

# AMOS YEE, FREE SPEECH, AND MAINTAINING RELIGIOUS HARMONY IN SINGAPORE

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*This Article examines the tension between freedom of speech and laws restricting the defamation of religion, using the case study of Singapore and the Amos Yee case. In 2015, four days after the death of revered former Prime Minister Lee Kuan Yew, Amos Yee, a sixteen-year-old blogger, posted a video called “Lee Kuan Yew is finally dead!” and, one day later, an image on his blog entitled “Lee Kuan Yew buttfucking Margaret Thatcher.” As part of Yee’s eight-minute-long video, Yee spent forty seconds criticizing Lee by drawing an unfavorable analogy between Lee and Jesus. As a result, Yee was charged under section 298 of the Penal Code, the law prohibiting the “uttering of words with the deliberate intent to wound the religious or racial feelings.” While international news highlighted Yee’s prosecution as a blatant attempt to silence criticism of the former Prime Minister, the courts held steadfast in their belief that Yee’s words were hurtful towards Christians, and that offending the religious sentiments of any community would not be tolerated in Singapore. This Article will review the facts of the case, the history of the law, and its application. It will also attempt to situate the law in the larger Defamation of Religions resolution debate in the United Nations from 1999–2010 and review legal restrictions on free speech in the United States and Europe.*

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## I. INTRODUCTION

With the 2015 *Charlie Hebdo* attacks in France, and the 2005 *Jyllands-Posten* Muhammad cartoons controversy in Denmark, tension between a fierce defense of free speech and the growing call to regulate speech on sensitive matters such as religion, particularly since September 11, is increasingly becoming an East vs. West, and a freedom of speech vs. freedom of religion issue. From 1999 to 2010, the Organization of Islamic Cooperation advocated for a resolution through the United Nations Commission on Human Rights (now United Nations Human Rights Council) to codify a right for religions not to be offended. Drafted by Pakistan, the resolution deplores intolerance and discrimination based on religion and prohibits the dissemination of ideas that may incite violence, intolerance or xenophobia. While most Asian and African countries voted in favor of the resolution every year, no Western country has ever voted in favor of the resolution.<sup>1</sup> The debates around this U.N. resolution illustrates how the current dispute over restrictions on religiously sensitive speech has often played out in the dichotomy of

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<sup>1</sup> Caleb Holzaepfel, *Can I Say That?: How an International Blasphemy Law Pits the Freedom of Religion Against the Freedom of Speech*, 28 EMORY INT'L L. REV. 597, 631 (2014).

West vs. non-West, with both sides advocating for an absolute universal standard.

These debates, however, overlook some pertinent considerations relating to history and context. For instance, Western countries, in opposing the resolution, argue that the resolution restricts freedom of speech and expression and that the law is thinly veiled as an attempt to move Islam “beyond criticism and beyond any perceived insult.”<sup>2</sup> However, even though many Western nations vehemently oppose the Defamation of Religions resolution on the grounds that it restricts freedom of speech, these same nations have histories of restricting speech regarding religion in their own jurisdictions. The United States has a long history of blasphemy laws, and Europe continues to restrict speech regarding the denial of the Holocaust. Furthermore, the Defamation of Religions resolution proposed by Pakistan was based on laws that had colonial roots that can be traced to the Indian Penal Code of 1871, which was drafted by the British. While Singapore has not participated in these debates, an interesting comparison can be drawn between Singapore and the nations involved in the debates. A study of the Singapore case provides an opportunity to go beyond the “West” vs. “non-West”/Muslim nations dichotomy. Singapore is not a predominantly Muslim nation but has laws in place similar to the resolution that regulates speech that may harm religious sentiment. These laws, like the resolution, can also be traced to the Indian Penal Code of 1871.

Moreover, through exploring these diverse approaches to legal restrictions on free speech and religion, this Article also attempts to explore how the law is used to contain, deflect, or enlarge rights in a particular society, time period, and political context. As described by legal anthropologist Sally Falk Moore, this approach involves “attention to social context,” including historical and socio-cultural circumstances.<sup>3</sup> Abdullahi An-Na’im highlights that events like the Rushdie affair and the international divarications relating to free speech and religion demonstrate a shift from using laws to settle issues at the local level in “relatively

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<sup>2</sup> *Id.*

<sup>3</sup> Sally Falk Moore, *Law and Anthropology*, in *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 214, 215 (1978). *See also* *LAW AND ANTHROPOLOGY: A READER* (Sally Falk Moore ed., 2005) (providing various scholars’ works on understanding the law and its impact on societies through anthropological approaches).

homogenous settings,” to local laws now becoming contested at the increasingly diversified and politicized global level.<sup>4</sup> Yet, in the wake of these changes, it must not be forgotten that laws are embedded and operate within particular local contexts. Thus, this Article examines the legal restrictions on free speech in the “West” and in Singapore, taking into account the contexts in which these laws are embedded, in order to argue that there is a need to consider local, historical and social contexts in assessing laws in general and restrictions on free speech in particular.

In Singapore, while state regulation may seem to restrict freedom of religion, prominent anthropologist Vineeta Sinha argues that, “[l]egal and bureaucratic regulation does not necessarily curtail religious expression” and suggests that regulating religion in Singapore may in fact facilitate greater religious freedom.<sup>5</sup> Secularism, therefore, takes a different form, with the state managing religion in many ways. Instead of “secularism,” for instance, An-Na’im uses the concept “secular state.”<sup>6</sup> He argues that there is not one type or definition of “secularism.” The author also posits that the strict separation of religion and state is based on a Western model that is not universal.<sup>7</sup> Instead, he argues that secularism exists in different ways in different contexts. He argues, therefore, for a “conception of secularism as a product of deeply contextual negotiation in each society,”<sup>8</sup> specifically, “as a negotiation between the religious neutrality of the state and the public role of religion.”<sup>9</sup> Thus, similar to the legal anthropological emphasis on context, An-Na’im argues for the importance of context in his discussion of secularism. Although the Singapore state is officially religiously neutral, it is heavily involved in the management of religion, along with the management of other rights, such as freedom of speech.<sup>10</sup>

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<sup>4</sup> Abdullahi An-Na’im, *What Do We Mean by Universal?*, in ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA’IM 3, 10 (Mashood A. Baderin ed., 2010).

<sup>5</sup> VINEETA SINHA, RELIGION-STATE ENCOUNTERS IN HINDU DOMAINS: FROM THE STRAITS SETTLEMENTS TO SINGAPORE 254 (2011) (alteration in original).

<sup>6</sup> ABDULLAHI AN-NA’IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A 9 (2008).

<sup>7</sup> An-Na’im, *supra* note 4, at 48.

<sup>8</sup> AN-NA’IM, *supra* note 6, at 37.

<sup>9</sup> *Id.* at 214.

<sup>10</sup> See SINHA, *supra* note 5.

This managerial approach to freedom of speech and religion can be seen in the *Public Prosecutor v. Amos Yee* case.<sup>11</sup> On March 27, 2015, four days after revered former Prime Minister Lee Kuan Yew passed away, sixteen-year-old Singaporean blogger Amos Yee posted a video called “Lee Kuan Yew is finally dead!” criticizing former Prime Minister Lee and his policies.<sup>12</sup> As part of Yee’s eight-minute-long video, Yee spent forty seconds criticizing Lee by referring to Christianity, drawing an unfavorable analogy between Lee and Jesus, and declaring both similar in being “power-hungry and malicious.”<sup>13</sup> Yee also posted a blog entry entitled “Lee Kuan Yew buttfucking Margaret Thatcher” with an image depicting Lee and Thatcher’s photos superimposed on a stick-figure drawing of two characters in a sexual position.<sup>14</sup> Many internet users took great offense to the video and picture, and within hours, members of the public began filing dozens of police reports. The police acted swiftly, and two days after the posting, Yee’s home was raided and he was arrested.<sup>15</sup> Yee was charged under section 292(1)(a) of the Penal Code regarding the transmission of obscene drawings, and under section 298 for deliberately intending to wound religious feelings.<sup>16</sup>

In this Article, section 298 of Singapore’s Penal Code and the recent Amos Yee case will be used to explore a non-Western and non-Islamic majority nation that maintains a law on the books that is similar to the Defamation of Religions resolution. Singapore’s distinctive characteristics, including its heterogeneity, make it a useful case study to examine the tension between freedom of speech and freedom of religion. In this Article, the situation of Singapore with regards to “religious harmony” and restrictions on religiously sensitive speech is explored in order to illustrate the role

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<sup>11</sup> Pub. Prosecutor v. Amos Yee Pang Sang, [2015] SGDC 215 ¶ 27 (Sing.).

<sup>12</sup> *Id.* ¶ 27.

<sup>13</sup> *Id.* ¶ 32.

<sup>14</sup> Carlton Tan, *Court Verdict Will Determine if Pornography Law Applies to Political Satire in Amos Yee Case*, ASIAN CORRESPONDENT (May 12, 2015), <https://asiancorrespondent.com/2015/05/court-verdict-pornography-law-political-satire-amos-yee/> [<http://perma.cc/DCQ5-N3HF>].

<sup>15</sup> Shah Salimat, *Police Arrest Amos Yee Over Anti-Lee Kuan Yew Video*, YAHOO NEWS (Mar. 29, 2015), <https://sg.news.yahoo.com/police-report-lodged-over-amos-yee-anti-lee-kuan-yew-video-063152918.html> [<http://perma.cc/B5M7-QZEV>].

<sup>16</sup> Pub. Prosecutor v. Amos Yee Pang Sang, *supra* note 11, ¶ 1.

of context in the formation and implications of section 298 of the Singapore Penal Code. Furthermore, the aim of this Article is not to take a position on the question of whether religiously sensitive speech should be regulated. Instead, through an examination of legal restrictions on free speech in the United States, Europe, and Singapore, the Article seeks to illustrate the importance of context in assessing laws on issues of human rights like freedom of speech. Lastly, the case study of section 298 is an example of how laws that restrict religiously insensitive speech as advocated by such initiatives as the Defamation of Religions resolution may work in practice, showing some of the problems associated with these laws, and how context significantly affects implications of laws.

This Article consists of three sections. First, the Article will discuss international debates regarding the Defamation of Religions resolution in the United Nations, blasphemy laws in the United States, denial of Holocaust laws in Europe, and whether the Singapore case can insert an alternative example outside of what is becoming a “West” vs. “Islam” debate. Next, the Article will discuss the details of Amos Yee’s case. It will review the events leading up to the case, the disposition of the trial court, and the High Court’s review of the trial court’s interpretation of section 298. This section will also discuss the history, language, and legislative intent behind section 298 regarding “uttering words, etc., with deliberate intent to wound the religious or racial feelings of any person.” Finally, the Article will explore the contemporary Singapore condition, examining the nation’s attitude toward religiously sensitive speech post-independence. It is hoped that this Article can spark a discussion on the management of free speech using a non-Western nation, while investigating the state of free speech in Singapore.

