (SPVs) such as Alibaba, Baidu and Didi, should be identified as "Chinese companies" rather than "foreign-owned enterprises" to facilitate their return acquisition of domestic Chinese companies. However, the *Foreign Investment Law* formally promulgated in March 2019 does not incorporate this attempt in the draft and still leaves the issue of the legality of the VIE structure blank, sustaining the uncertainty at the legislative level. This is an area of practice that is not easily grasped by intermediaries assisting in the overseas listings of China Concept Stocks when reviewing the compliance matters of the issuer.

Meanwhile, it is noteworthy of the policy-level trend. During this period, the State Administration of Foreign Exchange released the *2014 Monitoring Report on China's Cross-Border Capital Flows* (hereinafter referred to as "the Report") on February 15, 2015. it classifies China concept stock companies like Alibaba as "foreign-owned enterprises". In the column entitled "Alibaba is not Counted in the Statistics of Overseas Listings of China's Domestic Enterprises", the State Administration of Foreign Exchange states that 14 enterprises got listed in the US in 2014, including Alibaba, JD, MOMO, etc. While in terms of statistical caliber, they fall into the category of overseas enterprises rather than domestic enterprises, and therefore are not included in the category of overseas listings of domestic enterprises. The reason why Alibaba is recognized by the State Administration of Foreign Exchange as an overseas enterprise is that the entity listed on the New York Stock Exchange is "Alibaba Group Holding Ltd", which is registered in the Cayman Islands and serves as a Special Purpose Vehicle (SPV). In terms of statistical caliber, this company is an overseas enterprise rather than a domestic enterprise. Therefore, it does not belong to the category of overseas listings of domestic enterprise. The Report further states that, "The statistical object of overseas listings of domestic enterprises refers to the legal entities registered in mainland China, rather than companies with Chinese background." In other words, the Report emphasizes again that China Concept Stock companies like Alibaba are not "domestic enterprises".

It is clear that there is a subtle difference in their understanding of what constitutes "domestic enterprises" between the State Administration of Foreign Exchange, as the regulatory authority of foreign exchange matters in the process of overseas listings of domestic enterprises, and the CSRC, as the approving authority for overseas listings.

Regardless of the definition of "domestic enterprises", the CSRC has been regulating the indirect overseas listings in red chip model in recent years, but the leniency and strictness scale of enforcement has fluctuated over the years. As to Alibaba's NYSE listing in 2014, its business decision not to file with the CSRC for approval coincided with the liberalization policy of overseas listings of private companies. It was at the stage of "light-touch regulation" at the time, although "whether or not necessary to report for approval" is still an open question. However, when it comes to Didi's listing on the NYSE in 2021, its same business decision not to file with the CSRC for approval, was questioned in the post-IPO domestic regulatory storm, which signaled the next phase of drastic changes in regulatory policy and law. The CSRC has not yet taken a clearcut stand in the Didi case. Also, the Chairman of the CSRC, Huiman Yi, in an interview with Xinhua News Agency on July 6, 2021 regarding the Opinions jointly issued by the two general offices, focused mainly on "zero tolerance" for violations in the domestic securities market, without specifically mentioning the regulation of China Concept Stocks. However, it is fully predictable that in the next phase of regulation, the CSRC would devote more regulatory resources to the domestic jurisdiction and cross-border regulatory cooperation for overseas listings of China Concept Stocks in response to the Opinions of the two general offices.

D. Overall Tightening (After the Listing of Didi in the US on June 30, 2021)

As mentioned above, both the national security review by the CAC and the later Opinions jointly issued by the two general offices on strengthening the regulation of China Concept Stocks, reflect the trend of policy adjustments to restrict the phenomenon that overseas listings of China Concept Stocks in sensitive industries bypass the domestic approval and regulatory process. This time, the Opinions jointly issued by the General Office of the CPC Central Committee and the General Office of the State Council propose to strengthen the regulation of China Concept Stocks, take practical measures to respond to the risks and emergencies of China Concept Stock companies, promote the construction of relevant regulatory systems, and amend the *Special Provisions of the State Council on the Overseas Offering of Shares and Listing of Joint Stock Companies* to clarify the responsibilities of domestic competent industry authorities and regulatory authorities and strengthen cross-sectoral regulatory synergy.

Among them, how to design and implement the mechanisms and processes for strengthening "cross-sectoral regulatory synergy" between the CSRC, as the frontline regulatory authority of cross-border securities matters, and other "competent industry authorities and regulatory authorities" in China is also an urgent issue to be studied. For example, in the case of Didi, if the CAC, as the competent industry authority, has already started regulatory communication with the issuer before the listing of Didi in the US and has made clear compliance requirements on important matters related to outbound data transfer security

and national security, should it inform the CSRC, which has been empowered to approve the overseas listings of China Concept Stocks? How shall the CSRC exercise its related authority to review, guard a pass, and give the green light? Does the issuer need to disclose the above facts in the prospectus and related disclosure documents when being reviewed by the SEC for registration filing and during the period of official listing?

CONCLUSION: THE REGULATORY OUTLOOK AND PROSPECTS FOR OVERSEAS LISTINGS—OVERALL TIGHTENING OF DOMESTIC JURISDICTION FOR OVERSEAS LISTINGS OF CHINA CONCEPT STOCKS IN SENSITIVE INDUSTRIES

According to the Opinions, under the entry of cross-border securities regulatory collaboration, the General Office of the CPC Central Committee and the General Office of the State Council proposed that "the laws and regulations related to data security, cross-border data flow and management of confidential information shall be improved. The revision of regulations on strengthening confidentiality and archives management related to overseas issuance and listing of securities shall be accelerated, and the primary responsibility for information security of overseas listed companies must be fulfilled. The standardized management of cross-border information provision mechanism and process shall be strengthened. It is necessary to adhere to the principles of law and reciprocity, and further deepen cross-border audit and regulatory cooperation."[6]

In particular, the concept of "primary responsibility for information security" for overseas issuers is the first time to be introduced in the context of cross-border listing regulation, compared with the commonly seen concept of "primary responsibility for information disclosure". Moreover, this concept can be further interpreted to mean that issuers in certain sensitive industries—such as key financial infrastructures and key information infrastructures—assume greater responsibilities than the issuers in general industries, i.e., "primary responsibility for information security".

It is foreseeable that China's regulatory regime for cross-border securities activities will undergo a major shift after the Didi Debacle: private China Concept Stock companies involved in sensitive industries will soon face an overall tightening of domestic approval and regulation when they go abroad for red chip listings. As for how to tighten it, one of the ideas suggested by practical experts for consideration is the "negative list + post-IPO filing" model. For example, Shoushuang Li, a columnist for Caixin.com and expert in the practice of overseas listings of China Concept Stocks, suggests that it is not advisable to equate or compare the overseas listing review and approval mechanism for the China Concept Stocks of "real foreign-

[6] The General Office of the CPC Central Committee and the General Office of the State Council: "The Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law," July 6, 2021, http://www.gov.cn/zhengce/2021-07/06/content_5622763.htm.

owned” equity structure with that for H shares, so as to incorporate the former into the working scope of the Department of International Affairs at the CSRC. Instead, he calls for the establishment of a categorized and graded negative list by the competent industry authorities (such as the CAC and the Ministry of Education) and the securities regulatory authorities, so that entities with prohibited matters (e.g., schools in compulsory education) and entities with restricted matters (e.g., operators of key information infrastructure related to data security and national security) can only get listed after obtaining the consent of the competent authorities and securities regulatory authorities. This is similar to the current practice for offshore H-share listings, i.e., the competent authorities have power to decide whether to issue “outbound travel permit” or not, and sets up clear provisions on the review time frame and process, to break away from the situation of “tighter control ending the transformation efforts”, which would result in the conservative regulatory tendency of closing the door completely. For those China concept stock issuers that do not have negative list matters, no special review is required. Shoushuang Li also mentions that certain prohibitive requirements can be set for the domestic entities of issuers from the perspective of industry regulation and regulation of special matters, such as restrictions on outbound data transfer and restrictions on outbound transfer of audit working papers, etc., and that the domestic entities should make post-IPO filings with the CSRC and agree to accept the jurisdiction of the CSRC on certain matters under specific circumstances, so as to gradually establish the systems that enhance the regulation of China Concept Stocks, prevent risks of China Concept Stock companies and respond to emergencies as emphasized in the Opinions issued by the General Office of the CPC Central Committee and the General Office of the State Council. In this article, the author believes that the abovementioned idea takes the dual practical needs into consideration, balancing between safeguarding the red line of national security and taking care of the needs of China Concept Stock companies in critical industries to obtain financing support for their long-term development by accessing both international and domestic markets, which is worthy of attention as it provides a reasonable strategy for the continued exploration of institutional space.

While the directly revised matter in the Draft Revisions for Soliciting Comments of the *Measures for Cybersecurity Review* released by the CAC on July 10, 2021 is to bring in the national security review on the matter of overseas listings of China Concept Stocks, which can be considered as major regulatory adjustments contributed by Didi Debacle. In particular, Article 6 of the Draft Revisions for Soliciting Comments requires that “if operators with personal information of more than one million users purport to get listed abroad, they must file a cybersecurity review with the Cybersecurity Review Office.” And Article 4 specifies more than ten authorities that work jointly with the CAC to perform the national network security review mechanism, in which the CSRC is specially added. The other authorities refer to the National Development and Reform Commission, the Ministry of Industry and Information Technology, the Ministry of Public Security, the Ministry of State Security, the Ministry of Finance, the Ministry of Commerce, the People’s Bank of China, the State Administration for Market Administration, the National Radio and Television Administration, the National Administration of State Secrets Protection and National Archives Administration. Article 10 provides the factors to be considered in the review of national security risks arising from overseas listings, in which it specifically adds “the risk of key information infrastructure,

core data, important data or a large amount of personal information being influenced, controlled or maliciously utilized by foreign governments after being listed overseas”. This fully reveals that the regulators’ clear awareness of the risks that the current severe international political situation may jeopardise China’s national security through the transmission of regulatory mechanism in overseas capital markets, such as the additional information disclosure and audit working papers access requirements under the *Holding Foreign Companies Accountable Act*.

It is evident that to tighten domestic regulation and strengthen territorial jurisdiction for overseas listings of China Concept Stocks in sensitive industries with the attributes of “key information infrastructure operators” is an irresistible trend. The domestic compliance measures and due diligence of intermediaries for overseas listings of China Concept Stocks will definitely become a new industry concern and market focus. It will be a big test for China Concept Stocks to make prudent business decisions and legal judgments in this regard.

Supplementary Comments from the Author:

This article was completed on July 10, 2021. The author sincerely extends gratitude to Nuofang Wang and Hui Li, both graduate students at the International School of Law and Finance, East China University of Political Science and Law, for their research assistance. On July 21, 2022, Jing Leng adds her comments on Didi’s being fined after the cybersecurity review on Didi is settled as follows:

[Didi is fined] The cybersecurity review on Didi beginning from July 2021 finally is settled. The Cyberspace Administration of China imposes a fine of RMB 8.026 billion Yuan on DiDi Global Inc., and RMB 1 million each on its Chairman of the Board & CEO Wei Cheng, and President Qing Liu, in accordance with the Cybersecurity Law, the Data Security Law, the Personal Information Protection Law, the Law on Administrative Penalty, and other laws and regulations.

In addition, the wording is harsh and the characterization is severe:

“The facts of…violations are clear, the evidence is conclusive, the circumstances are serious and grave, the features are despicable, and should be punished severely and seriously.”

“…has handled data processing that seriously affect national security, as well as refused to fulfill the clear requirements of the regulatory authorities, and has other illegal and unlawful issues such as overtly agreeing but covertly opposing and malicious evasion of supervision. The illegal and unlawful operation of Didi brings serious security risks and hidden dangers to the national key information infrastructure security and data security. Because it involves national security, it is not disclosed in accordance with the law.”

In this light, I may still be too naive when I wrote this article on this matter last July: “Although Didi Debacle’s facts have yet to be ascertained, it is difficult to imagine that enterprises would be reckless in their approach to the major issues of outbound data transfer security and national security.”

Keep learning and keep comprehending!

