THE COLUMBIA UNDERGRADUATE LAW REVIEW
VOLUME VII · ISSUE 1 · Fall 2012:

MISSION STATEMENT

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

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

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

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

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

SUBMISSIONS

The submission of articles must adhere to the following guidelines:

i) All work must be original.

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

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

iv) We accept articles on a continuing basis.

Please send inquiries to: culr@columbia.edu
Visit our website at: www.columbia.edu/cu/culr

Dear Reader,

On behalf of the executive and editorial boards, I am proud to present the Fall 2012 issue of the Columbia Undergraduate Law Review. After thoroughly reading numerous submissions from around the country, we have decided to publish four exemplary papers and an interview with the Dean of Columbia's School of General Studies, Peter Awn.

This issue begins with its featured article: Sam Berman's "Sailing through Loopholes: The Burden of Neutrality During the American Civil War." His paper, based on in-depth research from the British Library and National Archives, examines legal loopholes in Britain's declaration of neutrality that permitted the building of Confederate warships in Britain during the U.S. Civil War.

In "©horeography: How Graham v Graham Shocked Artists into Legal Awareness" Marygrace Patterson examines two legal disputes over the copyright ownership of Martha Graham's dances and the trademarking of her name and techniques.

In her paper, "Freedom of Exercise v Separation of Church and State: A Comparative Analysis of France and the United States," Ruth Woodard compares the concept of separation of church and state in the United States and France, analyzing its application with regard to the French headscarf laws.

Connor Montferrat presents his analysis of the Violence Against Women Act in his paper, "Repeal Rule 413 of the Federal Rules of Evidence: the Admissibility of Evidence of Prior Sex Offenses." Montferrat considers congressional intent, case precedent, and common law to argue for the repeal of the amendment admitting evidence of prior acts of sexual assault offenses in court.

Lastly, Marc Heinrich's interview with Dean Awn further examines the issues of separation of church and state in France presented in Woodard's paper.

In publishing this culmination of a semester's hard work, the Columbia Undergraduate Law Review strives to contribute to the culture of intellectual debate and scholarly research not only at Columbia University but also at other undergraduate institutions around the country. We hope that you enjoy reading the selected submissions and that these articles succeed in igniting this spark of intellectual curiosity within yourself and your community.

Sincerely,

Varun Char

Editor-in-Chief

TABLE OF CONTENTS:

Student Articles:

Interview:

STUDENT ARTICLES

Sailing through Loopholes: The Burden of Neutrality During the American Civil War

Sam Berman
Colgate University

Abstract:
One of the greatest disparities in resources at the outset of the American Civil War was the Confederacy's lack of ships to combat the Union's naval supremacy. The South responded by turning to a sort of guerrilla warfare at sea, using small and quick vessels to destroy Northern mercantile interests. Incapable of producing vessels for this task at home, the Confederacy sought to build these ships abroad, a task to be spearheaded by James Bullock. Britain, the shipbuilding capital of the world, was chosen as the site of production. The problem with this plan was that Britain had declared a state of neutrality in the American conflict, and so the Confederacy was not legally permitted to construct its vessels in British territory. Bullock discovered a legal loophole in the doctrine that allowed him to do so anyway. He carried out his activities surreptitiously in case the British government's own interpretation of the law misaligned with his own. When the British learned of Bullock's actions and attempted to stop him for the sake of neutrality, Bulloch's understanding of the law proved to be accurate and Britain was unable to prevent his actions because of the document's strict wording. As the war progressed, Britain's response changed from one that was contingent upon the letter of the law to one that was based on its spirit and implicit meaning. Britain ironically violated the very law that was meant to keep the nation neutral in order to preserve its neutrality.

It is the right of the neutral, remaining at peace, to shut out war altogether from his own shores and his own waters, to repel its first approaches, no matter in what shape it may come or under what insidious disguise, and to prohibit belligerent ships from making his ports and roadsteads a station whence they may watch for and attack the enemy. It is his right to make, for that purpose, any regulations he thinks fit, provided he applies them to both belligerents alike.[1]

The Failure of British Neutrality

The Confederate States of America was formed in early February 1861 when seven states seceded from the Union after the election of President Abraham Lincoln. Hostilities began on April 12 with the Confederate attack on Fort Sumter, South Carolina, marking the start of the American Civil War (1861-1865). Contemporary observers did not believe the war would last long. The Union had every conceivable advantage: manpower, munitions, and perhaps most important and understated of all, naval supremacy. The Confederacy had broken away from a preexisting nation, scavenging what it could when it left, but mostly having to start fresh.[2]

All it took to make an army was a cause that men could rally behind, a will to fight, and volunteers with guns who called themselves soldiers. Confederate pride ensured that this would not be a problem; when the war began, volunteers were plentiful. Correcting the naval imbalance was an entirely different story. Incredible sums of money, shipbuilding expertise, and a variety of very specific construction materials were necessary to build a single vessel. But the Confederacy was agrarian from its plantation system and cotton-based economy, lacking the ability and resources to produce even a single ship capable of posing a threat to Union forces.[3]

Confederate President Jefferson Davis initially sought to work around this shortcoming through privateering, attacking the Union financially rather than directly.[4] This plan quickly proved to be a failure; in mid-April 1861, less than two weeks after Davis had begun to issue letters of marque, President Lincoln declared that he would use the Union's incredible naval superiority to blockade the Confederate coastline, a 3500-mile stretch. Though there were holes in the net and vessels could slip through, blockade running was risky, especially with captured vessels that were not particularly quick, making the taking of prizes a difficult and exceedingly dangerous task that few were willing to take on.[5] Not only had the blockade made privateering next to impossible, but even basic trade was made exceptionally

difficult, cutting off Southern trade and isolating the rebels. Finding a way to combat the Union navy was now more pressing than ever.

Though privateering had failed, the root of the idea was fundamental to Confederate success in the ocean. The only chance the Confederacy had to correct the imbalance in naval strength was to attack trade, pursuing a type of guerrilla warfare on the high seas. With this in mind, the Confederate Secretary of the Navy Stephen Mallory devised a clever plan. Mallory intended to build a fleet of merchant raiders to disrupt Union shipping. They would be scavengers built solely to plunder the ocean, picking off commercial vessels and living off the spoils of their prizes. Captured ships would either be converted into additional merchant raiders to wreak further havoc, or they would be burned. They would essentially be state-owned privateers with the fundamental distinction that they were not paid for prizes, and so they would have no reason to come to port except to refuel.[6]

Mallory's ships were designed to be sturdy and durable vessels that were built to last. Wood was used as the primary material both for its lightness and low cost. They were to be relatively small, lacking the overwhelming firepower and large size of men-of-war for the sake of speed, but still boasting more than fair endurance and a formidable armament. They would employ a combination of wind and steam for their power source. The most important and modern aspect of their design was a retractable screw device that allowed the propeller to be lifted out of the water, allowing these ships to venture into shallow waters and, more importantly for their purpose, reduce drag while under sail. This allowed them to use the wind more effectively and reliably than similar vessels that lacked this device, making them less dependent on their stores of coal for steam, and thereby allowing them to refuel less frequently and stay out at sea for longer periods of time. These "screw steamers" were a clever combination of new and old shipbuilding practices to maximize their effectiveness as commerce raiders while simultaneously keeping costs relatively low, creating a new class of ships that would be able to stay at sea for months at a time with little difficulty.[7]

The secretary's plan was ambitious and he was well aware of the South's inability to build such vessels. It was quite apparent that the project would have to be outsourced. Great Britain was the ideal location: it was relatively close and it was the shipbuilding capital of the world. Mallory sent several Confederate agents to Liverpool to complete the project, most notably the former U.S. Naval Captain James D. Bulloch who spearheaded the operation. The plan, however, had one major drawback: as of May 13,

1861, Britain had issued a Proclamation of Neutrality, thereby declaring its intent to remain neutral in the conflict. Bulloch could not violate the Queen's neutrality, and would therefore have to act surreptitiously under the nose of the British government.[8]

The Proclamation of Neutrality was an incredibly important statement: it was Britain's announcement of its "Royal determination to maintain a strict and impartial neutrality" in the conflict between the Confederacy and the Union.[9] It was a notification to the world, one that was only necessary in the face of de facto war between two separate powers, which the conflict had become as a consequence of Lincoln's blockade. According to the rules of international law, "a nation could not blockade its own ports because blockade was a recognized part of war only between independent nations."[10] As a British statesman had once put it, "If your ports are blockaded, then there is war, if war, then there are belligerents."[11] Because the war had taken on a maritime character and was likely to affect more than just America, Britain's declaration of an official stance was the next logical step. As a result, the Proclamation had the implication of recognizing the Confederacy as a belligerent power; it was not a nation, but it was a separate entity from the Union. The Proclamation conferred upon the Confederacy the status of a quasi-political entity, providing it with a certain degree of legitimacy in the international community. This gave the Confederate Government certain rights that soon proved to be crucial, including the abilities to solicit loans and purchase arms from British subjects.[12]

The Proclamation was more than a declaration to the international community. It was a warning to Britons, charging them "to abstain from violating or contravening…the laws and statutes of the realm…as they will answer to the contrary at their peril."[13] It declared that Great Britain, both its people and government, would conduct themselves in accordance with preexisting neutral policy. This policy was determined by

> a certain Statute made and passed in the 59th year of His Majesty King George III, intituled 'An Act to prevent enlisting or engagement of His Majesty's subjects to serve in a foreign service, and the fitting out or equipping, in His Majesty's dominions, vessels for warlike purposes, without His Majesty's license,'[14]

more commonly known as the Foreign Enlistment Act of 1819.

The Foreign Enlistment Act was responsible for guiding British neutral conduct during the war, and as Mallory had instructed, Bulloch was determined to do everything in his power to ensure that his actions abroad did not violate the Queen's impartiality; the last thing the Confederacy needed was to provide the British government with any reason to seize these vessels. The problem, however, was that the limits of neutrality were mostly unknown; the limits of neutrality in regard to building ships for belligerent powers were completely untested. Even Lord John Russell, Britain's foreign minister, once admitted that the cabinet was unclear on this aspect of the law. Therefore Bulloch's first step abroad was to determine what exactly the law meant so that he knew what he could and could not do, hiring legal advisors to analyze the Foreign Enlistment Act and direct him in his best course of action.[15]

Bulloch's legal advisors informed him that the issue at hand was tied exclusively to Section Seven of the Act, which addressed the legality of constructing vessels in neutral British territory for belligerent powers with which Britain was at peace. According to Section Seven,

> If any person within any part of the United Kingdom [or any other part of Her Majesty's dominion]…shall equip, furnish, fit out or arm or endeavor to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out or armed, or shall knowingly aid or assist, or be concerned in, the equipping, furnishing, fitting out or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince [against a power with which Her Majesty is at peace],[16]

then those who had done so or conspired to do so could be prosecuted under the Statute for violating Great Britain's neutrality.

The legal advisors' interpretation of this convoluted, ambiguously vague statement came to guide Bulloch's actions for years to come. As they saw it, the statute boiled down to the matter of intent. They believed that a person could only be condemned for a violation of neutral policy if he had armed a vessel in Britain's domain and if there was clear intent for aggressive use by a belligerent power against another power that was not at war with Britain. Building a vessel was not an offense but equipping it for war was. As long as Confederate vessels were constructed without any sort of armament and left neutral British territory unarmed, the advisors attested, then the Queen would not be able to prove intent, and the Foreign

Enlistment Act would not have been violated. The Act only applied to actions undertaken in British territory, so it would not be illegal for these vessels to then be equipped outside of Her Majesty's jurisdiction. Of course, the seventh section of the Act had never been tested; England lacked any relevant case law on the matter. This interpretation was entirely theoretical.[17]

Bulloch carefully adhered to this analysis of the Act. The ships that he had constructed were disguised as sturdily constructed merchant and passenger vessels, built without any sort of armament. The shipbuilders he hired were either ignorant or pretended to be ignorant of the true purpose of these ships; they made contracts with Bulloch for reinforced vessels that could easily be converted into merchant raiders, but evaded the intent provision of the statute because the ships were not built explicitly for war. Such vessels could clear British waters and leave the bounds of the Queen's neutral territory without violating the Foreign Enlistment Act. Once they had done so, there was nothing to prevent them from being armed in another port outside of the kingdom. In other words, an unarmed ship could be constructed in Britain with the intent to be armed at a later time, leave neutral territory, and then be armed elsewhere without a violation of the law. Furthermore, the Proclamation of Neutrality had given the Confederacy the right to trade for arms with British subjects, so the armament itself could also come from Britain. As long as the unarmed ship and the ship supplying the armament left Britain separately, then the Foreign Enlistment Act had not been violated. Again, the law was untested, and this analysis was purely theoretical at the time. It appeared that it would not be illegal for these so called merchant vessels to go to the Confederacy, but the lack of case law kept Bulloch on edge. As a precaution, he acted as secretively as possible, hoping to prevent British officials from learning that these vessels were meant for the Confederacy at all. He wanted to give the Queen's Government no reason at all to take his ships.[18]

The analysis provided for Bulloch proved to be in line with the Crown's own interpretation of the statute. Time and time again, Bulloch contracted ships that would be used for war but were not warships, legally acting within the bounds of the Foreign Enlistment Act. The Confederacy's greatest maritime predators were all built in England, and there was nothing that Her Majesty's Government could do to stop it. Until the British closed this loophole, the Confederacy hoped to sail its fleet through it.[19]

I argue that Great Britain's Foreign Enlistment Act, meant to guide England's conduct as a neutral party, was too narrow in its design, and it ironically made it impossible for the nation to maintain strict and impartial neutrality. The shortcomings of the statute gave men like Bulloch too much

room to maneuver on the outskirts of the law, allowing him to act without impinging upon the Queen's *legal* neutrality, though violating her *actual* neutrality. The British government, namely Lord Russell, was forced to go beyond what the law allowed to do what was necessary to enforce the sprit of the Foreign Enlistment Act rather than the letter of it. The Foreign Enlistment Act was a relic of a past era, a flawed legal document that actively prevented Britain from achieving true neutrality, which the British government demonstrated by its departure from the statute, doing whatever it took to prevent the escape of Confederate vessels. It was only by going beyond the law that Britain could adhere to what the Government considered to be its true obligations as a neutral party.[20]

Historians have argued about Her Majesty's success in maintaining neutrality in regard to Confederate shipbuilding. Mountague Bernard, one of the earliest scholars on the international dimension of the war, has argued staunchly in support of the British, maintaining that the Queen's government consistently and systematically acted to aid neither the Confederacy nor the Union.[21] There is value to this claim: Great Britain did everything it could to honor its declaration, though Bernard has portrayed the British response to Confederate shipbuilding too statically, failing to capture the complexity and developing nature of what Britain felt it had to do to maintain neutrality.

It was not until recently that scholars began to focus on the complicated nature of Britain's response to Confederate shipbuilding in her territory while emphasizing the determination of Her Majesty's Government to remain neutral. Frank Merli is one of the most notable historians on the subject. Unlike those before him, he highlights the inadequacy of the law and the British need to go, as Lord Russell once said, "beyond and behind the law" to do what was right. In Merli's preeminent works on the British dimension of the American Civil War, the historian is concise in explaining that what the British understood as "neutrality" was subject to change and frequent reinterpretation. The definition provided by the Foreign Enlistment Act was too vague and too broad; it was utterly inadequate in an era when warfare and international relations were being modernized and redefined. Prime Minister Palmerston's government did not establish an absolute interpretation of neutrality that held for every situation that arose throughout the war because there was no way to do so. Britain was thrust into the world's first modern war with outdate legislation as its guide. John Russell (foreign minister), William Atherton (attorney general), Roundell Palmer (solicitor general), Prime Minister Palmerston, and many others who were no less important were forced to make difficult decisions in trying times. They did the best they could to maintain strict, impartial neutrality while

trying to protect private property and commercial rights. Their job was not easy, nor was it enviable.[22]

Merli's treatment of Britain's developing response is only flawed by his failure to discuss the legal issues in sufficient detail. He makes it quite clear that Britain's treatment of its neutral obligations was always changing, but he does not address a number of the specific reasons why British officials chose whether or not to detain a vessel. The strict adherence to the Foreign Enlistment Act at the beginning of the war is understated in his work, and so the departure from the statute is an underemphasized development in British foreign policy. My research therefore seeks to build on Merli's, focusing more strongly on the strict adherence to the Act at the beginning of the war and the eventual need to go around it for the sake of neutrality.

Inadequate Law Defined: The Case of the *Florida*

Bulloch's first success came on March 22, 1862, when the *Oreto*, later renamed the *Florida*, made its legal escape from Liverpool.[23] The *Florida* was the forerunner of Bulloch's construction projects in Britain, and she would later become overwhelmingly successful in her endeavors. She was built as a merchant vessel, but her design screamed of a far more sinister purpose. She was a seven hundred ton screw steamer, built of wood and heavily reinforced.[24] The cruiser was unarmed, but she was pierced with sixteen holes for mounting weapons and four movable platforms for large rotating guns; she would likely be equipped with weapons at a later time.[25] The first of a new class of vessels, she was small and light enough to achieve great speeds, sturdy and durable, and capable of being well armed. Once equipped, she would be quite a formidable opponent.

A merchant vessel built with such specifications was bound to attract attention. The *Florida*, like so many of the other vessels suspected of belonging to the Confederacy throughout the war, was brought to Lord Russell's attention by the diligent efforts of the American Consul in Liverpool, Thomas Dudley. Dudley's suspicions of the *Florida* multiplied in January 1862 when he learned that Fawcett and Preston, a company known to do business with the Confederacy, was not only building the engines for the ship, but also having seven substantial guns with ammunition shipped to London, which Dudley astutely deduced would be used to arm the vessel at "some out-port" to skirt around the Foreign Enlistment Act.[26] Furthermore, these funds for constructing the engines were advanced to Fawcett and Preston by Fraser, Trenholm and Company, another organization with

known ties to the Confederacy.[27] He rightly assumed that she was meant for Confederate use, reporting his suspicions to Charles Francis Adams, the American ambassador to Britain, who relayed Dudley's fears to Russell.

Lord Russell ensured that the matter was investigated. In mid-February 1862, Samuel Price Edwards, the Collector of customs at Liverpool, had the ship thoroughly surveyed. It was clear to customs officials that the *Florida* was suspicious: it was unusually sturdy and obviously capable of being converted for warlike purposes, undoubtedly built for more than trade. Furthermore, the shipbuilders asserted repeatedly that the vessels belonged to an Italian shipping company, but the Italian consul denied any knowledge of this.[28] The *Florida*'s destination was unknown, and its owner was a mystery; it was strong, durable, and likely meant for war; men with known Confederate ties funded its construction. However, it was not armed: not a single weapon, not even a signal gun, could be found on board.[29] Lord Russell, who made the ultimate decision in such matters, was advised that detaining the vessel would be a horrendous violation of the law.[30] The British government would have liked to act, but the vessel had been constructed completely legally; it was not armed and there was nothing to concretely tie it to the Confederacy. When an English merchant claimed ownership of the *Florida* in early March and said that the vessel was bound for Palermo, the British government, unable to contests the veracity of this claim, was grudgingly forced to allow her to depart.[31]

The *Florida* had escaped Liverpool, but she was not yet free and clear. She arrived in the Bahamas at the end of April to receive her armament and, on May 1, the British government inspected the vessel off the coast of Nassau. As in Liverpool, the surveyor determined that she could not be detained because, despite its unusually strong design, she was still unarmed. Several days later a large part of the *Florida*'s crew deserted. Officials bribed these men, who then reported that they had been lied to and had gone aboard the *Florida* under false pretenses. The vessel, they claimed, was Confederate, and that the captain of the ship was in league with the rebels. They said that they had never gone to Palermo and that the ship would be armed in Nassau very soon.[32] Thanks to these testimonies, it appeared that a case could be made to demonstrate intent to arm the vessel for use by the belligerent South in its war against the Union under the Seventh Section of the Foreign Enlistment Act. Admiralty officers believed they had sufficient grounds to seize the vessel, but their legal advisors disagreed, firmly of the opinion that evidence was still insufficient to justify seizing the vessel under the Act. They did not believe these testimonies were sufficient to demonstrate the necessary intent. The Admiralty chose to

disregard this reading of the law and the judgment of skilled attorneys, taking the vessel into custody around May 7 for violating the Act.[33]

The *Florida* and her owners were brought to trial in August 1862 for violating the Foreign Enlistment Act, and Judge John Campbell Lees was charged to determine the legality of the seizure. Lees ruled that the statute laid out three criteria that had to be met to sustain the Crown's detention of the vessel and convict its owners. According to the law, it was necessary that: (1) the vessel had been equipped within Britain's jurisdiction, (2) there was clear intent to employ the cruiser in Confederate service, and (3) there was clear intent to commit hostile acts against the United States.[34] Crown lawyers could prove none of these points. The *Florida* had only been built, not equipped, within British territory: the vessel was still unarmed and therefore lacked "equipment." Without an armament, there was no way to prove that the vessel was meant for aggressive use against the Union; it was, after all, built as a merchant vessel, and a Confederate-sympathizing merchant in Nassau attested that trade was its true purpose.[35] The Confederate connection could not be proven either: the statements of bribed sailors, as the Admiralty lawyers had advised, were hardly conclusive, nor were the captain's affiliation with the South or the connection between the Confederacy and the companies that had funded the ship's construction. As a result, Lees ruled that neither the *Florida* nor its owners had violated the Foreign Enlistment Act, and the vessel was released.[36]

Lees's analysis of the law was not wrong, but his decision that the Foreign Enlistment Act had not been violated was a huge blow to Great Britain's ability to abide by neutral conduct. This was the first time that the seventh section of the statute was defined by the British courts, and its outcome was to serve as the foundation of how British officials would respond to future Confederate shipbuilding projects. Lees's interpretation of the essential criteria for conviction placed intent as paramount. As his second and third requirements for conviction under the statute show, demonstrating that the vessel was meant for the Confederacy was insufficient. The *Florida* could have been openly built as a Confederate ship, and as long as it was not to be used aggressively against the Union, then the law had not been violated. Furthermore, Lees explicitly interpreted "equipment" as munitions. Even though the vessel had been designed so that it could be armed, the lack of weapons meant that the screw steamer had not actually been equipped. The Crown's ability to respond to Confederate shipbuilding activities was extremely limited because of the narrow scope of the Act.

As one critic of the affair noted, it seemed unlikely that there would ever be a stronger case to demonstrate intent to arm a vessel for aggressive use by the belligerent South. "We may assume that no prosecution of the same type will be instituted, or if instituted, that it will fail."[37] The connection between the financiers and the ship's captain with the South, the vessel's warlike design, and the lies told to the British government about the destination and ownership of the *Florida* all pointed to the fact that the vessel was probably meant for the Confederacy to be used for war. These suspicious circumstances surrounding the cruiser, however, were not even sufficient to maintain the detention of the vessel while it was more thoroughly investigated. The extraordinary restrictiveness of the Act meant that as long as there were no guns, there would probably be no chance of conviction.

The fault was with the law, not with Lees. His interpretation was a literal definition of what the law allowed. Nonetheless, the affair set the stage for what was to come. In accordance with the legal decision, the British government adhered to the letter of the law on the matter. Her Majesty's Government was willing but incapable of acting except in situations where the evidence was so abundant that the vagueness of the law did not matter. Britain's Foreign Enlistment Act was fundamentally flawed, allowing Bulloch to skirt on the edge of the law. In the years to come, the Confederate agent repeatedly violated Britain's neutrality without actually violating it, and the Crown was forced to watch it happen, incapable of stopping him.

Testing the Limits of the Law: the *Canton* and the *Alexandra*

The case of the *Florida* demonstrates that one of the world's oldest and most prolific nations was the victim of its own legal shortcomings. Britain continued to strictly adhere to the letter of the law for months to come, unable to prevent the infamous *Alabama*, one of the Confederacy's most effective and well-known vessels, from making its escape from Liverpool as July 1863 came to a close.[38] The escape of these vessels and Bulloch's continued evasion of the law was an affront to national pride. British policy began to shift; efforts by the Crown to stop Bulloch intensified, though Her Majesty's government still acted within the bounds of the law. Testing just how far Lees' definition of the statute could be stretched became the issue of paramount importance.