## II. INTERNATIONAL DEBATES ON THE DEFAMATION OF RELIGION

In the late 1980’s, British Indian writer Salman Rushdie published his controversial novel *Satanic Verses*. The book triggered massive protests throughout the world for its depiction of

Islam and the Prophet Muhammad.<sup>17</sup> In response to the Rushdie affair and an increase of anti-Muslim sentiment throughout the world, the Organization of the Islamic Conference (OIC), now the Organization of Islamic Cooperation, began to advocate through legal means that the defamation of religion constitutes a violation of human dignity.<sup>18</sup> In 1999, Pakistan, on behalf of the OIC, introduced a draft resolution entitled “Defamation of Islam.”<sup>19</sup> After a number of countries on the United Nations Commission for Human Rights complained that the resolution was too Islam-centric, the OIC rewrote the resolution to be more general in nature, retitled it “Defamation of Religions,” and based on these accommodations, the resolution was passed without a vote that same year.<sup>20</sup> After the September 11th terrorist attacks in 2001, a growing concern over the rise of Islamophobia, xenophobia, and discrimination led to the passage of the resolution every year until 2006, when the United Nations Commission on Human Rights (UNCHR) was replaced by the United Nations Human Rights Council (HRC).<sup>21</sup> After the HRC replaced the UNCHR in 2006, the HRC again approved the resolution, and this time, submitted it to the General Assembly.<sup>22</sup> In the General Assembly, 111 member states voted in favor of the resolution, fifty-four voted against, and eighteen abstained.<sup>23</sup>

However, support for the resolution began to wane. With the change in structure of the UNCHR to the HRC, new members

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<sup>17</sup> Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT’L L. & POL’Y 375, 388, 416, 434 (1996).

<sup>18</sup> Lorenz Langer, *The Rise (and Fall?) of Defamation of Religions*, 35 YALE J. INT’L L. 257 (2010).

<sup>19</sup> U.N.C.H.R., 55th Sess., U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999), [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/CN.4/1999/L.40](http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1999/L.40) [<http://perma.cc/A4L3-G5TQ>].

<sup>20</sup> U.N.C.H.R. Res. 1999/82, at 280–81, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999), [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/CN.4/1999/167](http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1999/167) [<http://perma.cc/J34Q-CEG3>].

<sup>21</sup> Rebecca J. Dobras, *Is the United Nations Endorsing Human Rights Violations: An Analysis of the United Nations’ Combating Defamation of Religions Resolutions and Pakistan’s Blasphemy Laws*, 37 GA. J. INT’L & COMP. L. 339, 352 (2009).

<sup>22</sup> G.A. Res. 61/164 (Dec. 19, 2006), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/504/27/pdf/N0650427.pdf?OpenElement>, [<http://perma.cc/JXC2-4TVL>].

<sup>23</sup> Press Release, General Assembly Adopts 46 Third Committee Texts on Human Rights Issues, Refugees, Self-Determination, Racism, Social Development, GA/10562 (Dec. 19, 2006), <http://www.un.org/press/en/2006/ga10562.doc.htm> [<https://perma.cc/WEK3-T3HY>].

joined the new HRC and divergent views began to emerge. Between 2007 and 2011, a robust exchange between the OIC and the Western block, including the United States and the E.U., took place concerning whether the Defamation of Religions resolution was stifling free speech. In 2009, in a follow up session to the “World Conference against Racism” (WCAR) in Durban, South Africa in September 2001, the HRC was tasked with the elaboration of complementary standards in accordance with paragraph 199 of the Durban Declaration and Programme of Action.<sup>24</sup> In the first ad-hoc committee, Syria and the OIC (as represented by Pakistan) stated that “a convention is needed to tackle Islamophobia by encouraging States to adopt appropriate legislation at the national level.”<sup>25</sup> By 2010, negative responses to this position became more assertive. Sweden, on behalf of the European Union, Mexico, on behalf of Colombia, Dominican Republic, Guatemala, Japan, the Republic of Korea, Switzerland, Argentina, Chile, Brazil and Uruguay; Norway, Denmark, Poland, and France expressed their opposition to defamation of religions being regarded as a human rights legal concept, explaining that human rights were relevant to individuals but not religions.<sup>26</sup>

Moreover, Sweden reiterated that the European Union firmly rejected in the strongest terms any new standard connected with the concept of “defamation of religions.”<sup>27</sup> The United States noted that an individual’s belief in his or her own religion is deeply personal and that it would be impossible and inappropriate for an international legal framework or State to attempt to adjudicate or mediate when conflicts of religious beliefs arise.<sup>28</sup> Germany stated that discrimination based on religion was different to defamation of

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<sup>24</sup> U.N.H.R.C. Dec. 3/103, U.N. Doc. A/HRC/DEC/3/103 (Apr. 23, 2007), <http://ap.ohchr.org/Documents/E/HRC/decisions/A-HRC-DEC-3-103.doc> [<http://perma.cc/UXX3-9588>].

<sup>25</sup> U.N.H.R.C., Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on Its First Session, ¶ 53, U.N. Doc. A/HRC/10/88 (Feb. 24, 2009), <http://www.ohchr.org/Documents/Issues/Racism/AdHoc/Report1stSession.pdf> [<http://perma.cc/8JJ4-4F6H>].

<sup>26</sup> U.N.H.R.C., Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on its Second Session, ¶ 47, U.N. Doc. A/HRC/13/CRP.1 (Feb. 17, 2010), <http://www.strasbourgconsortium.org/content/blurb/files/A-HRC-13-CRP1.pdf> [<http://perma.cc/Y747-WFJ3>].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



religions and the two should be kept separate.<sup>29</sup> Portugal stated that if defamation of religions was a problem, then it was not necessarily human rights mechanisms and instruments that should be called upon to address the problem.<sup>30</sup> Moreover, “since 2008, and especially since the Durban Review Conference in April 2009, a clear change of discourse became apparent among U.N. member states from Latin America or Africa, [as they began] to slowly distance themselves from the OIC agenda.”<sup>31</sup> These changes were partially a result from pressure exerted by the Western block. International and local NGOs such as the Cairo Institute for Human Rights Studies (CIHRS), the Becket Fund for Religious Liberty, Article 19, and the International Humanist and Ethical Union (IHEU) also actively engaged in the debate.<sup>32</sup>

It was not just nation-states and NGOs that were criticizing the Defamation of Religions resolution; academics also vociferously voiced their dissent. According to one article, “After international debates and conversations such as these, blasphemy laws modeled in the style of Pakistan’s Penal Code became increasingly recognized as unacceptable—not only to the United States and Britain, but throughout the democratic world.”<sup>33</sup> Titles of law journal articles such as “Is the U.N. Endorsing Human Rights Violations?”<sup>34</sup> and “Defamation of Religions: The End of Pluralism?”<sup>35</sup> also revealed a strong resistance to the resolution. Instances of heavy fines and imprisonment being handed down in blasphemy cases in Pakistan, professors in Egypt who were convicted of apostasy for interpreting the Koran metaphorically and not literally, and Saudi Arabian and Palestinian comments on television broadcasts that Jews were vampires who “bake cookies with the blood of Arabs,” were all presented as evidence that local versions of the Defamation of Religions resolution in OIC states

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Julia Alfandari et al., *Defamation of Religions: International Developments and Challenges on the Ground; SOAS International Human Rights Clinic Project* (SOAS Sch. of Law, Research Paper No. 09/2011, 2011).

<sup>32</sup> *Id.*

<sup>33</sup> Holzaepfel, *supra* note 1, at 620.

<sup>34</sup> Dobras, *supra* note 21.

<sup>35</sup> L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT’L L. REV. 69 (2009).

have been highly problematic.<sup>36</sup> More complex legal arguments against the Defamation of Religions resolution also emerged. According to legal scholar Jeroen Temperman, “in shift[ing] the emphasis from the rights of individuals to the protection of religions . . . new grounds for limiting human rights are introduced that are not recognized by human rights law.”<sup>37</sup> Needless to say, the sentiment in academic discourse, much like the debates in the HRC, was overwhelmingly critical.

In 2011, a revolutionary wave of protests and uprisings, popularly referred to as *Arab Spring*, challenged the political status quo of many nations in the OIC.<sup>38</sup> Perhaps in response, although the resolution continued to be voted on in the General Assembly, support for the resolution dwindled, and in that same year, the resolution was redrafted and changed its title to “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.”<sup>39</sup> The new resolution was adopted at the general assembly with widespread support.<sup>40</sup> Following its adoption by consensus, “numerous officials and non-governmental organizations[] lined up to applaud Resolution 16/18 as a death

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<sup>36</sup> Maxim Grinberg, *Defamation of Religions v. Freedom of Expression: Finding the Balance in a Democratic Society*, 18 SRI LANKA J. INT’L L. 197, 214 (2006).

<sup>37</sup> Jeroen Temperman, *Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech*, 2011 BRIGHAM YOUNG U. L. REV. 729, 730 (2011) (alteration in original). See also, LORENZ LANGER, RELIGIOUS OFFENCE AND HUMAN RIGHTS 379 (2014) (“As a universally applicable norm system, international law is not suited to protect particularists sensibilities.”).

<sup>38</sup> ANTONI ABAT I NINET & MARK TUSHNET, THE ARAB SPRING: AN ESSAY ON REVOLUTION AND CONSTITUTIONALISM 1 (2015) (“The events in the Middle East and North Africa in late 2010 and early 2011 have been given the label ‘the Arab Spring’ . . . The events appeared to need some sort of label because they seemed—at the time and for a while thereafter—to indicate that nations in the region (not all the nations, but many of them) were undergoing substantial transformations in their systems of government. They seemed to be moving from authoritarian systems toward more democratic and constitutionalist ones.”).

<sup>39</sup> U.N.H.R.C. Res. 16/18, U.N. Doc. A/HRC/RES/16/18 (Mar. 21, 2011); See also Sejal Parmar, *Uprooting ‘Defamation of Religions’ and Planting a New Approach to Freedom of Expression at the United Nations*, in THE UNITED NATIONS AND FREEDOM OF EXPRESSION 373, 397 (Tarlach McGonagle & Yvonne Donders eds., 2015) (“The OIC, led by Pakistan, knowing that it was sooner or later going to lose the battle over the resolutions, . . . decided that it would be preferable to propose a resolution that could gain consensus from Western and OIC States.”).