THE EFFECTIVENESS OF ARTIFICIAL INTELLIGENCE IN SIMPLIFICATION OF ARBITRATION PROCEEDINGS: FICTION OR SEVENTH SEAL IN THE WORLD OF ARBITRATION?

Eoin Treacy*

Abstract: The term "online arbitration" has several meanings but is most often used to describe an arbitration conducted using remote communication technologies between the participants in the process. In this age of ubiquitous computing, discussing their use may seem redundant and obvious. In the proceedings held under the auspices of the world's leading arbitration institutions, modern remote communication technologies are widely used. For example, correspondence between the parties to the process (parties, arbitrators, office) is carried out by e-mail; procedural documents and evidence are submitted electronically; organizational meetings and interrogations of witnesses, and sometimes entire hearings, are conducted by telephone or videoconferencing; hearing transcripts are often stored using LiveNote systems, which allow attendees to view transcripts in real-time. With the spread of electronic document management, the disclosure of electronic evidence (e-discovery) is increasingly being used. The current project will mainly discuss the development of AI in Commercial Arbitration and its influence and impact on the speed and cost of arbitral proceedings. In the first part of the work, I will focus on the history and origins of AI in Arbitration mentioning the impact of COVID-19 and partial transfer to virtual hearings. Also, it will provide some data from UNCITRAL and ICC about virtual hearings. The second part of the work discusses and argues on effectiveness and efficiency of virtual hearings in arbitration, including translation and transcriptions during proceedings. I will analyze whether the e-discovery reflects on confidentiality and privacy matters. Third, I consider the most critical ones because they discuss the most problematic issue - arbitrators selection. Undoubtedly that 50 % of the cases on jurisdiction arise from arbitrator's challenge, which reflects on speed and sufficiently increases costs of the Parties. After discussing the selection tools, I decided to consider replacing arbitrators with AI, which deprived of objective or any possible challenge possible causes. Although I cover arbitration matters, in this Part, I want to provide with comparative analysis of the litigation process – judge selection and its possible replacement with AI. The conclusion will provide weaknesses and possible problems with these issues, including relevant solutions or ideas to discuss.

Keywords: Artificial Intelligence; E-Discovery; Covid-19; Online Arbitration; ADR; ODR; Arbbot

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INTRODUCTION

The term "online arbitration" has several meanings but is most often used to describe an arbitration conducted using remote communication technologies between the participants in the process. In this age of ubiquitous computing, discussing their use may seem redundant and obvious.[1]

In the proceedings held under the auspices of the world's leading arbitration institutions, modern remote communication technologies are widely used. For example, correspondence between the parties to the process (parties, arbitrators, office) is carried out by e-mail; procedural documents and evidence are submitted electronically; organizational meetings and interrogations of witnesses, and sometimes entire hearings, are conducted by telephone or videoconferencing; hearing transcripts are often stored using *LiveNote* systems, which allow attendees to view transcripts in real-time. With the spread of electronic document management, the disclosure of electronic evidence (e-discovery) is increasingly being used.[2]

According to traditional arbitration rules, there are no barriers to online arbitration. It requires solving practical problems of identifying the parties to electronic communication and their representatives and creating electronic document management systems that will ensure control over the parties' actions with evidence loaded into such systems. However, there is no doubt that the practice will, in any case, follow the path of increasing the use of online technologies in arbitration and will be able to overcome all difficulties. Suppose online arbitration does not save a lot of money and time. In that case, it at least makes the interaction between all parties involved in the process: parties, witnesses, experts, arbitrators and the arbitral institution. Thus, there is simply no alternative to the further spread of online arbitration.[3] Large companies sometimes have numerous disputes about the negligible value they would prefer not to arbitrate because the costs and hassle would be greater than the potential benefits. In this case, online arbitration may be the most effective solution.[4]

The current project will mainly discuss the development of AI in Commercial Arbitration its influence and impact on the speed and cost of arbitral proceedings. In the first part of the work, I will focus on the history and origins of AI in Arbitration mention the impact of COVID-19 and partial transfer to virtual hearings. Also, it will provide some data from UNCITRAL and ICC about virtual hearings.

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[1] Yvonne Mak, Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore, Kluwer Arb. Blog (Aug. 2, 2020), available at: http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearingswithout-parties-agreement

[2] Janet Walker, Virtual Hearings – The New Normal, Glob. Arb. Rev. (Mar. 27, 2020), available at: https://globalarbitrationreview.com/article/1222421/virtual-hearings%E2%80%93-the-new-normal

[3] Simon Rainey QC & Gaurav Sharma, Arbitration Hearings… and the Corona 'New Normal' Ten Golden Rules: or the easy path to your Virtual Hearing, Quadrant Chambers (Mar. 30, 2020), available at: https://www.quadrantchambers.com/news/arbitration-hearings-and-corona-new-normal-ten-golden-rules-or-easy-path-your-virtual-hearing

[4] The Hague Conference on Private International Law, Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention 2019, available at: https://assets.hcch.net/docs/e0bee1ac-7aab-4277-ad03343a7a23b4d7.pdf

The second part of the work discusses and argues on effectiveness and efficiency of virtual hearings in arbitration, including translation and transcriptions during proceedings. I will analyze whether the e-discovery reflects on confidentiality and privacy matters.

Third, I consider the most critical ones because they discuss the most problematic issue - arbitrators selection. Undoubtedly that 50 % of the cases on jurisdiction arise from arbitrator's challenge, which reflects on speed and sufficiently increases costs of the Parties. After discussing the selection tools, I decided to consider replacing arbitrators with AI, which deprived of objective or any possible challenge possible causes. Although I cover arbitration matters, in this Part, I want to provide with comparative analysis of the litigation process – judge selection and its possible replacement with AI.

The conclusion will provide weaknesses and possible problems with these issues, including relevant solutions or ideas to discuss.

I. EFFICIENCY OF ARBITRATION IN VIRTUAL HEARINGS

Recently, the CIArb has issued a new Framework Guideline on the Use of Technology in International arbitration.[5] Interesting features for research in this guideline include arbitrator selection tools to provide impartiality and independence. The work of this tool is based on data that selects relevant arbitrators with relevant experience from a specific list of institutions or from the general database. Also, the question at stake is whether confidentiality and privacy will be observed in online hearings, how to avoid cyber-attacks or data loss, and what will be the cost of the hearings. The rules also envisage transparency of remote hearings. For instance, the online hearing may entail parties joining at different times of the day or night with different impacts on their levels of concentration. Arbitration after post pandemic could be described as efficient, affordable, and generally reliable with tools that have been developed to ensure that all parties in attendance have audio-visual access to each other, as well as to digitized hearing bundles and live transcripts.[6] We also consider it necessary to highlight electronic document management. Since we are talking about the development of the e-justice system, we should understand it in a broad sense as e-court litigation and all related processes, including the filing of arbitration applications and other procedural documents via the Internet, the filing and use of evidence in electronic form and the conduct of judicial meetings online.[7]

Elements of electronic arbitration are possible when a case is created electronically. Since the arbitration process is formalized like any other legal process, the electronic arbitration

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[5] Ryan Calo "Artificial Intelligence Policy: A Primer and Roadmap", U.C. Davis L. Rev. (2017), p. 413; Available at.: https://lawreview.law.ucdavis.edu/issues/51/2/Symposium/51-2_Calo.pdf

[6] Antonios Dimitracopoulos, Virtual Hearings In Arbitration: Are They As Effective As They Are Efficient?, available at: https://www.mondaq.com/arbitration-dispute-resolution/962616/virtual-hearings-in-arbitration-are-they-as-effective-as-they-are-efficient

[7] Commission of the International Chamber of Commerce, Report on Informational Technology in International Arbitration 2017, available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc -arbitration-adr-commission.pdf

system is implemented through electronic document management and case management.[8] For the effective use of electronic document management, it is necessary to solve several tasks:

- Firstly, the regulatory framework should strike a balance between the requirements of the Arbitration Law and the Information Technology Law;

- Secondly, the system should optimally combine the openness and accessibility of litigation with reliable information protection;

- Thirdly, it is necessary to find a balance between the legal requirements of maintaining paper and electronic records;

- Fourthly, the system of electronic document management and electronic arbitration itself should be cost-effective, without unnecessary and unjustified costs for maintaining documentation in electronic form.

A progressive approach, the use of electronic documents, electronic document management and, as a result, a reduction in arbitration costs do not exclude the problems identified by practice. Their analysis concludes that the careful use of electronic documents is justified. However, all arbitration institutions worldwide are exploring the use of online arbitration and are developing suitable approaches to address emerging issues. Problems with the use of electronic documents in arbitration include:

1. Difficulty in ensuring the integrity of documents, establishing the authenticity of documents that are not certified by an electronic digital signature. The record received by the Arbitral Tribunal may contain inaccurate information due to improper copying of documents sent by e-mail.[9] The document is not subject to disclosure. Possible distortion of e-mails (cover letters, notifications);

2. Failure to provide an adequate level of confidentiality. As an alternative to an electronic digital signature, it is proposed to provide access to the electronic file for the parties to the process by issuing a password and login for access.[10] For example, according to the draft RAA Online Arbitration Rules, access of arbitration participants to the online dispute resolution system is provided by providing a login and password to authorized representatives of the parties. When working with the System, each person acting on behalf of a party to the

[8] Maxwell Chambers Offers Virtual ADR Hearing Solutions, Maxwell Chambers available at Maxwell Chambers Offers Virtual ADR Hearing Solutions, Maxwell Chambers available at: https://www.maxwellchambers.com/2020/02/18/maxwell-chambers-offers-virtualadr-hearing-solutions

[9] Joachim Delaney, The Show Must Go On: Alternative Dispute Resolution and Litigation During COVID-19 in Australia, Baker McKenzie (Mar. 26, 2020), available at: https://www.bakermckenzie.com/en/insight/publications/2020/03/alternativedispute-resolution-covid19

[10] Neil Kaplan, How we must adapt to COVID-19, Glob. Arb. Rev. (Mar. 29, 2020), available at: https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adaptto-covid-19

arbitration is personified and represents that party in the arbitration.[11] All actions performed by such a person in the System are considered the actions of this party;

The login and password must be protected by the person they are issued, but the password and login can be lost, stolen, etc. It does not matter whose fault it is; more importantly, confidentiality is violated, and significant damage (not only material) will be caused to arbitration participants. To prevent unauthorized access to the online dispute resolution system, arbitration institutions use appropriate system security software;

3. The difficulty of achieving a balance between paper and electronic documents at the stage of initiating the arbitration. We are talking about the joint filing of electronic and paper documents. In particular, if the goal is fully electronic administration of the arbitration procedure and the claimant files a request for arbitration by filling out a standard electronic form. Still, at the same time, a paper copy of the contract containing the arbitration clause or arbitration agreement is sent. It is unclear how to achieve such a combination and which priority should be given to an electronic document (which will be delivered faster) or its paper copy. Simultaneous sending of a copy of the agreement on referral to arbitration can be made by mail (letter) and electronic documents on the same day. The electronic document will arrive on the same day, and the letter - only a few days later, that is, the simultaneity of sending documents will be observed, but it is not clear how to ensure that the documents arrive at the arbitration court in complete form.[12]

4. Determination of approaches to the form of the arbitration clause. This problem is related to the previous one. This stems from the particular importance of the arbitration clause, which, as stipulated, for example, in Russian and Belarusian legislation, must be in writing.[13] The legislation of some countries allows reservations to be made either orally or electronically. If this approach is implemented in the legislation of both countries, it will be easier to form a single set of electronic documents. However, given our traditions and mentality, we venture to assume that the adoption of a number of legislative acts will take some time;

5. Lack of an institution of proper notification in electronic form. In general, there is still no unequivocal answer to how to notify the parties quickly and reliably in electronic arbitration.[14] All existing methods (e-mail, SMS, etc.) do not guarantee that the notification

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[11] American Arbitration Association–International Centre for Dispute Resolution (AAA–ICDR), AAA-ICDR COVID-19 Resource Center, available at: https://go.adr.org/covid19.html?_ga=2.266173005.351640490.1584719392888347822.1584719391

[12] Arbitration Place Virtual – eHearings, Arb. Place, available at: https://www.arbitrationplace.com/arbitration-place-virtual-ehearings_

[13] Joachim Delaney, The Show Must Go On: Alternative Dispute Resolution and Litigation During COVID-19 in Australia, Baker McKenzie (Mar. 26, 2020), available at: https://www.bakermckenzie.com/en/insight/publications/2020/03/alternativedispute-resolution-covid19_

[14] UK Department of Justice, Practice Direction 51Y – Video or Audio Hearings during Coronavirus Pandemic 2020 (UK), available at: www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video -or-audio-hearings-during-coronavirus-pandemic

will be carried out. There have been attempts to simply assume that sending means receiving a message electronically, but this is not the case.