In mid-October 1863, Ambassador Adams, brought a suspicious vessel called the *Canton* to the attention of the British government. She was

being built in Glasgow and, as Adams' sources had informed him, she was likely for the Confederacy. "She is…altogether similar to the *Alabama*…. Her port holes and other characteristic features…mark her a war vessel."[39] Like the *Florida*, she was a screw steamer disguised as a merchant ship. The British government immediately took action and the ship was examined. Captain Arthur Farquhar (1815-1908) of the *H.M.S. Hogue* of Her Majesty's Coast Guard confirmed Adams' report, observing that the ship "is evidently built for aggressive purposes and…will probably have great speed."[40] In a subsequent report he added that the vessel was being fit out as a passenger ship, but "she might easily be converted…into a second *Alabama*."[41] The collector of customs and the official surveyor concurred, observing that the unarmed screw steamer was quite unusual in its design[42] and should therefore be prevented her from leaving her port until the government issued directions to the contrary.[43]

The *Canton* was suspicious, but that was hardly sufficient as evidence to justify taking the vessel into government custody. A connection to the Confederacy could not be proven. Although her design made it abundantly clear that she could and probably would be armed as soon as she left British waters, "her hostile intent…as flagrant and clear as if she had her guns on board,"[44] sturdiness and potential to arm were hardly the same as actually "equipping" in the narrow meaning of the law. The Lord Advocate of Scotland James Moncrieffe therefore decided that it would be an "unjustifiable stretch" of governmental authority to seize the vessel. He wanted to act, but believed that a "prima facie case…in regard to the character and destination of the vessel in question" was necessary "to bring it within the scope of the Foreign Enlistment Act" before he could.[45]

The British government continued to watch the ship with a scrutinous eye. On November 10, Edward James Reed, the chief constructor of the royal navy, examined the ship's designs and confirmed the opinion that the *Canton's* "specifications afford some…suspicion."[46] This was enough for Admiralty officials to defy Moncrieffe's judgment on the matter, writing to the Home Secretary George Grey that "Although the law officers are of opinion that no sufficient grounds yet appear for seizing the *Canton* under the Foreign Enlistment Act, there are sufficient grounds for not allowing her to leave" her port.[47]

This decision to detain the *Canton* already shows a fundamental dissimilarity to how the *Florida* case was handled. The case against the *Florida* was almost airtight: the evidence all pointed to the fact that the screw steamer was Confederate and would be used to wage war against the Union. Nonetheless, she was allowed to depart. The *Canton*, on the other

hand, was not going to be prevented from departing solely because she was suspicious. There was no evidence tying her to the Confederacy and she had clearly not been armed. There had been no violation of the Act; the law offficers had said as much when seizure was advised against. And yet orders had been given to detain the vessel, which was probably illegal.

Measures were quickly adopted to prevent her departure. Should the *Canton* attempt to leave the harbor, the Collector of customs was to detain her under Clause 19 and 102 of the Merchant Shipping Act (1854), requiring her to either make a Declaration of Nationality or obtain a Certificate of Registry before she could depart. When the ship's owners made steps to obtain either form of documentation, the collector of customs, who had the full cooperation of the Glasgow police, was to notify Moncrieffe, providing him with sufficient time to seize the vessel under the Foreign Enlistment Act. In the contingency that the *Canton* was cleared and departed before Moncrieffe could do so, a telegraph would be sent from Glasgow to the Collector of customs at Greenock, where clerks had been stationed night and day specifically for this purpose, who would notify Captain Farquhar, who was lying in wait onboard the *HMS Hogue* to take the *Canton* by force if he had to. An additional gunboat was stationed further down the river in case it somehow slipped past him. If the need should arise, Farquhar was authorized to station yet another gunboat in the harbor alongside the *Canton*.[48] Unless the Queen's government allowed it, the suspicious screw steamer would not be going anywhere.

Only three days after the chief constructor had made his report, everything was in place. The police, coast guard, and customs officials were all ready to act on a moment's notice to stop the *Canton* from leaving its port. Only one thing stood in the way of due process, and that was the law itself. The legal matter was a judicial nightmare; it was a complete mystery to everyone involved if the government had the right to seize the ship and try it under the Act. The Crown had yet to make a prima facie case in regard to the seventh section and belligerent shipbuilding in neutral Britain. It was not a matter of evidence: the Lord Advocate felt that there was "strong reason to doubt whether the most unlimited access to information would materially alter the legal question."[49] It was a question of whether or not the construction of vessels like the *Canton* and *Florida* were actually illegal under the Act. Whether or not Bulloch's interpretation of the law was correct was the fundamental issue. No one knew if Bulloch's actions violated the law, but the Lord Advocate suspected they did not.

> We have not as yet any evidence that the vessel is intended for the Confederate Service. But even if we had I doubt greatly whether it would be possible on these facts to bring the case under the 7th section of the Foreign Enlistment Act.... In the present case she has not equipped and no one has attempted to equip her, and therefore it may be said with much force that no one can have aided, assisted, or been concerned in her equipment. These difficulties occur to us so strongly that on the whole matter we are of opinion that any application to the Court for condemnation of the vessel would probably fail, and that mainly because the characteristics of this particular vessel in the state in which she will leave the Clyde are insufficient to bring her within the description of the statute.[50]

Moncrieffe believed that Judge Lees was correct in his interpretation of the law. The statute, it seemed, had not been violated: the vessel had not been equipped. Moncrieffe went on to ponder whether the sturdy construction of the *Canton* could be interpreted as a type of equipping, but found it incredibly unlikely that such an analysis would be upheld by the courts. Equipment, it seemed, was defined only as a proper armament. The Lord Advocate conveyed his aggravation in a private message to Sir Grey. "She is so suspicious a craft that I am loath to let her go. The fact seems to be that she has been built expressly to avoid the Act; but I fear has done so successfully."[51]

It was extremely fortunate that such a connection fell into the Crown's lap. On November 30, one of the part owners of the ship came forward with incriminating letters sent between George Sinclair, a Confederate agent working under Bulloch who superintending the construction of the *Canton*, and James Pembroke, the intermediary who brokered the transaction between Sinclair and the Thompson Shipbuilding Yard, which was responsible for building the cruiser. The owner even provided the contract for the deal, leaving "no doubt whatever as to the original destination or character of the vessel."[52] These letters, beyond demonstrating a Confederate connection to the *Canton*, were significant because they also make it quite clear that the British were doing everything they could to prevent the continuation of Bulloch's projects and those of the agents who worked under him, like Sinclair, despite the apparent lack of illegality. The connection was ironically uncovered in a series of letters in

which Sinclair terminated his contract for the *Canton* because of Britain's determined refusal to allow the ship to escape.[53]

> The unconcealed hostility of your government in many of its acts towards my country and the recently publicly expressed opinion of Earl Russell that he was prepared to go beyond and behind the Law…can leave no doubt on a candid mind that he will not permit the unarmed vessel…to leave England for fear she may find arms in some other part of the world and offend the Yankees.[54]

Her Majesty's officials did not keep it a secret that they believed Confederate shipbuilding activities impinged upon national obligations of neutrality in the American Civil War. Sinclair blames the British response on pressure from the Union, but such a claim has little validity. What the Confederacy was doing was not illegal, but it should have been. The construction of the *Canton* did not violate the letter of the law of the Foreign Enlistment Act, but it did overstep the statute's intent.

The British government had made a huge leap forward in establishing a definitive Confederate connection. As far as the Queen's officials were concerned, the termination of the contract was an inconsequential matter: though the *Canton* no longer had a purchaser, the ship had been commissioned by a Confederate agent and had been originally intended for Confederate use. It was now a question of whether or not that connection was enough to bring the ship within the scope of the Act based on whether or not the strict interpretation of the law's provision of equipping would remain synonymous with arming, or if intent to arm was within limit of the Act's applicability.

There was still no prima facie case on which to base the decision; the limits of the Act were still largely untested. However, it appeared that there would soon be such a case. While the struggle for the *Canton* was taking place, a nearly identical legal battle was underway for the screw steamer *Alexandra*, constructed in Liverpool and seized under the Foreign Enlistment Act for a violation of neutrality. The *Alexandra* had already been brought to trial, and a verdict was to be given at the end of December 1863, only several weeks after the discovery of the *Canton*'s connection with the Confederate States. This was convenient; the discovery of the *Canton*'s Confederate connection had brought it within the scope of the proceedings that would be established by the verdict of the *Alexandra* case, so the decision made about the limit of the law would be applicable. The Lord

Advocate therefore elected to wait before seizing the *Canton* until that verdict had been given. The fate of the *Alexandra* was to serve as the prima facie case that the Crown so desperately needed. Moncrieffe was hopeful, writing that a ruling for the Crown "would materially alter the position of the case and the difficulties which surround it."[55] It is therefore necessary to describe the circumstances surrounding the *Alexandra* before concluding the *Canton*'s tale.

The British investigation of the *Alexandra* began in late March 1863. Like the *Canton* and *Florida*, she was a screw steamer with an incredibly suspicious design. The collector of customs at Liverpool believed she was a Confederate vessel,[56] and the official Survey observed that "She is well adapted for a small gun boat."[57] Unlike the case of the *Canton*, however, the connection of the vessel to the Confederacy could be established almost immediately. Once again, Thomas Dudley's hard work had yielded results. In his deposition to the Collector of customs, he stated that the ship was meant for the Confederacy and that it had "intent to cruise and commit hostilities against the government and citizens of the United States of America," naming Bulloch as the man "superintending the building and fitting out" of the vessel.[58] Adams sent this document, along with thirteen others, including six affidavits and a number of incriminating letters implicating Bulloch in Confederate shipbuilding activities, to Earl Russell on March 30.[59]

In several of these letters, Bulloch himself makes clear references to the intent to arm another vessel, the *Alabama*, with munitions from the *Agrippina*, a cargo ship that had departed separately from Great Britain.[60] Bulloch was also connected to the construction of the *Alexandra* through the aforementioned affidavits. There was an obvious tie to the Confederacy and there was clear intent to arm, but that was insufficient grounds to justify seizing the cruiser.

> There does not appear to be any evidence shown that the *Alexandra* is equipped, fitted out or armed within the meaning of the Foreign Enlistment Act…. She is more strongly built…than customary in merchant vessels, but …[there is] no law to prevent a British shipbuilder from building a steamer of any strength he pleases.[61]

Customs officials therefore believed that it would be inexpedient to seize the vessel.[62]

In an interesting reversal of events, the law officers of Her Majesty's Government disagreed, arguing that the vessel should be seized under the Act. It was finally time to tests the limits of the Queen's neutrality.[63] The "important question as to the true construction of the 7th section of the Foreign Enlistment Act"[64] was to finally be addressed, the true purpose of the Act to be determined. The surveyor complied with the order, seizing the *Alexandra* at noon on April 5, bringing it into the full custody of Her Majesty's Government.[65]

The law officers justified the seizure of the *Alexandra* through the Act's provisions of "intent" and "fitting out," interpreting the statute elastically to adhere to the spirit of the law rather than its overly specific wording. If the Court agreed with their understanding of the law, then the lack of weapons would be inconsequential, outweighed by the clear intent for both Confederate usage and arming at a later time. As the law officers noted,

> It is to be observed that what is prohibited [by the Act] is the fitting out with the particular intent and that no specific mode of fitting out is pointed at. The intent constitutes the gist of the offence, and any fitting out, with the illegal intent, would appear to be illegal.[66]

Intent was fundamental, and the law officers hoped that a "fitting out" with intent to employ aggressively by the belligerent South would be within the limits of the Act. Fitting out and arming, they argued, were listed separately in the wording of the Act, and therefore "each expression, 'equipment, furnishing, fitting out, arming', ought to be construed as capable of a distinct meaning."[67]

The trial of the *Alexandra* pitted two interpretations of the statute against one another. On the one hand was Bulloch strict interpretation of the statute, which stipulated that Confederate shipbuilding activities had not violated the Act because the ship was not armed in British territory. All that had taken place was a commercial transaction. On the other hand was the Crown's understanding of the situation, arguing that the ship had been "fit out" by its unusual design, allowing for an obvious and easy transition into a formidable gunboat, and therefore an actual arming was unnecessary.

The long and protracted trial began on June 22, 1863. The Crown Prosecutor Roundell Palmer was pitted against Hugh Cairns and George Mellish, two of Britain's greatest legal minds and the Confederacy's defense, and was severely outclassed. The defense argued that the Crown was

misconstruing the purpose of the Act, arguing that it was not intended "to prohibit all commercial dealings in ships-of-war with belligerent countries," and that it was meant to "foster and promote the development of…commerce."[68] The *Alexandra* was not a warship, they argued, but a merchant vessel that had the potential to be converted into one. A British shipbuilder was building a merchant vessel for the Confederacy, and there was nothing illegal about that. What the Confederacy then chose to do with that vessel was in no way directly tied to the meaning of the Act.[69] Judge Frederick Pollock was of the same opinion as the defense. He asked the jury if they believed that it was lawful for a neutral nation to provide ships for a belligerent for use against a nation with which the neutral power was at peace. He answered his own question, stating that the law did not prohibit the sale of munitions, and he saw no reason why the sale of ships should be fundamentally dissimilar.[70]

When the time came for deliberations, Pollock's instructions to the jury made it quite clear that the issue at hand boiled down to the Act's meaning of "intent" and "equipping." He stated that if the jurymen believed that the intent of the agreement between the Confederate agent and the shipbuilders was to actually equip the *Alexandra* within British territory specifically for the purpose of war against the Union, then the Act had been violated and the defendants were guilty. However, if the members of the jury believed that "the object really was to build a ship…in compliance with a contract, leaving to those who bought it to make what use they thought fit of it, then it appears…that the Foreign Enlistment Act has not been broken," and the defendants should be acquitted and absolved of all charges brought against them. Jury deliberations lasted less than a minute before a "not guilty" verdict was returned on June 26, 1863.[71]

Pollock was no Southern sympathizer, nor was the jury pro-Confederacy. Bulloch had not violated the incredibly narrow scope of the seventh section of the Foreign Enlistment Act. The Crown finally had its prima facie case, though it did not go as the law officers had hoped. The decision legalized everything that Bulloch had done. Ships and munitions could be sold to the Confederacy as long as they were not sold together. As one newspaper stated after the trial, "this [ruling] makes construction and supplying of the *Alabama* and *Florida*…perfectly legal acts."[72] Another article summed the implications of the ruing perfectly, stating that this case

> furnishes one of the most important decisions ever recorded in the annals of British jurisprudence. It declarers that according to the present state of the law we can build &

> send out as many vessels as any belligerent party may require, provided that they are equipped elsewhere…. The law is in a very unsatisfactory state.[73]

With the establishment of the prima facie case based on the *Alexandra* verdict, it is clear how the case of the *Canton* would be resolved. With a known Confederate connection, a suspicious design, and a clear intent to arm at a later time, the evidence available in the case of the *Canton* was inconsequently different from the information available to the Crown in the *Alexandra* proceedings, and therefore there was no reason to believe that the trial would progress differently at all. If the *Canton* was seized and brought to trial, there would be no reason to believe that the Court would rule that the seizure was justifiable under the Foreign Enlistment Act.

The Crown was unwilling to accept the limitations of the Act. Though this preliminary decision of the *Alexandra* had been made in June, Lord Russell appealed the case twice. As a result, the ship remained in detention until spring 1864,[74] giving the British government time to act in regard to the *Canton*. The decision in the second appeal in the *Alexandra* case was to be given at the end of the judicial term in 1863, coinciding with the discovery of Sinclair's letter and the decision as to seize the vessel or not in December. The original plan was to wait on the outcome of the *Alexandra* decision, but at the last moment it was decided that the ruling would not be made until the following judicial term began over a month later.[75] Suddenly, the Crown officials found themselves in an entirely different scenario. The case was unresolved: the *Alexandra* decision was not pertinent to the *Canton*. The Crown believed that now was the time to take action, the Home Office writing to Lord Russell that "if there are in his Lordship's opinion sufficient grounds," then it would be expedient to proceed with "the seizure of the vessel" immediately.[76]

On December 10, 1863, the *Canton* was seized "for the use of Her Majesty under the provisions of the Foreign Enlistment Act."[77] The Foreign Office ordered that this seizure was to be maintained until the legal issue was determined,[78] despite cries of foul play by the owners and legal advisers of the vessel.[79] In an interesting turn of events that directly contradict the outcome of the *Alexandra* trial, it was ruled in a preliminary hearing to test the sufficiency of the Crown's evidence that it was unnecessary for the Crown to prove either an arming or an intent to arm, a decision that greatly enhanced the government's chance of success in court. As a result of this decision and to avoid expensive and extensive litigation, no effort was made to contest the case, and the British government won by default.[80] The *Canton*

remained in government custody until the war came to an end, released to its owners in 1865.[81] This initial ruling was, quite frankly, a very poor reading of the law. Had the Confederates actually gone to trial, it is extraordinarily unlikely that Her Majesty's Government would have been able to maintain the seizure. The *Canton* would have ended up much like the *Alexandra*.

Despite the precedence set by the *Alexandra* regarding the Foreign Enlistment Act's limitations, the *Alexandra* did not join the rebel cause until very late in the war, and the *Canton* did not make it at all. The Confederacy had won the legal battle, but Russell's appeals and the unlikely ruling of the *Canton* were still small victories for the British. The Foreign Enlistment Act had proved itself to be as burdensome and limited as ever, but England still prevented two formidable vessels from having a significant impact on Union commerce. The limit of neutrality was no longer a mystery, and whether or not the British government was willing to accept it was the question.

Aftermath

The American Civil War finally came to a close in 1865 with Robert E. Lee's surrender to Ulysses S. Grant at Appomattox Courthouse, Virginia. It had been a bloody and protracted war, lasting far longer than any contemporary observer could have imagined. The death toll was incredible: technological advances and strategic changes had made Northern and Southern forces efficient killers. Everyone at home tried to forget, but the international community did not have that luxury. Britain's work was not yet over.

British law was in a terrible state. The Foreign Enlistment Act had been defied for the sake of neutrality, defiling the purpose and sanctity of law. The war had begun for Britain with a clear desire to maintain strict and impartial neutrality. To define neutrality, the Foreign Enlistment Act of 1819 existed. However, the interpretations of the statute given in the *Florida* case and *Alexandra* decision demonstrated that British policy was not capable of doing what it meant to do. Britain tried time and time again to fulfill her duties as a neutral party, but she could not. Law prevented obligations from being completed, and so it became necessary to do more than what was legally permissible. The decision to go beyond the law was not made lightly or spontaneously; the definition of neutrality provided by the Act did not live up to the standards of those who were sworn to uphold the doctrine. Legal neutrality was not actual neutrality, and actual neutrality was what truly mattered. Now that the war was over, it was time to let the law catch up.

In the late 1860s, British officials began to propose changes to the Foreign Enlistment Act to widen its scope to more properly address the issue of intent. One suggested modification was to forbid dispatching ships with the knowledge that they would be employed by a belligerent power against another power that was friendly with Great Britain. Another would illegalize the construction of vessels with intent to employ in belligerent service after being fit out and armed either inside or beyond the Queen's dominion. A third proposed allowing for the detention of vessels suspected of violating the Foreign Enlistment Act on grounds of suspicion alone, the burden of proof falling on the accused to show their innocence rather than on the Crown to show guilt.[82]

Legal neutrality was not abandoned during the war for the sake of convenience, but for the sake of the fulfillment of national obligations in maintaining proper neutrality. Had these proposed clauses existed in the statute during the war, Bulloch's activities would have undoubtedly been halted immediately; there would have been no question if Confederate shipbuilding had violated the law. Great Britain did all she could to honor her Proclamation. The Queen's government adhered to the letter of neutral law for a time, but the Foreign Enlistment Act hindered true impartiality. As long as the statute was abided by, complete neutrality was impossible. Unshackling herself from the law was the only way England could properly uphold her duties.

[1] Mountague Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* (London: Longmans, Green, Reader, and Dyer, 1870), p. 118.
[2] Warren W. Hassler, Jr., "American Civil War," *Encyclopedia Britannica Online: Academic Edition*, accessed May 06, 2012. http://0-www.britannica.com.library.colgate.edu/EBchecked/topic/19407/American-Civil-War.
[3] Hassler, Jr., "American Civil War," *Encyclopedia Britannica Online*.
[4] "Privateer," *Encyclopedia Britannica Online: Academic Edition*, accessed May 06, 2012. http://0-www.britannica.com.library.colgate.edu/EBchecked/topic/477348/privateer. Privateers are private citizens and vessels that have been issued letters of marque by a government, authorizing them to attack foreign shipping during wartime. Privateering was a way to mobilize armed ships and sailors without having to spend public money or commit naval forces, which was especially beneficial for a power that was at a naval disadvantage, like the Confederate States, or if the enemy was reliant on trade, like the Union. Privateers disrupted commerce and pressured the enemy into deploying warships to protect their trade interests against these merchant raiders. Privateering was high-risk and high-reward, completely based on commission; captured vessels and cargo were brought to ports of the nation that had issued the letters of marque, and privateers were paid based on the value of the prizes they had taken. In many ways, privateering was less destructive than direct warfare: the goal was to capture ships, not to sink them.
[5] Duncan Andrew Campbell, Unlikely Allies: Britain, America, and the Victorian Origins of the Special Relationship. London (New York: Hambledon Continuum, 2007), pp. 143-4.
[6] Frank J. Merli, *Great Britain and the Confederate Navy, 1861-1865* (Bloomington: Indiana University Press, 1970), p. 54.
[7] Merli, *Great Britain*, p. 63.
[8] Merli, *Great Britain*, p. 63.
All of the major European powers, not only Britain, had declared a state of neutrality in the American conflict. British neutrality regulations were less stringent than those of France and other nations considered as the site of the operation, which was also influential in the Confederate Government's decision to carry out the plan in England.
[9] 5/13/1861, British Proclamation of Neutrality: FO 5/1315, NA.
[10] Merli, *Great Britain*, p. 41.
[11] 5/16/65, Bright-Sumner, quoted in Merli, *Great Britain*, p. 41.
[12] Merli, *Great Britain*, p. 65.

[13] 5/13/1861, British Proclamation of Neutrality: FO 5/1315, National Archives (hereby abbreviated NA).
[14] 5/13/1861, British Proclamation of Neutrality: FO 5/1315, NA.
[15] Merli, *Great Britain*, p. 68.
[16] 5/13/1861, British Proclamation of Neutrality; enclosure of the Foreign Enlistment Act: FO 5/1315, NA.
[17] Merli, *Great Britain*, p. 71.
[18] Merli, *Great Britain*, p. 72.
[19] Merli, *Great Britain*, p. 61.
[20] Although the Confederacy worked to construct nearly twenty vessels in England, this paper focuses on only four of those cases. These instances of Confederate shipbuilding were selected because they represent the trend of the British response to the Foreign Enlistment Act as the war progressed.
[21] Bernard, *A Historical Account*, p. 507.
[22] Merli, *Great Britain*, p. 257; Frank J. Merli, *The Alabama, British Neutrality, and the American Civil War* (Bloomington: Indiana University Press, 2004), p. 175.
[23] Bernard, *A Historical Account*, p. 338.
[24] As discussed earlier, wood was used because it was light and cheap. Furthermore, wood posed a less open challenge to neutrality than iron by making it more difficult to determine the builder's true purpose.
[25] Merli, *Confederate Navy*, p. 63; Cross, *Lincoln's Man in Liverpool*, p. 27.
[26] Coy F. Cross, *Lincoln's Man in Liverpool: Consul Dudley and the Legal Battle to Stop Confederate Warships* (DeKalb: Northern Illinois University Press, 2007), pp. 26-7.
[27] Dudley-Seward, 1/31/62: Diplomatic Correspondence 24, Liverpool National Archives, quoted in Cross, *Lincoln's Man in Liverpool*, p. 27.
[28] Cross, *Lincoln's Man in Liverpool*, p. 27.
[29] Merli, *Confederate Navy*, p. 68.
[30] Bernard, *Historical Account*, p. 338.
[31] Bernard, *Historical Account*, p. 338.
[32] Memorandum 5/14/62: FO 5/1313, NA.
[33] Merli, *Great Britain*, p. 70.
The Bahamas were British colonies at the time, and were therefore neutral under the regulations of the Foreign Enlistment Act of 1819. The Bahamas were therefore neutral British territory, arming a vessel for the Confederacy would be a violation of neutral regulations.
[34] 8/7/62, Court Memorandum: FO 5/1314, NA.
[35] Cross, *Lincoln's Man in Liverpool*, p. 34.
[36] Merli, *Great Britain*, p. 71.