<sup>40</sup> *Id.* at 399.

knell for defamation of religion.”<sup>41</sup> One would think this would put some of the debate to rest. However, the title of law professor Robert Blitt’s law review article “Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated” highlights that some scholars are adamant in ensuring the Defamation of Religions debate never re-emerges, and if it does, that sharp criticism awaits.<sup>42</sup>

While much of the disparaging analyses of the Defamation of Religions resolution are grounded in sound logic and evidence, they at the same time argue in somewhat hyperbolic terms, positing the “liberated west” with the “oppressive OIC.” The resolution is often depicted as reproducing autocratic laws and structures of government, creating a chilling effect on free speech, and oppressing minorities. Moreover, even if the resolution speaks generally of “Defamation of Religions,” its numerous references to Islam prompt critics to refer to it as the “Defamation of Islam” resolution.<sup>43</sup> Again, without dismissing these arguments completely, what some of them overshadow is the fact that the United States had blasphemy laws that prosecuted anti-Christian speech for over 100 years. Furthermore, while the European Union argues that laws that protect religions, and not individuals, should not be considered human rights, then are Europe’s laws concerning the denial of Holocaust a human rights issue? These topics will be explored in the following section.

#### A. *Blasphemy in the United States*

Although the First Amendment of the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

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<sup>41</sup> Robert C. Blitt, *Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated*, 62 CASE. W. RES. L. REV. 347, 364 (2011).

<sup>42</sup> *Id.* at 381–82.

<sup>43</sup> Although it is acknowledged that the initial title of the resolution was “Defamation of Islam” some scholars have refused to accept that the title has changed, arguing that the content effectively protects Islam only. See Robert C. Blitt, *The Bottom Up Journey of “Defamation of Religion” from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas*, in 56 STUDIES IN LAW, POLITICS AND SOCIETY, SPECIAL ISSUE HUMAN RIGHTS: NEW POSSIBILITIES/NEW PROBLEMS 121, 162 (Austin Sarat ed., 2011) (emphasis added) (“The OIC’s position on defamation of Islam exposes its desire to protect *select* religious beliefs at the expense of either diluting or altogether casting aside existing international norms relating to freedom of expression, freedom religion or belief, and nondiscrimination.”).

abridging the freedom of speech, or of the press . . . ” some states still keep blasphemy laws on the books. These laws tend to have a strong Christian bias, such as Massachusetts’ law which criminalizes “reproaching Jesus Christ or the Holy Ghost.”<sup>44</sup> Michigan considered it a misdemeanor to take Jesus’ name in vain when cursing or swearing up until 2000.<sup>45</sup> Although these laws are still in the statute books, there are many operationally defunct laws preserved in statute books throughout the country, and the case can be easily made that blasphemy laws are virtually unenforceable.<sup>46</sup> It has been widely argued that the U.S. Supreme Court in *Joseph Burstyn, Inc. v. Wilson*, makes “the precedent in the United States . . . to consider freedom of speech an exceedingly broad right extending to blasphemers,”<sup>47</sup> and that “in *Joseph Burstyn, Inc., v. Wilson*, the Supreme Court effectively eliminated blasphemy regulations throughout the United States.”<sup>48</sup> On the other hand, it can also be argued that the court’s holding only applies to motion pictures.<sup>49</sup> Evidence that the blasphemy law issue is not completely resolved in the United States can be found in the fact that blasphemy laws have been passed in some states by overwhelming

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<sup>44</sup> MASS. GEN. LAWS ch. 272, § 36 (2016).

<sup>45</sup> MICH. COMP. LAWS § 750.103 (2016) (“Any person who has arrived at the age of discretion, who shall profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost, shall be guilty of a misdemeanor.”).

<sup>46</sup> See Philip K. Howard, *Obsolete Law—The Solutions*, ATLANTIC (Mar. 30, 2012), <https://www.theatlantic.com/national/archive/2012/03/obsolete-law-0151-the-solutions/255141/> [<https://perma.cc/5ZCL-SHRK>] (proposing solutions to inefficiencies created by obsolete laws).

<sup>47</sup> Holzaepfel, *supra* note 1, at 603 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

<sup>48</sup> Justin Kirk Houser, *Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic*, 114 PENN ST. L. REV. 571, 590 (2009).

<sup>49</sup> In fact, in the final line of the opinion, the court states, “We hold *only* that, under the First and Fourteenth Amendments, a state may not ban a film on the basis of a censor’s conclusion that it is ‘sacrilegious.’” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (emphasis added). While courts continue to rely on *Burstyn* as setting the standard in denying censorship based on “blasphemous” language, courts have also had to continue to determine whether or to what extent certain media are covered by the first amendment. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (concerning video games); *Reno v. ACLU*, 521 U.S. 844, 867–70 (1997) (concerning the Internet); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969) (concerning broadcasting). See also LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 525 (1993) (“The Supreme Court has never decided a blasphemy case.”).

majorities as late as 1977, and litigation only as late as 2010 have taken place to challenge such laws.<sup>50</sup>

Although blasphemy laws in the United States are essentially dead law, and instances where individuals are charged under these laws are exceedingly rare, these laws are still part of American history—a history that emphasized order in a largely Christian society. From America’s earliest encounters with blasphemy in the Salem witch trials from 1659–1660, to the famous case of John Ruggles, a man who shouted “Jesus Christ was a bastard, and his mother must be a whore” while at the door of a tavern after drinking heavily, America’s blasphemy laws were highly Christian-centric. In *People v. Ruggles*, the court remarked,

The people of this state, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order.<sup>51</sup>

Because Americans were considered to be Christian, it was important for courts to protect the community from blasphemous speech to preserve “decency and good order.”<sup>52</sup> Following the same line of reasoning, in *Updegraph v. Commonwealth*, the Pennsylvania Supreme Court noted:

“ . . . Christianity . . . is the law of our land . . . if from a regard to decency and the good order of society, profane swearing, breach of the Sabbath, and blasphemy, are punishable by civil magistrates, these are not punished as sins or offences against God, but crimes injurious to, and having a malignant influence on society.”<sup>53</sup>

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<sup>50</sup> Pennsylvania overwhelmingly passed a law prohibiting blasphemy in its legislature, with 193 votes to 1, in 1977. See *Corporate Name*, 15 PA. CONS. STAT. § 1303(c)(2)(ii) (repealed 2014), *invalidated by* *Kalman v. Cortes*, 723 F. Supp. 2d 766 (E.D. Pa. 2010).

<sup>51</sup> *People v. Ruggles*, 8 Johns. 290, 294 (N.Y. Sup. Ct. 1811).

<sup>52</sup> *Id.* at 294.

<sup>53</sup> *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 409 (Pa. 1824).

Even though one can very convincingly argue that America has changed dramatically since *Ruggles* and *Updegraph*, it would be very hard to deny that such laws have existed in American history.

It was only in 1952 with the *Burstyn* case that U.S. courts pronounced clearly that blasphemy laws violated U.S. freedom of speech protections found in the First Amendment of the U.S. Constitution.<sup>54</sup> And although courts have been quick to strike down blasphemy laws, such as the Maryland Supreme Court reversal of a conviction of a man who was found guilty for exclaiming, “Get your Goddamn hands off me” during a fight in 1970,<sup>55</sup> or the Federal District Court of Eastern Pennsylvania’s declaratory judgment that Pennsylvania’s blasphemy statute violates the First and Fourteenth Amendment of the U.S. Constitution after an individual challenged the statutes in order to register the name of his company as “I Choose Hell Productions LLC,”<sup>56</sup> instances of persecuting “anti-Christian” beliefs and behavior are on the rise. In 2009, a speech by prominent evolutionary biologist Richard Dawkins at the University of Oklahoma was investigated by the state legislature for promoting an “unproven and unpopular” theory.<sup>57</sup> In 2015, Apostolic Christian Kim Davis refused to honor the Supreme Court’s ruling in *Obergefell v. Hodges* by declining to issue marriage licenses to same-sex couples.<sup>58</sup> In the 2016 Republican presidential primaries, Donald Trump galvanized support by pandering to evangelical Christian voters and claiming *Roe v. Wade*, the landmark decision that forbade states from banning abortions, was a mistake that should be overturned.<sup>59</sup>

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<sup>54</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>55</sup> LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 527 (1993); *State v. West*, 263 A.2d 602 (Md. Ct. Spec. App. 1970).

<sup>56</sup> *Kalman v. Cortes*, 723 F. Supp. 2d 766 (E.D. Pa. 2010).

<sup>57</sup> Greg Lukianoff, *Oklahoma Legislature Investigates Richard Dawkins’ Free Speech*, HUFFINGTON POST (Apr. 20, 2009, 05:12 AM), [http://www.huffingtonpost.com/greg-lukianoff/oklahoma-legislature-inve\\_b\\_177473.html](http://www.huffingtonpost.com/greg-lukianoff/oklahoma-legislature-inve_b_177473.html) [<http://perma.cc/4EZW-TM97>].

<sup>58</sup> Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html> [<http://perma.cc/228B-47LH>].

<sup>59</sup> Cavan Sieczkowski, *Trump: I Would ‘Strongly Consider’ Appointing Judges to Overturn Same-Sex Marriage*, HUFFINGTON POST (Feb. 1, 2016, 09:27 AM), [http://www.huffingtonpost.com/entry/donald-trump-marriage-equality\\_us\\_56af63c8e4b00b033aafb496](http://www.huffingtonpost.com/entry/donald-trump-marriage-equality_us_56af63c8e4b00b033aafb496) [<http://perma.cc/W8DV-B86Y>].

The United States has over 100 years of blasphemy laws, and even if the laws are largely dead, with these laws' overtly Christian bias, along with the growing presence of the Christian right, it becomes difficult to ignore America's long and complicated history of tension between freedom of speech and freedom of religion. Yet as arguments unfold in favor of and against the U.N. resolution on Defamation of Religions, in light of the 2015 *Charlie Hebdo* attacks in France and the 2005 *Jyllands-Posten* Muhammad cartoons controversy in Denmark, arguments for the resolution are framed as contrary to American secular beliefs and as a "thinly veiled desire of Muslim states to move their religion beyond criticism and beyond any perceived insult."<sup>60</sup> While it is true that the United States consistently opposed the resolution, this fact is presented as if the United States was enlightening, "educating," or even saving the world from those who vote in favor of the resolution.<sup>61</sup> According to one article, "diverse people across the Western world live in an environment of general peace and mutual respect no matter their color or religious affiliation" and "Western Christianity accepts criticism and insults as part of the international cultural and religious paradigm despite violently suppressing blasphemy and heretical teaching in the past."<sup>62</sup> The article continues, "in contrast, a large portion of Muslims internationally have made no attempt to hide their distaste towards those who insult Islam . . ."<sup>63</sup> Blasphemy laws are further depicted as often being used to "settle personal scores and drive away business competition," or "suppress reformist dissent or minority sects of Islam."<sup>64</sup> In short, "such laws are used to intimidate and create a hostile environment for religious minorities."<sup>65</sup>

These depictions of the Defamation of Religions debate posit "traditional American freedom of speech standards" against "religions [that] are directly responsible for human rights violations, oppression, violence, and international terrorism."<sup>66</sup> Holzaepfel

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<sup>60</sup> Holzaepfel, *supra* note 1.