Moreover, it is worth considering some practical implications and sufficient patterns used in the arbitration to facilitate and promote AI in this dispute resolution.

2.1. Kleros. The Kleros platform is designed to resolve disputes through arbitration in smart contracts. In short, this platform offers "decentralized justice". The arbitration process on this platform can be activated automatically upon non-execution or improper execution of a smart contract and freezes the funds transfer until the conflict is resolved. So, to activate this process, the parties to the smart contract must first select Kleros as a dispute resolution service provider in their smart contract and agree on the main features of the process (the so-called Kleros sub-court, in which the dispute will be considered, the number of jurors (arbitrators) in a case, etc.).[15] This fact can be regarded as the conclusion of an arbitration agreement and confirmation of the consensus of submitting a potential dispute to arbitration.

The main idea of this platform is to emphasize the importance of Thomas Schelling's theory[16] that in the absence or impossibility of negotiations, people will choose "focal points" to reach a consensus.[17] Thus, in the Kleros system, the decision is made by a vote of a "jury" who are anonymous and are selected by the platform based on their nomination, depending on their industry of specialization (for example, e-commerce, insurance or transport). Jury fees are paid by the party that initiated the trial.[18]

Despite the feasibility and relative accessibility of these methods, first of all, there is a possible problematic recognition and enforcement of such a decision by the Kleros jury, as well as the issue of collecting procedural expenses for jury fees, evidence collection, etc.[19]

I disagree that decisions on the Kleros platform are unenforceable since now 160 countries worldwide are signatories of the New York Convention of 1958. Suppose this platform, instead of jury decisions (an attribute of national legal proceedings), introduces a system of international arbitration. In that case, enforceability given decisions by national courts can be guaranteed to some extent.

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[15] Federico Ast, Clement Lesaege "Kleros, a Protocol for a Decentralized Justice System", 2017; См.: https://medium.com/kleros/kleros-a-decentralized-justice-protocol-for-the-internet-38d596a6300d

[16] According to Schelling's legal-theoretical model, these "focal points" reflect each person's expectations of what the other person expects from him, which, in turn, will push people to work together, as a result of which the parties achieve "win-win" results. Thomas C. Schelling "The Strategy of Conflict", p. 29 (http://elcenia.com/iamapirate/schelling.pdf)

[17] Amy J. Schmitz, Colin Rule "Online Dispute Resolution for Smart Contracts", 2019, p. 118 (https://am.aals.org/wp-content/uploads/sites/4/2019/12/AM20CommercialLawSchmitzPaper.pdf)

[18] The Kleros Handbook of Decentralized Justice (https://ipfs.kleros.io/ipfs/QmZeV32S2VoyUnqJsRRCh75F1fP2AeomVq2Ury2fTt9V4z/Dispute-Resolution-Kleros.pdf)

[19] Frank Emmert "A Critical Review of the Kleros "Dispute Resolution", 2019, p. 5; See: https://www.researchgate.net/publication/335715800_A_Critical_Review_of_the_Kleros_Dispute_Revolution

2.2. Juris Platform. To protect a smart contract in the legal field, this platform offers the integration of the Juris protocol. This will include the Juris arbitration code in the smart contract.

The inclusion of this arbitration code in a smart contract provides access to the Juris contract tool library, which, in turn, allows you to generate a unique arbitration agreement code for inclusion in a smart contract.[20]

Thus, in the event of a dispute, the claiming party accesses the smart contract through the Juris control panel and begins the process of initiating the Juris protocol.

The system automatically freezes the activities of both parties under the smart contract and automatically creates an individualized account to hold all funds. It collects all the necessary documents in one case and sends a notification to the parties involved about the process. Further, the dispute resolution process provides for the automatic transfer of the case to mediation and arbitration, in particular:

a. Self-mediation. Through the Juris dashboard, disputing parties will access a wide range of mediation options. The instruments allow the parties to agree to enforce the contract as originally written mutually, to return all parties to their positions before the contract was signed (analogous to smart restitution), or any intermediate solution that all parties considered fair and implemented.[21]

b. SNAP solution. If it is impossible for the parties to resolve the conflict themselves, they can activate the Simple Neutral Arbitrator Poll (SNAP) procedure. This procedure does not provide for the issuance of a decision binding on the parties to the smart contract. On the contrary, it gathers the necessary number of active arbitrators of the Juris platform to issue their opinion on how the parties should act in this situation.

c. Mandatory PANEL Solution. Suppose the parties are unable to resolve their dispute to the satisfaction of each party. In that case, either party may activate the Juris Peremptory Agreement for Neutral Expert Litigation (the "PANEL").

The founders of the Juris platform insist on the enforceability of PANEL decisions based on the New York Convention of 1958, as it is analogous to arbitration with an automated method for resolving disputes that have arisen.

Methods for automating arbitration are highly diversified, and most of the ideas involve implementing infrastructure for virtual hearings and/or artificial intelligence.

II. AI AND ARBITRATOR SELECTION PROCESSES

Recent research questions the possibility of AI tools to perform tasks of neutral decision-makers and whether it will provide fairness as the main component of arbitration. The feature of robot arbitrators is that they can provide and recognize any translations transcripts based on

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[20] A.J. Kerpelman "A non-technical overview of the Juris dispute resolution system", 2018; *See:* https://medium.com/jurisproject/a-non-technical-overview-of-the-juris-dispute-resolution-system-62e28eec509d

[21] Ramsay Brown et. al. "Juris Whitepaper 9/18/18", p. 17; See: https://drive.google.com/file/d/1318klGEYL4g02VudL-C-BCnvpKujTnbF/view

cognitive neuroscience. Encryption technology such as blockchain could enable the secure transmission of electronic documents and ensure cybersecurity in the arbitral process. Recently arbitration community started discussion about Arbitration Bot (the "ArbBot"), which could serve as replacement of the arbitrator person. Similar to a human arbitrator, ArbBot will be required to ensure the equality of arms during the arbitration. As to the recognition and enforcement of the award, with detailed research of previous cases, various examples and outcomes, ArbBot could be programmed to render arbitral awards. However, its recognition and enforcement under New York Convention might be questionable and not stand the test of the NYC grounds. Still, NYC could be adapted to amendments in the global and interpreted "technologically". It still seems as sci-fi fiction, therefore this part of the work will discuss arbitrator selection tools to provide optimal impartiality and independence of the arbitration. Moreover, it further elaborates Artificial intelligence as arbitrator and comparatively AI as judge with decisive abilities on the dispute matters.

3.1. Arbitrator selection tools and diversity on arbitral panels

In the Upper English Court *Pyrrho Investments Ltd. v. MWB Property Ltd*. (2016), electronic document disclosure technologies were used through coding algorithms for the first time in the history of English legal proceedings. In this corporate breach of fiduciary dispute, there was a thorny issue of finding relevant correspondence in e-mail recovered from one party's backup tapes, where the total number of documents was 17.6 million. In the second stage of electronic disclosure of records, the number was reduced to 3.1 million through electronic de-duplication. From the point of view of further accelerating the consideration of the case, the court used the most convenient tool for electronic disclosure of documents, which benefited the administration of justice. Electronic disclosure of documents is the discovery of a (possible) electronic document (e-mail, voice mail, databases, documents stored on servers) and granting the opposing party the authority to examine this document.

The system of electronic disclosure of documents in international practice has become widely used, in particular, thanks to the Protocol on Electronic Disclosure in International Arbitration, developed by the Certified Institute of Arbitrators (CIArb), which encourages arbitration practitioners and the arbitral tribunal to raise the issue of electronic disclosure of a document at the stage of preliminary hearings on the organization arbitration process, which will also automate the process of obtaining evidence and their other presentation.

3.2. Artificial intelligence as an arbitrator.

There is a growing number of followers of the innovative idea to use artificial intelligence technologies as an arbitrator in the arbitration community. Although arbitration deals only with private rights, there are still certain mandatory requirements - both procedural and formal - to protect the interests of the parties and the integrity of arbitration. The use of artificial intelligence tools in adjudication may violate the procedural rights and public policy of the seat of arbitration. Thus, the use of artificial intelligence in the adjudication process should be very limited. At this stage in the development of artificial technologies, they are proposed to be used to study and generalize the law, process and analyze the arguments of the parties, as well as to cross-check the decision of the tribunal against the decision of artificial intelligence, since now transferring the final decision and the outcome of the case to the competence of a computer algorithm can be fraught with systemic failures, ultimately leading to a breakdown in the administration of justice.

When analyzing this thesis, it should be considered that almost every arbitration begins with the choice of an arbitrator (arbitrators) by the opposing parties. And now, the general perception is that replacing a human arbitrator with an AI arbitrator can have both positive and negative effects.

As for the disadvantages of the AI arbitrator, the main disadvantage is the right to make decisions by the AI arbitrator. The second stage of arbitration is the presentation of claims and defense on both sides. The question arises whether the AI arbiter would be smart enough to process both sides of the story, link the actual position to the law, and then decide. This is a pertinent question because a machine, even an artificial intelligence machine, is only as smart as the data that has been entered into the system. Indeed, the "mind" of an AI arbiter will be limited by information that limits its focus. In other words, the one who enters data into the artificial intelligence program will be able to influence the final decision of the AI arbiter.

Information embedded in a computer program has two origins: it may be included by third parties and/or by the programmer who created the algorithm. When developing or entering information into a computer program, the presence of this significant risk is noted - the likelihood of "contamination" of computer code by unconscious prejudices of people involved in the development process. The results of the conclusions of a computer program, as noted, cannot be objective, because reality itself is biased.

Among other things, in various jurisdictions there are significant restrictive rules for resolving a dispute by an AI arbitrator. So, for example, you can analyze the question of the arbitrability of a particular dispute. In AT&T Technologies v. Communication Workers of America, et al. The U.S. Supreme Court held: "Unless the parties expressly and unmistakably provide otherwise, the question of whether the parties have agreed to arbitration (a matter of substance) shall be decided by the court and not by the arbitrator." However, the U.S. Supreme Court has not established "who" should determine the arbitrability of a dispute if the intention of the parties can be clearly and unmistakably determined. This issue was further addressed in First Options of Chicago v. Kaplan by the Supreme Court with the proviso that this will depend on what the parties have provided for in the arbitration agreement. In other words, the arbitrator should have applied to the court to determine the arbitrability of the dispute that had arisen, even if he believes that there is a clear and unmistakable indication that the arbitrator has jurisdiction for such a determination. If an AI arbitrator (that is, a computer program) is involved in the case, does he have to go to court to obtain such approval of the arbitrability of the dispute?

In our opinion, despite the noticeable progress in the capabilities of artificial intelligence, there is another significant drawback - the motivation of the decision. When deciding, the arbiter is obliged to provide the reason and the logical chain of such conclusions, while the current situation with computers is such that their algorithms can calculate the decision but are not able to provide explanations for their decisions.

Despite the presence of numerous shortcomings in the existing technologies of artificial intelligence, in our opinion, they need to be trained and developed in them the ability to adapt to different legal models. This can only be achieved if these technologies are gradually used in resolving disputes under new generation contracts that were concluded on blockchain platforms as a probation. With the subsequent adaptation of the AI arbitrator to the specifics of practical issues, we can get a perfect technology for out-of-court dispute resolution.