[37] 8/11/62, Bayley-Newcastle: FO 5/1313, NA.
[38] Merli, *The Alabama*, p. 94.
[39] 10/15/63, Warner Underwood-C.F. Adams: FO 5/1051, NA.
[40] 10/22/63, Captain Arthur Farquhar-Customs House (hereby abbreviated CH): FO 5/1051, NA.
[41] 10/25/63, Farquhar-CH: FO 5/1051, NA.
[42] 10/20/63, Collector of customs-CH: FO 5/1051, NA.
[43] 10/20/63, Surveyor-CH: FO 5/1051, NA.
[44] 10/15/63, Underwood-Adams: FO 5/1051, NA.
[45] 11/06/63, James Moncrieffe-George Grey: FO 5/1051, NA.
[46] 11/10/63, Edward J. Reed-Commissioners of the Admiralty: FO 5/1051, NA.
[47] 11/13/63, Commissioners of the Admiralty-George Grey: FO 5/1051, NA.
[48] 11/18/63, Crown Officer-Moncrieffe: FO 5/1051, NA.
[49] 11/19/63, Lord Advocate-Home Office (hereby abbreviated HO): FO 5/1051, NA.
[50] 11/19/63, Lord Advocate-HO: FO 5/1051, NA.
[51] 11/19/63, Moncrieffe-Grey: FO 5/1051, NA.
[52] 12/01/63, Lord Advocate-HO: FO 5/1051, NA.
[53] 11/30/63, Galbraith-Prosecutor Fiscal; enclosed 9/24/62, Sinclair-Pembroke: FO 5/1051, NA.
[54] 11/30/63, Galbraith-Prosecutor Fiscal; enclosed 10/02/62, Sinclair-Pembroke: FO 5/1051, NA.
[55] 12/02/63, Moncrieffe-Grey: FO 5/1051, NA.
[56] 3/28/63, Collector of customs-Treasury Commissioners: FO 5/1048, NA.
[57] 3/28/63, Surveyor-Collector of customs: FO 5/1048, NA.
[58] 3/28/63, Collector of customs-Treasury Commissioners; enclosed Consul Dudley's deposition: FO 5/1048, NA.
[59] 3/30/63, Adams-Russell: FO 5/1048, NA.
[60] 3/30/63, Adams-Russell; enclosed 1/30/62, Bulloch-Mallory; 7/28/62, Bulloch-C.R. Young; 8/24/62, Semmes-Bulloch: FO 5/1048, NA.
[61] 3/30/63, Board of Customs-Treasury Commissioners: FO 5/1048, NA.
[62] 4/02/63, Customs House-Treasury: FO 5/1048, NA.
[63] 4/04/63, HO-Treasury: FO 5/1048, NA.
[64] 4/24/63, Foreign Office Memorandum: FO 5/1048, NA.
[65] 4/05/63, Surveyor-Collector of customs: FO 5/1048, NA.
[66] 4/24/63, FO Memorandum: FO 5/1048, NA.
[67] 4/24/63, FO Memorandum: FO 5/1048, NA.
[68] Merli, *Great Britain*, p. 164.
[69] Merli, *Great Britain*, p. 165.
[70] Merli, *Great Britain*, p. 165.
[71] Merli, *Great Britain*, p. 165.

[72] 6/26/63, Liverpool *Daily Courier*: FO 5/1048, NA.
[73] 6/27/63, Southampton *Times*: FO 5/1048, NA.
[74] Merli, *Great Britain*, p. 166.
[75] 12/5/63, Waddington-Hammond: FO 5/1051, NA.
[76] 12/5/63, Waddington-Hammond: FO 5/1051, NA.
[77] 12/10/63, Trevor-CH: FO 5/1051, NA.
[78] 12/11/63, FO-Treasury: FO 5/1051, NA.
[79] 12/14/63, Henderson-CC: FO 5/1051, NA.
[80] Merli, *Great Britain*, p. 126.
[81] 10/19/65, Moncrieffe-Hammond: FO 5/1051, NA.
[82] Bernard, *Historical Account*, pp. 405-6.

Works Cited

Adams, Ephraim D. *Great Britain and the American Civil War*. Volumes 1 and 2. New York: Longmans, Green and Co., 1925.

Bernard, Mountague. *A Historical Account of the Neutrality of Great Britain during the American Civil War*. London: Longmans, Green, Reader, and Dyer, 1870.

Campbell, Duncan Andrew. *Unlikely Allies: Britain, America, and the Victorian Origins of the Special Relationship*. London, England.: New York: Hambledon Continuum, 2007.

The National Archives (TNA), *FO 5/1000 Case of the Ironclads built at Birkenhead vol. 1 – vol. 4.,* (London, United Kingdom: Foreign Office, 1863 – 64), correspondences: 7/11/63 Adams-Russell, 9/4/63 Russell-Layard, 9/5/63 HO-Layard, 9/11/63 Russell-Adams, 9/12/63,Russell Memo, 10/8/63 Hammond-Secretary of the Admiralty, 10/8/63 Hammond-Secretary of the Treasury, 10/23/63 Colquhoun-Russell, 10/28/63 Hammond-Secretary of the Admiralty, 11/3/63 Hammond-Secretary of the Admiralty.

TNA, *FO 5/1003 Case of the Ironclads built at Birkenhead vol. 1 – vol. 4.,* (London, United Kingdom: Foreign Office, 1863 – 64), correspondences: 12/23/63 Colquhoun-Russell, 1/12/64 Laird Brothers-Lord Commissioners of the Treasury, 1/14/64 Russell-Treasury, 1/25/64 Laird Brothers-Treasury, 2/2/64 Russell-Treasury, 2/3/64 Laird Brothers-Treasury, 2/6/64 Russell-Treasury, 3/10/64 Foreign Office-Colquhoun, 3/29/64 Foreign Office Memorandum, 4/8/64 Colquhoun-Russell, 4//10/64 Colquhoun-Russell, 5/20/64, Colquhoun-Russell, 5/20/64 Gregory-Greenwood, 5/20/64 Rowcliffe-Lairds and Others, 5/26/64 Greenwood-Rowcliffe.

TNA, *FO 5/1313 Case of the Oreto or Florida, vol. 1.,* (London, United Kingdom: Foreign Office, 1862), correspondences: 5/14/62 Memorandum, 8/11/62 Bayley-Newcastle.

TNA, *FO 5/1314 Case of the Oreto or Florida, vol. 2*., (London, United Kingdom: Foreign Office, 1864), correspondences: 8/7/62 Court Memorandum.

TNA*, FO 5/1315 Case of the Sumter or Gibraltar, vol. 1.,* (London, United Kingdom: Foreign Office, 1861 – 63), correspondences: 5/13/61 British Proclamation of Neutrality.

TNA, *FO 5/1048 Case of the Alexandra*, (London, United Kingdom: Foreign Office, 1863-64), correspondences: 3/28/63 Collector of customs-Treasury Commissioners, 3/28/63 Surveyor-Collector of customs, 3/30/63 Adams-Russell, 3/30/63 Board of Customs-Treasury Commissioners, 4/02/63 Customs House (hereby abbreviated CH)-Treasury, 4/04/63 HO-Treasury, 4/05/63 Surveyor-Collector of customs, 4/24/63 Foreign Office Memorandum, 6/26/63 Liverpool *Daily Courier*, 6/27/63 Southampton *Times*.

TNA, *FO 5/1051 Case of the Canton or Pampero,* (London, United Kingdom: Foreign Office, 1863), correspondences: 10/15/63 Warner Underwood-C.F. Adams, 10/20/63 Collector of customs-CH, 10/20/63 Surveyor-CH.[1], 10/22/63 Captain Arthur Farquhar-CH, 10/25/63 Farquhar-CH, 11/06/63 James Moncrieffe-George Grey, 11/10/63 Edward J. Reed-Commissioners of the Admiralty, 11/13/63 Commissioners of the Admiralty-George Grey, 11/18/63 Crown Officer-Moncrieffe, 11/19/63 Lord Advocate-Home Office (hereby abbreviated HO), 11/19/63 Lord Advocate-HO, 11/19/63 Moncrieffe-Grey, 11/30/63 Galbraith-Prosecutor Fiscal, 12/01/63 Lord Advocate-HO, 12/02/63 Moncrieffe-Grey, 12/5/63 Waddington-Hammond, 12/5/63 Waddington-Hammond, 12/10/63 Trevor-CH, 12/11/63 Foreign Office-Treasury, 12/14/63 Henderson-CC, 10/19/65 Moncrieffe-Hammond.

TNA, *FO 83/2218 Law Officers' Reports, America*, *US*, (London, United Kingdom: Foreign Office, 1863), correspondences: 7/11/63 Price Edwards-CC, 7/24/63 Law officers of the Crown (hereby abbreviated LOC)-Russell, 8/12/63 Dickins-Peel, 8/19/63 Palmer-Waddington, 8/31/63 Russell-Chairman and Committee of the Emancipation Society, 9/6/63 Russell-Adams.

TNA, *FO 83/2219 Law Officers' Reports, America, US*, (London, United Kingdom: Foreign Office, 1863), correspondences: 9/1/63 Layard-LOC, 9/1/63 Layard-Hamilton, 9/3/63 Layard-Hamilton, 9/4/63 Layard-Solicitor General, 9/12/63 LOC-Russell, 9/23/63 Grey-Russell, 10/10/63

Hammond-LOC, 10/10/63 Hammond-LOC, 10/19/63 LOC-Russell, 10/21/63 LOC-Russell, 10/26/63 Hammond-LOC.

Hassler, Jr., Warren W. "American Civil War." *Encyclopedia Britannica Online: Academic Edition*. Accessed May 06, 2012. http://0-www.britannica.com.library.colgate.edu/EBchecked/topic/19407/American-Civil-War.

Merli, Frank J. *Great Britain and the Confederate Navy, 1861-1865*. Bloomington: Indiana University Press, 1970.

Merli, Frank J. and David M. Fahey. *The Alabama, British Neutrality, and the American Civil War*. Bloomington: Indiana University Press, 2004.

Owsley, Frank Lawrence. *King Cotton Diplomacy: Foreign Relations of the Confederate States of America*. Chicago: University of Chicago Press, 1959.

"Privateer." *Encyclopedia Britannica Online: Academic Edition*. Accessed May 06, 2012. http://0-www.britannica.com.library.colgate.edu/EBchecked/topic/477348/privateer.

Steele, Brent J. "The Power of Self-Identity: British Neutrality and the American Civil War," in *Ontological Security in International Relations: Self-Identity and the IR State*, 76-93. New York: Routledge, 2008.

Freedom of Exercise v Separation of Church and State: A Comparative Analysis of France and the United States

Ruth Woodard
University of Virginia

Abstract:
This paper examines the differences between U.S. and French law regarding freedom of religion, and the tensions present in each country between the right of the individual to practice his religion and the role of the state as a secular or religion-neutral entity. I will argue that while the United States tends to value the individual over the state, France tends to value the collective as the highest expression of freedom. This in turn leads to an emphasis on freedom of expression in the United States (protected not only by the free exercise clause but also by the free speech clause) and to an emphasis in France on the separation of church and state as well as the protection of a secular public space. I will make the case that the best explanation for these differing traditions can be found in the history and philosophical traditions unique to each country. In the United States, historical fears of the state becoming a tool of oppression led to a greater concern for the protection of individual liberties than for the creation of a nationally cohesive group. In France, however, the state has traditionally been seen as the only entity with the ability to forge a cohesive national identity through which true freedom could be found. The subordination of individual preferences regarding religion in order to achieve the common good has therefore been granted more importance in France than in the United States These differences, based on differing historical experiences and philosophical traditions, will be examined by using the French headscarf cases as a point of reference to explore both the French method of interpretation of the proper limits of freedom of religion and the opposing American conception of freedom of exercise and expression.

> Upon my arrival in the United States, the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more did I perceive the great political consequences resulting from this state of things, to which I was unaccustomed. In France I had almost always seen the spirit of religion and the spirit of freedom pursuing courses diametrically opposed to each other; but in America I found that they were intimately united, and that they reigned in common over the same country.
> —Alexis de Tocqueville, *Democracy in America*[1]

The United States and France have two of the longest histories in the world of operating under written constitutions: the United States ratified its present constitution in 1787, and France created its first constitution in 1791. Both countries created almost contemporaneously written guarantees of individual liberty and civil rights: both the Bill of Rights and the Declaration of the Rights of Man and the Citizen were written and adopted in 1789. And yet for all their similarities, France and the United States have chosen deep differences in their respective approaches to governance and the acceptable level of government activity in the lives of their citizens. A comparative study of the two nations that takes into account the apparent commonalities of their histories and values will bring these points of divergence into focus.

I will argue that one such point of divergence is in the interpretation of the freedom of religion, a freedom that is enshrined in each of the documents respecting civil liberties above. A strong argument can be made that the differences between the French and American constitutional approaches to the issue of freedom of religion—both freedom of exercise and separation of church and state—reflect the societal, cultural, and political differences between the two countries, leading to different opinions about seemingly similar values concerning fundamental rights of citizens regarding religion. In order to understand the nuances of these varying approaches to state-individual relations, I will begin with an examination of how the nebulous concept of freedom of religion is understood in both France and the United States. I will then consider the historic and cultural basis for the differing interpretations of that concept in each state. Finally, I will use the example of the French headscarf cases as a point of departure between the American and French traditions of interpretation to demonstrate

the opposing methods used by each country to determine the balance of individual versus collective rights in the realm of religion.

To begin a comparison of constitutional law regarding freedom and exercise of religion between France and the United States, it is important to define what exactly is meant by the rather broad and vague term freedom of religion, as well as the ways in which the two countries' understandings of the term diverge in some respects and overlap in others. For both France and the United States, freedom of religion can be seen as encompassing two fundamental values often in conflict with one another: the freedom of the individual to exercise his religion freely, sometimes referred to as free exercise or freedom of conscience, and the general principle of state separation from religion, provided for by the establishment clause in the United States and the concept of *laïcité* in France. The latter of which encompasses both the principle that government in all its forms must be kept completely apart from religion and the expectation that government has a positive duty to protect a religion-free public zone.[2] Both freedoms are inherent in a complete understanding of the concept of freedom of religion, and yet they often offer opposing normative judgments about exactly which restrictions on religion are and are not acceptable.

Particularly in American case law, this leads to seemingly arbitrary and contradictory rulings. Should the state, for example, impose a burden on a citizen's right to practice his religion by refusing to grant him unemployment benefits because he was fired for refusing to work on his holy day, or should the state merely perform its duty to maintain the clear boundaries between it and religion, which prevent it from preferring one particular denomination over another or over no religion?[3] Both the United States and France perform a balancing act between these two principles. Sometimes the scales tip towards the right of the individual to exercise his religion freely, and at other times they are weighted towards maintaining a more clearly demarcated line between the state and religion. However, the United States and France are each predisposed to tip the balance on one side of the scales more frequently than the other, and to tip in opposite directions.[4] The Supreme Court of the United States more often errs on the side of the individual's right to practice whichever religion he so chooses in the manner he sees fit, whereas the *Conseil d'Etat* of France more often embraces a strict separation of the government from entanglement with religion.

Historic Origins of French Interpretations of Religious Freedom

The unique historical circumstances and philosophical traditions under which the founding documents that guarantee freedom of religion in the United States and France developed are responsible for the differences between how the guarantees are interpreted. Daniel Conkle, professor of law and adjunct professor of religion at Indiana University Bloomington, points to the broad political-philosophical traditions of each nation, noting that France has been more strongly influenced by the thought of Rousseau and therefore views the highest responsibility of the state as creating societal cohesion, as opposed to protecting the natural rights of the individual, as in the Lockean American tradition.[5] Conkle argues that the need to ensure that society is a cohesive unit necessarily leads the French to place much higher value and importance not merely on the division of church and state, but also on the positive and sometimes aggressive protection and promotion of a secular French state espousing secular French values. Furthermore, French values have always emphasized assimilation, and the creation of a socially cohesive state.[6] Individual rights in the French tradition, then, are not merely individual—they serve the purpose of assuming the integration of every citizen into the national community.[7] These traditions could be seen today in the relationship between the government and its citizen in France in the context of the welfare state, which places utilitarian benefits of the whole above the desires of the individual.

With this philosophical background in mind, the history of *laïcité* is brought into sharper focus. T.J. Gunn, senior fellow for religion and human rights at the Emory University School of Law, traces the development of *laïcité* to two major periods in French history: the first five years following the Revolution of 1789 and the period beginning in 1879 culminating in the Law of 1905.[8] Gunna argues that although freedom of religion was enshrined in the founding documents of the Revolution, notably the Declaration of the Rights of Man and the Citizen of 1789,[9] in practice the picture was not so utopian, and indeed, the principle of free exercise embodied in Article Ten of that document was at the same time subordinated to the goal of a secular state.[10] The revolutionaries saw the Catholic Church and its clergy as having been complicit in the restriction of the rights of the people under the *ancien régime.* Thus, immediately following the Revolution, a series of laws were passed, in particular the Civil Constitution of the Clergy of July 12, 1790,[11] reorganizing the Church based on control and ownership by the French government and most importantly, requiring all clergy to take an oath of loyalty to the new France.[12] Finally, after the worst of the Terror was over in 1795, a new law on the separation of church and state was passed by the Constituent Assembly. This law guaranteed the

freedom of worship; however, in what now seems to be a particularly portentous piece of foreshadowing, the law also forbade priests and other clergy from wearing their religious clothing in public.[13] The overall effect of this era in French history is significant for a full understanding of the French attitude towards religion today. By forcing a choice between religion and citizenship, the modern French state at its very naissance sent the signal to its people that "a person could not be genuinely Catholic and genuinely French."[14] This particular method of framing the interaction between personal religion and collective belonging recurs in French thought and is highly present today as France struggles with an immigrant population which refuses to subsume its religious identity to secular French values.

The second period of French history with a direct bearing on the evolution of *laïcité* is, roughly, the two decades leading up to the Law of 1905. In this period, over twenty-four laws were passed promoting the concept of *laïcité*. During this time, education was secularized: in 1882, religious instruction was banned from public education, which was made mandatory for both girls and boys.[15] These years of secularization culminated in the Law of 1905,[16] which formally separated church and state as well as provided renewed protection for the exercise of religion. Yet, as with the Declaration of Rights, the free exercise of one's religion was assumed to be subordinate to the need for a secular state. Jean Jaurès, the founder of the French Socialist Party and an important supporter of the Law of 1905, described the reasoning behind its adoption and the function of the principle of *laïcité* in government and education in an address at the Collège de Castres in 1904. According to Jaurès, although "[democracy] respects and assures the complete and necessary freedom for all opinions, for all beliefs, and for all religious practices," the exercise of religion and education must be kept wholly separate in order to prepare children for life in a secular society.[17] This view demonstrates not only the French attitude towards religion, namely that it "relates only to the individual conscience" but also the strong assumption that the public spheres as represented by "the social and legal order" are "essentially secular."[18] These words demonstrate the French concept that the most important function of the state is to create a coherent society rather than to protect the right of the individual to live his life as he sees fit. Religion is something which is entirely personal and should not cross in any fashion into the public realm; the state is more interested in maintaining the secular nature of the public realm than it is with maintaining the rights of its citizens to worship in the private realm.[19]

Historic Origins of American Interpretations of Freedom of Religion

The American approach to the freedom of religion is also deeply rooted in cultural and historical traditions which, like its French counterpart, were developed in times of religious conflict. Though many who settled in the early American colonies were themselves fleeing religious persecution, they did not hesitate to set up their own laws embodying intolerance and persecution.[20] Many colonies had established churches, which were supported by taxes levied on the entire population. Quakers and Catholics were fined, arrested, and even killed. Gradually, however, the colonies moved towards greater religious freedom, at least for Christians. Even so, this movement was less towards the positive freedom to worship as one chose and more towards freedom from harassment or persecution.[21]

By the time of the writing of the Constitution there was a general consensus that religious freedom needed to be protected by the state, but there was much disagreement on the best way to go about the task. Some, like Madison and Jefferson, argued for full separation of church and state—the high-wall theory—while others preferred a system in which government support for one particular religion or denomination over another was banned, but general support for all religions was allowed. This is called nonpreferentialism.[22] This debate between high-wall theory and nonpreferentialism has never fully been settled. The Constitution's ban on "laws respecting an establishment of religion" has been interpreted by those sympathetic to government aid for religion as allowing nonpreferential support even today, and decisions by the Supreme Court would seem to support this. Even in *Everson v Board of Education of Ewing Township* (1947),[23] the case in which Justice Hugo Black wrote the high-wall theory into constitutional law when holding the establishment clause applicable to the states, the government was allowed to pay for the costs of busing children to parochial schools.[24]

Furthermore, in striking contrast to the sentiments of Jean Jaurès, the attitude in America towards the teaching of religion in schools—so long as it was Protestant—was overwhelmingly positive well into the 20th century. In 1890, Josiah Strong, an influential nativist, argued in his book *Our Country*, "Schools are 'the principal digestive organ' of the body politic, and their purpose is to absorb the 'children of strange and dissimilar races' and transform them all into 'Americans.'"[25] Elaborating on this point, he argued that while teaching Protestant Christian values in public schools was necessary, the teaching of Catholic values was anathema to the purpose of creating Americans: "The object of the public school is to make good

citizens. The object of the parochial school is to make good Catholics."[26] While Jaurès argued passionately against the teaching of religion in schools, and Strong argued passionately for doing so, I would argue that their view of the purpose of public education is remarkably similar: both saw public schools as the birthplace of citizens and as a great homogenizer necessary to create a unified and cohesive social state.[27] The United States has since moved away from Strong's views, embracing a relatively more pluralistic and immigrant-friendly national philosophy, but the French view is still quite similar to that which Jaurès outlined in 1904.[28] As T.J. Gunn points out, "The 'greatest function' of the French school [i]s not academic training, but the teaching of patriotism."[29] This distinction will be extremely significant when it comes to the task of understanding the difference between French and American conceptions of the freedom of religion.

The Role of the State in the French Headscarf Cases

The most interesting and salient example of the differences in interpretation of the principle of freedom of religion between the United States and France is embodied in the French headscarf cases. The controversy revolves around the growing Muslim immigrant population in France, much of it from the Maghreb, the North African region composed of former French colonies. With this growing immigrant population, the first mass immigration France has ever experienced (in contrast to the experience of the United States with several waves of mass immigrants), the issue of accommodating new religious practices into French public spaces emerged.[30] In light of the French view of the purpose of the institution of public education (that is to reinforce the values of the French secular state) the desire of young Muslim girls to wear the traditional religious headscarf (*foulard* in French) in public schools has created division within France since the late 1980s.[31]

The first legal incident concerning this controversy came in 1989. In September of that year, three Muslim girls were expelled from their public school for refusing to remove their headscarves. The expulsion made the national news and ignited a heated debate as to whether or not this action was justified. The Minister of Education, Lionel Jospin, subsequently asked the *Conseil d'Etat* to issue an advisory opinion, or *avis*, on the question of whether or not a student wearing religious clothing in a public school violated the principle of *laïcité*.[32] The *Conseil* advised that wearing religious clothing did not, in fact, violate *laïcité* and reinstated the girls in their school. In their decision, the *Conseil* defined *laïcité* as requiring not only

state neutrality towards religion (in this case represented by teachers and administrators) but also respect for the individual right of freedom of conscience for students.[33]

In reaching this decision, the *Conseil* took into account the Preamble of the Constitution of 1946, which provided for "the provision of free, public, and secular education at all levels" and Article Two of the Constitution of 1958, which states that "France shall be a…secular…Republic," and that "it shall ensure the equality of all citizens before the law, without distinction of origin, race or religion."[34] The *Conseil* took this last phrase, along with Article Ten of the Declaration of the Rights of Man and the Citizen—"No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established law and order"—to mean that students had the right to manifest their religion, including wearing religious clothing or symbols in school, so long as the wearing of such symbols did not create a disruption or have a proselytizing effect.

For a considerable amount of time following this, the issue of Islamic headscarves in public schools seemed to be dying out. Then, in 2003, the controversy was reignited when the Prime Minister, Jean-Pierre Raffarin, told a French radio station in an interview that in his opinion, headscarves should be "absolutely" prohibited in the setting of public schools.[35] The topic was soon seized upon by the media and quickly became one of the most talked-about subjects in the country. Following this heated discussion, President Jacques Chirac created a commission to analyze the practice of *laïcité* in the Republic. The commission, popularly known as the Stasi Commission after the surname of its chairman, made several recommendations, including the banning of headscarves in public schools. The Commission justified its recommendation on the basis that young Muslim girls were often pressured into wearing the foulard by their male relatives, and that allowing headscarves in public schools only served to reinforce the idea that those who did not wear the foulard were somehow inferior. Arguing further, the Commission declared that permitting the wearing of headscarves in public schools violated the "space of neutrality" essential to development and learning.[36] Legally, the Stasi Commission justified a ban on headscarves under the well-established "public order" (*l'ordre publique*) doctrine, analogous to the American state "police powers," which holds that individual rights may only be restrained if necessary to maintain the public security, tranquility, or health.[37] However, as T.J. Gunn has pointed out, the Commission did not rely on any empirical data nor did it conduct systematic surveys of those who chose to wear the

foulard and those who did not in order to ascertain their exact motivations.[38] In short, the Commission, as many other European courts and legislative bodies have done, failed to seriously consider the possibility that Muslim girls might actually want to wear the foulard. In doing so, they viewed the headscarf not as an expression of religion, but as a political symbol and a "reminder of subjection of women or even of Islam fundamentalism."[39] As per the recommendations of the Commission, a law banning conspicuous religious clothing in public schools was adopted March 15, 2004.[40]

There is one further aspect of the French system that differs from the American and that must be considered: the obligation of the French state to adhere to the European laws and treaties that it has signed and pledged to obey as a member of the European Union. This is an area in which the United States has little experience, but which is of vital importance for EU member nations and for France in particular, acting as it has as the driving force behind much of the project of European integration during the past sixty years. Most importantly, France must abide by any decisions made regarding its laws which citizens or interest groups have challenged in the European Court of Human Rights (ECtHR) as a violation of the Convention of Human Rights. Article Nine of the Convention reads:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[41]

Allowing the involvement of the ECtHR raises the possibility of recourse for those Muslim girls wishing to wear their headscarves in public school, but this is not as promising as it might seem. In June 2004, the ECtHR ruled in *Leyla Sahin v Turkey*, a case arising out of a ban on the wearing of headscarves on university campuses in Turkey, that the ban was necessary for fostering secularism.[42] In its decision, the ECtHR noted that it had held in previous decisions that "in a democratic society the State [is]

entitled to place restrictions on the wearing of the Islamic headscarf if it [is] incompatible with the purported aim of protecting the rights and freedoms of others, public order and public safety." Further, the ECtHR added that the headscarf, due to the fact that it was such a "powerful external symbol" could have "some kind of proselytizing effect," much as the Stasi Commission did.[43]

More recently, in 2008, the ECtHR ruled in *Dogru v France,* a case regarding a French girl expelled from her public school in 1999 (before the enactment of the Headscarf Law in 2004) for refusing to remove her headscarf during physical education classes. In its decision, the ECtHR noted the importance of secularism to the founding of the French state and the deep roots of *laïcité*. Citing its earlier decision in *Leyla Shan*, the ECtHR ruled that France had not violated Article Nine, writing, "The conclusion reached by the national authorities that the wearing of a veil…was incompatible with sports classes for reasons of health or safety is not unreasonable."[44] This case demonstrates that the ECtHR is reluctant to interfere with the decisions of member states unless the violation is particularly clear and egregious, and that it also gives a healthy amount of latitude to the interpretation of what exactly constitutes a threat to "public order." In light of these decisions, it is highly unlikely that the French law will fall—at least through the channel of the ECtHR. Barring a sudden transformation of public opinion, the headscarf law is here to stay.