<sup>61</sup> Graham, *supra* note 35, at 72 ("As the parsing of words and negotiations has evolved over the past decade, delegations have gradually become more educated on the concept of defamation of religions and its danger to the human rights structure.").

<sup>62</sup> Holzaepfel, *supra* note 1, at 630, 634.

<sup>63</sup> Holzaepfel, *supra* note 1, at 630.

<sup>64</sup> Graham, *supra* note 35, at 80.

<sup>65</sup> Graham, *supra* note 35, at 81.

<sup>66</sup> Holzaepfel, *supra* note 1, at 621, 638 (alteration in original).

therefore argues that “there must be an avenue to fight back through public speech.”<sup>67</sup> While it is true that American courts have found blasphemy laws unconstitutional, “traditional American” standards seem more of a construction and an ideal, rather than a clear cut reality. Also, considering America’s own history of blasphemy laws, and logic behind such laws, to claim that the Defamation of Religions resolution is a thinly veiled attempt to place Islam beyond criticism would be to ignore that these same laws were justified as preserving a civil and orderly Christian society for nearly 100 years in the United States.

Because “traditional American freedom of speech” values are often seen as “traditional Western democratic” principles, and since the “West” includes Europe, the next section will review the existing Defamation of Religions laws in Europe as it pertains to Judaism and the Holocaust.

### B. *Laws Against Holocaust Denial in Europe*

While the United States currently takes the position that freedom of speech is a “traditional American value” and that it should be protected and left generally unrestricted, Europe is less *laissez-faire*. In the past several decades, speech regarding the denial of the Holocaust has become increasingly more regulated, from the Gaysott Laws in France, to section 130(3) in Germany.<sup>68</sup> In the United Kingdom, general provisions in the law make it possible to prosecute individuals with “revisionist ideologies.”<sup>69</sup> This section will briefly discuss European laws against denying the Holocaust, recent European Union decisions that endorse such laws, and European and American justifications for such laws.

In Finland, Hungary, Italy, Ireland, Latvia, Greece, Malta, the Netherlands, Sweden, and the United Kingdom, “revisionist

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<sup>67</sup> Holzaepfel, *supra* note 1, at 638.

<sup>68</sup> Loi 90-615 du 13 juillet 1990 tendant a reprimer tout acte raciste, antisemite, ou xenophobe [Law 90-615 of July 13, 1990 to Suppress Any Racist, Anti-Semitic or Xenophobic Act], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1990, p. 8333 (Fr.); STRAFGESETZBUCH [StGB] [PENAL CODE], § 130(3), *translation at* [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1241](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1241) [<http://perma.cc/BH5R-GCHV>] (Ger.).

<sup>69</sup> *Irving v. Penguin Books Ltd.*, [2000] EWHC (QB) 115 [1.2] (Eng.). In this case, a libel charge prompted a thorough examination of David Irving’s work to determine whether his ideas were in fact “revisionist.”



ideologies” can be punished under general criminal provisions dealing with the maintenance of public peace or laws dealing with statements and behaviors motivated by racist intent.<sup>70</sup> Although not directly tried under these “revisionist ideology” laws, David Irving’s case demonstrates how ideas can be greatly scrutinized under such laws. In 2000, David Irving sued Penguin Books and Prof. Deborah Lipstadt for publishing a statement that Irving was “a Nazi apologist and an admirer of Hitler” and that he “resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place.”<sup>71</sup> After a lengthy trial in which several expert witnesses explained to the court how Irving’s ideas were faulty, the court held that Irving was indeed “deliberately skew[ing] the evidence to bring it into line with his political beliefs.”<sup>72</sup> As a result of losing the trial, Irving was left bankrupt and forced to sell his home in order to afford the legal fees.<sup>73</sup>

Other countries are more explicit in their regulation of speech that denies the Holocaust. Currently, Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Slovakia, and Switzerland have laws specifically prohibiting the denial of the Holocaust.<sup>74</sup> France’s Gaysott Act of 1990 is so expansive that it prohibits the wearing of “uniforms, badges or emblems resembling those worn by members of an organization that was declared criminal” by the Nuremberg Tribunal.<sup>75</sup> Under these laws, in 1996, a far-right party member Bruno Gollnisch had his teaching position suspended for five years, salary cut in half, received a suspended three-month prison sentence, fined 5,000 euros, and was ordered to pay for the court decision to be published in the papers and 55,000 euros in damages. All of this was in part the result of a statement in

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<sup>70</sup> Laurent Pech, *The Law of Holocaust Denial in Europe: Toward a (Qualified) EU-Wide Criminal Prohibition*, in GENOCIDE DENIALS AND THE LAW 185, 198 (Thomas Hochmann & Ludovic Hennebel eds., 2011).

<sup>71</sup> Irving v. Penguin Books Ltd., *supra* note 69, ¶ 1.2.

<sup>72</sup> Irving v. Penguin Books Ltd., *supra* note 69, ¶ 13.144 (alteration in original).

<sup>73</sup> Vikram Dodd & D.D. Guttenplan, *Holocaust Denier Made Bankrupt*, GUARDIAN (Mar. 5, 2002), <https://www.theguardian.com/uk/2002/mar/05/humanities.highereducation> [<http://perma.cc/LDZ7-PF4T>]; Vikram Dodd, *Failed Libel Action Costs Irving His Home*, GUARDIAN (May 22, 2002), <https://www.theguardian.com/uk/2002/may/22/irving.humanities> [<http://perma.cc/KSJ3-TM3L>].

<sup>74</sup> Russell L. Weaver et al., *Holocaust Denial and Governmentally Declared “Truth”:* French and American Perspectives, 41 TEX. TECH L. REV. 495, 496 (2009).

<sup>75</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. R645-1 (Fr.).

2004 in which he disclosed, “I want things to be clear, as far as I am concerned, I do not deny the existence of homicidal gas chambers . . . but on the issue of the number of people killed, historians should be free to discuss it.”<sup>76</sup>

Moreover, many countries, such as Germany and Austria, have enacted even stricter laws given their “dark past” and perceived sense of moral responsibility to overcome it.<sup>77</sup> In 1994, Germany’s Penal Code was amended to include section 130(3), which states:

“Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.”<sup>78</sup>

By 2005, the law was enhanced to include section 130(4), which added that violating the “dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.”<sup>79</sup> On the basis of similar laws in Austria, the same David Irving who was bankrupted and forced to sell his home in the UK in 2000 was arrested in 2006 for statements made in a speech seventeen years earlier in which he called for the end of the “gas chambers fairy tale.”<sup>80</sup> After pleading guilty to the charge of

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<sup>76</sup> Russell L. Weaver et al., *The Creation of Transnational Administrative Structures Governing Internet Communication*, 78 MO. L. REV. 527, 544 (2013). It should be noted that Gollnisch’s conviction was reversed by the Cour de cassation, France’s highest court, on June 24, 2009. *Bruno Gollnisch Blanchi par la Cour de Cassation*, NOUVEL OBSERVATEUR (June 24, 2009), <http://tempsreel.nouvelobs.com/societe/20090624.OBS1737/bruno-gollnisch-blanchi-par-la-cour-de-cassation.html> [<http://perma.cc/RA8J-UZY6>].

<sup>77</sup> Pech, *supra* note 70, at 190.

<sup>78</sup> STRAFGESETZBUCH, *supra* note 68, § 130(3).

<sup>79</sup> STRAFGESETZBUCH, *supra* note 68, § 130(4).

<sup>80</sup> *David Irving Jailed for Holocaust Denial*, GUARDIAN (Feb. 20, 2006), <https://www.theguardian.com/world/2006/feb/20/austria.thefarright> [<http://perma.cc/F5FD-QSE9>].

denying the Holocaust, a crime that could face up to ten years of imprisonment, Irving was sentenced to three years in prison.<sup>81</sup>

In 2007, the European Union passed legislation to outlaw Holocaust denial throughout the then twenty-seven-member bloc, while giving these nations the option to not enforce the law if such a prohibition did not already exist in their laws.<sup>82</sup> The *European Union Framework Decision for Combating Racism and Xenophobia* punishes “publicly condoning, denying or grossly trivialising the crimes” defined by the Nuremberg Charter of 1945.<sup>83</sup> For such crimes, the Framework Decision makes them “punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.”<sup>84</sup> Article 10, section 1 of the Framework Decision gave members time until November 28, 2010 to take the necessary measures to comply with the provisions of this framework.<sup>85</sup> While this may seem decisive in expanding the reach of denial of Holocaust laws, Framework Decisions do not have direct effect on national laws, are only subject to the optional jurisdiction of the European Court of Justice, and enforcement proceedings cannot be taken by the European Commission for any failure to transpose a framework decision into domestic law. Therefore, when Germany attempted to extradite Fredrick Töben,<sup>86</sup> another convicted Holocaust denier, from the United Kingdom

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<sup>81</sup> *Holocaust Denier Released from Prison: David Irving Free after 13 Months in Jail*, SPIEGEL ONLINE (Dec. 20, 2006), <http://www.spiegel.de/international/holocaust-denier-released-from-prison-david-irving-free-after-13-months-in-jail-a-455726.html> [<http://perma.cc/AF5Y-7HGH>].

<sup>82</sup> Dan Bilefsky, *EU Adopts Measure Outlawing Holocaust Denial*, N.Y. TIMES (Apr. 19, 2007), <http://www.nytimes.com/2007/04/19/world/europe/19iht-eu.4.5359640.html> [<http://perma.cc/DPV4-WRYD>].

<sup>83</sup> Council of the European Union, Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, art. 1, § 1(d), 2008 O.J. (L 328) 56 (EU).

<sup>84</sup> *Id.* art. 3, § 2, 2008 O.J. (L 328) 57.

<sup>85</sup> *Id.* art. 10, § 1, 2008 O.J. (L 328) 58.