3.3. Artificial intelligence as a judge

It is undeniable that the intervention of artificial intelligence technologies in the decision-making process in legal proceedings cannot guarantee the observance of the goals and objectives of justice, since each case is unique, which laid the foundation for the discretionary powers of judges. However, it is worth recognizing that today algorithm technologies have already begun to expose and indicate what is "right" and what is "wrong", in particular, internet algorithms decide which advertising posts should be visible to Internet users, also about which employees to fire and even send to prison.

Thus, in the United States, in criminal proceedings, artificial intelligence technology "COMPAS" is used, which bases its decisions on the basis of forecasting analytical data on the criminal risk assessment system. Followers of similar risk assessment systems make the criminal justice system fairer by replacing judges' bias and intuition with a more objective assessment of the situation. However, even this system could not avoid reproaches and doubts about impartiality, since in 2016 ProPublica published an analysis of the decisions of the COMPAS platform accusing it of bias against African Americans, since the platform in relatively comparable cases where African Americans and whites were accused, classified African Americans as "high risk" offenders.

It is worth making a reservation that in criminal proceedings, in most cases, the court's decision is reduced to finding guilty / not guilty or acquittal. In this plane, the use of artificial intelligence seems acceptable, while the possibility of using these technologies in making a decision in civil or economic proceedings is complicated by a plurality of elements.

However, many jurisdictions have adopted the practice of A.I. dispute resolution. For example, the states of Michigan, Ohio, New York, and Texas already have unique dispute resolution programs in civil, tax and transportation legal relations through artificial intelligence.

Given the differences between litigation and arbitration, most of the reasoning concludes that AI judges should not and cannot fully resolve disputes. However, this does not mean that it is proposed to abandon technologies completely, on the contrary, they are proposed to be used as one of the stages that the parties to the dispute are invited to go through before taking the case to court and allow the judge to evaluate the decision of the AI judge. The main reason for such conclusions is the interpretation of identical factual data by a computer and a person differently.

CONCLUSION

Artificial intelligence cannot substitute arbitrators and practitioners. It should be taken in mind that AI is sci-fi, but alternatively developed due to statistics and development of technology. It can be used in any machinery field of human development, but in law it is still hardly imagined because of inconsistent, unique approach of the lawyers to the dispute resolution matters. The attempt to automate law (particularly, the time-consuming and labour-intensive processes) has been ongoing for decades, but still need further elaboration and scholar research. So far, it has only been successful in performing bespoke legal tasks and aiding the practitioners. AI has revolutionized many processes like e-discovery, and greatly improved procedural efficacy. However, as to complete replacement of human functions in dispute resolution process, AI is not manageable and constituted as fiction. Thus, I believe that that day when technology would allow decision-making by machine arbitrators, time spacing will be possible throughout the times and humanity would discover planets outside the solar system.

RACE, MEDIA, AND POLICE PRACTICES: HOW THE MEDIA INFLUENCES POLICE INTERACTIONS WITH BLACK AMERICANS

Iasia Beh*

Abstract: The spring of 2020 saw mass protests all across the country against the murder of George Floyd by a Minneapolis police officer. They demanded justice and they demanded change. How can there be positive, permanent change to policing, which, since its implementation, has targeted Black communities? This paper will talk about one of those changes: the abolition of all police forces. First, the paper will discuss the media and how it is used to perpetuate negative stereotypes about Black people. It will go over three prominent Black stereotypes; the Mandingo, the Sapphire, and the Savage. After that, it will discuss how to use popular culture to change how Black people are perceived in society. Next, it will go over news media and how that is an avenue for negative Black stereotypes. Then it will go over how to dispel those stereotypes through different journalistic techniques. Second, the paper will talk about stop and frisk, or Terry stops. It will define what stop and frisks are and when the police are allowed to stop and frisk. It will then talk about the issues involved with the practice and then discuss different reforms, such as elimination, that can alleviate the issues involved with stop and frisk. Next, the paper will explain about what a chokehold is. There are two different types of chokeholds, the carotid restraint and a chokehold. Then the paper will go through a case and discuss the implications of having chokeholds in police practices. Next, it will go through all of the different reforms, such as defunding, training, and abolition, to fix the issues brought on by how chokeholds are being implemented today. Next, the paper will discuss the three automobile exceptions: stop and frisk, search incident to an arrest, and the automobile exception. This section will discuss when the police can order someone out of their car, when they can search the car, and why they can search it. The paper will then discuss the implications of allowing police discretion to choose which cars to search and discuss the racial disparities in the stops and searches. Next, the paper will discuss reforms that can be made to alleviate the issues involved with the automobile exceptions. Lastly, what will happen to society if there is no police? The paper will go over the possibilities of funding and programs that can be implemented in the place of the police. It will discuss the debate over what will be done to combat dangerous crime.

Keywords: Race; Police; Media; Social Justice; Stop and Frisk; Car Search; Criminal Justice

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INTRODUCTION

The spring of 2020 saw mass protests all across the country against the murder of George Floyd by a Minneapolis police officer. They demanded justice and they demanded change. How can there be positive, permanent change to policing, which, since its implementation, has targeted Black communities? This paper will talk about one of those changes: the abolition of all police forces.

First, the paper will discuss the media and how it is used to perpetuate negative stereotypes about Black people. It will go over three prominent Black stereotypes; the Mandingo, the Sapphire, and the Savage. After that, it will discuss how to use popular culture to change how Black people are perceived in society. Next, it will go over news media and how that is an avenue for negative Black stereotypes. Then it will go over how to dispel those stereotypes through different journalistic techniques.

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I. DOES THE MEDIA INFLUENCE HOW SOCIETY THINK?

A white family is traveling across the country to go on a family vacation at an amusement park. Along the way, they take a wrong turn in St. Louis. Suddenly they are in the "'hood." While they are being distracted by a Black man holding a basketball and another Black man dressed like a "pimp," their car is robbed. The scene is set to jazz music, which signifies to the viewer that this is a Black neighborhood. The movie is National Lampoon's *Vacation*, which is often cited as one of the greatest comedy films of all time.[1]

This movie is not an anomaly. Countless films and television shows portray Black people using negative racial stereotypes. Many Black stereotypes have evolved over the years,

[1] Staff, *Let's 'Fix' Racism in Movies and T.V.* THE RINGER.COM, (Aug. 31, 2016), www.theringer.com/2016/8/31/16037096/lets-fix-racism-in-movies-and-tv-c5c20ad529f0.

but their effects are the same: they can have a negative, sometimes even deadly, impact on a Black person's life.[2,3]

Black male stereotypes can harm how they are perceived in society. The idea that Black men are angry and violent to get revenge on white people is the central idea of many Black male stereotypes. The Mandingo stereotype, for example, shows Black men as a "Black brute" who would like to exact revenge on the white man by having sex with white women, often by force.[4] This racial stereotype is seen in many movies such as "Birth of a Nation."[5] This stereotype is harmful as it allows for false accusations of Black men in sexual assault cases, such as the five Black and brown boys in New York in the 1990s, known colloquially as the Central Park 5.[6]

The Savage stereotype is equally as damaging. It has evolved over the years, but the meaning is still the same: Black men are violent, inferior, animal-like creatures who do not experience much pain.[7,8] This stereotype can be seen when Black men are depicted as drug dealers, gangsters, and criminals. This stereotype is deadly, as aggression and fear are often the reasons cited for police using deadly force and Black people are 2.8 times more likely than white people to die at the hands of an officer.[9]

Black women also have the same aggressive stereotypes. The Sapphire stereotype is often seen in popular culture today: the independent Black woman who does not need a man

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[2] There were many racial stereotypes for Black people in the late 19th and early 20th centuries. These stereotypes have died down in recent years but are still prevalent in society today. Laura Green, N*egative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, FERRIS STATE UNIVERSITY, (last accessed Nov. 17, 2020), www.ferris.edu/htmls/news/jimcrow/links/essays/vcu.htm

[3] From the Trans-Atlantic Slave Trade to mass incarceration, negative stereotypes of Black people were and are currently used to justify Black Americans' mistreatment in the United States. *Popular and Pervasive Stereotypes of African Americans*, NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE, (Jul. 19, 2019), nmaahc.si.edu/blog-post/popular-and-pervasive-stereotypes-african-americans

[4] *Id*; *See also* Jesus Gregorio Smith, Home And Community for Queer Men of Color 149-71 (Lexington Books, 2019). Smith's book talks about the case of a gay Black man who was over sentenced for second degree murder for giving his sexual partners HIV. The book discusses how it is because of the hypersexuality of Black men and homophobia that lead to this man being sent for thirty years. He eventually only served six of them after a journalist from Buzzfeed News covered his story.

[5] "Birth of a Nation" depicts a Black man chasing a white woman down and attempting to rape her. The film then puts him to death by lynching. *The Birth of A Nation' Opens, Glorifying the KKK. HISTORY.COM*, (Feb. 9, 2010), www.history.com/this-day-in-history/birth-of-a-nation-opens.

[6] The "Central Park Five" were five Black and brown innocent teenagers accused and convicted of the beating and rape of a wealthy white woman in Central Park. They were exonerated years later after the real rapist was discovered. History.com Editors. "The Central Park Five." *History.com*, A&E Television Networks, (May 14, 2019), www.history.com/topics/1980s/central-park-five.

[7] Laura Green, *Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, FERRIS STATE UNIVERSITY, (last accessed Nov. 17, 2020), www.ferris.edu/htmls/news/jimcrow/links/essays/vcu.htm.

[8] Black people are often perceived as having higher pain thresholds, leading them not to be treated for pain in the medical field and receiving less correct diagnoses. Kelly M Hoffman, et al. *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites*, NATIONAL ACADEMY OF SCIENCES, (Apr. 19, 2016), www.ncbi.nlm.nih.gov/pmc/articles/PMC4843483/.

[9] Even though most victims of police force are white (52%), there is a disproportionate that are Black (32%). Sarah DeGue, et al. *Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 17 U.S. States, 2009-2012.* U.S. NATIONAL LIBRARY OF MEDICINE, (Nov. 2016), www.ncbi.nlm.nih.gov/pmc/articles/PMC6080222/

and will not listen to anyone.[10] This stereotype also brings about the "Angry Black Woman." The Angry Black Woman is mad at everybody for apparently no reason; she is bitter at the world.[11] This stereotype is deadly in that police use the excuse that the Black woman was angry and argumentative when explaining why they enacted force or escalated a situation.[12] Sandra Bland is an example of this: she was slammed into the ground and arrested because the officers at the scene said that she was "combative."[13] She later died in police custody.

So how are negative stereotypes dispelled in the media? One way is through storytelling. Black people have a rich array of experiences, motivations, and value systems that should be told. Stereotypes only represent, if any, a tiny percentage of any given population. Through telling stories about Black people doing everyday things and living through everyday experiences that all races participate in, it humanizes the race. It makes it more likely that Black people will be seen as equal.[14] Through popular culture, society can make the proper changes to begin seeing Black people in a positive light by connecting to people's emotions in a way that creates empathy in people who otherwise would have never considered or interacted with the Black experience.[15]

Popular culture also benefits from being widely spread; whatever is prevalent will be seen, heard, and consumed by large groups.[16] The quick and widespread circulation of popular media makes using popular media a fast, easy way to spread positive messages about the Black community. An example of a positive story is the show "Black*ish." The show is not perfect (there are issues of colorism in the casting), but the show depicts a wealthy Black family as they navigate life. The show does not shy away from them being Black; it embraces it. However, the characters' situations are not because they are Black; it is because they are people.

Popular media is not the only way that negative Black stereotypes make it out to the public for consumption. News media also uses stereotypes to depict Black people. Studies have shown that Black families are perceived as dysfunctional, and white families are shown to be

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[10] Black people are underrepresented in dramas and overrepresented in comedies. Black people are overrepresented in comedies because Black stereotypes are often used as comedic relief. "Amos 'n Andy" was the first broadcasted depiction of Black women that associated them with the term "Sapphire." The show ran from 1928-1960 on the radio, and in the 1950s, the show was on television. Sapphire's character was very domineering, and she emasculated her husband, who was a poor, racist depiction of a Black man. After that show, many other sitcoms have been released that show Black women as domineering, emasculating, aggressive, and angry. *The Sapphire Caricature*, *FERRIS* STATE UNIVERSITY, www.ferris.edu/HTMLS/news/jimcrow/antiblack/sapphire.htm.