Freedom of Exercise in U.S. Case Law

The headscarf law strikes many Americans as a complete invasion of personal liberty, and it would certainly never pass constitutional muster in the United States. However, many of the Supreme Court's decisions regarding the freedom of religion, notably those regarding displays of the Ten Commandments, would seem just as absurd to the French. In order to understand the fundamental differences between the French and American approach to freedom of religion and to fully discuss the American Ten Commandments cases, we must first examine U.S. constitutional principles and methods of interpretation in this area. Nevertheless, it is also important to note that while various traditions of interpretation can be identified, the application of each depends on the composition of the Supreme Court and the facts of the case before it.

A brief review of the broad methods of interpretation of the constitutional protection of the freedom of religion, as a basis for the examination of cases, is therefore useful in order to ascertain how the

balance between individual freedom and state interests has been perceived in different ways. This holds particularly true for cases such as the Ten Commandments, which present similar facts yet receive differing judgments. Generally, there are three competing theories of interpretation of the First Amendment's protection of individual religious freedom and prohibition of state religion: strict separation, strict neutrality, and accommodation. Strict separation, the guiding principle behind *Everson v Board of Education of Ewing Township* (1947), requires state neutrality amongst all religions and a secular purpose for legislation, but permits indirect benefits for religion. Strict neutrality, the interpretation most similar to French *laïcité*, requires not only a secular purpose but also secular effects—no indirect aid for or burden on religion is permitted. This approach was used in *Abington School District v Schempp* (1963), which banned prayer in public schools. Finally, accommodation, while also requiring secular purpose, is more flexible than strict separation and permits aid for all religions without discrimination. While for a time under the Warren Court strict neutrality seemed to be gaining the upper hand, under the Burger and Rehnquist Courts more accommodation of religion has been permitted.[45]

Although a nuanced understanding of the competing interpretations of the freedom of religion is important, for comparative purposes, it is necessary to synthesize the American approach into a general principle. David Conkle does so successfully when he explains the U.S. approach to religious freedom as "benevolent neutrality" that "generally demands that the government not favor religion over irreligion, but, as an apparent exception, it permits some governmental expression that seems to violate this principle."[46] As an example of the demand on the government to be neutral between religion and no-religion, Conkle cites *Santa Fe Independent School District v Doe* (2000), a case in which the Court held that school-sponsored prayers before football games, even when given by a student, were impermissible because they would not be purely private expression but rather would have the weight of the school board behind them.[47]

This prohibition against government sponsorship of religion is the guiding principle behind two seemingly contradictory cases involving displays of the Ten Commandments, *Van Orden v Perry* (2005) and *McCreary v ACLU of Kentucky* (2005). In *Van Orden*, the Rehnquist Court held that a display of the Ten Commandments erected by a civic organization on the grounds of the Texas State Capital did not violate the Establishment Clause. In contrast, a display of the Ten Commandments located within the courthouse in *McCreary* was held to be unconstitutional because the purpose of the government was clearly non-secular and because

unlike in *Van Orden*, where the monuments had stood for forty years without challenge, the display in *McCreary* lacked the historical nature necessary for an exception to the ban on government expression of religion. Therefore, a different result was achieved in *McCreary* than in *Van Orden*, two cases with essentially the same facts, decided on the same day.

To many, this result seems arbitrary—a case of the Court twisting its interpretation to get the result it wants (note that Rehnquist doesn't uphold the precedent set by *Stone*[48] and barely mentions the *Lemon* test in *Van Orden* while Souter relies heavily on both *Stone* and the *Lemon* test in *McCreary*).[49] Yet for the purposes of comparing the American and French approaches to the freedom of religion, these two cases stand out as an example of just how much more willing the United States is to accommodate religious expression, even when it comes from the government, much less an individual in a governmental setting. These cases indicate just how differently Americans and French view their public spaces. The French are primarily concerned with not burdening the general public with what they see as oppressive expressions of religion, while Americans allocate much more leeway to the expression of religion in public places so as not to burden the individual's, or even state actor's, religious freedom.

The First Amendment's free speech clause, which includes protection of not only political speech but also religious expression, is a factor that further explains the differing approaches to freedom of religious expression. Even in cases that seem factually similar, comparing U.S. and French decisions on the freedom of exercise is complicated by the addition in the American case of an overlapping tradition protecting freedom of expression. With this in mind, the most analogous case in American law to the French headscarf case is that of *Tinker v Des Moines Independent Community School District* (1969). In this case, two students, John and Mary Beth Tinker were suspended from their public schools for wearing black armbands in protest of the Vietnam War. In defending the right of the Tinkers to express their political beliefs, the Court made its famous assertion that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[50] In language that foreshadowed the French *Conseil d'Etat's avis* regarding wearing Islamic headscarves in public schools, the Court ruled that student expression could only be restricted if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[51]

Under this analysis, it is not enough for the expression to be controversial—as some might see the wearing of a foulard in a French public school that extols the virtues of *laïcité*. Rather, the speech must also

constitute a real disruption; it must "intrude upon the work of the schools or the rights of other students."[52] In order to understand why French law shifted away from this commonality of allowing student expression that is not fundamentally disruptive to other students or the learning process, we must look at the differences between the public school setting in France and in the United States. Public schools in France, with their highly national and standardized curriculum, are treated less as places of learning and more as places to form French citizens, and French citizens are by definition secular citizens.[53] Coupled with the French fear (as opposed to the American embrace) of pluralism, anything that might be seen as impairing the goal of fostering unity and common French values in public schools must be outlawed.[54] In this sense, the French public school setting may actually be more analogous to an American military setting—a position that might strike some as extreme, and yet one which the French rhetoric surrounding public schools frequently justifies.[55]

If one accepts this analogy, the U.S. case of *Goldman v Weinberger* (1986) mirrors the decision of the National Assembly to ban headscarves in public schools. In *Goldman*, the petitioner, an ordained rabbi and Orthodox Jew who served as a clinical psychologist for the Air Force, was reprimanded for wearing his yarmulke in violation of Air Force regulations which stipulated that headgear could not be worn indoors with the exception of armed security police.[56] He sued, citing his First Amendment right to religious expression and argued that respecting that right required the Air Force to make an exception for religious clothing as long as wearing such clothing did not present a "clear danger of undermining discipline and *esprit de corps*." Chief Justice Rehnquist writing for the court rejected this claim and held that the Air Force did not have to justify its decisions regarding which measures were in fact necessary to "foster instinctive obedience, unity, commitment, and *esprit de corps*." Just as the French National Assembly made a distinction between "ostentatious" religious clothing, so too did Rehnquist note that the Air Force could use its discretion when allowing or disallowing "visible religious headgear."[57] Thus, if one takes the mission of French schools to be this same sort of fostering of unity and a sense of common citizenship which inherently ignores race, ethnicity, and religion, *Goldman* importantly aids Americans in appreciating the deep antipathy the French feel towards allowing headscarves in public schools.

Conclusion

This paper has explored the various points of departure between the American and French approaches to freedom of religion based on an examination of the state-individual interaction in each country. The U.S. tradition of valuing the individual over the state versus the French tradition of valuing the collective will as the highest expression of freedom leads to an emphasis in the United States on freedom of expression (protected not only by the free exercise but also by the free speech clause) and an emphasis in France on the separation of church and state and the protection of a secular public space. As noted by Frederick Gedicks, the differences in the construction of religious liberty in these two nations stems from differing conceptions of the "proper role of the state in securing religious freedom and other human rights." In the United States, the state has historically been seen as an instrument, which, while necessary for the protection of public order and safety, could easily be turned against its own people as an instrument of tyranny. Fears of this order placed more weight on the protection of individual liberties than on the creation of a nationally cohesive group. In France, however, the state has been seen as the only force capable of shaping the cooperative unit needed for true freedom to be realized. The subordination of individual preferences in order to gain the common good has therefore been granted more importance in France than in the United States.

These cultural and historical differences are at the root of the differences in legal and constitutional interpretation of the amorphous concept of freedom of religion in France and America. For two nations that were born in the same era and which appear to the rest of the world to have very similar value systems and ideals, these root differences illustrate how such disparate results can be achieved in the realm of religious freedom. Whether or not one of these two systems is normatively better than the other is a difficult claim to adjudicate. Certainly, the American approach does a better job of defending individual liberty and allowing citizens to feel that their rights are taken seriously by the state. Nevertheless, the French system, with its clear choice to err on the side of secularism avoids just the kind of arbitrary decisions that cause such anger and confusion in the United States. The French establishment, dealing as it is with the fallout from the nation's first wave of mass-migration, may do well to appreciate laws such as the headscarf law. At the same time, the law is supported by only 42 percent of French Muslims, and so it may serve only to undermine the goals of the state in the realm of education. By pushing those Muslims already predisposed to

feel distrustful of the state away from public schools and into private religious schools, the French state itself is placing them out of the reach of the French values they wish to inculcate. Furthermore, decisions such as these only act to additionally alienate the segment of young Muslims, the vast majority of whom are French citizens by birth, yet who feel disenfranchised by the government and rejected as immigrants by larger French society. To these Muslims, the stance of the current French government may very much mirror that of the Revolutionary government who forced Catholic priests to make a choice between their faith and their citizenship—and that is a choice that could turn out very badly for France.

[1] Tocqueville, Alexis de, *Democracy in America*, (A. S. Barnes & Co. 1851), 337.
[2] O'Brien, David M. "Freedom From and of Religion" In *Constitutional Law and Politics: Civil Rights and Civil Liberties* 2 by David O'Brien. (W.W. Norton & Co.,2008), 709-710
[3] *Sherbert v Verner* 374 U.S. 398, 400-401 (Supreme Court, 1963)
[4] Deshmukh, Fiona. "Legal Secularism in France and Freedom of Religion in the United States: A Comparison and Iraq as a Cautionary Tale." 30 *Houston Journal of International Law* (2007) 118. Online at http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=31437267&site=ehost-live (visited April 11, 2012).
[5] Conkle, Daniel O. "Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, But Not Indifference." 13 *Indiana Journal of Global Legal Studies* (2006) 441. Online at http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=22956616&site=ehost-live (visited April 14, 2012).
[6] Deshmukh, "Legal Secularism," 122-123.
[7] Rogoff, Martin A. *French Constitutional Law: Cases and Materials*. (Carolina Academic Press, 2007) 279.
[8] Gunn, T. Jeremy. "Religious Freedom and Laïcité: A Comparison of the United States and France." 2 *Brigham Young University Law Review* (2004) 432. Online at http://www.law2.byu.edu/lawreview4/archives/2004/5GUN-FIN2.pdf (visited April 10, 2012)
[9] Rogoff, *French Constitutional Law*, 504.
[10] Deshmukh, "Legal Secularism," 121.
[11] Rogoff, *French Constitutional Law*, 338.
[12] Gunn, "Religious Freedom and Laïcité," 435-438.
[13] id at 438
[14] id at 439
[15] Rogoff, *French Constitutional Law*, 337.
[16] id at 340
[17] id at 339
[18] id at 339
[19] Conkle, "Religious Expression," 442.
[20] O'Brien, "Freedom From and Of Religion," 710.
[21] Gunn, "Religious Freedom and Laïcité," 442.
[22] O'Brien, "Freedom From and Of Religion," 712-713.
[23] *Everson v Board of Education of Ewing Township 330* U.S. 504, 520 (Supreme Court, 1947)
[24] O'Brien, "Freedom From and Of Religion," 714-715.

[25] id at 449 footnote 129
[26] id at449 footnote 129
[27] Deshmukh, "Legal Secularism," 123.
[28] Gedicks, Frederick Mark. "Religious Exemptions, Formal Neutrality, and Laïcité." 13 *Indiana Journal of Global Legal Studies* (2006) 484. Online at http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=22956619&site=ehost-liveks(visited April 10, 2012).
[29] Gunn, "Religious Freedom and Laïcité," 453.
[30] Levine, Robert A. "Assimilating Immigrants: Why America Can and France Cannot." (RAND Corporation 2004). 13-14. Online at http://www.rand.org/pubs/occasional_papers/OP132. (visited April 15, 2012).
[31] Deshmukh, "Legal Secularism," 123.
[32] Gunn, "Religious Freedom and Laïcité," 453.
[33] Avis du Conseil d'État No. 346893 (Nov 27, 1989), reprinted and translated in Rogoff, *French Constitutional Law*, 342-344. Online at http://www.conseil-etat.fr/media/document//avis/346893.pdf. (visited April 15, 2012).
[34] Rogoff, *French Constitutional Law*, 342.
[35] Gunn, "Religious Freedom and Laïcité," 459.
[36] Uitz, Renata. *Freedom of Religion in European Constitutional and International Case Law*. (Council of Europe Publishing 2007), 127.
[37] Gunn, "Religious Freedom and Laïcité," 467.
[38] id at 468-473
[39] Uitz, *Freedom of Religion*, 129.
[40] Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles , collèges et lycées.
[41] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 9.
[42] Uitz, *Freedom of Religion*, 127.
[43] *Leyla Sahin v Turkey*, (App no 44774/98) ECHR 2005
[44] *Dogru v France*, (App no 27058/05) ECHR 2008
[45] O'Brien, "Freedom From and Of Religion," 718.
[46] Conkle, "Religious Expression and Symbolism," 419.
[47] id at 425
[48] *Stone v Graham 449* U.S. 39, 42-43 (Supreme Court, 1980) banning the display of the Ten Commandments in public classrooms and finding that such displays represent a fundamentally religious message.
[49] Deshmukh, "Legal Secularism," 144.
[50] *Tinker v Des Moines Independent Community School District*, 393 U.S. 503, 506 (Supreme Court, 1969)

[51] id
[52] id
[53] Gunn, "Religious Freedom and Laïcité," 453.
[54] Conkle, "Religious Expression and Symbolism," 484, 491.
[55] Deshmukh, "Legal Secularism," 150-151.
[56] *Goldman v Weinberger 475* U.S. 503, 509 (Supreme Court, 1986)
[57] id

Works Cited

Conkle, Daniel. O. "Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, But Not Indifference." 13 *Indiana Journal of Global Legal Studies 417, 443* (2006). Online at http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=22956616&site=ehost-live (visited April 10, 2012).

Deshmukh, Fiona. "Legal Secularism in France and Freedom of Religion in the United States: A Comparison and Iraq as a Cautionary Tale." 30 *Houston Journal of International Law* 111, 155 (2007). Online at http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=31437267&site=ehost-live (visited April 10, 2012).

Gedicks, Frederick Mark. "Religious Exemptions, Formal Neutrality, and Laïcité." 13 *Indiana Journal of Global Legal Studies* 473, 492 (2006). Online at http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=22956619&site=ehost-live (visited April 10, 2012).

Gunn, T. Jeremy. "Religious Freedom and Laïcité: A Comparison of the United States and France." 2 *Brigham Young University Law Review* 419, 506 (2004) Online at http://www.law2.byu.edu/lawreview4/archives/2004/5GUN-FIN2.pdf (visited April 10, 2012).

LeClerc, Aline. "Je suis Français à 100 % mais dans leurs yeux je reste un immigré." *Le Monde*. February 16, 2012. Online at http://lacourneuve.blog.lemonde.fr/2012/02/16/je-suis-francais-a-100-mais-dans-leurs-yeux-je-reste-un-immigre/ (visited April 22, 2012)

Levine, Robert A. "Assimilating Immigrants: Why America Can and France Cannot." Santa Monica, CA: RAND Corporation, 2004. Onlne at http://www.rand.org/pubs/occasional_papers/OP132. (visited April 15, 2012).

O'Brien, David M. "Freedom From and of Religion" In *Constitutional Law and Politics: Civil Rights and Civil Liberties* 2 by David O'Brien, 709,869. (W.W. Norton & Co. 2008).

Rogoff, Martin A. *French Constitutional Law: Cases and Materials*. (Carolina Academic Press,2007).

Tocqueville, Alexis de. *Democracy in America*. (A. S. Barnes & Co. 1851).

Uitz, Renata. *Freedom of Religion in European Constitutional and International Case Law*. (Council of Europe Publishing 2007).

©horeography: How *Graham v Graham* Shocked Artists into Legal Awareness

Marygrace Patterson
Barnard College

Abstract
Martha Graham's Appalachian Spring premiered at the Library of Congress in 1944. According to the legislation of the time, the ballet itself was not copyrightable, despite its first performance at the institution of the national copyright registrar. Choreographic copyright has a long and complex history, which has shaped the audience's experience of dance works in America, and has come to the forefront of artistic discussion in the past two decades. Following Martha Graham's death in 1991, two major legal battles erupted, one related to the trademarking of Martha Graham's name and technique, another related to the copyright ownership of her seventy dances. Appalachian Spring, among nine other equally remarkable works, was left in the public domain and a legal precedent was set that restricted the artistic ownership rights of choreographers. For this reason, Appalachian Spring, once revered for its artistic genius, today functions primarily as an illustration of copyright law as it relates to dance. The cause of this transformation from great American dance to exemplar of copyright issues is the subject of this essay. For not only does the case illuminate a topic increasingly vital to the live arts, but it may also act to prompt discussion surrounding the merits and pitfalls of choreographic copyright. If copyright has the potential to be used to protect and disseminate a dance, it also can be used to control and restrict public access to that dance. Copyright should be utilized to prevent ownership disputes and provide financial support to artists; it should not be relied upon to preserve ephemeral art. Young dancers, aging choreographers, and dance lovers alike must now consider the weight of the law and understand what they can do to preserve, promote, and protect American art.

Introduction

Martha Graham's *Appalachian Spring* premiered at the Library of Congress in 1944. According to the legislation of the time, the ballet itself was not copyrightable, despite its first performance at the institution of the national copyright registrar.[1] Choreographic copyright has a long and complex history, which has shaped the audience's experience of dance works in America, and has come to the forefront of artistic discussion in the past two decades. Following Martha Graham's death in 1991, two major legal battles erupted, one related to the trademarking of Martha Graham's name and technique, another related to the copyright ownership of her seventy dances.[2] *Appalachian Spring*, among nine other remarkable works, was left in the public domain and a legal precedent was set that restricted the artistic ownership rights of choreographers. Set to a score by Aaron Copland and incorporating a set by Isamu Noguchi, *Appalachian Spring* painted a poignant portrait of the American frontier and set a high standard for the blossoming modern dance movement of the mid-1900s. Although this dance was once revered for its artistic genius, today it functions primarily as an illustration of copyright law as it relates to dance. The cause of this transformation from great American dance to exemplar of copyright issues is the subject of this essay. Not only does the case illuminate a topic increasingly vital to the live arts, but it also has ignited an important discussion surrounding the merits and pitfalls of choreographic copyright. If copyright has the potential to be used to protect and disseminate a dance, it also can be used to control and restrict public access to that dance. Copyright should be utilized to prevent ownership disputes and provide financial support to artists; it should not be relied upon to preserve ephemeral art. Young dancers, aging choreographers, and dance lovers alike must now consider the weight of the law and understand what they can do to preserve, promote, and protect American art.

The history of copyright begins with the Constitution, which outlined the basic goals of copyright protection as well as its practical limits. This essay will present the historical cornerstones of choreographic copyright law, as well as a central discussion of the Martha Graham case and its impact on choreographic copyright. While she was not the first artist to influence the field of dance law, her case prompts discussion of every major issue that arises with choreographic copyright. By better understanding the costs and benefits of relying on copyright law, artists may take steps toward revitalizing their creative community. Ultimately, I will address the

contemporary American choreographer who may ask, "What should I do to protect myself and my work? What are the limitations to existing copyright protections? What are the benefits of those limitations? And, how can the artist most effectively utilize choreographic copyright?" Understanding *Graham v Graham* will assist in formulating answers to each of these questions.

The immense struggles of the Martha Graham Dance Company (MGDC) caused a sea change in the dance community's awareness of legal issues. Although the two major cases, under the umbrella title of *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.* ("*Graham v Graham*"), grew out of a unique set of circumstances, they relied upon the precedent set by many other artists. Both the trademark dispute ("*Graham v Graham 1*") and the copyright dispute ("*Graham v Graham 2*") hinged on the actions of a man named Ron Protas, to whom Martha Graham had willed all of her property when she died. Using the law to advance his control over Graham's legacy and the MGDC, Protas manipulated his way to power while betraying Graham's lifelong artistic aims. Ultimately, this dispute led to the near destruction of a major choreographic legacy, and ignited efforts to protect the dances of many other choreographers. For this reason, *Graham v Graham* remains the central example of the positive and negative effects of choreographic copyright.

It is important to acknowledge the choreographic copyright cases proceeding and following *Graham v Graham*. The prior cases provide the legal framework within which the Graham case was decided, while the cases that occurred after *Graham v Graham* underscore the immense shift within the dance community that occurred because of this decision. From a legal dispute involving the New Dance Group in 2007 that granted choreographers implied ownership to their dances, to the closing of Merce Cunningham's school and company after his death, to Twyla Tharp's preemptive digitizing of dances and release of her work into the public domain, *Graham v Graham* has spurred a revolution regarding the rights of dancers.

While choreographic copyright can be used to maintain artistic heritages, there are limits to its protections that are compounded by the ephemeral nature of dance. As Jesse Huot, Twyla Tharp's son and business manager notes, "Our art does not deteriorate the same way [as other arts]. The paint doesn't chip and it can be in many places at once."[3] It is this intangibility of dance works that makes choreographic copyright such a

fraught and important issue. Qualitative deterioration, choreographic authenticity, artistic intent, and preservation are issues that abound in this discussion of the legal protection of dance. These problems contribute to the argument that choreographic copyright, when misinterpreted, can act against the goals of both copyright and choreographers.

Background: The Constitution and Copyright Acts

The Honorable Judge Miriam Cedarbaum, who wrote the opinion on *Graham v Graham*, saw a singular document as the keystone to her judgment on these landmark cases: the Constitution of the United States of America.[4] Article I, Section VIII, Clause VIII of the Constitution, also known as the Copyright Clause, reads that Congress has the duty "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries."[5] The Founders saw copyright, a limited monopoly over written ideas, as essential to this success. Preservation was never made a priority in the Copyright Clause; rather, promotion of creation through financial and legal support was the goal. This claim is supported by the specific language "securing for *limited* Times" utilized in the Copyright Clause, which emphatically puts a temporal cap on authorship rights. More simply, copyright intends for the public and the creator to benefit equally from individual contributions. Today's choreographer, therefore, cannot use the Constitution, or any legal acts stemming from the Constitution, to keep his or her art from the public. The Copyright Clause can be used only as a source of pecuniary motivation for creation or protection of an artistic legacy, not for isolating choreography from dancers in order to attempt to eternally preserve the dance in its original form.

The founders did not have choreographers in mind when they drafted the Copyright Clause, however, evolution in the arts has given way to a common understanding that the creation of a dance implies artistic authorship. Since the ratification of the Constitution, not only has there been progress in the realms of art and science, but also an evolution of the concepts of "author" and "inventor." If the authorship of a dance contributes to "useful Art," then choreographers are subject to the same standards of copyright protection as all other inventors. If the dance author, the choreographer, seeks the protection and economic gains of the Copyright Clause, he or she is also bound by the language and intent of the clause in its entirety. What many fail to appreciate is the limited nature of the legal

protections afforded by the Clause, as well as the purpose of its very existence. Copyright protection, when it was created, was not infinite, and was intended to benefit society through the financial encouragement of creative contributions. According to the Copyright Clause, creation is as important as preservation; the latter should only act in coordination with the former so that future generations might benefit from historical contributions.