<sup>86</sup> Frederick Töben was detained under a European arrest warrant issued in 2004 by a court in Mannheim, Germany, where he is accused of denying the mass murder of Jews by the Nazis during the Second World War. Joshua Rozenberg, *Man Accused of Denying the Holocaust May Escape Extradition from Britain*, TELEGRAPH (Oct. 3, 2008), <http://www.telegraph.co.uk/news/newsttopics/lawreports/joshuarozenberg/3132331/Man-accused-of-denying-the-Holocaust-may-escape-extradition-from-Britain.html> [<http://perma.cc/5XSS-HTZN>].

when he was caught passing en route from the United States to Dubai, the request failed.<sup>87</sup>

Notwithstanding the differing views on how to punish the crime of Holocaust denial, it is undeniable that such restrictions on speech do take place in Europe. According to one scholar, “Holocaust denial is a form of hate speech because it willfully promotes enmity against an identifiable group based on ethnicity and religion.”<sup>88</sup> More importantly, at least in Europe, the Holocaust is considered an uncontestable fact. The European Court of Justice once ruled that, “denying the reality of clearly established historical facts, such as the Holocaust . . . does not constitute historical research akin to the search of truth.”<sup>89</sup> This ahistorical pursuit, the court continued, constitutes defamation of Jews and the incitement of hatred towards them.<sup>90</sup> Because the Holocaust is considered a clearly established fact, it is put above other examples of genocide throughout the world such as the Armenian genocide, which was denied the same legislative protection by the French courts in 2011.<sup>91</sup> Interestingly, even though the United States does not restrict speech pertaining to the denial of the Holocaust, and stands by its staunch defense of freedom of speech, many American scholars agree with restricting denial of Holocaust speech. While theoretically, the denial of Holocaust speech may be allowed due to the idea that all citizens should be free to decide what is acceptable and unacceptable in the “free marketplace of ideas,” according to prominent American legal scholar Stanley Fish, “[w]hen your opponent is only pretending to play your game so that he can subvert it and pervert it, you have every right—it is an *earned* right—to walk away and refuse him the advantage of engagement.”<sup>92</sup> Therefore, while the justifications may differ, a

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<sup>87</sup> *Holocaust Denier Fredrick Toben Freed*, TELEGRAPH (Nov. 20, 2008), <http://www.telegraph.co.uk/news/worldnews/europe/germany/3492675/Holocaust-denier-Frederick-Toben-freed.html> [<http://perma.cc/8SZ7-PXWM>].

<sup>88</sup> Raphael Cohen-Almagor, *Holocaust Denial is a Form of Hate Speech*, 2 AMSTERDAM L. F., no. 1, 2009, at 33, 35, <http://amsterdamlawforum.org/article/view/105/189> [<http://perma.cc/BN4Z-4W4P>].

<sup>89</sup> Ioanna Tourkochoriti, *Should Hate Speech Be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide between (France) Europe and the United States*, 45 COLUM. HUM. RTS. L. REV. 552, 613 (2013).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 612.

<sup>92</sup> Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 VAL. U. L. REV. 499, 512 (2001) (alteration in original).

tacit acceptance of laws against Holocaust denial can be found in the United States as well.<sup>93</sup>

While laws against Holocaust denial are kept in place to protect Jewish people from hate speech, the Defamation of Religions resolution proposed by Pakistan arguably does the same. Defamation of Religion, according to the OIC, constitutes a violation of human dignity.<sup>94</sup> Sharing the same roots as the resolution, section 298 of the Singapore Penal Code aims to address these same issues in restricting the utterance of words that may offend religious sentiments.<sup>95</sup> Thus, they are all concerned with limiting the negative effects of offensive speech.

This next section will explore whether or not section 298 effectively achieves these aims. It will begin with the Amos Yee case and conclude with an analysis of the particular Singapore social and political conditions that surround section 298 of the Singapore Penal Code.

### III. AMOS YEE'S CASE

On March 23, 2015, Lee Kuan Yew, Singapore's founding Prime Minister, passed away at the age of ninety-one after two years of ill health. His passing, for many Singaporeans, signified the end of an era. Lee oversaw Singapore's independence from Britain and separation from Malaysia. After the split in 1965, he pledged to build a meritocratic, multi-racial nation.<sup>96</sup> In a region still recovering from World War II, and serving as a major battle ground

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<sup>93</sup> This section is not meant to determine whether laws against Holocaust denial are proper. Instead, it highlights that while the Defamation of Religions resolution is criticized for being too specific towards Islam, or defending an ideology or religion instead of a person, Holocaust laws can easily be criticized on these bases as well. Furthermore, while it is unacceptable that people of the Jewish faith continue to experience harassment, discrimination, and hate crime, it is undeniable that such deplorable conditions are growing for Muslims throughout the world. Lastly, even beyond Islam, if one was to take the approach of the American forefathers with regards to blasphemy laws promoting "decency and good order," such laws can be beneficial in promoting order, as opposed to oppressing minorities. See *People v. Ruggles*, *supra* note 51, at 294 (blasphemy as a gross violation of decency and good order).

<sup>94</sup> U.N.C.H.R., 55th Sess., U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999), [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/CN.4/1999/L.40](http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1999/L.40) [<http://perma.cc/A4L3-G5TQ>].

<sup>95</sup> Penal Code (Cap 224, 2008 Rev Ed), s 298 (Sing.).

<sup>96</sup> *Singapore's Founding Father Lee Kuan Yew Dies at 91*, BBC (Mar. 23, 2015), <http://www.bbc.com/news/world-asia-32012346> [<http://perma.cc/PY6Q-GLBR>].

for the Cold War, Lee led the first post-independence generation of Singapore's political leaders which transformed the tiny outpost of Singapore into one of Asia's wealthiest and least corrupt countries. The New York Times reported upon his death that Lee Kuan Yew was "efficient, unsentimental, incorrupt, inventive, forward-looking and pragmatic."<sup>97</sup> At the same time, Singaporean academic Cherian George described Lee's leadership as "a unique combination of charisma and fear," with the New York Times in the same article mentioning that, "Mr. Lee developed a distinctive Singaporean mechanism of political control, filing libel suits that sometimes drove his opponents into bankruptcy and doing battle with critics in the foreign press."<sup>98</sup> Political opponent J.B. Jeyaretnam has argued that, "There's a climate of fear in Singapore. People are just simply afraid. They feel it everywhere. And because they're afraid they feel they can't do anything."<sup>99</sup> Therefore, while Lee Kuan Yew was undoubtedly revered by many for transforming Singapore into the cosmopolitan city it is today, at the same time, others feared him, and believed his political tactics were oppressive and authoritarian.

#### A. *Charges Against Amos Yee and the District Court's Opinion*

On March 27, 2015, four days after Lee Kuan Yew's death, 16-year-old Singaporean blogger Amos Yee posted a video called "Lee Kuan Yew is finally dead[!]" criticizing former Prime Minister Lee and his policies.<sup>100</sup> As part of Yee's eight-minute-long video, Yee spent forty seconds criticizing Lee by referring to Christianity, drawing an unfavorable analogy between Lee and Jesus, and declaring both similar in being "power-hungry" and "malicious" and who "deceive others into thinking they are compassionate and kind."<sup>101</sup> Yee also posted a blog entry entitled "Lee Kuan Yew

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<sup>97</sup> Seth Mydans, *Lee Kuan Yew, Founding Father and First Premier of Singapore, Dies at 91*, N.Y. TIMES (Mar. 22, 2015), <http://www.nytimes.com/2015/03/23/world/asia/lee-kuan-yew-founding-father-and-first-premier-of-singapore-dies-at-91.html> [<http://perma.cc/2BKS-38ZP>].

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Pub. Prosecutor v. Amos Yee Pang Sang*, [2015] SGDC 215 ¶ 27 (Sing.).

<sup>101</sup> *Id.* ¶ 32; Kirsten Han, *Singapore Police Arrest 17-Year-Old Over Critical Lee Kuan Yew Video*, GUARDIAN (Mar. 30, 2015), <https://www.theguardian.com/world/2015/mar/30/singapore-police-arrest-17-year-old-amos-yee-critical-lee-kuan-yew-video> [<http://perma.cc/H5HP-DFVW>]; Appellant's Closing Statements ¶ 98, *Amos Yee Pang Sang*, [2015] SGDC 215.

“buttfucking Margaret Thatcher” with an image depicting Lee and Thatcher’s photos superimposed on a stick-figure drawing of two characters in a sexual position.<sup>102</sup> Within hours, members of the public filed dozens of police reports, and two days after the posting, Yee’s home was raided and he was arrested.<sup>103</sup> Yee was charged under section 292(1)(a) of the Penal Code regarding the transmission of obscene drawings, and under section 298 for deliberately intending to wound religious feelings. A third charge under chapter 256A, the Protection from Harassment Act, was also filed, but this charge was ultimately dropped.<sup>104</sup> District Court Judge Jasvender Kaur heard the case from May 7–8, 2015.<sup>105</sup> She issued her final judgment on July 28, 2015.<sup>106</sup>

Section 292(1)(a) of the Singapore Penal Code is entitled, “Sale of Obscene Books, etc.” The language of the statute is as follows:

292 (1). Whoever sells, lets to hire, distributes, transmits by electronic means, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, transmission, public exhibition or circulation, makes, produces, or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure, or any other obscene object whatsoever;<sup>107</sup>

With regards to this charge, in defining “obscene,” the court focused on the persons likely to view the blog, and whether the content had a tendency to deprave and corrupt. Judge Kaur decided that because Yee was a teenager, the likely readers of the blog were teenagers themselves.<sup>108</sup> As such, the picture of Lee Kuan Yew and Margaret Thatcher “buttfucking” could “excite teenagers to try out different sexual positions [and engage in] deviant sexual activity i.e.,

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<sup>102</sup> Tan, *supra* note 15.

<sup>103</sup> Salimat, *supra* note 16.

<sup>104</sup> Pub. Prosecutor v. Amos Yee Pang Sang, *supra* note 11, ¶ 1.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Penal Code (Cap 224, 2008 Rev Ed), s 292(1)(a) (Sing.).

<sup>108</sup> Amos Yee Pang Sang, [2015] SGDC 215, ¶¶ 14–26.

anal intercourse.”<sup>109</sup> On this basis she found that the image had a tendency to deprave and corrupt, and therefore found beyond a reasonable doubt that Yee was guilty of violating 292(1)(a).<sup>110</sup>

Section 298 of the Singapore Penal Code is entitled “Uttering words, etc., with deliberate intent to wound the religious or racial feelings of any person.” In particular, the law states,

298. Whoever, with deliberate intention of wounding the religious or racial feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, or causes any matter however represented to be seen or heard by that person, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.<sup>111</sup>

In addressing this charge, the court focused on a portion of the video in which Yee compared Lee Kuan Yew to Jesus. In his video, Yee stated,

Seeing what Lee Kuan Yew has done, I am sure many individuals who have done similar things come to mind. But I’m going to compare him to someone that people really haven’t mentioned before – Jesus. And the aptness of that analogy is heightened seeing how Christians really seem to be a big fan of him. They are both power hungry and malicious, but deceive others into thinking that they are compassionate and kind. Their impact and legacy will ultimately not last as more and more people find out that they are full of bull. And Lee Kuan Yew’s followers are completely delusional and ignorant and have absolutely no sound logic or knowledge about him that is grounded in reality, which Lee Kuan Yew

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<sup>109</sup> *Id.* ¶ 23.