[11] *Id*.

[12] Eternity E. Martis, *The 'Angry Black Woman' Stereotype Is Justifying Police Brutality*, HUFFPOST CANADA, (Aug. 13, 2016), www.huffingtonpost.ca/eternity-e-martis/stereotype-justifying-police-brutality_b_7967558.html.

[13] *Id*.

[14] Popular media is a great way to dispel racial stereotypes. It is fast, accessible to large amounts of people, and is enjoyable to consume. It is cheap and people of all ages and socioeconomic demographics can participate in it. It is frequently used to negatively show Black people, from T.V. shows that use racial stereotypes to who is cast in specific roles. Popular media can influence how a whole society interacts and sees Black people. Rachel D. Godsil, et al., *#PopJustice: Volume 3 Pop Culture, Perceptions, and Social Change* PERCEPTION.ORG, (Feb. 2016), perception.org/wp-content/uploads/2016/05/PopJustice-Volume-3_Research-Review.pdf.

[15] *Id*.

[16] *Id*.

a place of stability in the news.[17] Negative news stories on Black communities harm Black people as it leads to many more restrictions on them and their communities. Restrictions include jobs with more stringent drug test requirements, welfare restrictions, and reductions of social programs.[18] These cuts are a direct result of the fact that since people see Black families as a lousy source for support, that must be where all of the Black community's problems lie. If Black people would work hard on their family lives and those improved, then all of their problems would go away.

Programs are taken away because they are seen as unnecessary. Many community staples' removal and restriction negatively impact the communities because there is a direct correlation between poverty and crime.[19] If people in poor Black neighborhoods are stripped of programs that help the neighborhood and the jobs are much harder to get, those communities will stay poor, and as a result, be considered a high crime neighborhood. That leads to more policing, more police encounters, and more instances of escalation with the police.

Another way that news media perpetuates stereotypes against Black people is how news stations report on Black people. Black people are overrepresented when it comes to reporting on them committing crimes. New York news stations in 2014 reported "African-Americans as suspects in 68 percent of murder stories, 80 percent of stories about thefts, and 72 percent of stories about assaults" even though they only made up 54 percent of murder cases, 55 percent of theft cases, and 49 percent of assaults that same year.[20] This inaccurate portrayal of Black crime leads to viewers believing that Black people commit their crimes at the rates that are being reported instead of what they are. This inaccurate portrayal leads to Black people being reported to police forces at higher percentages and for crimes they did not commit. Some activists call on their elected representatives to mitigate this divide by creating laws that deter white people from calling the police unnecessarily on Black people after a few videos, most famously Amy Cooper, went viral in 2020.[21]

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[17] Poverty was not always negatively perceived in the media. In the first have of the 20th century, when white people were benefitting from social programs, they were depicted as needing the programs. White people did not need the programs because they were lazy; they needed them because they were experiencing a hard time. After the Civil Rights movement in the 1950s and 1960s, Black people started to receive the same benefits from those programs. After that, the programs were then seen as only for lazy, non-hard working people, and, even though white people still benefit from these programs, Black people are depicted as being the main benefactors. Tracy Jan, *News Media Offers Consistently Warped Portrayals of Black Families, Study Finds*, THE WASHINGTON POST, (Apr. 29, 2019), www.washingtonpost.com/news/wonk/wp/2017/12/13/news-media-offers-consistently-warped-portrayals-of-black-families-study-finds/.

[18] *Id*.

[19] Erika Harrell and Lynn Langton, *Household Poverty and Nonfatal Violent Victimization, 2008–2012*, BJS.GOV, (Nov. 2014), www.bjs.gov/content/pub/pdf/hpnvv0812.pdf.

[20] Elizabeth Sun, *The Dangerous Racialization of Crime in U.S. News Media*, *CENTER FOR AMERICAN PROGRESS*, (Aug. 29, 2018), www.americanprogress.org/issues/criminaljustice/news/2018/08/29/455313/dangerous-racialization-crime-u-s-news-media/; Azi Paybarah, *Media Matters: New York TV News over-Reports on Crimes with Black Suspects*, POLITICO PRO, (Mar. 23, 2015), www.politico.com/states/new-york/city-hall/story/2015/03/media-matters-new-york-tv-news-over-reports-on-crimes-with-black-suspects-020674.

[21] Amy Cooper was a white woman who did not have her dog on a leash in Central Park. A Black man told her that she needed to have the dog on a lease, and she then called the police and falsely reported that he was threatening her and her dog. Erika D. Smith, "Column: California Wants to Make It Legal to Sue Karens. Why Aren't We Prosecuting Them?" *Los Angeles Times*, Los Angeles Times, Jul. 11, 2020, www.latimes.com/california/story/2020-07-11/california-prosecute-karen-police-911-race.

News media needs to begin to show Black families as functional and a place where Black people get a strong sense of self and receive support. There needs to be more positive stories on the Black family, especially on conservative news networks. By telling positive stories, it will help Black communities maintain social programs and welfare programs and reduce job restrictions so that there is some financial stability in Black neighborhoods. Showing Black people in a positive light will help those neighborhoods from being deemed "high crime." The news media also has to stop reporting Black crimes at higher rates on their news stations and in the papers more than they occur. The media needs to report the correct amount of crimes, and it needs to show that white people also commit those same crimes.

II. TO TAKE A LONG STEP DOWN THE TOTALITARIAN PATH: HOW POLICE PRACTICES IMPACT THE BLACK COMMUNITY

"He fit the description." "He looked suspicious." "This is a high crime neighborhood." "They looked like they were up to no good." These are phrases spoken so often in the aftermath of a police brutality case that it is impossible to attribute these quotes to one specific story. Black Americans experience violence at the hands of the police. The question is: Is that because of individual "bad apples," or is it because of policies and procedures that either intentionally or unintentionally target Black and brown communities? As stated above, mass media influences how someone in society perceives Black people. Some central police practices that affect many in the Black community are *Terry* stops (more commonly known as stop and frisks), chokeholds, and the automobile warrant exceptions. Can these practices be influenced by perceptions by the specific officers or the police forces of Black people?

A. *Terry* Stops: What Are They and How Do They Impact the Black Community?

The Fourth Amendment of the Constitution states, " The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [22] Police obtaining a warrant is one of the Fourth Amendment's quintessential parts, showing probable cause to search or seize an item or person. *Terry* stops, however, do not have the same standard. The stop and frisk was created as an intermediary level of suspicion to alleviate and control some of the negative interactions people were having with the police forces when there was no arrest and to protect police from armed suspects.[23] There are two parts to the *Terry* doctrine: if there is "reasonable suspicion" that the person is involved in some type of criminal activity, they can be stopped, and with the reason to believe the person is armed, there can be a "frisk" of their person to check for weapons.[24]

What does reasonable suspicion mean? The Supreme Court has not given any specific guidelines as to what reasonable suspicion is. In *Illinois v. Wardlow*, the Court states that while being in a high crime area on its own is not enough to meet the reasonable suspicion standard, unprovoked flight from that area is deemed to be enough to reach reasonable suspicion.[25] However, the dissenters brought up the fact that in many neighborhoods considered "high crime" or that are mostly minority, even innocent people might flee from the police to avoid

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[22] U.S. Const. Amend. IV

[23] Ric Simmons and Renée McDonald Hutchins, Learning Criminal Procedure: Investigations 556 (West Academic Publishing, 2nd ed. 2019). citing *Terry v. Ohio*, 392 U.S. 1, 17 (1968)

[24] *Terry*, 392 U.S. at 21, 27 (three men were seen acting suspiciously outside of stores known for being hit with armed robberies. The officer stopped and frisked them and discovered weapons on them).

[25] *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (man ran in the opposite direction after seeing the police in a high crime neighborhood. This was enough to raise reasonable suspicion for a *Terry* stop).

unjustified persecution and violence at the officers' hands.[26] This dissent shows that seemingly normal reactions, or reactions that would be deemed reasonable given the circumstances, can be seen as suspicious to an officer and cause the individual to be stopped. Police officers are also given grace when it comes to stopping and frisking innocent people. In the Supreme Court case *Heien v. North Carolina*, the Court found that "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'"[27]

An officer can stop and frisk an individual in their car as long as the initial stop is legal, such as a routine traffic stop. They are allowed to maintain the stop as long as it takes them to complete what the officer needs to complete incident to the initial stop. In *Pennsylvania v. Mimms*, the Court determined that officers could always ask for someone to get out of their car because the Court believed that any traffic stop is dangerous to police officers, even if the stop is for a minor traffic violation.[28] The law is this way because it is assumed that every vehicular police stop is dangerous and that traffic stops are the most dangerous for the officer.[29] However, traffic stops are not as dangerous as they may seem; only about 1 in 6.5 million traffic stops result in killing an officer, 1 in 361,111 resulted in serious injury to an officer, and assaults against an officer only occurred 1 in 6,959 of traffic stops.[30] If the officer suspects the person to have a weapon on them, they can frisk their person or the car's area that the person would have had access to. This practice is problematic as Black people are stopped more than white people for traffic violations and searched more.[31] Societal perceptions of Black people and the images of Black people seen in the media influence whom the officers stop in the first place. If the officer watches the news, for instance, and they see a Black man driving in a nice car in a Black neighborhood, he might assume that the car is stolen because the media over reports when Black people commit thefts. Because of negative perceptions about Black people with murders and assaults, the Black person could be ordered out of their car and frisked. The situation could escalate, leading to either arrest, injury, or death of the Black person.

Media perceptions and implicit biases of officers affect whom they decide to stop and frisk and decide to find as suspicious people. Black people, especially men, are perceived to be dangerous and are often seen as a threat. These thoughts and perceptions can lead to an officer seeing a Black man performing an everyday task or evading questions and instantly fear or assume that he is armed and dangerous. As stated previously, the term "high crime" is often used to describe neighborhoods where mostly Black people live. According to *Terry*, if "high crime" neighborhoods are synonymous with Black and brown neighborhoods, then Black and brown people who live in those areas are already subject to suspicion. Due to the high policing in those areas, Black people, especially men, are often more likely to be stopped and frisked than white people. According to the NYPD Annual Reports, out of all the people stopped and

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[26] *Id*. at 132

[27] Ric Simmons and Renée McDonald Hutchins, Learning Criminal Procedure: Investigations 575 (West Academic Publishing, 2nd ed. 2019). citing *Heien v. North Carolina*, 135 S.Ct. 530, 536 (2014).

[28] *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (the Court ruled that Mimms could be asked out of his car even though the stop was for a minor traffic violation)

[29] Traffic stops are considered one of the most dangerous activities a police officer can be a part of. Scoville, Dean. "The Hazards of Traffic Stops." *POLICE Magazine*, Oct. 19, 2010, www.policemag.com/340410/the-hazards-of-traffic-stops.

[30] Jordan B. Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 Mich. L. Rev. 635 (2019).

[31] This study was completed using almost 100 million traffic stops from 21 state patrol agencies and 29 municipal police departments. The data found that Black people were stopped and searched at higher rates than white people. *The Stanford Open Policing Project* OPENPOLICING.STANFORD.EDU, openpolicing.stanford.edu/findings/.

frisked in New York in 2019, 59% were Black compared to 9% being white.[32] Reports show that stops and frisks do not catch criminals. According to the NYPD Annual report, nearly 90% of all stopped and frisked people are innocent.[33]

If stop and frisk were allowed to be carried out the way it is now, many more Black people would be subjected to this invasive, humiliating police practice. The vast majority of stopped and frisked people are Black and brown, and the vast majority are innocent people. If no arrest happens, there is no Fourth Amendment remedy that the victim can receive, leading to virtually no oversight of the practice and no justice.

1. What are some reforms that can be implemented to end racial discrimination in *Terry* stops?

There are many different ways to approach stop and frisk abuse: reforming stop and frisk law, ending stop and frisk, or abolishing the police system as we know it to be.