Emerging from the Copyright Clause is a chronological series of Copyright Acts, which provided terms of application of copyright that the Copyright Clause had theoretically instated. These Copyright Acts had a major impact on Judge Cedarbaum's 2002 *Graham v Graham 2* opinion, specifically in relation to copyright ownership issues. The first was drafted in 1790 and was the primary Congressional implementation of copyright law.[6] The "encouragement of learning" was cited as the aim of the Copyright Act of 1790, emphasizing progress over preservation as the purpose of copyright.[7] The Copyright Act of 1909, drafted under Theodore Roosevelt as a response to evolved methods of reproduction and duplication, remains the statutory landmark for copyrighted works created before 1976.[89] It also stipulated that if no notice of copyright was affixed to a work and the work was not "published," the 1909 Act did not extend copyright protection over the work, and it became part of the public domain.[10] This act was the reason that ten of Martha Graham's dances were left in the public domain following *Graham v Graham 2*, as will later be discussed.

The Copyright Act of 1976 adapted the Copyright Act of 1909, allowing copyright protection to attach to original works in a tangible medium of expression, or "fixed form," regardless of publication or affixation of a copyright notice.[11] The heightened importance of video in the 1970s coincided with the drafting of this Act and allowed dance to be translated into a tangible form for copyright and entertainment purposes. The 1976 Act also coined the term "fair use," and in Section 102, extended the meaning of "works of authorship" to include "pantomime and choreographic works."[12] It is the Copyright Act of 1976 that remains the most important tool for dancers seeking copyright protection, and the sole reason many of Graham's dances were protected, as they had been filmed and were therefore copyrightable.[13] Because of the Copyright Act of 1976, unpublished dances created after 1976 have legal ground and no longer immediately enter the public domain.[14]

The final piece of legislation necessary to understand contemporary choreographic copyright is the Copyright Renewal Act of 1992. This act significantly altered the original intent of the Copyright Clause by extending

the length of copyright protection to 100 years after the death of the author and allowing renewal of copyrights without reapplication of the copyright holder.[15] This most recent legislation is also the most controversial to date. While prior acts had been passed in the interest of reflecting the evolution of technology and what constituted authorship, this act extended the idea of a limited monopoly to an extreme and, as a result, emphasized preservation over creation as the goal of copyright. Since the Copyright Act of 1976 had coined the term "fair use," allowing copyrighted dances to be utilized for educational purposes, the Dance Heritage Coalition sought to protect the pre-Renewal Act ability to use past art to inspire present art and scholarship. The Copyright Renewal Act undermines the goals of the Copyright Clause and complicates a discussion of choreographic copyright, because of its limitation of scholarly endeavors and creative inspiration.

In sum, the Copyright Acts of 1790, 1909, and 1976, as well as the Copyright Renewal Act of 1992 created the basis for the *Graham v Graham 2* decision. It took Martha Graham's weak will in which she outlined the terms of her estate after her death and a power-hungry man to ignite the fight for Graham's legacy. However, if the dancers, board members, audience members, and donors who had long supported Graham's artistic vision had a clearer idea of how they could utilize copyright law to protect that vision, the struggle may have turned out quite differently.

Martha Graham

The case on which all issues of contemporary choreographic copyright rest is *Graham v Graham*, the two major legal disputes which followed Martha Graham's death at the age of 96. When Martha Graham passed away in 1991, her school and dance company were thriving; the school's classes were full, and the company performed and toured routinely. By the end of the decade, the school had shut down, the company had ceased performing, and the center was over one million dollars in debt. Today, the Martha Graham Center of Contemporary Dance ("the Center"), which oversees MGDC, and the Martha Graham School ("the School") are, against all odds, gaining artistic and economic momentum once again. Despite the complex and lengthy history behind the Graham legal battles, this case is the best contemporary demonstration of the effects, positive and negative, of copyright protection. Disputes ranging from the trademarking of names and dance techniques, to the changing tides of copyright law, and the ownership

rights of artists abound in this ten-year battle over the future of the Graham legacy.

Ron Protas

The chief cause of *Graham v Graham* was a man named Ron Protas. When he befriended Graham in 1967, Protas was a freelance photographer and Columbia Law School dropout. With youthful charm, he soon became personally and professionally close to the seventy-three-year-old Graham, becoming her closest ally in matters pertaining to her company despite his lack of any previous dance training. He became an employee of the Center in 1972 prompting "resignations, requested by Graham, of longstanding members of the board."[16] Protas presumably used his close personal and professional relationship with Graham to influence her decisions about the board that had so long shown her and her art support. Some dancers including Stuart Hodes, who danced in Graham's company from 1947-1958, would eventually use their artistic clout to overthrow Protas's assumed authority. Unfortunately, they did not act soon enough.

Throughout the 1970s and 1980s Protas unabashedly manipulated the aging, arthritic, alcohol-dependent Graham into promoting his rise to power. Protas did everything for Graham, from running her personal errands to managing the Center's finances. He also did the Center's bookkeeping. Member of the Center's board of directors, Judith Schlosser, testified during the first trial that the minutes were "usually edited by Mr. Protas,"[17] making the record of these important meetings skewed in Protas's favor. By the mid-1970s, Graham had appointed Protas executive director of the Center, as well as a member of both the Center and the School boards. In 1980, he became the co-associate artistic director of the Center, along with Linda Hodes, longtime Graham dancer and Stuart Hodes' now ex-wife. As Graham grew ill and became incapable of attending board meetings herself, Protas acted as her voice from 1987-1991.[18] In the will Graham signed on January 19, 1989, Protas was named as her sole executor and legatee. The will read:

> In connection with any rights or interests in any dance works, musical scores, scenery sets, my personal papers and the use of my name, which may pass to my said friend Ron Protas...I request, but do not enjoin that he consult with my friends, Linda Hodes, Diane Gray, Halston, Ted

> Michaelson, Alex Racoli and Lee Traub, regarding the use of such rights or interests.[19]

Although the will gave Ron Protas all of Graham's property, it did not make clear *what* she owned at the time of her death. James McGarry, the attorney who drew up her will, testified during the trial that a will like Graham's took no more than an hour to draft. Graham either carelessly neglected to clarify to whom she left her dances or assumed that they were owned by the Martha Graham Center of Contemporary Dance, a corporation she had created in her name in 1956. Speculation over Graham's intent, however, does not provide any substantial information about the legal protection of choreography.

After Graham's death on April 1, 1991, Protas became the artistic director of the Center and the School. Shortly after Protas assumed his new position, his lawyer, Peter Stern, advised him to determine exactly what rights he had acquired from Graham's will.[20] In legal and financial matters, Protas was headstrong, leaving dancers and board members uneasy. However, nobody questioned the legitimacy of his claims and soon he successfully forced Linda Hodes out of her position of co-artistic director. Had the artistic personnel hired their own lawyer to investigate the legitimacy of Protas's ownership rights the legal battle to come could have been either abbreviated or avoided. However, instead of pushing back against Protas's managerial claims, everybody submitted to his demands, believing that they had no legal ground upon which to protest.

Protas's authority was not limited to management, however. As evidenced by extensive testimony of many witnesses during the trials, company members had long despised Protas's unwillingness to pay them on time, and felt that his desire for power and money was tarnishing Graham's artistic vision. While Graham's dances had always been subject to choreographic evolution, and further evolution is expected after the death of a choreographer, many dancers felt that Protas's artistic direction fostered destructive changes to Graham's choreography and artistic intention. The people who had long studied Graham's technique, and had worked personally with Graham on the dances, found their artistic voices stifled by a man who wanted to establish his authority over all aspects of Graham's legacy. Reasons such as these made Protas's position of power a threat to Graham's artistic heritage and made the Center and Graham dancers start to question what legal action could be taken to fight back. A man whom Graham's dancers and closest friends despised, who had no previous training in dance and who saw economic, and not artistic, value in Graham's work,

portended the destruction of Graham's legacy. In the minds of the board and company members, Protas had no right to be there, but to their dismay, he seemed to have every legal right to be there. The Center's acceptance of Protas's advances, as well as Graham's neglectful last will, point to the need for a deeper understanding of the law among dancers and choreographers.

The Trademark Dispute

Among the common ways to protect choreographic legacies are trademarks and trusts. These efforts, as demonstrated by the management of Balanchine's choreographic legacy, illustrate the benefits that choreographers can gain by utilizing the law. However, since the law does not discriminate against those who might work against the artistic missions of choreographers, Ron Protas was successful in using these entities to restrict the power of those who questioned his actions and motives, and to extend control over the Graham choreographic canon.

George Balanchine's New York City Ballet is one of the most financially stable dance companies in the United States. His ballets are performed at consistently high standards, and his name retains its credibility nearly thirty years after his death. Protas closely observed the trademarking of the Balanchine Technique by the Balanchine Trust. Barbara Horgan, Balanchine's longtime personal assistant, in collaboration with the lawyer, Hank Leibowitz, established the Balanchine Trust in 1987, following Balanchine's death. The Balanchine Trust was formed by those to whom Balanchine had willed his copyrighted dances and it successfully trademarked the Balanchine technique. The Trust licenses Balanchine ballets, designates répétiteurs to stage them, upholds strict standards of performance, and collects royalties from those who perform the ballets.[21]

In 1993, Ciro Gamboni, a partner of Cahill, Gordon and Reindel LLP met with Ron Protas to discuss trademarking the name "Martha Graham," and the "Martha Graham technique." Protas held that the Center would receive 40 percent of the proceeds from the trademarking of Graham's name and technique.[22] In his application to the United States Patent and Trademark Office for the registrations of these titles, Protas used the support of an oral license from Martha Graham.[23] After initial hesitation due to Protas's flimsy evidence, the Patent and Trademark Office granted federal registration for MARTHA GRAHAM TECHNIQUE in August 1995, in the interest of "educational services; namely providing instruction through classes and workshops in the field of contemporary dance."[24] In

October of that year, Protas obtained the federal registration for the use of the name MARTHA GRAHAM in the same interest as the trademark of the technique as well as "entertainment services; namely, organizing and producing performances of contemporary dance."[25] Normally, these trademarks would be utilized in the interest of promoting and protecting a quality-assured legacy, as Balanchine's had been. Instead, Protas used them in coming years to force the Center to submit to his artistic and managerial power, threatening to revoke their use of Martha Graham's name and technique if they did not.

In 1998 Protas and his lawyer created the Martha Graham Trust (the Trust) and named Protas as its sole trustee and beneficiary. Created "to serve as a repository to hold and license all of the Martha Graham intellectual property that Protas claimed to have inherited," the Trust cast further doubt on Protas's "good" intentions.[26] The formation of Protas's trust prompted the boards of the Center and the School to seek ways to replace Protas as artistic director. They also began negotiations with Protas for a license agreement to use the Graham trademarks. Protas claimed as a court witness, "The Martha Graham Trust was my response to requests and pressure from the Center to create some sort of process so that when I died the ballets would go to a foundation and they would have a licensing agreement from the trust, which was a not-for-profit entity."[27] In effect, however, the Center was relying on permission from Protas to perform Martha Graham's works. Thus, the dancers and the board members had to further submit to Protas's authority at the risk of not being allowed to perform the dances at all. These negotiations still failed to stimulate an investigation into the validity of the Graham trademarks, even though Protas had used faulty evidence of his exclusive ownership rights in his trademark and copyright applications.

On July 15, 1999, the Center and the School, and the Martha Graham Trust signed a written license agreement, in an effort to limit Protas's control and obtain permission to continue to perform Graham's ballets, and use her name and technique. It stated that "The Trust as licensor shall be the sole judge of whether any particular product or service bearing or offered under any Martha Graham Mark is within the scope of the license granted hereunder."[28] In other words, Protas would grant the Center permission to use Martha Graham's name and technique, but would be the only person to determine if their use was admissible according to his artistic perspective. The agreement also provided Protas with an annual salary of $55 thousand in the first year, growing eventually to $76 thousand in the tenth year, as well as many benefits to be provided to an "artistic consultant"

whom the Trust—Protas—would appoint.[29] The enormously high salary declared in the license agreement made clear that Protas was more concerned with obtaining a steadily-growing salary than with the continued performances of MGDC and the financial stability of the School. However, because the validity of the trademarks of Martha Graham's will had yet to be challenged, Protas was successful in retaining his power.

While the trademark license agreement did not stipulate that Protas step down as artistic director, the motive of consent of the Center and the School was to obtain permission from Protas to allow this to occur. Protas's resignation as artistic director was in the interest of the Boards and the financial well-being of the School and the Center. This was not only because Graham's artistic vision was threatened by Protas's control of her works, but also because there were several potential donors who proposed large donations contingent upon Protas's removal.[30] On an even more practical level, in 2000, the dancers of the Martha Graham Dance Company boycotted performances of Graham's work and encouraged dancers throughout the world to do the same, in an effort to wrest control of the Martha Graham Dance Center from Ron Protas. Finally, the Center's board took a stand against Protas, in recognition of the immediate financial and artistic risk that he created. Dismissing Protas's proposal to remain artistic director, on March 23, 2000 the Board approved a motion to remove him.[31] The dancers and board members had finally begun to take control of Graham's legacy.

However, many argued that this effort was too little, too late.[32] Shortly after Protas's removal, the Center's Board voted to suspend operations because of financial problems, including the Center's inability to pay its rent and meet payroll. Protas promptly terminated the license agreement with the Trust on May 26, 2000, since the School and the Center were required to have "continuing operations" in order for it to remain effective.[33] The termination of this agreement was meant to restrict to Center's use of Graham's name and technique as a consequence for diminishing Protas's involvement. The legal agreement that had once granted the Center permission to use Graham's ballets was now being used against the Center to restrict its use of the ballets.[34] Although the Center was finally challenging Protas's usurpation of Graham's legacy, the focus of this legacy had already shifted from her artistic genius to a petty battle over ownership rights.

Protas responded to the Center's resistance by founding the Martha Graham School and Dance Foundation, a not-for-profit corporation organized under Delaware law.[35] No longer the company's artistic director,

Protas sought to exert his sole authority over the rights to Martha Graham's name and technique by creating this foundation. Judge Cedarbaum contested the legality of Protas's motion, declaring:

> If by registering Martha Graham's name in connection with educational services, Protas sought the ability to preclude the Center and the School from using Martha Graham's name, he was seeking to undermine the arrangements of Martha Graham with respect to the use of her name.[36]

Despite Protas's efforts to maintain exclusive control over Martha Graham's legacy, the School and Center received enough funding upon Protas's removal to acquire a long-term lease to their former premises as well as a grant to renovate of the Center and School premises. Had the Center been more legally savvy, however, they would have thought sooner about the validity of Protas's trademarking of Graham's name and technique, and the extent of Protas's ownership rights. On January 16, 2001 the School reopened, but the legal battles for the Martha Graham Dance Company had only just begun.[37]

Upon the re-opening of the School in 2001, the Center received a cease and desist order forbidding use of the trademarks "Martha Graham" and "Martha Graham Technique." This final straw prompted Marvin Preston, the company's executive director, to question the scope of Protas's ownership, an action that should have been taken immediately after Graham's death. Preston believed that Protas did not own as much as he claimed to. Beyond questions of ownership, however, lie questions of the intent of trademark. On the first day of the *Graham v Graham 1* trial, Cynthia Parker Kaback, who had been hired by Protas in 1973 as the company's manager, was questioned on her previous experiences related to the Martha Graham technique. She stated,

> Occasionally there would be unauthorized people that would be advertising that they were teaching Graham technique. And everyone would be very concerned because we wanted to protect the integrity and reputation of that name.[38]

This desire to protect Graham's technique is a far cry from Protas's denying Graham dancers of the right to perform her dances. As Stuart Hodes noted,

the purpose of attempting to trademark the technique and training students to be accredited to teach that technique was "to attract good students, train capable teachers, and generate tuition," not to deny others the right of practicing the Graham technique.[39] As it turns out, Protas's mere intentions could be used against him in a court of law. Since his actions were proven not to be in the interest of the legacy he had supposedly inherited, none of them were legal. As the Center gained footing in their legal fight against Protas, it became clear how flawed its initial acceptance of Protas's authority had been, and in its underestimation of what the law could do to destroy as well as support them.

Copyright and Ownership Dispute

Just as Protas had attempted to restrict the use of the Graham technique by trademarking Martha Graham's name and technique and creating the Martha Graham Trust and Foundation, he attempted to restrict the Center's use of works that had been created for the Center. "What property did Martha Graham, the great dancer, choreographer, and teacher own at the time of her death in 1991? That is the central question in the second phase of this lawsuit," opens Judge Cedarbaum's opinion of the 2002 Graham case.[40] Having settled problems of trademarking, Protas then sued for ownership rights over the dances performed by MGDC after his departure as artistic director. In July of 2000, Protas began to apply for copyright protection for the seventy dances Graham had produced in her lifetime. Assuming that Graham owned her own dances at the time of her death, Protas argued that he had exclusive rights over their ownership and performance.[41] So ensued the second, more pivotal case related to the legal protection of dances.

Protas would not have been able to copyright Graham's dances had it not been for the precedent set by Hanya Holm in 1952, when she secured the first American choreographic copyright for her dances in *Kiss Me Kate* (1947). Wanting the same rights to protection as were available to writers and musicians, Holm had a microfilm of her choreography for *Kiss Me Kate* written in Labannotation and sent it along with the appropriate copyright application to the Copyright Office in Washington.[42] It was eventually registered as a dramatic-musical composition. Critic John Martin excitedly explained in the *New York Times* on March 30, 1952:

> The importance of this development is manifold. For one thing, of course, it gives official recognition to the dance

> creator as such, which is at least a small step toward the dignity to which he is entitled. For another thing, it provides tangible evidence of the practicability of dance notation….For a third thing, it lays the ground for that happy day in time to come when there will be an available literature of dance compositions…for future generations to study and consult.[43]

It is clear from this article that the copyrighting of Hanya Holm's dance was significant on two fronts: one, dance should be legally on par with other arts such as music or writing and two, this equality stemmed from the ability to provide tangible evidence of the dance through notation. Labanotation, a notation system published by Rudolf Laban in 1928 in *Kinetographie Laban*, was the key to presenting the Copyright Office with a material version of the work to be copyrighted.

There are a number of limitations to the grandeur of success often attributed to Hanya Holm's copyright application, and to the notation systems utilized by choreographers in effort to eternally preserve their works. First, the dance had to be considered a dramatic-musical composition in order for it to be copyrightable. In the 1950s, choreographic copyright as a legally enforceable idea did not exist, so Holm had to protect her dance by making her dance a piece of, rather than on par with, dramas. Second, the dance could be copyrighted because it was published as part of *Kiss Me Kate*. Under the Copyright Act of 1908, if a work was already published, all it required was the affixing of a copyright notice for it to attain protection.[44] The legal ground this case gained was minimal, in that the Holm's copyright did not demand a new precedent be set since it applied under the Copyright Act of 1908. Lastly, what John Martin's article ignores in its celebration of the potential for dance scholarship, are the limits to the reading of Labanotation. As a written language, it is complicated for even the best-educated specialists. This case of the 1950s, in sum, begged for an evolved perception of what constituted a fixed medium of dance. The Copyright Act of 1976 would legalize the use of video in copyright applications, but the complicated relationship between preservation and copyright would not be resolved. The precedent set by Hanya Holm in terms of publishing, preserving, and copyrighting remained at the crux of many issues surrounding Martha Graham's legacy.

Martha Graham's dances are predominantly maintained in fixed mediums by video, but they cannot avoid the same issues of artistic

authenticity as systems of written notation, such as Labannotation. As any experienced dancer can attest, video and notated forms of dances can only be used as a prerequisite for copyright application and a guide to understanding the kinesthetic basics of a dance work; it cannot be used as an exclusive manner of preservation. What is lost in the copyrightable versions of dances is the intention behind each movement and the various decisions the dancer is allowed to make regarding the choreography each time it is performed. Only a dancer who has embodied the choreography, or a person who was privy to the choreographer's creation of a work, have the ability to flesh out the structural bones of a video or a notated score. So although, according to the Copyright Act of 1976, these fixed forms of dances made choreographic copyright legitimate, one cannot have unreasonable expectations regarding the ability of the copyrighted form of a dance to ensure its preservation. In terms of preservation, memory and personal experience match the value of the copyrightable fixed medium of a dance. What makes a dance copyrightable does not necessarily guarantee the preservation of a dance in its ideal form.

While there is much to be drawn from this case about the moral and artistic aspects of copyright law, the decision hinged on legal stipulations of the Copyright Act of 1976 and the incorporation of the Center in 1948. Although factually tedious, it is important to understand the decision in its entirety in order to discuss what may be drawn from it. Martha Graham had produced seventy dances that were fixed in a tangible means of expression. Thirty-four of the seventy dances were created after 1956, when Graham was technically employed by the Martha Graham Center of Contemporary Dance Inc. and the Martha Graham School for Contemporary Dance Inc. Prior to 1956, Martha Graham had been the sole proprietor of her own school since 1930. The Center and the School had been incorporated in 1948 and 1956 respectively, under the New York Membership Corporation Law (now the Not-for-Profit Corporation Law). Graham sat as artistic director and was a board member for the Center and the School until her death. She consented to the incorporation of the Center and the use of her name in the corporate title to avoid being subject to ordinary tax income. She also was given a salary by the Center and the School after 1956 for the dances she created, and was named artistic director by the School, effectively making her an employee.[45] In short, she transferred her name and her artistic rights to a corporation because along with those rights came pecuniary obligation. As Judge Cedarbaum states, "Concerned with the "foster[ing] of the creative impulse and its needs," Graham recognized that "[she] could never have

done what [she did] if [she] had not had such a place."[46] By splitting up her property into different legal entities, Graham was only acting in the interest of her art and her financial stability, a model for any contemporary choreographer. However, because these divisions of Martha Graham's name and property caused practical complications in terms of ownership rights Graham should have clarified the terms of ownership in her will and in the contracts that were drawn with the Center for her choreography. It is this shortcoming that must be noted and taken into account when choreographers decide to incorporate their company and copyright their dances.

To further complicate matters, nineteen of the thirty four post-1956 ballets fell under the copyright legislation of the Copyright Act of 1909, while the remaining fifteen post-1956 ballets were covered by the Copyright Act of 1976. As Julie C. Van Camp emphasizes in her essay "Martha Graham's Legal Legacy," there are two sets of date restrictions that are vital to understanding the Graham case. One set of dates are the pre- and post-1956 ballets, relating to Graham's ownership of the ballets. The other set of dates are the pre-1976, post-1956 ballets, relating to contemporary copyright legislation.[47] As the decision recognizes, these two factors complicated the ruling, but emphasized the importance of regarding just how significantly corporations and copyright can affect the future of a dance.

Protas argued in the 2002 case that he, as legatee and trustee of the Martha Graham Trust (which he had created), was entitled to all of the seventy dances created during Martha Graham's lifetime. Protas assumed that Graham owned her dances at the time of her death, and as sole executor, that they should be granted to him, not the Center. In 1974, however, Edmund Pease, treasurer and a member of the Center's board of directors, had performed a thorough study of the Center and Graham's assets in order to determine exactly what belonged to whom. He revealed in his report that the "Center's assets included the dances, sets, costumes, and included that these items be carried on the Center's balance sheet as assets at nominal value." Furthermore, Jeanette Roosevelt, a board member of the Center and founder of the Barnard College Dance Department,[48] testified that Graham "gave" her works to the Center, stating, "whenever dances were created, they would become works that the board was responsible for."[49] Martha Graham herself approved this report, and Francis Mason, Chairman of the Center's board of directors at that time, testified to the board's approval of the report.[50] Therefore, had the Graham dancers and board members questioned Protas's authority as soon as Martha Graham died and sought out

Pease's report to support their claims, they would have had credible grounds on which to debunk Protas's allegations of authority.