<sup>110</sup> *Id.* ¶ 26.

<sup>111</sup> Penal Code (Cap 224, 2008 Rev Ed), s 298 (Sing).



easily manipulates, similar to Christian knowledge of the Bible and the work of a multitude of priests.<sup>112</sup>

In her analysis, Judge Kaur focused on three aspects of the law as applied to Yee's comments: 1) the meaning of "any person," 2) whether Yee's actions wounded the feelings of Christians, and 3) whether Yee's actions were deliberate.<sup>113</sup> With regards to the meaning of "any person," Yee argued that the statute was "only meant to criminalise words, gestures or representations that are directed at a person and not at the entire religious community."<sup>114</sup> Judge Kaur rejected this argument referring to section 2 of Singapore's Interpretation Act which states that "words in the singular include the plural and words and expressions in the plural include the singular."<sup>115</sup> Concerning whether Yee's actions wounded the feelings of Christians, she found that words such as "power hungry," "malicious," "deceptive," "full of bull," and Yee's representations that Jesus' legacy will not last, that Christians have no knowledge of the bible, and that Christians are being manipulated by a multitude of priests, are clearly derogatory and offensive to Christians.<sup>116</sup> She emphasized the fact that Yee knew that some of the comments he was making would be offensive to Christians, and that some of the people who had left negative comments about the video were Christians.<sup>117</sup> On this point, Judge Kaur found that the section did not actually require any proof that the feelings of Christians were wounded, only that Yee deliberately intended to wound the religious feelings of a person.<sup>118</sup>

On determining whether there was deliberate intention, the defense argued that there was no "real or dominant" intention to wound the religious feelings of Christians.<sup>119</sup> Yee argued that the video was meant to be a criticism of Lee Kuan Yew's legacy, and not a video aimed at harming the religious feelings of Christians.<sup>120</sup> This, the defense added, is evidenced in the fact that the title of the

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<sup>112</sup> Amos Yee Pang Sang, [2015] SGDC 215, ¶ 27.

<sup>113</sup> *Id.* ¶¶ 29–50.

<sup>114</sup> *Id.* ¶ 29.

<sup>115</sup> *Id.* ¶ 29.

<sup>116</sup> *Id.* ¶ 33.

<sup>117</sup> *Id.* ¶ 36.

<sup>118</sup> *Id.* ¶ 40.

<sup>119</sup> *Id.* ¶ 46.

<sup>120</sup> *Id.* ¶ 46.

video is “Lee Kuan Yew is finally dead” and that Yee prefaced his comments on Christianity with, “Seeing what Lee Kuan Yew has done, I am sure that many individuals who have done similar things have come to mind.”<sup>121</sup> Lastly, in his closing statement, Yee stated that as he was doing research for his video, he began to see a lot of similarities between Lee Kuan Yew and Jesus and thought that it was a “rather interesting and unique analogy.”<sup>122</sup> Judge Kaur found that the motive of using Jesus as an analogy was irrelevant since Yee was still denigrating Jesus, and secondly, she found that Yee was “fully aware” that the comparison was offensive.<sup>123</sup> She added that Yee had looked up provisions of the Sedition Act, a law that prosecutes seditious speech and in the past had also been used to prosecute acts that offended religious sentiments that had the potential to cause public disorder.<sup>124</sup> Judge Kaur dismissed the argument that people had the ability to ignore Yee’s comments, and the defense’s argument that people stumbling across his blog was akin to overhearing a conversation not meant for them.<sup>125</sup> Having found that all of the elements of section 298 were satisfied, the court found Yee guilty of the charge beyond a reasonable doubt.<sup>126</sup>

Upon sentencing, the court acknowledged that Yee had already spent eighteen days in Singapore’s Changi Prison.<sup>127</sup> Having found that the elements of both charges were proven beyond a reasonable doubt, Yee was convicted of both charges and required to spend three weeks in Changi Prison for the section 298 charge, and one week in Changi Prison for the section 292(1)(a) charge.<sup>128</sup> She added that as both offenses were distinct, she ordered both sentences to be run consecutively for a total of four weeks.<sup>129</sup>

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<sup>121</sup> *Id.* ¶ 46.

<sup>122</sup> Appellant’s Closing Statements ¶ 100, Amos Yee Pang Sang, [2015] SGDC 215.

<sup>123</sup> Pub. Prosecutor v. Amos Yee Pang Sang, *supra* note 11, ¶ 49.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ¶ 51.

<sup>126</sup> *Id.* ¶ 52.

<sup>127</sup> *Id.* ¶ 67. See also *Singapore: Exonerate 16-Year-Old Blogger*, HUM. RIGHTS WATCH (June 22, 2015), <http://www.hrw.org/news/2015/06/22/singapore-exonerate-16-year-old-blogger> [<https://perma.cc/NFT4-C5MM>] (advocating for Amos Yee’s exoneration).

<sup>128</sup> Pub. Prosecutor v. Amos Yee Pang Sang, *supra* note 11, ¶¶ 83–86.

<sup>129</sup> *Id.*

*B. On Appeal at the High Court*

On appeal, the defense argued that the District Court's ruling was unsafe, and that the Court of Appeal has previously held that one's freedom of speech, enshrined in article 14 of the Constitution, was a fundamental right.<sup>130</sup> Yee's counsel argued that:

"[a]lthough the speech and means with which Amos chose to express his critique of Mr. Lee Kuan Yew may be shocking and timed inappropriately, the question before the court today is this: Are there competing public interests which are so greatly undermined, that the constitutional right to freedom of speech must yield?"<sup>131</sup>

To make his case, Yee's counsel added that the case was larger than Yee, and that the court's decision has far reaching implications on the curtailment of free speech and rigorous debate.<sup>132</sup> He added that in an age of renewed interest in politics and an emerging sense of ownership amongst Singaporeans over their political processes, people should not be afraid of criticizing their leaders.<sup>133</sup>

Yee's counsel first focused on the obscenity charge, arguing that the High Court wanted to adopt the strict approach used by the District Court in determining who the "likely viewers" covered under the obscenity definition, and what the standard should be when determining whether the words or actions would "deprave and corrupt."<sup>134</sup> On the section 298 charge, Yee argued "the court must choose how much weight to accord to the context and the theme behind the relevant words, as well as how cogent the evidence must be in determining whether a defendant deliberately intended to wound the religious feelings of another."<sup>135</sup> Yee rested both his

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<sup>130</sup> Appellant's Opening Submissions ¶ 5, *Amos Yee Pang Sang v. Pub. Prosecutor*, [2015] SGHC, Magistrate's Appeal No. 9108 of 2015/01, <http://www.dodwell-law.com/wp-content/uploads/2015/10/10.-Appellants-Opening-Submissions-08.10.15-compressed.pdf> [<http://perma.cc/7PN5-RP7S>].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* ¶ 6.

<sup>133</sup> *Id.* ¶ 5.

<sup>134</sup> *Id.* ¶ 8.

<sup>135</sup> *Id.* ¶ 5.

arguments on two previously decided cases of the Court of Appeal. The first was *Review Publishing Co. Ltd. v. Lee Hsien Loong*.<sup>136</sup> In this case, Yee argued that the Court of Appeal found that one's freedom of speech is a "right based on a constitutional or higher legal order of foundation."<sup>137</sup> Yee noted that in *Review Publishing Co. Ltd.*, the Court of Appeal even went so far as to say that "the right of free speech set out in art. 14(1)(a) is of a higher legal order than the Convention right of free speech in England as the Singapore Constitution is expressly declared (in art. 4) to be the supreme law of the land."<sup>138</sup>

Next, Yee referred to the recent case, *Attorney-General v. Au Wai Pang*.<sup>139</sup> Yee stated that in this case the High Court rejected the "inherent tendency" test in favor of the higher threshold of the "real risk" test.<sup>140</sup> The High Court in *Au Wai Pang* stated that, "there is significant tension between freedom of speech and the administration of justice because of the public interest in protecting both principles."<sup>141</sup> Yee cited to the section of the opinion in which the High Court stated, "[t]he issue, in the final analysis is one of balance: just as the law relating to contempt of court ought not to unduly infringe the right of freedom of speech, by the same token, that right is not an absolute right, for its untrammelled abuse would be a negation of the right itself."<sup>142</sup>

In attempting to establish a standard in achieving this balance, the Court of Appeal relied on the article "A 'Real Risk' of Undermining Public Confidence in the Administration of Justice" by Associate Professor David Tan from the National University of Singapore School of Law.<sup>143</sup> In particular, the Court of Appeal held, "I agree with Mr. Tan that the combination of the "real risk' test and the placing of the legal burden on the Prosecution 'calibrates'

<sup>136</sup> *Review Publishing Co Ltd v. Lee Hsien Loong*., [2009] SGCA 46.

<sup>137</sup> *Id.* ¶ 9 (emphasis added) (quoting *Review Publishing Co Ltd. v. Lee Hsien Loong*, [2010] 1 SLR 52, ¶¶ 175–76).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* ¶ 10 (citing *Attorney-General v. Au Wai Pang*, [2015] SGHC 16).

<sup>140</sup> *Id.* ¶ 10

<sup>141</sup> *Id.* (citing *Attorney-General v. Au Wai Pang*, [2015] SGHC 16, ¶ 9).

<sup>142</sup> *Id.* (emphasis added) (quoting *Attorney-General v. Au Wai Pang*, [2015] SGHC 16, ¶ 9).