There are many critics of *Terry* stops. Reforming the stop and frisk procedure has been a hot topic ever since the landmark case of *Floyd v. City of New York*.[34] Reforming stop and frisk laws, raising the reasonable suspicion standard, ending stop and frisk, defunding the police, and abolishing the police are all ways to reform *Terry* stops.[35] Do these reforms stop the discriminatory aspect of *Terry* stops?

Between 2011-2019, there had been a 98% reduction in *Terry* stops in New York City.[36] Under Mayor Bloomberg in 2011, nearly 700,000 people were stopped. When Mayor de Blasio took office in 2012, there was extreme public pressure to reduce the number of stops. Between that and transparency through the police, stops were reduced to 11,629 in 2017.[37] Crime has also gone down in New York City since there have been fewer stops, disproving the theory that there need to be more stops to reduce crime overall.[38] In fact, in 2018, homicide was down to the lowest that it had been in almost 70 years.[39]

However, while the number of stops has been reduced significantly, racial discrimination has not changed significantly. In 2011, Black men between the ages of 14-24 only made up 4.7% of all people in New York City, but they made up 41.6% of all stops in 2011.[40] Between the years of 2014-2017, the same demographic only made up 5% of the population but made up 38% of all stops.[41] This data shows that even with transparency, even when the police are on board for change, even when the police stop significantly fewer people, racial discrimination will still show through. Black men, especially, will still be negatively

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[32] *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, (Mar. 11, 2020), www.nyclu.org/en/stop-and-frisk-data.
[33] *Id*.
[34] 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (the court ruled in a class action that the stop and frisks were unconstitutional and were being carried out in a racially discriminatory way)
[35] *Stop-and-Frisk Reforms: What is the Latest?* CENTER FOR CONSTITUTIONAL RIGHTS, Feb.16, 2016, ccrjustice.org/home/blog/2016/02/16/.
[36] Michelle Shames and Simon McCormack, *Stop and Frisks Plummeted Under New York Mayor Bill De Blasio, but Racial Disparities Have not Budged* AMERICAN CIVIL LIBERTIES UNION, (Mar. 14, 2019), www.aclu.org/blog/criminal-law-reform/reforming-police/stop-and-frisks-plummeted-under-new-york-mayor-bill-de.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.

affected. New York City has acknowledged this and, in the summer of 2020, decided to disband the last unit responsible for making *Terry* stops in their police force.[42]

Another policy reform is to change the standard of *Terry* from reasonable suspicion to probable cause. Even in *Terry v. Ohio*, there was a debate about whether or not reasonable suspicion was constitutional. Justice Douglas, in his dissent, was afraid that allowing the Court to lay out a lesser standard to probable cause for a *Terry* stop would be a "long step down the totalitarian path."[43] He believed that the people, not unelected judges, should decide by waiting for a constitutional amendment to the Fourth Amendment stating that the standard should be lowered to reasonable suspicion.[44] By raising the standard to probable cause, fewer people will be stopped and frisked, and it will be more likely that the people who are stopped are armed.

Another policy reform is to end stop and frisk altogether. As previously mentioned, in the summer of 2020, the New York Police Department disbanded their last unit that did stop and frisk. While there has not been enough time to determine that ending stop and frisk completely does not affect whether or not crimes will increase, there is a showing that crime does not increase when there are fewer *Terry* stops.

Another policy reform is to defund the police forces. Defunding means taking the funds given to the police forces, reducing them, and giving social programs the money.[45] The more accurate way to describe it would be to say that it is reallocating funds from the police forces to communities that need the money.[46] Defunding can mean anything from fewer officers to fewer weapons the police can use. As mentioned before, even when fewer people are stopped, that does not mean that racial discrimination has stopped. Instead, it has shown the racial discrimination stays around the same. If the police are defunded, that does not address police discrimination in the forces and the officers themselves.

The last reform that activists are discussing is the abolition of the police forces as we know it. If there were no police, there would be no stops. There would be no frisks. There would be no officers who would, either subconsciously or consciously, use race to meet the reasonable suspicion standard. There would be no neighborhoods in poverty because funds would be allocated from the police department to public social programs to fund schools, activities and create jobs for those neighborhoods.[47] With community-specific after school programs such as art and music, fully funded schools with excellent teacher retention, and schools that emphasize helping students with their problems instead of punishment, young students will be less likely to become involved in gangs and violence as they will be more

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[42] The George Floyd protests of 2020 influenced the NYPD to make reforms to their police departments. Minneapolis and Los Angeles are among other cities that have pledged to make reforms. Tom Winter, et al. *NYPD Is Disbanding a Unit That Is the 'Last Chapter' of Stop-and-Frisk NBCNEWS.COM*, (Jun. 17, 2020), www.nbcnews.com/news/all/nypd-disbanding-unit-last-chapter-stop-frisk-n1231135.

[43] *Terry*, 392 U.S. at 39

[44] *Id*.

[45] Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?* BROOKINGS, (Jun. 19, 2020), www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/.

[46] *Id*.

[47] The NYPD spends $10.9 billion a year, making it the country's highest-spending police force. Many other police departments in major cities spend several hundred million a year. The LAPD spends $3 billion annually. David Zahniser, et al. *Los Angeles Cuts LAPD Spending, Taking Police Staffing to Its Lowest Level in 12 Years*, LOS ANGELES TIMES, (Jul. 1, 2020), www.latimes.com/california/story/2020-07-01/lapd-budget-cuts-protesters-police-brutality; Adrian Pietrzak, *Seven Facts About the NYPD, Budget* CITIZENS BUDGET COMMISSION OF NEW YORK, Jun. 12, 2020, cbcny.org/research/seven-facts-about-nypd-budget.

likely to go to school and finish.[48] Black families will spend more time together because there will be better-paying jobs so the parents would not have to work as many hours. The community can create their own programs to respond to specific issues involving community-specific crimes so that they are sure to meet the community's needs.[49]

B. Chokeholds

Stop and frisks are not the only police practice that law enforcement uses to discriminate against Black people. Another practice is restraint. Many Black people have been killed by law enforcement by chokeholds. Eric Garner and George Floyd are only two names of the many harmed due to this practice. What is a chokehold, and why is it so problematic?

There are two types of chokeholds. The carotid restraint is where the officer holds the individual so that there is no blood flow to the brain, causing temporary unconsciousness.[50] The second is the chokehold, when the officer applies pressure to the windpipe making it so the individual cannot breathe.[51] In Minneapolis, the city where George Floyd was murdered in 2020, the police force has used a chokehold 237 times since the beginning of 2015, and in 44 of those times, the individual in the chokehold went unconscious.[52]

In St. Louis, Missouri, a man named Nicholas Gilbert was arrested on suspicion of trespassing.[53] The police took him into a holding facility and put him in an individual cell to book him.[54] One of the officers claimed that Gilbert was acting erratically and even yelled that he had tied a piece of clothing around his neck to try and kill himself.[55] Another officer went into the cell and saw that Gilbert did not have a piece of clothing around his neck.[56]The officer then tried to cuff Gilbert and Gilbert allegedly began resisting the officer.[57] Several other officers then entered the cell to try and get Gilbert into a specific position. All in all, six officers, weighing a combined 1300 pounds for fifteen minutes, were on top of Gilbert throughout this encounter.[58] He died during the altercation.[59] The Eighth Circuit found that the officers did not use excessive force and were protected by qualified immunity.[60]

If chokeholds are allowed to be used, many more Black people will be subjected to this restraint's adverse effects like Gilbert, or George Floyd, or Eric Garner, either through passing out or through death. It is humiliating and scary to be held so that someone cannot breathe or have blood flow to their head. That can cause lasting trauma to the person that the chokehold

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[48] Gary D. Gottfredson, *What Can Schools Do to Help Prevent Gang-Joining?* NCJRS.GOV, (last accessed Nov. 17, 2020) www.ncjrs.gov/pdffiles1/nij/243471.pdf.
[49] Derecka Purnell, *How I Became a Police Abolitionist*, THE ATLANTIC, (Jul. 24, 2020), www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/.
[50] Kaveh Waddell, *Why Many Large Police Departments Tolerate Their Officers Using Neck Holds*, THE ATLANTIC, (Dec. 10, 2014), www.theatlantic.com/politics/archive/2014/12/why-many-large-police-departments-tolerate-their-officers-using-neck-holds/458079/.
[51] *Id*.
[52] Summer Lin, *What Are Chokeholds and Can Police Use Them? It Depends What Kind and Where You Live*, MIAMI HERALD, (Jun. 3, 2020), www.miamiherald.com/news/nation-world/national/article243230871.html.
[53] *Lombardo v. City of St. Louis*, 956 F.3d 1009, 1011 (8th Cir. 2020).
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Lombardo v. City of Saint Louis, 20–391*, AMERICAN CIVIL LIBERTIES UNION, (last accessed Oct. 27, 2020), www.aclu.org/cases/lombardo-v-city-saint-louis-20-391.
[59] *Lombardo*, 956 F.3d at 1012.
[60] *Id*. at 1014.

is used against.[61] Qualified immunity will continue to protect officers who do chokeholds from facing liability for harming the people they do put into chokeholds, just like in *Lombardo*.

1. What Are Policy Reforms that Can End Racial Discrimination When the Police Perform Chokeholds?

Since the George Floyd incident in the spring of 2020, many people call for reform to police departments to assure that no other Black man will be murdered the way he was. There have been calls to ban chokeholds, hold police that commit misconduct accountable by firing them and to have a national database where all fired officers are submitted to, defunding police forces, and abolishing police forces. People in favor of chokeholds have also called for more training on how to perform the move and only use it if it is a life-threatening situation. Will these reforms minimize the death toll of civilians by police officers?

The first policy reform regarding chokeholds is that the police need more training on the move and should only be trained to use the move in life-threatening situations. Even President Trump, who has made himself out to be the "Law and Order" president, has called for there only to be chokeholds in life-threatening situations.[62]

What is considered life-threatening? As stated previously, Black people, especially men, are perceived in the media and society as being aggressive, threatening, and dangerous. This perception can cause much fear in an officer who does not realize that he has implicit biases against Black people, and it can cause him to put a Black man into a chokehold because he feared for his life. Black people are more likely to experience police force than white people. In Minneapolis, the city where George Floyd was murdered, even though Black people only make up 20% of the city since 2015, 59% of the force the police use is against a Black person.[63] Out of neck restraints, 66% are committed against a Black person.[64] Simultaneously, 60% of the city was white, and only 24% of police force acts were used against white people.[65] This data shows a strong bias to use force against Black people, and there is no showing that using the chokehold in only life-threatening situations will close that racial gap.

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[61] This study was conducted on 18 to 26-year-old men in New York City. It found that the more police interactions and the more intrusive the encounter, the more anxiety and trauma symptoms were observed in the young men. Amanda Geller, et al. *Aggressive Policing and the Mental Health of Young Urban Men* AMERICAN PUBLIC HEALTH ASSOCIATION, (Dec. 2014), www.ncbi.nlm.nih.gov/pmc/articles/PMC4232139/.

[62] A Reuters study showed that 82% of Americans support a ban on chokeholds. In the same article, a police officer who trains thousands of officers says that the move should only be used if the officer is facing death. Mark Albert, *'Weapon of Last Resort': Physical Restraint Trainer Says Police Need More Training*, KMBC, (Jun. 16, 2020), www.kmbc.com/article/weapon-of-last-resort-physical-restraint-trainer-says-police-need-more-training/32884552.

[63] Richard A. Oppel and Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites The New York Times*, THE NEW YORK TIMES, (Jun. 3, 2020), www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html.

[64] *Id*.

[65] *Id*.