From Protas's copyright application to his shifty disposition during his court testimony, there was doubt about his credibility. Because of his "evasive and inconsistent testimony and…demeanor," Judge Cedarbaum did not consider him a credible witness.[51] The inconsistencies in his testimony, his application for trademarks, and his applications for copyright strengthened the legal argument against him.[52] As a director, Protas was judged not to have acted in the interest of the Center, his primary obligation. Judge Cedarbaum ruled that "By representing to the defendants that he "owned everything," Protas violated his duty of good faith and profited improperly at defendants' expense" and that as "a longstanding fiduciary of the Center," he "enriched [himself] unjustly by grasping" what did not belong to him."[53] Protas simultaneously threatened Graham's legacy and gave the Center legal grounding in its case against him.[54]

Judge Cedarbaum ruled in 2002 that the post-1956, post-1976 ballets were neither Martha Graham's nor Ron Protas's. They were the property of the Center and thus considered "works for hire,"[55] produced by Martha Graham for a corporation.[56] Categorizing Graham's dances as "works for hire," meant that Martha Graham did not own her own artistic creations at the time of her death. Instead they were owned by the corporation she had created in her name in 1956 and which had paid her a salary to create works. In effect, in order to restore the Center's hopes for survival, Judge Cedarbaum was left to rule against Protas as well as against the inherent ownership rights of choreographers. Sixteen Graham dances were published before 1956, and ten of those were published before January 1, 1964. The Copyright Act of 1909 governs those ten works, and in the absence of any copyright renewal applications those ten works, including *Appalachian Spring*, were released into the public domain.[57] In an appeal to this already drawn out trial, nine dances that had been proven not to be owned by Protas or the Center, were determined to belong to the Center. While the legal lines remained blurry, the Center was shown to have the potential to prove the ownership of nine of Graham's cherished dances, and fell short in even realizing they had this capability.

The Martha Graham Center of Contemporary Dance was not able to assert full ownership rights over all of Graham's dances. Ten iconic dances were released to the public domain, which meant that they could be staged and performed by anyone. Even those dances that are legally protected, however, are subject to inevitable evolution. Problems regarding authenticity

include: who has the right to adapt a dance, whose version of the dance is notated and performed after the death of the choreographer, and what the intention behind a given movement is supposed to be. Copyright cannot answer these questions; it cannot make a dance authentic. In fact, Graham scholar Victoria Geduld argues that authenticity in dance does not exist.[58] It is important, then, that artists do not exaggerate the ability of copyright to preserve a dance in a given form. Rather, they must take their own initiative to make sure their dances are passed down through generations of dancers who have embodied the dance in its proper form. At the same time there must be room for evolution and error, in hopes that great performances will stand above the rest.

The *Graham v Graham 2* decision changed the contemporary dance field, and heralded a new sense of vitality in the legal protection of dances. Although the dances were judged not to belong to Protas, they were also judged not to belong to their creator. While no dance is guaranteed a successful future, Protas threatened such an important legacy and such a vast body of work that it made the dance community takes note of the necessity to utilize the law in its favor. As Holm and Fuller's cases emphasize, however, there are shortcomings to choreographic copyright protections, especially in regards to preservation. Authenticity, quality, and intent might only to be ensured by the people who devoted themselves to a specific choreographer's craft. So with the close of the second phase of the Graham trial, the securing of artistic rights beckoned choreographers.

Aftereffects of the Graham Trials

As Norton Owen, member of the board of the Dance Heritage Coalition and director of the Jacob's Pillow Archives, points out, Martha Graham can only be considered an example of American choreographic copyright if two variables are taken into consideration. Ron Protas is the first; Martha Graham's flimsy last will is the second.[59] It took over fifty years, a celebrated choreographer, a power-hungry heir, and two court cases to instill in the dance community a sense of urgency about how the law can influence dance. If it were not for a combination of these factors, the Martha Graham Dance Company would not have raised the issues of ownership right protection and choreographic preservation for an entire generation of senior American choreographers.

One of the primary concerns and criticisms of Judge Cedarbaum's decision was that, while it acted in support of the future of MGDC, it limited

the rights of choreographers by asserting that Graham did not own her own dances at the time of her death. If Ron Protas had not been involved, a different precedent might have been set. However, it was the changing of the precedent in Judge Cedarbaum's opinion that made choreographers scramble to understand the law and take measures to protect themselves. With this improved legal awareness, it did not take long for the issue of the rights of choreographers to be addressed. Katherine Forrest, litigator of Cravath, Swaine, and Moore LLP, who had represented the Martha Graham Center for Contemporary Dance in *Graham v Graham*, made it her mission to repair the precedent set by the Graham decision while not attempting to overturn Judge Cedarbaum's ruling, which had been tailored to the specific issues of MGDC.[60]

The case that provided the legal platform for this revision was one involving the New Dance Group (NDG), a New York City dance organization founded by students of Hanya Holm in 1932. Choreographers including Sophie Maslow, Anna Sokolow, and Jane Dudley, who all danced for Martha Graham, made socially engaged works for the group during its formative years.[61] In 2007, Rick Schussel, the executive director of the NDG, used Judge Cedarbaum's decision in *Graham v Graham 2* to mount his campaign for a seventy-fifth anniversary gala celebration of the NDG that would include performances of *Harmonica Breakdown* (1938) and *Time is Money* (1934) by Jane Dudley, and *Folksay* (1942) by Sophie Maslow. He argued that since independent choreographers had made these dances for NDG, the dances were "works for hire" and owned by the corporation. Abigail Blatt, Sophie Maslow's daughter and a lawyer at Paul Weiss LLC, and Thomas D. Hurwitz, Jane Dudley's son, sought the rights to protect their mothers' legacies by ensuring that they could decide when and where their mothers' dances could be performed. The issues raised in *Graham v Graham 2* were once again at the forefront of the discussion surrounding this 2007 case. As Daniel J. Wakin's September 4, 2007 article about the NDG case in the *New York Times* notes, "The movement of limbs and bodies is notoriously tricky to represent after the fact." What was at stake was not only "limbs and bodies," however, but an artistic legacy as important as Graham's, and not yet tarnished by a man like Ron Protas.[62]

The plaintiffs argued that the anniversary celebration performances had the potential to cause "irreparable devaluation of the work and serious and irreparable damage to the artistic reputations of Ms. Dudley, Ms. Maslow, and Ms. Anthony."[63] So, hiring Katherine Forrest, they wrote a cease-and-desist letter to Rick Schussel.[64] His lawyer, John R. Sachs Jr.,

asserted that since "[t]hese choreographers were closely associated with the company as employees or board members and were doing the choreography under the auspices of the New Dance Group," NDG owned the dances.[65] However, since the choreographers were never paid for their work with the New Dance Group, their dances had been willed to their children, and those children had their only interest in holding their mothers' works to high standards, the works were deemed not to be "works for hire." Performances of the works by Jane Dudley and Sophie Maslow were canceled days before the anniversary gala. Although this case drew less public attention, required less time, and involved a much less artistically significant repertory than *Graham v Graham 2*, it effectively reversed the *Graham* precedent by granting choreographers implied ownership rights to their work. [66]

Judge Cedarbaum judged *Graham v Graham* appropriately, then, effectively resolving the struggles of MGDC, as well as invigorating artists and lawyers to set a new case law precedent that rules in favor of artistic ownership rights. While it was less than inspirational to hear that Martha Graham did not own her dances, the decision was the catalyst for the creation of precedent in favor of the rights of artists. The arts community must be thankful to *Graham v Graham* for prompting this discussion, and to the New Dance Group case for creating an artistically beneficial legal precedent.

Choreographic Copyright Today

Graham v Graham 2 caused a sea change in the attitude of choreographers toward copyright protection. In the decade since the decision was written, there have been many instances of the case's direct effect on the desire of choreographers using the law to protect their legacies.[67] For choreographers to protect their ownership rights, very few steps must be taken. The process of applying for a copyright is simple: have the dance notated by the Dance Notation Bureau or video record the dance, and then send in a copyright application along with the fixed form of the dance to the Copyright Office in Washington D.C. The process of ensuring that the choreographer maintains his/her ownership rights to a dance that is created for dancers of a not-for-profit corporation is equally straightforward: write a contract that stipulates the terms of use of the dance, as well as the ownership rights to the dance. Finally, to ensure that an heir does not threaten an artistic legacy and to provide support in preservation efforts, create a trust comprised of dancers, lawyers, donors, and advisors who will

all act to protect the choreographer's artistic vision and work. Although the quality of performance of a dance cannot be guaranteed, there is no sound reason not to take the appropriate steps to prevent avoidable choreographic catastrophes. The future is impossible to predict, but personal and legal motions made to ensure its success can help shape it. Although "our art does not chip," we must help it live on through the bodies and memories of those who appreciate it. Using copyright to restrict dances, or discontinuing performance of them for fear of deterioration are actions neither necessary, nor beneficial to choreographers and dance audiences.

With the precedent set by the NDG case, which granted choreographers the same inherent rights as all other artists, dancers can now act to ensure that their artistic voices can be heard for generations to come. As Judge Cedarbaum asked, "Does not everyone want to become immortal?" There are legal provisions that assist in the immortalization of this generation of choreographic legacies; *Graham v Graham* heralded an understanding and application of these provisions to choreography. Copyright law and choreography share a common goal: creation. Copyright law exists to encourage creative works, and choreographers exist to create new dances. As long as these two fields maintain this mutual mission, they can and should work in tandem to promote productive contributions to society. It is now the responsibility of artists to know the law and use it in their favor, if they expect to benefit from its protections. Otherwise, not only will the strife of the MGDC have been in vain, but the legal ground generations of choreographers have gained will be torn from beneath our dancing feet.

[1] Copyright Act of 1976. Section 106.
[2] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.,* 43 Fed. Appx. 408, 411 (2nd Cir. 2002). There were appeals made to these cases, which amounted to a total of 5 trials. Only the most prominent two will be discussed in this essay, because they are the only two which altered precedent and had any sizable impact on choreographic copyright.
[3] Jesse Huot, interview by Marygrace Patterson, New York City, 30 November 2011.
[4] Judge Cedarbaum, interview by Marygrace Patterson.
[5] U.S. Constitution, Art. I, Sec. 8, Cl. 8.
[6]This act protected the "right and liberty of printing, reprinting, publishing, and vending" the copyright holder's "maps, charts, and books" for a term of 14 years, renewable for one 14 year term if the holder remained alive. *See Copyright Act of 1790.*
[7]The Copyright Act of 1790 was initially altered by the 1Copyright Act of 1831, which extended the initial duration of copyright protection to 28 years, renewable for one 14-year term. This Act was primarily the result of lobby efforts and was merely an adjustment to the 1790 Act, rather than an altering of the concept of copyright. *See Copyright Act of 1831.*
[8] This is especially important to note in terms of the Martha Graham case wherein a number of her choreographic works were copyrighted before 1976, and a number copyrighted after 1976. While this complicated the trial, it provides an interesting example to compare the effects of the 1909 act, with that of the 1976 act. *Appalachian Spring* was one of the dance works left in the public domain because it was copyrighted before the 1976 Copyright Act. *See Copyright Act of 1976.*
[9] The Copyright Act of 1909 extended the copyright period to twenty-eight years from the date of publication, renewable for one twenty-eight-year term. Under this act, federal statutory copyright protection applied to works when the work was published and had a notice of copyright affixed. This meant that unpublished works, such as dances, were governed exclusively by state law, and published works, copyrighted or not, were governed by federal law. *See Copyright Act of 1909.*
[10] Copyright Act of 1909.
[11] This Act kept the initial duration of copyright protection at 28 years, and extended the potential renewal term to up to 47 years. *See Copyright Act of 1976.*
[12] Copyright Act 1976.

[13] Video has also allowed choreographers like Twyla Tharp to preemptively protect their creations by recording each dance as soon as it is created. At the same time, efforts to digitize everything from Tharp's intention behind a work, to the breakdown of the choreography, are intended to promote preservation.
[14] id. In 1988, Congress enacted the Berne Convention Implementation Act, effectively holding the United States to the provisions of the 1886 Berne Convention for the Protection of Literary and Art Works. Unlike the previous Copyright Acts, the Convention utilized the French concept of the "droit d'auteur," or the right of the author. Dealing with philosophically grounded rights, rather than economically driven Anglo-Saxon copyright, the Berne Convention sole ownership rights over any creation put into physical form. In sum, the Berne Convention Implementation Act of 1988 gave a new legal perspective to the presiding Copyright Act of 1976, and in conjunction these two acts form the contemporary legislative basis for American copyright. After 1988, copyright was an economic *and* moral protector of artistic rights. *See Berne Convention Implementation Act.*
[15] This act made it possible to secure a second term for works copyrighted between January 1, 1964 and December 31, 1977 without a renewal registration requirement. Any work that secured copyright for the first time before January 1, 1964 that did not apply for a renewal in time, would not have its protection automatically extended. In other words, it provides copyright protection even when the author of the work does not request it. *See Copyright Renewal Act of 1992.*
[16] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.*, 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).
[17] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.,* 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).
[18] id
[19] id
[20] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.*, 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).
[21] Ellin Sorrin, "The George Balanchine Trust," 2011. < http://balanchine.com/the-trust/> (11 November 2011).
[22] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.*, 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).

[23] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.*, 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001). When asked for more information regarding this evidence, Protas relied on unsupported assertions made by Barbara Groves, a senior administrative employee at the Center who reported to Protas. *See Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc. 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).*

[24] id

[25] id

[26] During the trial Protas recalled meeting with Barbara Horgan of The Balanchine Trust, during which he sought "guidance" on the formation of a Trust, so that when he died he would not "leave a mess."[26] Whatever the advice that Horgan may have given him, the trust that Protas formed bore little resemblance to The Balanchine Trust. While the latter was an irrevocable trust (a trust whose terms cannot be amended or altered until the terms or purpose for the trust has been fulfilled) spearheaded by lifelong associates and dancers of Balanchine, the Martha Graham Trust was a revocable trust created and maintained by Ron Protas alone.

[27] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of*
Contemporary Dance, Inc., 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).(testimony from trial).

[28] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.,* 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).

[29] id

[30] One such donor was Dolores Weaver, who asked to review the license agreement before she gave a $250 thousand grant that was conditional on Protas stepping down. *See Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc., 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).*

[31] id at 91. Despite the license agreement that weighed heavily in Protas's financial interest, as well as prior mention of being willing to accept Janet Eilber as the new Artistic Director, Protas announced at a February 2000 board meeting that because of financial difficulties, Eilber would not be able to accept the position. *See Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc. 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).*

[32] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.,* 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).
[33] id
[34] Protas attempted to sue the Center and the School for illegal license estoppel, failing on the grounds that legal precedent of licensee estoppel only deals with licenses that were active for extended periods of time, unlike the July 15, 1999 agreement. Judge Miriam Cedarbaum wrote the opinion on this case, and stated, "The means by which Protas procured the trademark registrations, the terms of the short-lived license agreement and the context in which it was executed, as well as the relationship between the parties and the public interest in charitable and education corporations all argue against the application of the doctrine of licensee estoppel by a court of equity." Furthermore, previous cases of license estoppel had also dealt predominantly with estopping commercial licenses, not not-for-profit educational institutions. On June 22 of that same year, the Board voted to remove Protas from the Board of Directors. *See Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc., 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).*
[35] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.,* 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).
[36] id
[37] id
[38] id at 60
[39] id at 61
[40] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc. 224 F. Supp*. 2d (U.S. Dist. 2002).
[41] id
[42] John Martin, "The Dance: Copyright," *The New York Times*, 30 March 1952, p. X10.
[43] id
[44] id
[45] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc*., 224 F. Supp. 2d (U.S. Dist. 2002).
[46] id
[47] Van Camp, "Martha Graham's Legal Legacy," p.30.
[48] Paul Scolieri, "Professor Paul Scolieri Takes Students to Jacob's Pillow Dance Festival," Barnard College <http://barnard.edu/headlines/professor-paul-scolieri-takes-students-jacobs-pillow-dance-festival> (14 September, 2011).

[49] *Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc*., 224 F. Supp. 2d (U.S. Dist. 2002).
[50] id
[51] id
[52] id. In his applications for the 70 fixed works, there were numerous factual discrepancies. Cedarbaum states in her opinion, "Despite his knowledge that these 21 films had been published, beginning in July of 2000, Protas applied to register 19 of the 21 dances as unpublished works and obtained certificates of copyright registration for 15 of them." It appears that by blatantly ignoring the status of many of the works as published and therefore copyrightable by the Center, Protas intended to copyright them as unpublished works and stealthily steal them from their rightful owner. He successfully obtained 15 copyright certificates by misrepresenting the publication status of the dances. The Copyright Office also took issue with Protas's underhanded practices, requesting comments on the publication status of 14 works Protas intended to copyright. A letter the Office wrote to him stated, "Please be aware that the question of publication is extremely important to a copyright registration as it affects the deposit copy, copyright notice requirements, and even how a court might view the facts given on a particular registration. In light of the seriousness of this subject, we would appreciate your thorough research in this area concerning both current claims and those already registered so that the most accurate claims possible might be put on record." It was clear the Copyright Office and to the board of the Center that Protas's application for the copyright of Martha Graham's dances was less than legal, although he aspired to use the law in his favor. But ultimately the Office left it up to the "parties involved" to deal with "conflicting claims submitted for registration." *See Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.. 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).*
[53] id
[54] Ron Protas did, however, successfully acquire a renewal term of copyright for just one dance, *Seraphic Dialogue*. While the majority of the dances he claimed ownership of had procured copyrights by "deliberately misrepresenting their publication status," *Seraphic Dialogue* was created prior to 1956, so it did not belong to the Center, and Protas had been able to copyright the dance using a 'published' videotape made available in 1992. *See Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc.. 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).*
[55] Works Made for Hire under 1976 Act 17 U.S.C Section 201 and 101 53.

[56] *Yardley v Houghton Mifflin Co.* 108 F. 2d 28 (1939) set the precedent for artistic works for hire stating, "The right to copyright should be held to have passed with [the work created by the artist], unless the plaintiff can prove that the parties intended it to be reserved to the artist."
[57] id
[58] Victoria Geduld, interview by Marygrace Patterson, New York City,15 November 2011.
[59] Norton Owen, interview by Marygrace Patterson, Beckett, MA, 21 August 2011.
[60] Geduld, interview by Marygrace Patterson.
[61] id
[62] Daniel J. Wakin. "Control of Dances Is at Issue in Lawsuit." *The New York Times*, 4 September 2007, p. E.1.
[63] id
[64] Geduld, interview by Marygrace Patterson.
[65] Despite Schussel's potential for financial gain through the performances of the historically significant dances, Sach's targeted Blatt and Hurwitz's demand to be paid for performances of their mothers' works as proof that they had only money in mind in their legal pursuits. *See Wakin. "Control of Dances Is at Issue in Lawsuit."*
[65] The two choreographers who exemplify the negative and the positive potential of the influence of *Graham* are Merce Cunningham and Twyla Tharp, respectively. Merce Cunningham, who passed away on July 26, 2009, created a Legacy Plan "to avoid the ugliness that surrounded the legacy of Martha Graham (who gave Mr. Cunningham his start in dance)."Twyla Tharp, whose son and business manager, Jesse Huot, is working to protect her legacy while she continues to create work, has taken a more generous approach in terms of the dissemination of her material. By digitizing multiple versions of each dance, and licensing her works to various companies, she aims to control, but not stifle, the future of her dances.

Bibliography

Aldrich, Elizabeth. "Letters from the Heart: Martha Graham's Correspondence with Benjamin Garber in the 1960s and 1970s." Society of Dance History Scholars Conference Proceedings, 2010.
Aymes v Bonelli. 980 F.2d 857 (1992).
"Balanchine Trust: Step Savers; Organization Upholds Integrity of his Ballets." *The Washington Post*, April 5, 1995, p.G08.

Berne Convention Implementation Act of 1988.<http://www.copyright.gov/title17/92appj.html> (March 1, 1989).
Blatt, Abigail. Interview by Marygrace Patterson via email, 21 November 2011.
Carter v Helmsley-Spear, Inc. 71 F.3d 77 (2d Cir. 1995).
Cedarbaum, Judge Miriam. Interview by Marygrace Patterson. New York City, 19 September 2011.
Copyright Act 1909. <http://www.copyright.gov/history/1909act.pdf> (March 4, 1909).
Copyright Act 1976. <http://www.copyright.gov/title17/92appa.html> (October 19, 1976).
"Copyright---'Dramatic Composition'--Stage Dance." 1892. *Albany Law Journal* (August 27): 165-666.
Copyright Renewal Act of 1992, title I of the Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (1992).
"Cunningham Bids D.C. an Unsettling Farewell." *The Washington Post,* December 5, 2011, p. C1.
"Dances in the Public Domain?; Martha Graham's works may lack copyright protection." *The Washington* Post, July 28, 2000, p. C1.
De Mille, Agnes. *Martha: the life and work of Martha Graham*. New York: Random House, 1991.
Dillon, Tambra. "The Legacy Plan." Merce Cunningham Dance Company. <merce.org/p/index.php> (Accessed 27 November 2011).
Fuller, Loie. *Fifteen Years of a Dancer's Life*. Boston: Small, Maynard, 1913.
Garcia-Márquez, Vicente. *The Ballet Russes: Colonel De Basil's Ballet Russes de Monte Carlo, 1932-1952*. New York: Knopf, 1990.
Geduld, Victoria. Interview by Marygrace Patterson. New York City, 15 November 2011.
Graham, Martha. *Blood Memory*. New York: Doubleday, 1991.
Helpern, Alice. Interview by Marygrace Patterson via email, 22 November 2011.
Huot, Jesse. Interview by Marygrace Patterson. New York City, 30 November 2011.
Horgan v Macmillan, Inc. 789 F.2d 157 (1986).
Hodes, Stuart. "Martha vs. Martha: The Struggle for an American Legacy." Unpublished manuscript.
Jowitt, Deborah. *Time and the Dancing Image*. Berkley: University of California Press, 1989.
Kaufman, Sarah. "Back on their Feet; After three years in legal limbo, Martha Graham Dance Company Leaps into Action." *The Washington Post*, January 27, 2003, p. C01.

"Martha Graham's Legal Legacy." *Dance Chronicle*, 30:1, January 2007, p. 67-99.

Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc., 153 F. Supp. 2d 512, 514-518 (S.D.N.Y. 2001).

Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc. 224 F. Supp. 2d (U.S. Dist. 2002).

Martha Graham School and Dance Foundation, Inc. v Martha Graham Center of Contemporary Dance, Inc., 43 Fed. Appx. 408, 411 (2nd Cir. 2002).

Martha Graham School and Dance Foudnation, Inc. v Martha Graham Center of Contemporary Dance, Inc., 380 F. 3rd 634, 629 (2nd Cir. 2004).

Martha Graham School and Dance Foundation, Inc., et al., Petitioners v Eliot Spitzer, Attorney General of New York. 544 U.S. 1060; 125 S. Ct. 2518; 161 L. Ed. 2d 1110; 2005 U.S. LEXIS 4372; 73 U.S.L.W. 3693 (2005).

Martin, John. "Copyright: The Dance." *The New York Times*, March 30, 1952, p.X10.

Massine: a Biography. New York: Knopf, 1995.

Owen, Norton. Interview by Marygrace Patterson. Beckett, MA, 24 August 2011.

Pebble Cove Homeowners' Ass'n, Inv. v Shoratlantic Dev. Co., Inc. 191 A.D. 2d 544 (1993).

"Readying a Final Curtain Call, Merce Cunningham Acts to Protect his, and his Company's, Legacy." *International Herald Tribune*, June 12, 2009, p. 9.

Scolieri, Paul, "Professor Paul Scolieri Takes Students to Jacob's Pillow Dance Festival," Barnard College <http://barnard.edu/headlines/professor-paul-scolieri-takes-students-jacobs-pillow-dance-festival> (September 14, 2011).

Stodelle, Ernestine. *Deep Song: The Dance Story of Martha Graham*. New York: Schirmer, 1984.

Taper, Bernard. *Balanchine, a Biography: With a New Epilogue*. 2nd Edition. Berkeley: University of California Press, 1996.

Van Camp, Julie C. "Copyright of Choreographic Works." *1994-1995 Entertainment, Publishing and the Arts Handbook* 59-92. New York: Clark, Boardman, and Callaghan, 1994, p.59-92.

Wakin, Daniel J. "Control of Dances at Issue in Lawsuit." *The New York Times*, September 4, 2007, p. E1.

Walker, Katherine Sorley. *De Basil's Ballets Russes*. New York: Atheneum, 1983.

Yan, Cathy. "Merce Cunningham's Final Bow." *Wall Street Journal* (online), March 08, 2010.
Yardley v Houghton Mifflin Co. 108 F.2d 28 (1939).

Repeal Rule 413 of the Federal Rules of Evidence: The Admissibility of Evidence of Prior Sex Offenses

Connor F. Montferrat
Rutgers University

Abstract
On September 13, 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994. It was known to most, from Title IV of the act, as the Violence Against Women Act (VAWA). VAWA enacted three new Federal Rules of Evidence: 413, 414 and 415. Most notably, Rule 413(a) amended the Federal Rules of Evidence to allow the admission at trial of evidence of a defendant's prior acts of sexual assault. Most commentators opposed the bill, arguing that it undermined the integrity and rationality of the Federal Rules of Evidence or that Congress had capitulated to political pressures to pass laws to fight crime. Rule 413(a) of the Federal Rules of Evidence should be modified or repealed. Statutes like those in Florida, Alaska, or Arizona set examples for amendments to Rule 404 or Rule 413 and are a great foundation for reforming the current rules, which are found in both state statutes and federal law. Courts need to fight against injustices in the world such as rape, sexual assault, and child molestation, but they must protect the rights of the accused while respecting Congressional intent, the Constitution, case precedent, and common law. This paper was an assignment topic. The class was given the choice to pick the topic and argue for or against it, I chose the latter. However, as a future law student, I believe that Rule 413 must stay in place and not be repealed. When people's lives are placed in jeopardy due to the defendant's actions past and present, it is right and just for the jury to know about the defendant's prior convictions in sexual assault cases.