<sup>143</sup> *Id.* See David Tan, A 'Real Risk' of Undermining Public Confidence in the Administration of Justice 16 MEDIA & ARTS L. REV. 191, 203 (2011) (suggesting that the "real risk" test for liability achieves an appropriate balance between the freedom of speech and public interest in protecting public confidence).

appropriately the tension between freedom of speech and the public interest in protecting public confidence in the administration of justice.”<sup>144</sup> The Court of Appeal went on to clarify, “the AG must prove the absence of fair criticism within the ambit of liability for scandalising contempt. This ensures that the alleged contemnor (“the defendant”) is not disadvantaged.”<sup>145</sup>

In his concluding paragraphs, Yee’s counsel highlighted the fact that Yee had left the Catholic faith to adopt “logic and reasoning” as his religion.<sup>146</sup> He added that Yee “[was] not a peddler of obscenity, nor [did] he have any reason to insult Christians.”<sup>147</sup> Yee’s actions, therefore, according to his counsel, are “exactly those sought to be protected by the right to free speech.”<sup>148</sup> Yee was “expressing his views on matters of public interest to promote criticism and for the betterment of the country.”<sup>149</sup> Yee’s counsel submitted that “the balance must tilt towards the presumptive right and Constitutional guarantee of free speech, such that ‘likely viewers’ in the section 292 charge should not be interpreted widely and loosely, and a finding of a tendency to ‘deprave and corrupt’ must be based on cogent reasoning and evidence.”<sup>150</sup> He added that, regarding the section 298 charge, “the court must closely scrutinize the evidence and context of the words before it arrives at a finding that Amos’s purpose was to insult Christians.”<sup>151</sup> Yee reiterated that he thought the District Court’s findings were unsafe *vis-à-vis* article 14 of the Singapore Constitution.<sup>152</sup>

After rejecting many of Yee’s counsel’s arguments at oral arguments, the High Court issued an oral opinion dismissing Yee’s appeal. Through the prosecutor’s office, a written summary of the court’s opinion was made available. In the summary, Justice Tay Yong Kwang stated, “I see no reason to disagree with the [District Judge] in most of her findings except for the qualifications that

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<sup>144</sup> Appellant’s Opening Submissions, *supra* note 130, ¶ 10 (emphasis added) (quoting *Attorney-General v. Au Wai Pang*, [2015] 2 SLR 352, at ¶ 358).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* ¶ 11.

<sup>147</sup> *Id.* (alteration in original).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* ¶ 12.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ¶ 13.

follow . . . ”<sup>153</sup> In the summary, the High Court supplemented Judge Kaur’s analysis by adding, “depicting 2 naked bodies in that overtly sexual position, with or without the attendant words, must be obscene by the standards of any right-thinking society.”<sup>154</sup> On the section 298 charge, Justice Tay stated, “[Mr Yee] . . . used vulgarities and insults to deliberately provoke the reader and to draw him out.”<sup>155</sup> The court continued, “[h]is statement to the police showed that he was ‘fully aware that this comparison was bound to promote ill-will amongst the Christian population,’” and asked, “how is ill-will different from wounding somebody’s feelings?”<sup>156</sup> Addressing Yee’s counsel’s argument that Yee had left the Catholic Church to adopt logic and reasoning as his religion, Justice Tay saw this as a possible “emotional catalyst” that perhaps motivated Yee’s choice of words.<sup>157</sup> Furthermore, he added that his words were also directed at non-Christians “so long as they hit the smaller group’s feelings as well.”<sup>158</sup> Justice Tay stated that “[t]hree carefully crafted sentences about a subject can deliver as much venom as 30 pages of text about another subject, especially when the subjects are then linked by analogy and said to be similar.”<sup>159</sup>

In addressing the freedom of speech argument, Justice Tay went on to say,

All this was done in the noble disguise of freedom of speech and a purported desire to generate genuine discussions and debate. His deliberate use of vulgarities and crude language and obscene depiction to provoke reaction seems like someone throwing stones at the windows of a neighbour’s flat to force the neighbour to notice him, come out to quarrel or even to fight. This does not sound like freedom of speech at all. It is a licence to hate, to humiliate

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<sup>153</sup> Amos Yee Pang Sang v. Pub. Prosecutor, 2015 SGHC, Magistrate’s Appeal No. 9108 of 2015/01, ¶1.

<sup>154</sup> *Id.* ¶ 2.

<sup>155</sup> *Id.* ¶ 3.

<sup>156</sup> *Id.* ¶ 4 (alteration in original).

<sup>157</sup> *Id.* ¶ 5.

<sup>158</sup> *Id.* ¶ 6.

<sup>159</sup> *Id.* ¶ 6 (alteration in original).

others and to totally disregard their feelings or beliefs by using words to inflict unseen wounds.<sup>160</sup>

On these grounds, Justice Tay dismissed Yee's appeal.<sup>161</sup> He also affirmed the District Court's sentence of four weeks' imprisonment over both the prosecution's and defense's request for one day of confinement in Changi Prison for each of the two charges.<sup>162</sup>

While this may seem like a terse and somewhat prudish interpretation of the law, it must be remembered that the law itself is not Singaporean. It stems from a long line of history tracing back to the Indian Penal Code and the British colonial concern that religious tensions would erupt into violence. Furthermore, the interpretation of the law also reflects the legislative intent found in recent revisions to the law that were meant to protect Singaporeans from the rise of religiously insensitive actions and remarks in Singapore and Europe. The next section will review the history of the law from its inception to today.

### *C. History of the Law*

Section 298 of the Singapore Penal Code first found its way to Singapore through the Indian Penal Code of 1860, which was enacted in the Straits Colonies in 1871.<sup>163</sup> The text of section 298 of the 1860 Indian Penal Code was as follows:

298. Whoever with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or placed any object in the sight of that person, shall be punished with imprisonment of

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<sup>160</sup> *Id.* ¶ 9.

<sup>161</sup> *Id.* ¶ 12.

<sup>162</sup> *Id.*

<sup>163</sup> George Baylon Radics, *Decolonizing Singapore's Sex Laws: Tracing Section 377A of Singapore's Penal Code*, 45 COLUM. HUM. RTS. L. REV. 57, 64 (2013).

either description for a term which may extend to one year, or with fine, or with both.<sup>164</sup>

In 1862, when the Indian Penal Code first came into operation, it included four sections that protected religious freedom in the British colony. These sections were 295 (defiling a place of worship), 296 (disturbing a religious assembly), 297 (trespassing on burial places), and 298 (uttering words with deliberate intent to wound religious feelings).<sup>165</sup> The Law Commissioners who drafted the laws stated that in framing the clause they had two objects in mind.<sup>166</sup> The first was to allow fair latitude to religious discussion, and the second was to, at the same time, prevent intentional insults to the sacred views of others.<sup>167</sup> The explanatory section to the law added, “such insults . . . seldom have any effect other than to fix those opinions deeper and to give a character of peculiar ferocity to the theological dissention. Instead of eliciting truth, they only inflame fanaticism.”<sup>168</sup>

Singapore’s section 298 shares very similar language to the original Indian Penal Code of 1860. Section 298 of the Singapore Penal Code currently states,

**Uttering words, etc., with deliberate intent to wound the religious or racial feelings of any person**

**298.** Whoever, with deliberate intention of wounding the religious or racial feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, or causes any matter however represented to be seen or heard by that person, shall

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<sup>164</sup> D.E. CRANENBURGH, *THE INDIAN PENAL CODE BEING ACT XLV. OF 1860: ANNOTATED WITH RULINGS OF THE HIGH COURTS IN INDIA UP TO JULY 1894* 262 (1894) (ebook).

<sup>165</sup> *Id.* at 260–262.

<sup>166</sup> WALTER MORGAN & A.G. MACPHERSON, *THE INDIAN PENAL CODE, (ACT XLV. OF 1860) WITH NOTES* 221 (1861) (ebook).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 217–18 (alteration in original).



be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.<sup>169</sup>

The main difference between the 1860 Indian Penal Code version and the current Singapore version was the addition of the words “or racial” and “or causes any matter however represented to be seen or heard by that person.”<sup>170</sup> It also increases the imprisonment term from one year to three years.<sup>171</sup> Some of these changes came about in 2007 in response to the *Jyllands-Posten* Muhammad cartoons controversy. Revising the law to include section 298A, Parliament added the following,

**Promoting enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony**

298A. Whoever —

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, knowingly promotes or attempts to promote, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different religious or racial groups; or

(b) commits any act which he knows is prejudicial to the maintenance of harmony between different religious or racial groups and which disturbs or is likely to disturb the public tranquility,

shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.<sup>172</sup>

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<sup>169</sup> Penal Code (Cap 224, 2008 Rev Ed), s 298 (Sing).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Penal Code (Cap 224, 2008 Rev Ed), s 298A (Sing).

Most members of Parliament agreed with the enhancement of the law and in fact argued that the law did not go far enough. According to one member of Parliament,

[L]earning from the recent Danish cartoon controversy, I would like to ask the Senior Minister of State whether these sections go far enough to address cases where the author draws cartoons or paints pictures innocently, ignorantly or under the guise of freedom of expression without deliberate intention to provoke nor knowledge that it will lead to disharmony.<sup>173</sup>

Another member of Parliament brought up Singapore's history with racial problems stating, "Any insensitive or inconsiderate action by a small minority can easily result in racial riots as Singapore had experienced in the Maria Hertogh riots and in the 1969 racial riots."<sup>174</sup>

These changes also came on the heels of several high profile cases in Singapore in which bloggers were caught posting insensitive materials regarding religion in 2005. In *Public Prosecutor v. Koh Song Huat Benjamin*, Koh was accused of posting disparaging comments about Malays and Islam on an internet forum for dog lovers in a discussion about whether taxis should refuse to carry uncaged pets out of consideration for Muslims in 2005.<sup>175</sup> Nicholas Lim Yew was concurrently charged and convicted for advocating the desecration of Islam's holy site of Mecca.<sup>176</sup> While Koh was sentenced to serve one month's imprisonment, Lim was sentenced to a nominal one-day imprisonment and the maximum fine of \$5000 in default of one month's imprisonment.<sup>177</sup> A third blogger, a seventeen-year old Chinese male was sentenced to twenty-four months of supervised

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<sup>173</sup> *Singapore Parliamentary Debates, Official Report* (Oct. 23, 2007), vol. 83, at col. 2380 (Abdullah Tarmugi, East Coast).

<sup>174</sup> *Id.* at col. 2416.

<sup>175</sup> *Pub. Prosecutor v. Koh Song Huat Benjamin*, [2005] SGDC 272; *Singapore Jails Bloggers for Racist Remarks*, SYDNEY MORNING HERALD (Oct. 10, 2005), <http://www.smh.com.au/news/breaking/singapore-jails-bloggers-for-racist-remarks/2005/10/07/1128563001603.html> [<http://perma.cc/4C6F-V2SM>].