Another policy reform that is talked about is a ban on chokeholds. Most people support a ban on chokeholds.[66] The question is, do these bans work? Police forces have been banning chokeholds for decades. The Los Angeles Police Department banned them in 1983, the New York Police Department banned them in 1993 unless the officer's life is in danger, and other major police departments like Houston, Philadelphia, and Chicago have also banned chokeholds in some capacity.[67] Have these bans made a difference in these jurisdictions? The hope is that with the banning, the officer will think twice about using a chokehold or will just not use the move at all. The data shows that this is not the case. Many people have died at the hands of police in these jurisdictions and hundreds more have complained about having the technique used against them every year.[68] A study of these complaints in 2014 completed in New York shows that the use of chokeholds is rising even though the practice has been banned in the city for decades.[69]

Another policy reform is to have a national database of all police officers fired for misconduct while on the job. The idea is that if there is a national registry, then these officers would not be able to be hired at another police force in another state or county. Police officers fired at one police force are sometimes rehired at another and are more likely to be fired again and commit misconduct than officers who were never fired.[70] This data shows that if an officer commits a chokehold on somebody in a jurisdiction where they are not supposed to or where they inflict harm on someone with one, they can still be hired and be a police officer in a different jurisdiction, and they are more likely to do something of the sort again. Officers being rehired is especially dangerous for Black people because officers rehired after being fired are more likely to be hired in more impoverished and Blacker neighborhoods.[71]

Defunding the police has become a popular statement out of the George Floyd protests. Defunding is the previously mentioned movement that talks about reallocating funds from police forces to the public communities that need them. In the instance of chokeholds, it could

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[66] The survey was conducted with 1,113 people and it showed that 83% wanted a ban on racial profiling, 93% wanted federal officers to wear bodycams, 89% wanted the police to identify themselves and state the reason for the stop clearly, and 91% want there to be independent investigations of police forces when they show a pattern of misconduct. 75% of people surveyed said they believe that people should be allowed to sue police departments for damages. Chris Kahn, *Exclusive: Most Americans, Including Republicans, Support Sweeping Democratic Police Reform Proposals - Reuters/Ipsos Poll*, REUTERS, (Jun. 11, 2020), www.reuters.com/article/us-minneapolis-police-poll-exclusive/exclusive-most-americans-including-republicans-support-sweeping-democratic-police-reform-proposals-reuters-ipsos-poll-idUSKBN23I380.

[67] An NPR review of chokehold bans in major jurisdictions showed that the bans were ineffective and were subjected to "lax" enforcement. Monika Evstatieva and Tim Mak, *How Decades Of Bans On Police Chokeholds Have Fallen Short*, NPR, (Jun. 16, 2020), www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short.

[68] *Id*.

[69] Civilian Complaint Board, *A MUTATED RULE: Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City*, NYC.GOV, (Oct. 7, 2014), www1.nyc.gov/assets/ccrwww1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20141007_chokehold-study.pdfb/downloads/pdf/policy_pdf/issue_based/20141007_chokehold-study.pdf.

[70] Only 44 states have a way to decertify officers. If an officer is decertified, that means he can no longer be an officer in that state. Being decertified does not prevent the officer from receiving employment at a police force in a different state. The new forces they are hired to may not do a thorough background check, or the last force they worked for may try and conceal what they did to be fired. There has also been evidence that police forces allow officers who commit misconduct to resign with a great reference to avoid legal issues. *See* Ben Grunwald and John Rappaport, *The Wandering Officer*, 129 Yale L.J. 1676, 1694-97 (2020).

[71] *Id*.; Nikita Lalwani and Mitchell Johnston, *Analysis | What Happens When a Police Officer Gets Fired? Very Often Another Police Agency Hires Them*, THE WASHINGTON POST, (Jun. 16, 2020), www.washingtonpost.com/politics/2020/06/16/what-happens-when-police-officer-gets-fired-very-often-another-police-agency-hires-them/.

potentially save lives as one of the ways that defunding happens is by making sure there are fewer officers out in the field at any given time. The fewer officers, the fewer chances a Black person has of being caught in a chokehold. Even with defunding, however, the culture of police forces and the officers that work there is still to discriminate. Without real change towards fixing that, no amount of money will make a substantial change.

The last policy reform is police abolition. If the police are abolished, there would be no chokeholds. There would be no situations in which someone would need not to be able to breathe. There would be no holding a knee to their backs so that they could not breathe or get circulation to their heads. Instead, a crisis prevention team or a de-escalation team with professionals trained at helping specific situations would help the person calm down and get better.

C. The Automobile Exceptions

The Fourth Amendment states that there needs to be probable cause and a warrant to search and seize people in the United States. There are three ways police officers can search someone's car without a warrant when they are in their car. One is the stop and frisk, previously discussed.[72] If the officer suspects that they may have a weapon on them or in their vicinity, they may search them or the area in their wingspan for weapons only. Second is a search incident to a lawful arrest. When someone is arrested, the police can search their car to look for evidence of the crime committed. The search has to be a part of, or incident to, the arrest that was made. And third, the automobile warrant exception. If the officer has probable cause that there is contraband inside a car, he has the right to search the car areas he believes the contraband might be.

The first automobile warrant exception is the search incident to a lawful arrest. If the arrest is lawful, then the officer can search the person of the seized individual or their car they were driving if they were arrested while driving. The officer can search anywhere that is in the immediate vicinity of the person who was arrested.[73] In *New York v. Belton*, the Court ruled that Belton's jacket in the car's back seat was searchable because that area was accessible to him.[74] The dissenters in the case warned that the use of this rule could make it so that the whole car's interior and all of the containers within could be searched and that they believed that this rule could set a "dangerous precedent."[75] The dissent's argument has proven to be the case. It essentially created a rule where if someone is arrested in a car, the car's entire interior can be searched. The rule is very loose; the *Belton* rule was even cited in a case where someone was arrested while walking away from their car.[76] In *Arizona v. Gant*, the Court attempted to amend the vagueness of *Belton*. It ruled that the search of a vehicle, while the individual was arrested ten to twelve feet away, was unconstitutional, stating that "if there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search . . . the rule does not apply."[77]

The next automobile warrant exception is the automobile exception. This exception allows the police to search the entirety of someone's car and the containers within if they have

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[72] Stop and frisk is discussed in detail in section A of this paper.

[73] *Chimel v. California*, 395 U.S. 752, 763 (1969) (found that the officers cannot search a whole house, but just the areas in the immediate vicinity of the area they are in).

[74] *New York v. Belton*, 453 U.S. 454, 460 (1981).

[75] *Id*. at 466 (Brennan, J., dissenting).

[76] *Thornton v. United States*, 541 U.S. 615 (2004) (the Court extended *Belton* by allowing officers to search the car of someone that they arrested, even if they were not in the car at the time of the arrest).

[77] *Arizona v. Gant*, 556 U.S. 332, 339 (2009).

probable cause that there is contraband and the car is inherently mobile. The automobile exception is different from a *Terry* stop and a search incident to a lawful arrest in that the justification for the search is probable cause right after the car is legally seized, such as during a routine traffic stop, and that the entirety of the car, including the trunk and any containers in the car, are allowed to be searched if there is probable cause that there is contraband in them.[78] The *Carroll* Court found that since ships and vessels could have warrantless searches if there were probable cause for contraband aboard, the same standard should be used for cars.[79] There must be probable cause; obscure facts that casually relate to a nearby crime are not enough for probable cause.[80] The police are also not allowed to search a car without a warrant if the car is within the curtilage of someone's home.[81]

In 1991, the Court ruled that the officers can search any containers that they find in the car, even ones that are closed, for two reasons: first because they said that someone's expectation of privacy is limited when they get in their car so that should also apply to containers in the car, and second because the police are allowed to hold the item that they find that they suspect is full of contraband until there is a warrant and by not having them search the bag immediately does nothing to aid privacy.[82] People are not considered containers for the definition of a container in the automobile warrant exception.[83]

One of the main arguments for having the automobile warrant exception is the fact that cars can move. The idea is that if the officer left to get a warrant, then the person could just drive off or get rid of the evidence. The car does not necessarily need to be mobile to trigger the automobile warrant exception; the Court has found that even when the car cannot move readily, the exception still applies.[84]

If the police are allowed to continue to use the automobile warrant exceptions, Black people will continue to be discriminated against. Black people are more represented in vehicular stops, frisks, searches, and arrests.[85] If the law stays the same, then nothing will change. That will mean more Black people will be humiliated and have criminal records

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[78] Ric Simmons, and Renée McDonald Hutchins, Learning Criminal Procedure: Investigations 407 (West Academic Publishing, 2nd ed. 2019).

[79] In *Carroll*, undercover officers knew that a man sold illegal alcohol. After pulling him over, they searched his car believing there to be contraband in the car. They found the alcohol, and it was ruled that the search was legal because there was probable cause that there was contraband in the car. *Carroll v. United States*, 267 U.S. 132, 153 (1925).

[80] Ric Simmons, and Renée McDonald Hutchins, Learning Criminal Procedure: Investigations 410 (West Academic Publishing, 2nd ed. 2019) citing *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221-22 (1968).

[81] *Collins v. Virginia*, 138 S.Ct. 1663 (2018) (homeowners have a reasonable expectation of privacy in their homes' curtilage so a warrant is required).

[82] *California v. Acevedo*, 500 U.S. 565, 573 (1991) (the Court ruled that if there is probable cause to search the car, then the containers in the car can also be searched).

[83] *United States v. Di Re*, 332 U.S. 581 (1948).

[84] *See Chambers v. Maroney*, 399 U.S. 42 (1970). (the exception still applied even though the police had seized the car and had driven it to the police station).

[85] Black people are less likely to be stopped after sunset under the "veil of darkness." This shows that there is discrimination as Black people are stopped less when their race is not immediately apparent. Black people are also two times more likely to be searched than white people when they are stopped. Emma Pierson, et al. *A Large-Scale Analysis of Racial Disparities in Police Stops across the United States*, (July 2020), 5harad.com/papers/100M-stops.pdf.

because of the arrests. That will also mean that more Black people are put into situations that can potentially escalate to harmful or deadly.[86]

1. What Are Reforms to End Racial Discrimination with the Automobile Exceptions?

There are many different ways to reform the automobile warrant exceptions. Having no exception and requiring a warrant, defunding the police, and abolishing the police are all talking points among activists to fight racial discrimination by police forces.

The reason behind having an exception to search an automobile is that either there is a weapon in the car that can harm the officer that is performing the traffic stop, there is contraband in the car that the person should not have and should not be able to drive off with, or there is evidence in the car that is from the crime that someone has been arrested for. It makes logical sense in those instances to not want to wait to get a warrant because that could take time, and stops cannot legally last that long. If the person is allowed to go while the officer is waiting for approval on a warrant, they could drive off and get rid of whatever evidence or contraband they had. If the officer is not allowed to search the vehicle when they believe there may be a weapon inside, the officer can be injured or killed. If this is how the warrant exception was being applied, then there would be no issues. Black and white people would be stopped, searched, cited, and arrested at approximately the same percentage per population. This is not how the warrant exceptions are being carried out in practice, however. Black people are stopped, searched, cited, and arrested at higher rates and with less evidence than white people. Receiving a warrant may be inconvenient and potentially dangerous, but it may help combat the racial biases in warrantless searches and seizures.

Many people advocating for police reform believe that if there is more training given to police officers, then there would be fewer incidents of improper police practices, including stopping, frisking, searching, citing, and arresting Black people at higher rates during vehicular stops. Many advocates for police to do more scenario training and know exactly what they would do in split-second decision-making times.[87] They talk about tactical potential imagery, which is the idea of pre-playing scenarios in the officer's head to be more likely to perform better in an actual traffic stop.[88] This training has not been proven to work, however. There is no difference in how the officers interact with civilians after the training in many places where there are police training reforms.[89] Statistics show that there is little to no improvement when there is training.[90] The training has to change drastically, or this is an avenue of reform that will never work.

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[86] Many police forces are implementing new reforms and training programs to try to emphasize the importance of de-escalation. Phil Rogers, *Police Video Shows How Quickly Simple Traffic Stop Can Escalate to Conflict*, NBC CHICAGO, (Sept. 17, 2017), www.nbcchicago.com/news/local/police-video-illustrates-how-quickly-simple-traffic-stop-can-escalate-to-conflict/20992/.

[87] Officers are encouraged to work through multiple scenarios to anticipate what may happen in real life. This can help them de-escalate situations and to remain safe while performing traffic stops. Sergeant (Ret.) Robert E. Bemis, *Do not Be a Drag: Considerations When Attempting to Control Subjects inside a Vehicle* POLICE1, (May 31, 2019), www.police1.com/police-training/articles/dont-be-a-drag-considerations-when-attempting-to-control-subjects-inside-a-vehicle-3Rjj5LQFeULve3iu/.