The Problem

On September 13, 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994. It was known to most, from Title IV of the act, as the Violence Against Women Act (VAWA). VAWA enacted three new Federal Rules of Evidence: 413, 414 and 415. Most notably, Rule 413(a) amended the Federal Rules of Evidence to allow the admission at trial of evidence of a defendant's prior acts of sexual assault. In a criminal case in which the defendant is accused of sexual assault, evidence of any prior offense committed by the defendant, including sexual assault, is admissible and may be considered as relevant evidence.[1] Most commentators opposed the bill, arguing it undermined the integrity and rationality of the Federal Rules of Evidence or that Congress was under political pressures to pass laws to fight crime.

During October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. The Committee considered public responses to the proposed new rules, which included eighty-four written comments representing 112 individuals and eight local and eight national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed Rules 413, 414, and 415. One researcher in particular, Katherine K. Baker, author of "Once a Rapist? Motivational Evidence and Relevancy in Rape Law," criticizes Rule 413 of the Federal Rules of Evidence by arguing that statistics do not demonstrate high recidivism probability for rapists.

The paper proceeds in four parts. Part II briefly examines the process of proof, the current Federal Rules of Evidence, and case law interpreting these rules. Part III reviews the first reports and recommendations made to Congress by the Advisory Committee and Judicial Conference on the new rules. Part IV considers in detail case law both prior to Rule 413 and after its enactment. Finally, Part V presents arguments in favor of Rule 413, and Part VI argues that Rule 413 should be modified or repealed on the basis of case law, court rulings, and work of researchers showing that the rule violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the Constitution, other additional amendments, and other existing Federal Rules of Evidence.

Process of Proof

In criminal cases, the state has the burden of proving the guilt of the defendant beyond a reasonable doubt; this burden rests with the government and never shifts. The defendant has no burden of proof and does not have to take the witness stand to prove his innocence. If and when the defendant chooses to put him- or herself on the stand, however, he or she assumes a burden to produce a sufficient amount of evidence to establish the elements of either of an alibi, self-defense, or insanity.

In order to understand Rule 413, one must first understand both the concept of relevancy and the purpose of the Federal Rules of Evidence. The Federal Rules of Evidence is a code of evidence law governing the admission of facts by which parties in the United States federal court system may prove their cases in both civil and criminal courts. Relevance is the tendency of a given item of evidence to prove or disprove one or more of the legal elements of a case. Evidence also must have probative value, meaning it must tend to establish the proposition for which it is offered, or the proposition must be more likely to be true in light of the evidence than it would be without the evidence. Evidence is considered relevant for admission only if it is both probative and material.[2] Evidence is material if it is significant to the issue at hand or has some logical connection to a fact relevant to the outcome of a case.

Evidence may be excluded if it does not tend to establish the proposition in question or if the proposition is not material to the outcome of the case. Evidence that is not probative is inadmissible, and the rules of evidence call for such evidence to be excluded from a proceeding or stricken from the record if it is objected to by the opposing counsel.[3] Evidence is considered prejudicial if the jury is likely to overestimate the probative value of the evidence or if it will arouse undue hostility toward one of the parties. Evidence is only considered prejudicial, in other words, when it is likely to affect the result of a case in some improper way. The decision to exclude prejudicial evidence is based on whether the evidence has a prejudicial impact that substantially outweighs its probative value.[4]

Evidence can also be excluded if it attacks the defendant's character. In particular, Rule 404(b) dictates that evidence of prior bad acts is typically inadmissible.[5] Although evidence of other crimes is clearly inadmissible under this rule, if the accused chooses to testify in his or her own defense, the prosecution is generally permitted to ask about his or her other crimes in cross-examination or during rebuttals. If the defendant puts his or her character at issue on the stand, the prosecution can then impeach the defendant by introducing evidence contrary to the defendant's testimony.[6] Evidence of a defendant's previous conviction of a crime may be

considered by the jury only insofar as it affects the credibility of the defendant as a witness; it must never be considered as evidence of guilt of the crime for which the defendant is presently on trial. Prior act evidence is likely to be highly prejudicial.[7] A criminal case should be based on the facts of what the suspect is being charged for, and not his or her tendency to commit a crime because of previous convictions. However, this is not the case in sexual assault cases due to Rule 413(a).

Judicial Proposition

After the Advisory Committee on Evidence Rules met in Washington, it concluded that the rules included in VAWA were unfairly prejudicial, biased against defendants' behavior and character, not supported by empirical evidence, and that they diminished the protections that defendants have in criminal and civil cases against undue prejudice. In addition, the advisory committee concluded that, because prior bad acts would be admissible, "mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence."[8] The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure for review, which then sent its report to the U.S. Congress.

The Judicial Conference listed several factors to be considered while evaluating prior act evidence, such as the proximity in time to the charged or predicate misconduct, the similarity to the charged or predicate misconduct, the frequency of the other acts, and other relevant similarities and differences.[9] Many circuit courts have a list of factors for district courts to consider in conducting what is known as a Rule 403 balancing test for prior sexual offenses. When dealing with the probative value aspect of this balancing test, courts include factors such as the similarity of the prior acts to the acts charged, temporal proximity, the strength of proof of the prior act, the need for the evidence, and the availability of less prejudicial evidence.[10] Courts have other factors to balance against the probative value of the evidence. These rules contribute to a misinformed jury and distract the jury from the charge on trial. They also have a prejudicial impact on the jurors and allow for a trial within a trial to take place.

Prior Bad Acts

Rules banning evidence of prior criminal acts date to early English common law. Some of the oldest English cases to address the ban on

character evidence are cited in Wigmore on Evidence, such as Hampden's Trial and Harrison's Trial. Courts refused to admit evidence of the defendants' prior bad acts in these cases. In Hampden's Trial, the defendant was charged with forging to disturb the peace and stir up sedition in the kingdom. Judge Withins stated,

> You know the case lately adjudged in this Court; a person was indicted for forgery, we would not let them give evidence of any other forgeries but that for which he was indicted, because we would not suffer any raking into men's course of life to pick up evidence that they cannot be prepared to answer to.[12]

In Harrison's Trial, the defendant was charged with murder. The prosecution called a witness to testify to the defendant's prior felonious conduct and the Lord Chief Justice Holt asked, "Are you going to arraign his whole life? Away, away! That ought not to be; that is nothing of the matter."[13] In the early American case Rex v Doaks,[14] the defendant was indicted for running a brothel, and the Massachusetts Superior Court refused to allow allegations of previous lewd acts.[15] This ruling placed limitations on what evidence can be brought into the courtroom by excluding evidence of prior criminal acts.

In the landmark case People v Molineux,[16] Roland Molineux was charged with first degree murder by poisoning. The prosecution attempted to show that Molineux had a tendency to murder by submitting evidence suggesting that Molineux had been responsible for an earlier homicide. However, Molineux had never been convicted of the prior murder charge. Molineux was convicted, but he appealed to the Court of Appeals of New York, which granted him a new trial. The Court of Appeals ruled that using evidence of an unproven previous act of murder against the defendant in a subsequent unrelated trial violated the basic tenet of the presumption of innocence, and, therefore, that such evidence was inadmissible. Judge Werner wrote in the opinion of the court, "the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged."[17] This case illustrates the basic principle of the presumption of innocence: defendants cannot be found guilty on the basis of alleged previous criminal behavior.

In Michelson v United States,[18] the defendant was convicted of bribing a federal Internal Revenue Service (IRS) agent after the government proved he paid a large amount to the agent in order to influence his official

action. The defendant admitted to the bribe but claimed entrapment because the agent allegedly threatened him. During the trial, after the defendant claimed he had no prior arrests, it was established that he had in fact been arrested for a misdemeanor offense of counterfeiting watch facings. The prosecution then asked a character witnesses whether he knew of the counterfeiting conviction and of another arrest for receiving stolen property twenty-seven years earlier. The Court of Appeals held this evidence admissible and affirmed Michelson's conviction.

The Supreme Court affirmed this decision in accordance with the English common law rule banning evidence of prior acts. Chief Justice Jackson wrote,

> The state may not show [the] defendant's prior trouble with the law, [or] specific criminal acts…The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him opportunity to defend against a particular charge.[19]

English common law and early U.S. case law, then, tended to exclude prior act evidence.

However, in Williams v State,[20] the court admitted prior assault evidence to show plan, scheme, or design. This case led to what is known as "Williams's Rule," by which relevant evidence of collateral crimes is admissible at a jury trial when it does not illustrate the "bad character" or "criminal propensity" of the defendant. Florida's Evidentiary Rule 90.404(2)(a) reads, "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity."[21] Some states have created an exception to similar rules, however, under which the prosecution may use a defendant's prior bad acts to show he or she has a tendency towards certain sexual conduct.

Similarly, in State v Maylett,[22] the Idaho district judge held that if evidence of uncharged crimes is relevant to a permissible purpose, such as establishing a common scheme or plan, then the trial judge may exercise his or her discretion in choosing to admit or exclude the evidence by balancing its probative value against the likelihood of prejudice. In this case, Maylett

appealed his conviction based on testimony admitted at trial of prior, uncharged sexual contact between Maylett and the victim and victim's twin sister. The two girls were Maylett's stepdaughters; all three lived together. The appellate court denied Maylett's motion to exclude the girls' testimony but did restrict the testimony to a one-year period preceding the date of the alleged incident.[23] It held the trial court did not abuse its discretion in admitting the testimony of Maylett's prior sexual conduct. The appellate court also held the court below properly limited the proof of prior acts to a period not too remote in time from the crimes with which Maylett was charged. Finally, the court articulated its balancing rationale and concluded the probative value of the evidence was not substantially outweighed by the prejudice it caused to the defendant.

In the recent Ohio case State v Gresham,[24] the court admitted evidence of prior sexual acts to show the defendant's "lustful disposition" in a case of statutory rape. Roger Scherner and Michael Gresham were separately charged with child molestation. At trial, relying on the recently enacted evidentiary legislation, the state successfully introduced evidence that the defendants had previously committed sex offenses against other children. In Scherner's case, the trial court ruled that evidence of his prior acts of molestation was also admissible for the purpose of demonstrating a common scheme or plan. For Gresham, the trial court held that evidence of the defendant's prior conviction for second degree assault with sexual motivation was only admissible due to the statute.

It is evident the legislature believed that just as violent criminals may be inclined to recidivism, individuals committing sex offenses may have a "lustful disposition" toward victims and become repeat offenders. Under the lustful disposition exception, courts can admit evidence of a defendant's prior sexual misconduct "'for the purpose of showing the lustful inclination of the defendant toward the offended [person], which in turn makes it more probable that the defendant committed the offense charged.'"[25] Based upon a defendant's past sexual abuse of a certain victim, he or she is considered more likely to have committed the charged sexual offense against the same victim. The Washington Supreme Court made split rulings in the Gresham and Scherner cases. It affirmed Scherner's conviction and noted the court below did not abuse its discretion in admitting the evidence showing a scheme or plan. In Gresham's case, the Court noted Rule 413 conflicts with Rule 404(b) and held that its enactment violates the separation of powers doctrine; the statute, accordingly, was held to be unconstitutional. The court, in other words, effectively reversed Gresham's conviction and held that admitting evidence of his prior conviction was not

harmless error. In each case, however, evidence was admitted at trial to show the lustful disposition of the defendant against the victim, ostensibly making it more probable that the defendant committed the charged offense.

Rule 413

One reason Rule 413 was adopted was due to competing claims of consent in the courtroom: often, the victim is the only witness to his or her rape, and the defendant's only defense is the alleged consent of the victim. Therefore, evidence that the defendant has committed other sexual assaults can be considered important when evaluating competing claims of consent. In State v Rusk,[26] the prosecution had to prove a sexual encounter occurred without consent and by forcible compulsion. In cases of alleged date rape like this one, the issue is generally whether the jury believes the complaining witness that he or she was forcibly coerced. The Maryland Court of Special Appeals determined there was sufficient evidence on which the jury could conclude the parties' sexual encounter was non-consensual, and the conviction was affirmed. This court found that force is an essential element in the crime of rape, and the victim has to resist or try to prevent the encounter for his or her safety. The prosecutor appealed this decision and the Court of Appeals, Maryland's highest court, reversed the Court of Special Appeals and upheld the conviction, stating the victim's fear of the assailant can be enough, but the "victim's fear must be reasonably grounded in order to obviate the need for either proofs of actual force on the part of the assailant or physical resistance on the part of the victim."[27]

In some states, a victim does not have to violently resist or be physically attacked for a sexual encounter to qualify as sexual assault; the victim merely has to say the word "no." In cases of competing claims of consent, which often turn on whether the victim adequately conveyed his or her lack of consent, it can be helpful for a jury to be aware of a defendant's prior acts. Rule 413 helps the jury to determine the credibility of the defendant's story when the victim may not have any reliable corroborating witnesses or material evidence to support her claim.

In New Jersey in July, 1994, a seven-year old girl named Megan Kanka was lured into a neighbor's home with the hope of seeing a puppy. She was subsequently sexually assaulted and murdered by her neighbor. Prior to living there, the murderer had already served six years in prison for aggravated assault and attempted sexual assault on another child; the Kanka's were not aware that a previously convicted sex offender lived across the street. As a result of this case, "Megan's Law" was enacted by the

New Jersey state legislature and later became federal law. Under Megan's Law, a convicted sex offender must notify the community when he or she moves into a neighborhood.[28] A case like Megan Kanka's might have been avoided if her murderer's prior convictions were taken into account during his previous trials. Instead of living next door to the victim, he could have been serving a longer sentence or been placed in mental health facility due to evidence of prior sexual assault. Political pressure mounted after Megan's murder and led to the passage of stricter laws against sex offenders.

Another argument in favor of Rule 413 is that similar past conduct is especially prevalent in sexual offenders. Recidivism rates for convicted child molesters are higher than recidivism rates for those convicted of non-violent crimes and are comparable to those convicted of other violent crimes.[29] In United States v Meacham,[30] the defendant argued on appeal that the trial court improperly applied Rules 403, 404(b), and 414 by admitting evidence that he molested two of his stepdaughters more than thirty years prior to the charged offense, thereby depriving him of his right to a fair trial. Meacham was convicted of one count of transporting a twelve-year-old minor across state lines with the intent that she engage in sexual activity. The circuit court held that the court below did not abuse its discretion in admitting the prior acts evidence under Rule 404(b). Emphasizing the political nature of the rules, however, the circuit court noted that Rule 414 was not developed through the usual Judicial Conference rulemaking process, but instead by the legislative process.[31] While it may be true that in some cases, sex offenders still feel a temptation to abuse children decades after their first offense, the enacted Rules of Evidence potentially carry serious constitutional implications.

Repeal Rule 413

Rule 413 violates the Due Process Clause of the Constitution, the Equal Protection Clause, and Federal Rules of Evidence 403 and 404. Courts have uniformly dismissed the argument that the new rules violate the principle of equal protection because they do not place individuals accused of sexual crimes into a "suspect class" and rationally relate to a legitimate government purpose, without considering the rules' dire effects.[25] Similarly, courts have developed the concept of "lustful disposition" in order to admit prior bad act evidence. The use of "lustful disposition" in Gresham should be considered a breach of Rule 403 because it is highly prejudicial to the defendant, and because Rule 404(b) states that evidence of prior crimes, wrongs, or acts is not admissible to impeach a defendant's character or

demonstrate a pattern of illegal behavior. Courts should evaluate what motivates perpetrators of rape when they consider the admissibility of prior act evidence rather than relying on uninformed, unconventional terminology and outmoded, traditional thinking about rapists. Reform of the new rules, if it is to come at all, must emerge from the courts.

The rules' legislative history indicates that the sponsors of VAWA also recognized the conflict between Rules 403 and 413 and did intend to keep the protections of Rule 403 available to judges faced with prior sexual misconduct evidence. Senator Bob Dole (R-KS) and Representative Susan Molinari (R-NY) first proposed the new rules in 1991 by introducing amendments to the Women's Equal Opportunity Act. Representative Molinari (NY-13) stated, "In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." She announced her intention to block the passage of VAWA unless it included the new evidentiary rules, insisting that "the proposed reform is critical to the protection of the public from rapists and child molesters."[32] Representative Molinari, along with the rest of Congress and President Clinton, clearly ignored the dubious constitutionality of the rules. Regardless of political pressure, they should not have lost focus on the rule of law.

The Judicial Conference urged Congress to abandon the rules completely; the Advisory Committee made other arguments. One of the Committee's objections to the new rules, including Rule 413, was that they would result in mini-trials within trials. Disregarding the Fifth Amendment, this would place defendants in double jeopardy: the law forbids a defendant from being tried more than once on the same or similar charges following a legitimate acquittal. Rule 413 also violates the Sixth Amendment by leading to impartial juries.[28] In regards to the Fourteenth Amendment, in United States v Wright,[33] the United States Court of Appeals for the armed forces rejected the defendant's equal protection claim.[34] In addition, in United States v Castillo,[35] the Tenth Circuit held that Rule 414 did not violate the defendant's right to due process and that Rule 403 adequately protected the defendant's rights.[36] In Spencer v Texas,[37] four dissenting Supreme Court justices argued that evidence of prior crimes introduced for no purpose other than to show criminal disposition violates the Due Process Clause.[38] Prior act evidence encourages juries to focus on the defendant's character rather than whether the state has proved the defendant's guilt beyond a reasonable doubt.

Excluding altogether or limiting prior act evidence to convictions would relieve defendants from having to contest uncharged offenses at trial and reduce the possibility of jurors punishing prior bad acts of the accused. Jurors may feel that at the defendant's first trial he or she was wrongfully set free and become more likely to punish the defendant at his or her current trial.[39]

If Rule 413 is not repealed, the courts should at least place limitations on admissible evidence of prior bad acts. Federal courts might look to state statutes for guidance in this regard. Alaska's Rule 404(b-2)[i], for example, has exceptions to the admissibility of evidence of prior acts, including a ten-year limit.[40] Another example is found in Arizona, where it is required that prior sexual offenses be within a close timeframe to the offense charged, or else the prosecution must present expert medical testimony establishing the defendant's propensity to commit the crime charged.[41] This would prevent cases such as United States v Gabe,[42] in which evidence was admitted of an offense twenty years prior to the crime charged, or in Meacham, in which offenses allegedly committed twenty-five to thirty years prior were admitted.[43] However, states ranging from Colorado, Massachusetts, Minnesota, Illinois, Indiana, North Carolina, New Jersey, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Washington have state evidentiary laws identical to the Federal Rules of Evidence or have additional sections regarding the admissibility of evidence of prior bad acts.[44] Congress and the federal courts should follow the example set by states like Arizona and Alaska.

Courts might also learn from scholars who have studied recidivism rates and the impact of propensity evidence on criminal trials. Rule 413 is based on exceptions in Rule 404(b) that allow evidence if it demonstrates certain factors, such as motive or opportunity. Katherine Baker shows through her study of recidivism rates that rapists are not more likely to repeat their acts than violent offenders who commit robbery or assault, contrary to what most advocates of Rule 413 argue.[45] Baker asserts that courts need to consider the motivational typologies she presents to understand why men rape. She presents reasons including a desire for sex or power over other men or women, or a desire to demonstrate their strength or masculinity to other men. Courts instead typically rely on terminology like "lustful disposition," traditional assumptions of motive such as sexual desire, and other inadequate, over-simplified rapist stereotypes.[46] Judges and jurors must be informed and recognize the many different aspects of rape in order to develop a more nuanced understanding of the exceptions to the evidentiary rules. Susan M. Davies believes a person's behavior can be

predicted after one observes that person's conduct in similar situations.[47] This theory is found in past decision-making of judges and jurors in the cases discussed above in which evidence of prior sexual offenses was admitted. Reliance on this type of evidence has become the norm within the courtroom, even though Baker's research demonstrates that evidence of a prior rape is more likely to be prejudicial than it is to demonstrate motive.

Anne E. Kyl also argues that propensity evidence has a significant impact on jurors. She states that "character propensity evidence creates an inferential sequence within the minds of jurors that the accused has a unique, abnormal propensity to commit certain acts; that he acts on that propensity; and having done so repeatedly in the past, he will do so in the future."[48] Put simply, there has never been a case in which evidence of prior bad acts has led directly to an acquittal; Jason McCandless argues that Rules 413 and 414 will "greatly increase the risk of convicting an innocent person."[49] Prosecutors should not present evidence of a defendant's prior uncharged sexual misconduct in order to demonstrate that the defendant committed the sex offense with which he or she is presently charged. Jurors should not reach verdicts based on character evidence and evidence of the defendant's prior sexual offenses, whether he or she was convicted or acquitted. Scholars, researchers, lawyers, the Advisory Committee, and the Judicial Conference saw and predicted the deleterious effects of Rule 413, yet Congress has not recognized the faults of this rule.

Conclusions

This paper has considered the enactment of Federal Rule of Evidence 413. It first discussed the process of proof in criminal trials before considering the comments and suggestions regarding the new rules made by the Advisory Committee on Evidence Rules and the Judicial Conference. Cases demonstrating the effects of prior bad act evidence reveal the negative impact of Rule 413. Cases from the English common law held that prior act evidence violates the presumption of innocence, making it inadmissible. Other American courts have separated defendants accused of sexual crimes by using terms like "lustful disposition" or "depraved sexual desire," which has furthered stereotyping of accused sex offenders and eroded the rights of defendants on trial.

Furthermore, courts have abused their discretion when they have unfairly used the balancing test to admit evidence even when it exerts a significant prejudicial impact on the jury. The Meacham court abused its discretion by allowing a thirty-years prior offense into evidence. In another

case, a court allowed prior act evidence even though the defendant presented a credible alibi to the crime charged,[50] referencing Representative Molinari's unreasonable statement, "a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children—that simply does not exist in ordinary people."[51] Congress blatantly ignored the report and recommendations regarding the new rules submitted by the Advisory Committee and the Judicial Conference and passed the politically motivated Violence Against Women Act to further its agenda in complete disregard of the Constitution.

Specifically, Rule 413 violates the Fifth and Sixth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In addition, it breaches Rules 403 and 404. Congress should pass a new law repealing or modifying Rule 413, but because Congress is not expected to amend or abolish any federal rule of evidence in the near future, the courts should provide reform. Statutes like those in Florida, Alaska, and Arizona set examples for potential amendments to Rules 404 and 413 and are a great foun−dation for reforming the current rules. Courts need to fight against injustices such as rape, sexual assault, and child molestation, but while doing so they must protect the rights of the accused while respecting precedent, Congressional intent, and the Constitution.

[1] FED. R. EVID. Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

[2] FED. R. EVID. Rule 401. Definition of "Relevant evidence." Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[3] FED. R. EVID. Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

[4] FED. R. EVID. Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[5] FED. R. EVID. Rule 404 (b). Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes. (b) Other crimes, wrongs, or acts. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

[6] Kadish, Schulhofer Paulsen. *Criminal Law and Its Processes Cases and Materials, Eighth Edition*, Aspen Publishers: 2007, p. 21. "Character is never an

issue in a criminal prosecution unless the defendant chooses to make it one." (Citing *People v Zackowitz*, 254 NY 192 (1930)).

[7] Lempert, Richard O. & Stephen A. Saltzburg, *A Modern Approach to Evidence*. West Group, 1982. pp. 218-219.

[8] Arizona State University, Sandra Day O'Connor College of Law. Federal Rules of Evidence, Notes to Rule 413.
<http://homepages.law.asu.edu/~kayed/class/evidence/rules/N415.htm>

> "The advisory committee concluded that, because prior bad acts would be admissible… mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. The committee also noticed that many of the comments received had concluded that the Rules, as drafted, were mandatory—that is, such evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test. The committee believed that this position was arguable because Rules 413-415 declare without qualification that such evidence 'is admissible.'

[9] Ojala, Erik D. "Propensity Evidence Under Rule 413: The Need For Balance." Washington University Law Quarterly*,* Volume 77:947, p. 965. "In its report to Congress, the Judicial Conference suggested an amendment to Rules 404 and 405 to explicitly direct the court to use Rule 403 in evaluating the probative value of evidence. The Judicial Conference enumerated the following factors as relevant to a Rule 403 determination: (i) proximity in time to the charged or predicate misconduct; (ii) similarity to the charged or predicate misconduct; (iii) frequency of the other acts; (iv) surrounding circumstances; (v) relevant intervening events; and (vi) other relevant similarities or differences."