[88] *Id*.

[89] CBS News, *How Effective Are Police Training Reforms? 'We are Totally Fooling Ourselves,' Expert Says*, CBS NEWS, (June 3, 2020), www.cbsnews.com/news/police-reform-training-george-floyd-death-effectiveness/.

[90] *Id*.

The last policy reform is abolition. There would be no arrests with police abolition, there would be no frisks, and there would be no citations. Instead, the money that has been allocated traditionally to the police will be put in organizations that help people fix the taillights on their cars, who help people get their cars registered, and who remind people of the rules of the road. With police abolition, there could be de-escalation organizations whose jobs would help get weapons off the street. As mentioned previously, if funds used for the police were used to invest in communities where there is a lack of funding for schools, jobs, and infrastructure, then violent crime will go down. Fewer people will feel the need to carry around weapons with them.[91] With abolition, the goal of traffic stops will not be punishment, but warning and helpfulness. Abolition would significantly benefit poor communities, whose residents might not be able to keep up financially with the car's maintenance that they need for work or to take their child to school. Instead of punishing people for being poor, abolition instead calls to aid and support people who do not have the funds or education they need to have a properly running car.

III. WHO WILL PROTECT US IF THERE ARE NO POLICE?[92]

Many people believe that abolishing the police is going too far. They believe that if the police forces can be reformed and all bad actors are removed from the police forces, then the police will operate in a way that is going to protect everyone equally. Since the Black Lives Matter movement's creation and popularity in the early 2010s, many police forces have implemented implicit bias training in their forces to try to combat racist police interactions. Have they worked?

The NYPD did a study to show if their implicit bias training works and helps their officers not use racial biases when interacting with people. The study shows how their officers thought and did after receiving the training. They found that the officers, after the training, did have more conscious thought toward racial police practices.[93] That is where the positive data ends. The study found virtually no change in the racial disparities with stops, frisks, summonses, and arrests.[94] A higher percentage of Black people were stopped, frisked, and arrested than before the officers received training.[95] This data shows that even when there is a conscious effort to remove bias from the officers in the force, that bias is not going to change, at least in how implicit bias training is set up now.

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[91] Violent crime has been steadily going down in the United States for the past two decades. Places where there is the most violent crime is in poor, Black and brown neighborhoods. Those neighborhoods need more funding, jobs, and social support instead of policing. *Neighborhoods and Violent Crime: HUD USER*, *HUD USER*, (last accessed Nov. 19, 2020), www.huduser.gov/portal/periodicals/em/summer16/highlight2.html.

[92] *See generally* Sean Illing. *The 'Abolish the Police' Movement, Explained by 7 Scholars and Activists*, VOX, (Jun. 15, 2020), www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis.

[93] This study was conducted to see the effects of implicit bias training on the officers who received it. Immediately after the training, the survey asked the officers about their reactions to the training. 70% of officers said they had a new understanding of implicit bias, over 66% said that they learned new skills and strategies and they would try to implement them at work, and almost half of the officers said they would use all five of the points that they learned in training on the job. The officers were then asked, anywhere from 2-13 months after the training, if they had tried to use any training. 41% said they had not, 31% said sometimes, and 27% tried frequently. Robert E. Worden, et al., *The Impacts of Implicit Bias Awareness Training in the NYPD*. (July 2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/impacts-of-implicit-bias-awareness-training-in-%20the-nypd.pdf

[94] *Id*.

[95] *Id*.

The main argument against police abolition is who will protect the community if there are no police? Abolition of the police does not mean that there are no programs to deal with community issues. Police abolition means different things to different people. Most of the time, it does not mean leaving a void where the police used to be. It means eradicating the need for the police in the first place. As stated before, most crimes are crimes of poverty.[96] By allocating the billions of dollars allocated to social programs such as universal healthcare, childcare, and schools, people's lives will improve, and they will be more able to move out of poverty.

Next, many scholars and activists state that there would still be someone to call in times of need; it just would not be the police as we know it. Instead, it would be community-based trained individuals in the field. For calls about drug issues, instead of police, someone trained in drug intervention would show up. In the case of suicide, instead of the police, someone trained in mental health would show up. Nine out of ten 9-1-1 calls are about non-violent crimes.[97] In the case of the 10% that are violent, communities would develop plans on dealing with those issues that are community-specific and community-based staffed with individuals from that community. That way, the needs of the communities are being met by people who know their needs. These programs will be based on rehabilitation instead of punishment, making the person less likely to re-offend and giving them a chance to get better and positively impact society.[98] All of the answers are not needed immediately; instead, communities can come together and implement plans that will work the best for them.

Many people are not protected by the police when they need police forces' help. Minority communities as well are not protected by police forces. Instead, they are overpoliced.[99] When they are overpoliced, many innocent people are subjected to being stopped, frisked, and questioned. There are many instances when unarmed, innocent Black people are subjected to police harassment that then turns into escalation, leading to arrest, injury, or death, including when Black people protest when the police use excessive force on Black people.[100]

If the police protected, there would be equal amounts of policing in wealthy white neighborhoods and in poor Black neighborhoods. If drugs were considered to be extremely dangerous and needed to be off of the streets, then white people and Black people would be arrested, jailed, and sentenced similarly as studies have proven that both white and Black people use drugs at similar rates instead of 2.7 times more than white people to be arrested and

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[96] Crime and poverty are described as a vicious cycle in this article. Poverty causes "hopelessness and desperation," which leads to people committing crimes. They often do not have the funds to hire a great lawyer so they end up with a record. Having a record makes it hard to get employment or to get housing, which leads to poverty. John N. Mitchell, *Breaking Poverty: Crime, Poverty Often Linked*, WHYY, (Sept. 18, 2018), whyy.org/articles/breaking-poverty-crime-poverty-often-linked/.

[97] Jeff Asher, *There is Great Crime Data for Nearly Every City in the U.S. Why Is Nobody Using It?*, SLATE MAGAZINE, (Mar.15, 2016), slate.com/news-and-politics/2016/03/calls-for-service-data-are-the-best-way-to-analyze-crime-why-dont-cities-make-them-available.html.

[98] Mariel Alper and Matthew R. Durose, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, BJS.ORG, (May 2018), www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

[99] Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTS NOW, (Jun. 17, 2020), now.tufts.edu/articles/how-racial-segregation-and-policing-intersect-america.

[100] Talia Buford and Lucas Waldron, *We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here is What We Found*, PROPUBLICA, (July 16, 2020), projects.propublica.org/protest-police-tactics/.

6.5 times more likely to be incarcerated for drug-related crimes.[101] Black people are arrested five times more often than white people, even though they do not commit five times as many crimes.[102] In some jurisdictions, that number was increased to 10 times the amount that white people were arrested.[103] Police forces are not great at solving crimes in the first place: statistics show that "38% of murders, 66% of rapes, 70% of robberies, and 47% of aggravated assaults" go unsolved every year.[104]

CONCLUSION

When looking at how to fix the criminal justice system, one must look at how society interacts and feels about Black people. Mass media has a massive influence on how people think, feel, and interact with each other. If the media still perpetuates negative stereotypes about Black people, then society will negatively stereotype Black people. As long as the Mandigo, Savage, and Sapphire stereotypes are shown prominently in the media, people will continue to see Black people as aggressive, inferior, angry, scary, and a threat to white safety. Studies have shown that popular culture is an avenue for social change. Through positive images of Black people and families in the media showcasing a wide variety of stories, many people who would have never been exposed to the Black experience will be able to find empathy for them.

When looking at the media and police practices, it seems nearly impossible to think up a solution to make police officers and the criminal justice system a more equitable place for Black people. Many organizations have tried to implement implicit bias training and other measures to ensure that their employees receive anti-racism training. These fixes, though, have been proven not to work. Officers still stop and frisk Black people who are overwhelmingly innocent. They still restrain Black people in restrictive, deadly chokeholds. They still overwhelmingly search the cars of Black people without a warrant. Research shows that when Black people speak out about racial bias in policing, more than two-thirds of all police officers believe that the protests of police killings of Black men are not due to Black people wanting change and reform to police practices, but the protests are brought about due to anti-police bias.[105] Even when Black people speak up, they will not be listened to or taken seriously by police forces as they are set up right now. In the same study, police officers were asked if they believed that the country had made the correct strides to make it so that Black and white people were equal. 92% of white officers believed that the country had made the right changes and that Black and white people are equal.[106] This data shows that more than 60% of all officers believe there is racial equality in the United States.[107]

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[101] *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, THE HAMILTON PROJECT, (Oct. 8, 2020), www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

[102] Anagha Srikanth, *Black People 5 Times More Likely to Be Arrested than Whites, According to New Analysis*, THE HILL, (Jun. 11, 2020), thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites.

[103] *Id.*

[104] *National Data*, FBI, (Sept. 20, 2018), ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/clearance-browse-by/national-data.

[105] Black people are five times more likely than white people to say that they have been stopped unfairly by the police. More than half of all officers believe that their relations with the community are either excellent or good. Drew DeSilver, et al., *10 Things We Know about Race and Policing in the U.S.*, PEW RESEARCH CENTER, (Aug. 17, 2020), www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/.

[106] *Id.*

[107] *Id.*

Abolition is the only way to combat racism in policing. It would take generations for the media to right itself in its portrayals of Black people and even more to have a generation of people who have not been inundated with negative stereotypes. It is the only way to ensure that Black people are not unfairly stopped and frisked, die by police chokeholds, and have their cars searched without warrants. If chokeholds are banned, the police still can cause deadly harm in other ways with their weapons or another type of hold. There is also nothing that stops an officer from performing a chokehold variation, which frequently leads to the same result had chokeholds still be permitted. Even if stop and frisks are banned or reformed, that does not stop police officers from seeing Black people as threatening or dangerous, causing them to stop them or escalate situations. Implicit bias training does not stop an officer from seeing a Black person in a vehicle, and feeling like the driver is suspicious.

While many people asking for police reform ask for defunding of the police, that does not go far enough to combat racial profiling in the police forces. The way that the police are set up today is in a way that is discriminatory because the way policing has been is discriminatory. The only way to fix it is to tear it down and then build something different. This does not mean that people will not receive the help they need or the protection they need. It means that the current system is not working, and there needs to be something else in its place. It means that something can be figured out that is better, more community-based, and free from racial discrimination.

Abolition may seem scary. It may seem like abolition leaves a big gaping hole where the police should be. It may seem that there would be no one left to protect everyone. The truth is that the police now do not protect everyone. Most crimes go unsolved. Many people who are stopped and frisked are innocent. The police kill people when they should be de-escalating situations. Many Black people are stopped by officers while driving just because they are Black. Many officers do not live in the communities they serve, so they do not understand the nuances or have an emotional attachment to the people who live and work in the communities they are supposed to be protecting.[108]

Since the officers do not live in the communities they serve, this leaves a vast divide between officers and the Black community. It shows itself in the statistics showing that officers stop, frisk, and arrest Black people at much higher rates than they do white people, even when they have had implicit bias training. Instead, communities would be better off if the funding from the police forces were given to them. That way, they can implement programs and services that will fit the needs of their community. Abolition could look like mental health facilities, investing in infrastructure and education, creating good-quality jobs, and creating de-escalation offices with unarmed professionals trained in de-escalating volatile situations. This formula could lead to real change and can lower the amount of crime. It has been shown that having more police does not reduce crime.[109]

Why could the abolition of the police not be the answer?

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[108] Emily Badger, et al., *Where Minority Communities Still Have Overwhelmingly White Police*, THE WASHINGTON POST, (Aug. 14, 2014), www.washingtonpost.com/news/wonk/wp/2014/08/14/where-minority-communities-still-have-overwhelmingly-white-police/?arc404=true.

[109] The number of police officers per 1,000 people has been declining for two decades, while violent crime has declined. Simone Weichselbaum and Wendi C. Thomas, *More Cops. Is It the Answer to Fighting Crime?*, USA TODAY, (Feb. 13, 2019), www.usatoday.com/story/news/investigations/2019/02/13/marshall-project-more-cops-dont-mean-less-crime-experts-say/2818056002/.

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