[10] Orenstein, Aviva A. "Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403" (2005), Cornell Law Review, Volume 90:1487, p. 1523, "On the probative value side of the balancing scale, courts include the following factors: (1) 'the similarity of the prior acts to the acts charged,' (2) 'temporal proximity,' (3) "the 'presence or lack of intervening circumstances,'"(4) 'the frequency of the prior acts,' (5) the strength of proof of the prior act, (6) the 'relationship between the parties,' (7) the need for the evidence, and, relatedly, (8) the potential for less prejudicial evidence."

[11] *United States v Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998).

> "When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct."

[12] Leonard, David P. "In Defense of the Character Evidence Prohibition: Foundations of the Rule against Trial by Character." Indiana Law Journal, Volume 73, Number 1, Winter 1997, pp. 1167. One of the "oldest cases

Wigmore cited [was] Hampden's Trial….Judge Withins stated: You know the case lately adjudged in this Court; a person was indicted for forgery…."

[13] id. "When the prosecution attempted to offer propensity evidence against the defendant, Justice Holt remarked: 'Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter.'"

[14] Quincy 90 (Mass. Super. Ct. 1763).

[15] *Massachusetts Digest: A Digest of the Reported Decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts from 1804 to 1879, With References to Earlier Cases, Volume 2*, Little, Brown, and Company, 1881. "In support of an indictment for keeping a bawdy-house, evidence of acts of lasciviousness by the prisoner while a lodger, and before she was the mistress of the house, is inadmissible. *Rex v Doaks,* Quincy, 90 (1763)."

[16] 18 NY 264 (1901).

[17] *People v Molineux*, 168 NY 264 (1901).

> "First in order, if not in importance, is the question whether any evidence was admissible concerning the alleged killing of Barnet.…The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. (1 Bishop's New Crim. Pro. Sec. 1120.) This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others."

[18] 335 U.S. 469 (1948).

[19] *Michaelson v United States*, 335 U.S. 469 (1948).

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime…it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge…despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

[20] 110 So.2d 654 (Fla., 1959).

[21] Florida Statues, Title VII, Chapter 90, Evidence Code.

> "Character evidence; when admissible**."**
>
> > (1) Character Evidence Generally—Evidence of a person's character or a trait of character is inadmissible to prove action

> in conformity with it on a particular occasion, except: (a) *Character of accused.*—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the trait.
> (2) Other Crimes, Wrongs, or Acts (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

[22] 108 Idaho 671, 701 P.2d 291 (Ct. App. 1985).

[23] *State v Maylett*, 701 P.2d 291, 108 Idaho 671 (1985) (Burnett concurring).

> **"**These rules are not mere precatory guides to discretion; they are standards controlling the outcome of evidentiary questions. Discretion is properly exercised only when a rule of evidence calls for it…if but only if, evidence of uncharged crimes is relevant to a permissible purpose, such as establishing a common scheme or plan, then the trial judge may exercise discretion in balancing the probative value against the likelihood of unfair prejudice."

[24] No. 84148-9, slip op. (Wash. Sup. Ct., Jan. 5, 2012),

[25] *State v. Gresham*, No. 84148-9, slip op. (Wash. Sup. Ct., Jan. 5, 2012).

[26] 289 Md. 230 (1981)

[27]. *State of Maryland v Edward Rusk,* 289 Md. 230, 424 A.2d 720 (1981). <http://www.invispress.com/law/criminal/rusk.html

[28] Office of the Attorney General. Department of Law and Public Safety. "Megan's Law" <http://www.nj.gov/njsp/spoff/megans_law.html>. 12 Nov. 2012.

[29] Matton, Danielle. New Hampshire Bar Association. "An Examination of FRE 413, 414, 415, and the Adoption of these Rules by the States." <http://www.nhbar.org/publications/archives/display-journal-issue.asp?id=257>. September, 2000. 12 Nov. 2012

[30] 115 F.3d 1488 (10th Cir. 1997).

[31] Bureau of Justice Statistics, U.S. Dept. of Justice, Pub.No. NCJ-163392, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault (Feb. 1997) <http://bjs.ojp.usdoj.gov/>. 12 Nov. 2012.

[32] *United States v Meacham* 115 F.3d 1488, 1495 (10th Cir. 1997).

> "The rule, however, was not developed through the usual Judicial Conference rulemaking process, but by Congress itself. The historical notes to the rules and congressional history indicate there is no time limit beyond which prior sex offenses by a defendant are

inadmissible….Under Rule 414 the prior acts evidence must still be relevant and followed by a Rule 403 balancing…the prior acts evidence was not so prejudicial as to violate the defendant's constitutional right to a fair trial."

[33] 53 MJ 476 (Armed Forces App. 2000).

[34] *United States v Wright*, 48 MJ 896, 901 (A.F. Crim. App. 1998).
"The appellant has not identified, nor are we aware of any holding by the Supreme Court, or any other court for that matter, which identifies sex offenders as a 'suspect class.'"

[35] 140 F.3d 874 (10th Cir. 1998).

[36]
1. *Johnson v Elk Lake School Dist., 283 F. 3d 138 (*3rd Cir. 2002).
"We also conclude, however, that even when the evidence of a past sexual offense is relevant, the trial court retains discretion to exclude it under Federal Rule of Evidence 403 …We conclude that the District Court did not abuse its discretion in excluding Radwanski's testimony, and, finding that Johnson's other allegations of trial error are without merit, will affirm the District Court's order denying Johnson's motion for a new trial."
2. *United States v Wright,* 48 MJ 896, 901 (A.F. Crim. App. 1998).
"The appellant has not identified, nor are we aware of any holding by the Supreme Court, or any other court for that matter, which identifies sex offenders as a 'suspect class.'"
3. *United States v Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998).
"The Supreme Court has defined narrowly those infractions that violate fundamental fairness, and declared that '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation Defendant asserts that the historic exclusion of prior bad acts evidence to prove propensity to commit the charged crime is so basic to our criminal justice system that it falls within the narrowly defined "fundamental fairness" arena.'"

[37] 385 U.S. 554 (1967).

[38]
1. 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994):
Statement of Senator Dole: "The presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice";
2. 140 CONG. REC. H8968, H8991 (daily ed. Aug. 21, 1994):
Statement of Rep. Molinari:"In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's

> authority under evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect";
>
> 3. 140 CONG. REC. H5438 (daily ed. June 29, 1994):
>
> Statement of Rep. Kyl: "The trial court retains total discretion to include or exclude this type of evidence."

[39] U.S. Const. Amend VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[40] In a decision subsequently affirmed by the United States Court of Appeals for the Armed Forces, the United States Air Force Court of Criminal Appeals held, "the reasoning in *Mound*, 149 F.3d at 801 and *Castillo*, 140 F.3d at 883 provides ample justification for rejecting the equal protection claim and we do so now" (*United States v Wright*, 48 MJ 896, 901 (A.F. Crim. App., 1998), *aff'd* 53 MJ 476 (Armed Forces App., 2000)). The court here references the following holding of the *Mound* court:

> "We…reject Mound's argument that Rule 413 is a violation of his equal protection rights. Because Rule 413 does not burden[] a fundamental right, and because sex-offense defendants are not a suspect class, we must uphold the legislative classification so long as it bears a rational relation to some legitimate end." *United States v Mound*, 147 F.3d 799, 801 (8th Cir. S.D. 1998).

[41] *United States v Castillo*, 140 F.3d 874 (10th Cir. 1998).

> "Our review of the record demonstrates that the court clearly considered and applied the *Enjady* factors…[the evidence] nor confused or misled the jury… Specifically, we held that Federal Rule of Evidence 414 was constitutional."

[42] 237 F.3d 954, 960 (8th Cir. 2001).

[43] *Spencer v Texas*, 385 U.S. 554, 574 (1967).

> "It seems to me that the use of prior-convictions evidence in these cases is fundamentally at odds with traditional notions of due process…because it needlessly prejudices the accused without advancing any legitimate interest of the State. If I am wrong in thinking that the introduction of prior-convictions evidence serves no valid purpose I am not alone….[T]his failure, in my view, undermines the logic of the Court's opinion."

[44] *People v Frazier*, 89 Cal. App.4th 30, 107 Cal. Retr. 2d 100 (2001).

> "A risk does exist a jury might punish the defendant for his uncharged crimes regardless of whether it considered him guilty of the charged offense especially where, as here, the uncharged offenses…were much more serious than the charged offense."

[45] Alaska Rules of Evidence. (b) Other Crimes, Wrongs, or Acts. (2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses (i) occurred within the 10 years preceding the date of the offense charged; (ii) are similar to the offense charged; and (iii) were committed upon persons similar to the prosecuting witness.

[46] *State v Treadaway*, 568 P.2d 1061, 1065 n.2, 1067 (Ariz. 1977). A prior, separate sex offense with a different victim as remote as three years earlier is almost never admissible and especially not for the purpose of showing only defendant's propensity to commit the crime charged.

[47] 1. *United States v Meacham,* 115 F.3d 1488, 1495 (10th Cir. 1997). "There is no time limit beyond which prior sex offenses by a defendant are inadmissible."

2. *United States v Gabe, 23*7 F.3d 954, 960 (8th Cir. 2001). "Prior victim's testimony is prejudicial to Gabe for the same reason it is probative—[twenty years later]—it tends to prove his propensity to molest young children in his family."

[48] 1. The Federal Rules of Evidence are duplicate to Rule 404(b) in the states of Colorodo, Massachusetts, New Jersey, Oregon, Oklahoma, South Carolina, and Washington. However, Illinois, Indiana, Pennsylvania, and Texas have additional sections stating, in sum and substance, "In a criminal case in which the prosecution intends to offer evidence under subdivision (b), it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown."

2. In Minnesota, Subsections of Rule 404(b) include "(1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant."

3. In North Carolina, an additional amendment of Rule 404(b) includes, "Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult."

[49] Baker, Katherine. "Once a Rapist? Motivational Evidence and Relevancy in Rape Law," 110 *Harvard Law Review* 563 (1997). "A 1989 Bureau of Justice Statistics recidivism study found that only 7.7% of released rapists were

rearrested for rape. In contrast, 33.5% of released larcenists were rearrested for larceny, 31.9% of released burglars were rearrested for burglary, and 24.8% of drug offenders were rearrested for drug offenses. Only homicide had a lower recidivism rate than rape."

[50] id at 612. "Judges should incorporate these typologies into Rule 404(b) determinations of admissibility because the traditional assumptions about rapist motivation that underlie Rule 413 are inadequate."

[51] Davies, Susan M. "Evidence of Character to Prove Conduct: A Reassessment of Relevant." 27 Crim. L. Bull. 504, 518-19 (1991). "'Interactionism,' this new theory rejects the contention that a person's character disposition has minimal predictive value. Rather, this approach stresses the necessity of considering both the defendant's relevant traits and the specific situation in determining subsequent behavior."

[52] Kyl, Anne E. "The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414," 37 Ariz. L. Rev. 659 (1995).

[53] McCandless, Jason L. "Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414," 5 Wm. & Mary Bill of Rts. J. 689 (1997), p. 3.

[54] United States *v Charley, 189 F.3d 1251, 1257–59 (10*th Cir. 1999).

> "The jury upheld the conviction on six of seven counts despite accused presentation of credible alibi and that "[n]one of the law enforcement officers were able to discover any direct evidence of the reported incidents. There were no eyewitnesses; there was no physical evidence; and Defendant denied the accusations. However, from the outset of the girls' disclosures, everyone involved, including those providing treatment, was aware that Defendant had been convicted in 1994 for sexually abusing his five-year-old granddaughter."

[55] Orenstein, Aviva A., "Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403" (2005), 90 Cornell L. Rev 1487, 1524.

Bibliography

Alaska Rules of Evidence, Alaska Court System, State of Alaska, Article IV. Admissibility of Relevant Evidence, Rule 403. <http://www.courts.alaska.gov/ev.htm>

Baker, Katherine. "Once a Rapist? Motivational Evidence and Relevancy in Rape Law," 10 *Harvard Law Review* 563 (1997).

Colorado Rules of Evidence, 13.11, Article 1, Rule 404(b) < http://www.boulder-bar.org/bar_media_manual/evidence/13.11.html>

Congressional Record Senate, Volume 140, page S12990.

Cornell University Law School. *Federal Rules of Evidence,* Web. 1 Nov 2011. <http://www.law.cornell.edu /rules/fre/rules.htm>.

Davies, Susan M. "Evidence of Character to Prove Conduct: A Reassessment of Relevant," 27 Crim. L. Bull. 504, 518-19 (1991).

Federal Rules of Evidence. <http://federalevidence.com/rules-of-evidence>. Web.

Florida Statutes, Title VII, Chapter 90, Evidence Code, Rule 404. <http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0090/Sections/0090.404.html>

Illinois Rules of Evidence, Rule 404(b) <http://www.state.il.us/court/SupremeCourt/Evidence/Evidence.asp>

Indiana Rules of Evidence, Rule 404(b) <http://www.in.gov/judiciary/rules/evidence/#_Toc283195436>

Johnson v Elk Lake School Dist., 283 F. 3d 138 (3rd Cir. 2002). <http://caselaw.findlaw.com/us-3rd-circuit/1232579.html>

Kadish, Schulhofer Paulsen. *Criminal Law and Its Processes Cases and Materials*, Eighth Edition, Aspen Publishers: 2007.

Kyl, Anne E. The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414, 37 Ariz. L. Rev 659, 663 (1995).

Lempert and Saltzburg, Richard O & Stephen A, A Modern Approach to Evidence, p. 218-19, 2nd edition, 1982

Leonard, David P. "In Defense of the Character Evidence Prohibition: Foundations of the Rule against Trial by Character." Indian Law Journal, Volume 73, Number 1, Winter 1997.

Massachusetts Digest: A Digest of the Reported Decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts from 1804 to 1879, With References to Earlier Cases, Volume 2, Little, Brown, and Company, 1881.

Massachusetts Rules of Evidence, Article IV: Relevancy and Its Limits, Rule 404(b) <http://www.mass.gov/courts/sjc/guide-to-evidence/>

McCandless, Jason L. *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414* , 5 Wm. & Mary Bill of Rts. J. 689 (1997).

Michaelson v United States 335 U.S. 469 (1948).

Minnesota Rules of Evidence, Article IV: Relevancy and Its Limits, Rule 404(b) <http://www.mncourts.gov/documents/0/Public/Rules/Rules_of_evidence_eff_9-1-06.pdf>. 11 Nov. 2012.

New Jersey Rules of Evidence, Rule 404(b) <http://civiljury.blogspot.com/2010/02/nj-rules-of-evidence-njre-rule-404.html>. 11 Nov. 2012.

North Carolina General Statutes, Article IV: Relevancy and Its Limits, Rule 404(b) <http://www.ncga.state.nc.us/gascripts/statutes/StatutesTOC.pl?Chapter=0008C>. 1 Nov. 2012.

Oklahoma Rules of Evidence, Article 4: Relevancy, Sec. 2404 <http://www.dougloudenback.com/law/EvidenceRules.pdf>. 11 Nov. 2012.

Ojala, Erik D. "Propensity Evidence Under Rule 413: The Need For Balance." Washington University Law Quarterly, Volume 77:947 (1999).

Orenstein, Aviva A., "Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403," Cornell Law Review, Volume 90:1487 (2005).

People v Molineux 168 NY 264 (1901).

Pennsylvania Rules of Evidence, Rule 404(b) <http://www.pacode.com/secure/data/225/chapter4/s404.html>. 11 Nov. 2012.

State of Maine v Glen Adams aka Robert J. Moul, 513 A.2d 854 (Me. 1986).

State of Maine v Stanton Terrio, 442 A.2d 537 (Me. 1982).

Spencer v Texas, 385 U.S. 554 (1967).

State v Maylett 701 P.2d 291, 108 Idaho 671 (1985).

State v Treadaway, 568 P.2d 1061 (Ariz. 1977)

Texas Rules of Evidence, Article IV: Relevancy and Its Limits, Rule 404(b) <http://www.michaelariens.com/evidence/freandtre/treframe.htm>. 11 Nov. 2012.

United States Constitution, Constitutional Amendments 5th, 6th, and 14th.

United States v Castillo, 140 F.3d 874 (10th Cir. 1998).

*United States v Charley, 189 F.3d 1251 (10*th Cir. 1999).

United States v Aaron Cuch 842 F.2d 1173 (10th Cir. 1988).

*United States v Eagle, 137 F.3d 1011 (8*th Cir. 1998).

United States v Enjady, 134 F.3d 1427 (10th Cir. 1998).

United States v Gabe, 237 F.3d 954 (8th Cir. 2001).

United States v Guardia, 135 F.3d 1326 (10th Cir. 1998).

United States v Meacham, 115 F.3d 1488 (10th Cir. 1997).
United States v Mound, 157 F.3d 1153 (8th Cir. 1998).
United States v Wright, 48 M.J. 896 (A.F. Crim. App. 1998).
Washington Statutes, Rule 404(b)
<http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0404>. 11 Nov. 2012.

INTERVIEW

Interview with Peter Awn, Dean of the School of General Studies at Columbia University

Marc Heinrich
CULR Publisher

Dean Awn received his Ph.D. in Islamic religion and comparative religion from Harvard University in 1978. Previously he earned a B.A. in Philosophy and Classical Languages, and an M.Div. in Christian Theology. He is presently Professor of Islamic Religion and Comparative Religion. He has been visiting professor at Princeton University and has lectured widely to academic and business professionals on the role Islamic religion plays in the current political and social development of the Muslim world. Professor Awn was the first recipient of the Phillip and Ruth Hettleman Award for distinguished teaching and research. His book, "Satan's Tragedy and Redemption: Iblîs in Sufi Psychology", a study of the devil in Islamic mysticism (Sufism), was the recipient of a book award from the American Council of Learned Societies.

Marc: Do you mind speaking a little bit about your career/life, how you became interested in this? How you came to here?

Dean Awn: My interest originally was because I have a Christian theology as well as a PhD in comparative religion with a specialty in Islam. I got into that because my family was Lebanese Christians, and I was interested in the history of religious minorities in the Middle East. Had to study for contextual reasons, found that much more interesting. My area of specialization is Islamic mysticism, and that has brought lots of interesting comparative overlays with Buddhism, Christianity, Judaism, etc. This is the best job on the market in the year I was looking which was in the late 1970s. And now I've been at Columbia now 35 yrs, teaching mostly Islamic religion and occasionally Lit Hum.

Marc: Do you like lit hum [Masterpieces of Western Literature]?

Awn: Oh yes, I taught it almost every year since I became a dean so I enjoy it a lot.

Marc: What is your perspective on the controversy regarding whether women have the right to wear headscarf's…?

Awn: There are first two issues. The whole construction of what secularity and secularism mean is somewhat idiosyncratic of as you move from cultural area to cultural area. So in the French context, you will find that the French ideal carries over to the modern Turkish constitution. there is this notion, laïcité. That is the core notion. The argument is, at least in the school system, even though we realize that people come from a whole range of religious backgrounds, or no religious backgrounds, that symbolically everyone needs to be the same because that's the way we create the cohesion of French society; not by celebrating difference but by celebrating the commonality. And so in school you can't wear a cross, you can't wear a yamaka, you can't wear a headscarf. So that is one issue.

In the United States, now, what they will do with religious schools, however, as you'll find frequently in Europe government supports with government funds education of religious schools in order to give up control of the equality of the curriculum and diversity of the curriculum. In this country, we construct singularity in a different way. It isn't what you wear. You can wear bananas on your head, have eighteen piercings, dye your hair purple and green (you get an A in my class I'll have a lot of respect for you) it isn't what you look like. Nor do we see what you wear as symbolic of difference that threatens common ideas. We have no constructed myth of racial uniformity in this country. It is impossible for a country for a country of immigrants. So the ideals are, at least as we encounter them initially, abstract and then become embodied in the structures of the state, and in the way we live. But not in the way we look, not in what we believe religiously, if we believe anything. However, while we let people wear what they want. Will we ever put a dime into religious school? The answer is no. That's where we draw the line. So the French draw the line in the state school system. But we draw the line, in terms of supporting religious education.

Is one better than the other? I think in a sense to me its totally idiosyncratic. You may have serious arguments in both directions, but I don't think one can automatically say one is better than the other.

The more interesting question is the burqa. Where is that is now outlawed in any public environment. First and foremost what you have to realize it is very difficult from the point of view of the study of religion to unravel what

is religious and what is the hold over from the culture in which the religion is imbedded. So to be quite honest, most Muslims find the burqa bizarre. It is by no means standard practice in the Islamic world. They find it purely the result of or the consequence of various tribal cultural areas that overtime develop what they would consider a somewhat extreme attitude towards the control of female sexuality. There is no requirement that you can defend religiously, to completely cover the face and the body. The only thing you can find in the Qur'an is basically the idea of modesty for both men and for women. There are no details about what that means. Head covering were ubiquitous among Christians, among Jews, and then Muslim women. Roman catholic forget, its changed now, people don't necessarily observe this since the 60s,but Roman catholic women always had to put something on their heads before they went to church. They never knew why. They just knew that you don't go to church without putting a scarf or wearing a hat or something. It was a vestigial gesture to head coverings. You will find it in the orthodox Jewish community. Women wear scarves or women wear wigs, which are exactly for the same purpose as a headscarf in Islam.

Why? Women's hair was seen in traditional society as highly erotic. That to show you're hair was to show one of you're most erotic body parts. Now today sexy hair maybe something we acknowledge but this isn't something that makes you stop in your tracks. That isn't how the erotic is now constructed. So covering the head that you could say has become culturally imbedded within Islamic and non-Islamic society. Now this complete burqa covering is really a minority position that comes out only in specific cultural environments in the Islamic world. So to call it somehow standard Islamic practice is completely wrong the majority of Muslims throughout the world find it somewhat strange.

But then we go back to is there logic in arguing you cannot cover you're face? Can you make a security argument? Along those lines, you have a passport photo. We are not going to have a passport photo of your eyes because then there is now way to check whether or not its you. So there is a sense in which what you are attempting to manage is a cultural practice not religious practice even though the people themselves who do it will argue oh no this is part of Islam this is part of my Islam, which one has to respect. But I'm not sure the state doesn't have the right to question whether or not individuals can be recognized at particular key points. Now you may want to say wear your burqa around town if you want, but you're going to have to

take passport photos, you're going to have to show you're face if you want to travel.

What's also very interesting is under a bruqua you're not sure whether it is a man or a woman. When someone is that completely covered in some big flowing thing as we've found so often when you're trying to escape in certain parts and want to be incognitive as a male you can throw on a burqa and start running around.

So am I completely against it, this kind of intrusion? Do I think it is absolutely necessary? No. I think you can follow a more narrowly focus in insisting that in any time when security is of concern, you have to be willing to show you're face. And if your not then you're the one who has to make the choice. You don't get a passport. You don't travel. You don't do this or that if you're not in a position to be willing to conform to the security regulations but I think every country has the right to impose.

To me it's a very interesting thing. To show you again, where we differ in a very profound way. Is not just in this issue of how you construct the secular, but also of how you deal with extreme hate. Actually, you may know that in France and in Germany and I think a number of other European countries, it is against the law to deny the holocaust.

Marc: Another question I was going to ask is, I don't personally know a lot about and would be interesting: how is the separation of the church and state in France, how is that the same or different from that in the United States, as far as how the government looks towards religion?

Awn: I would say that the separation is much more, at least from an ideological point of view, radical. Except that you could argue since they support, to some degree, religious schools that they are involved in some aspect of education that has a religious faith to it. So from that point of view, there are none of these other than we still have with an established church. The French, well, statistically, in France the number of people who attend church, who identified themselves as religious is relatively small. So the government's engagement in any serious way with religious institutions is not great.

De facto, in the United States, while clearly we preach the separation of church and state. The ability of religious institutions to interface with

government in the framing of laws and policies etc. is I would argue far more entrenched than what you'd find in France. It is also very interesting that that if we were to look back on when did it become essential now for major politicians to talk about their religion.

Marc: and you know "God bless..."

Awn: And yes you would not find that in France. That is nobody's business. Here it is what's interesting. The French are very serious about it. There are certain things you talk about in the press and you talk about publicly about an individual's life, and there are certain things that are none of you're business. Your private life, your sex life--I mean sure scandals hit--but the French are appalled at the degree to which we explore what is going on in everyone's underwear especially people in prominent positions. That's people with mistresses, people who have extramarital affairs, people who might be prominent but also homosexual. You just don't talk about it. The French find the American press astonishingly inappropriate in dwelling so intensely on private issues that really no one's business and don't affect the quality of one's performance in government or elsewhere.

So issue of public and private is far more valued in and imbedded in French society than in American society. It is not only publically secular in terms of not being, not offering to any great degree the ability of religious institution have an impact on both the running of the state and policy. There is also this issue of the moral status of an individual especially as it relates to one's private life. This is not as much a central focus as it is in this country.

What really perplexes me is how when you have these very logical within the context of constructions of the secular and how religion interfaces or not with the public sphere and the government. And the whole issue with free speech. How do you determine whether one's better than the other? It's difficult to say.