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

probation under the condition that he undergo psychological evaluation and follow-up to address the death of his brother,<sup>178</sup> attend counseling sessions to correct his misguided dislike of Malays, post a \$10,000 bond to ensure good behavior, and perform 180 hours of community service in a Malay welfare home.<sup>179</sup> The third blogger pled guilty to making inflammatory comments about Malays and Muslims.<sup>180</sup>

All three cases were charged under the Sedition Act. The Sedition Act in Singapore prohibits seditious acts and speech, and the printing, publication, sale, distribution, reproduction and importation of seditious publications.<sup>181</sup> What is notable about the act is that in addition to punishing actions that can undermine the administration of government, the Act also criminalizes actions which promote feelings of ill-will or hostility between different races or classes of the population. In particular, the Act states:

3(1) A seditious tendency is a tendency —

(a) to bring into hatred or contempt or to excite disaffection against the Government;

(b) to excite the citizens of Singapore or the residents in Singapore to attempt to procure in Singapore, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Singapore;

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<sup>178</sup> Reports had stated his brother died en route to the hospital because the family had failed to secure a taxi that had chosen to pick up a Malay passenger instead of the third blogger and his family. See Chong Chee Kin, *Third Racist Blogger Convicted but May Avoid Jail Term*, STRAITS TIMES (Oct. 27, 2005) (stating that the third blogger blamed his baby brother's death 10 years previous on a Malay couple who refused to give up a cab they hailed for his family to take his infant brother to the hospital).

<sup>179</sup> *Third Racist Blogger Sentenced to 24 Months Supervised Probation*, CHANNEL NEWS ASIA, (Nov. 23, 2005), <http://www.channelnewsasia.com/stories/singaporelocal/news/view/180127/1.html> [<http://perma.cc/MQ2E-N6TC>].

<sup>180</sup> *Id.*

<sup>181</sup> Sedition Act, (Cap 290, 2013 Rev Ed) s 2 (Sing).

(d) to raise discontent or disaffection amongst the citizens of Singapore or the residents in Singapore;

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Singapore.<sup>182</sup>

If found guilty of committing a seditious tendency, a first offence under the act may lead to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding three years, or both.<sup>183</sup> For subsequent offences, a defendant can be sentenced to imprisonment for a term not exceeding five years.<sup>184</sup> The three bloggers were the first people to be charged under the Sedition Act since 1966.<sup>185</sup>

Because the charge of “sedition” seemed disproportionate to the act of posting hostile and insensitive remarks, some members of Parliament believed that amending section 298 of the Penal Code would provide the government with more flexibility to go after such offenses. In particular, one member of Parliament noted, “The cases of the racist bloggers, Benjamin Koh and Nicholas Lim, who were charged and convicted under the Sedition Act raised the question whether there was a need to prosecute the offenders under such a high signature Act.”<sup>186</sup> Other members of Parliament were afraid that the Sedition Act was too narrow and that section 298 gave prosecutors more discretion to charge those who commit offensive acts through the internet and social media. In particular, one member of Parliament remarked, “these changes make such offences have clearer definitions and it does not solely rely on the Sedition Act that may have limited scope.”<sup>187</sup> Moreover, a conviction under section 298 could lead to a lower penalty of a maximum imprisonment of three years. On these bases, section 298

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<sup>182</sup> *Id.* s 3.

<sup>183</sup> *Id.* s 9(2).

<sup>184</sup> *Id.* s 4(1).

<sup>185</sup> *Third Racist Blogger Sentenced to 24 Months Supervised Probation*, *supra* note 179.

<sup>186</sup> *Singapore Parliamentary Debates, Official Report* (Oct. 23, 2007), vol. 83, at col. 2175 (Abdullah Tarmugi, East Coast).

<sup>187</sup> *Id.* col. 2313–16.

of the Penal Code was amended by an act of Parliament in 2007, and was first commenced on February 1, 2008.<sup>188</sup>

Therefore, section 298 was a British import that was enhanced by events taking place in Europe and the advent of technology in Singapore. In addition to section 298 and the Sedition Act, Singapore also has the Maintenance of Religious Harmony Act of 1992.<sup>189</sup> These laws provide a comprehensive legal infrastructure that restricts freedom of speech particularly in respect to religion. As was demonstrated in the earlier section, section 298 can trace its roots to circumstances and contexts that go as far back as the Indian Penal Code of 1871. Yet laws cannot be sustained without acceptance in the society in which they are located. This next section will review the particular socio-historical conditions in Singapore that continue to keep section 298 in place.

#### IV. SINGAPORE CONTEXT

Although section 298, in conjunction with the Sedition Act, and other laws that restrict freedom of speech can seem highly oppressive, these laws emerged within, and are supported by, a larger social and historical context.<sup>190</sup> Since its inception, Singapore's heavy handed policies have constantly received criticism from international human rights groups and actors for the lack of human and civil rights protections—in particular, Singapore's death penalty is condemned, its use of caning constantly under fire, and treatment of foreign workers and political dissidents heavily scrutinized.<sup>191</sup> Yee's case was no exception.

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<sup>188</sup> Penal Code (Amendment) Act 2007, No. 51 of 2007, 2 GOV. GAZETTE ACTS SUPPL. 2008 (Sing.).

<sup>189</sup> Maintenance of Religious Harmony Act, (Cap 167A, 2001 Rev. Ed.) (Sing.).

<sup>190</sup> See George Baylon Radics, *Singapore: A 'Fine' City: British Colonial Criminal Sentencing Policies and Its Lasting Effects on the Singaporean Corporal State*, 12 SANTA CLARA J. INT'L L. 57, 90 (2014) (stating Singapore has a cultural and social history of promoting the idea of "community over self," and its people are in support of the strict national laws).

<sup>191</sup> See Michael Hor, *The Death Penalty in Singapore and International Law*, 8 SING. Y.B. INT'L L. 105, 105 (2004) (observing that "certain aspects of capital punishment in Singapore may be problematic should such standards ever crystallize into customary international law"); *A Sentence from the Dark Ages: Flogging Is Barbaric Torture; Singapore's President Should Grant Michael Fay Clemency*, L.A. TIMES (Apr. 19, 1994), [http://articles.latimes.com/1994-04-19/local/me-47545\\_1\\_michael-fay-clemency](http://articles.latimes.com/1994-04-19/local/me-47545_1_michael-fay-clemency) [<http://perma.cc/ET4M-G2CC>] (stating the punishment Fay has been sentenced to "amounts to the kind of torture outlawed by United Nations treaties," and also illuminates

International human rights organizations including the United Nations Office of the High Commissioner for Human Rights (OHCHR), Amnesty International, Human Rights Watch and Freedom House, released statements denouncing Amos Yee's prosecution and conviction.<sup>192</sup> The prosecution of Yee was criticized as violating the right to free speech.<sup>193</sup> Moreover, Yee's age complicated the matter further, and Singapore was criticized for contravening its obligations as a signatory of the United Nations Convention on the Rights of the Child (UNCRC).<sup>194</sup>

Phil Robertson, deputy Asia director of the Human Rights Watch commented, "[t]he" dismal state of Singapore's respect for free expression can be seen in the decision to impose the criminal justice system on outspoken 16-year-olds."<sup>195</sup> A statement by the U.N. Office of the High Commissioner for Human Rights (OHCHR) said, "the criminal sanctions considered in this case seem disproportionate and inappropriate in terms of the international protections for freedom of expression."<sup>196</sup> In addition, the U.N. Special Rapporteur on freedom of expression said, "the mere fact that a form of expression was considered to be insulting to a public figure was not sufficient to justify the imposition of penalties,"

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the extremes used to get Fay to confess); Philip Shenon, *Singapore, the Tiger Whose Teeth Are Not Universally Scorned*, N.Y. TIMES (Apr. 10, 1994), <http://www.nytimes.com/1994/04/10/weekinreview/the-world-singapore-the-tiger-whose-teeth-are-not-universally-scorned.html> [<http://perma.cc/LGC2-EY46>] (describing Michael Fay's flogging with a rattan cane for spray painting cars and comparing it to torture); see also *Singapore, World Execution Capital*, ECONOMIST (Apr. 1, 1999), <http://www.economist.com/node/195425> [<http://perma.cc/X4QN-M9S6>] (stating statistics about the extremely high rate of executions in Singapore).

<sup>192</sup> Press Statement, Office of the United Nations High Commissioner for Human Rights [OHCHR], Regional Office for South-East Asia, United Nations Human Rights Office Urges the Singapore Government to Consider the Best Interests of the Child in Amos Yee Court Case, <http://bangkok.ohchr.org/files/ROB%20Press%20Statement%202020615.pdf> [<http://perma.cc/7USL-YR6Y>]; *Singapore: Free 16-Year-Old Prisoner of Conscience Amos Yee*, AMNESTY INT'L (July 3, 2015), <https://www.amnesty.org/en/documents/asa36/2014/2015/en/> [<http://perma.cc/Q5NT-AWBD>]; *Singapore: Exonerate 16-Year-Old Blogger*, HUM. RIGHTS WATCH (June 22, 2015), <https://www.hrw.org/news/2015/06/22/singapore-exonerate-16-year-old-blogger> [<http://perma.cc/F98J-RQ5L>]; *Singapore: Teenage Blogger Ordered to Mental Health Institute*, FREEDOM HOUSE (June 24, 2015), <https://freedomhouse.org/article/singapore-teenage-blogger-ordered-mental-health-institute> [<http://perma.cc/2KB9-Z54A>].

<sup>193</sup> AMNESTY INT'L, *supra* note 192.

<sup>194</sup> AMNESTY INT'L, *supra* note 192.

<sup>195</sup> AMNESTY INT'L, *supra* note 192.

<sup>196</sup> OHCHR, *supra* note 192.

adding that Yee's conviction would have a "deterrent effect on others in Singapore who criticized public figures or the Government."<sup>197</sup> The U.N. OHCHR urged the government to "give special consideration to his juvenile status and ensure his treatment is consistent with the best interests of the child, the principle that lies at the heart of the Convention on the Rights of the Child," adding that the "OHCHR also hopes that the judiciary will exercise its authority in the protection of human rights including the rights of the child."<sup>198</sup> When asked in an interview with *Time* magazine about Yee's case, Singapore's Prime Minister Lee Hsien Loong, who is Lee Kuan Yew's son, justified the punishment of Yee by referring to the need to maintain religious harmony.<sup>199</sup>

While these criticisms are useful in highlighting potential pitfalls and shortcomings with Singapore's laws, many of these criticisms do not take into account that the laws Yee was prosecuted under, such as section 298, reflect Singapore's particular historical and social conditions. This section will explore the conditions that surround section 298 to provide a richer understanding of why this law exists. It will first discuss the religious and racial history of Singapore, then proceed to discuss how in a post-9/11 Singapore, lawmakers have ramped up these laws not only to prevent terrorism, but also to protect its Muslim minority. This section will then conclude with a discussion on whether restricting religious speech is the best approach to maintaining religious harmony, as well as an examination of some of the difficulties in applying the law.

#### A. *Multiculturalism and Religious/Racial Harmony in Singapore*

One of the main reasons behind retaining and enhancing section 298 of Singapore's Penal Code is to protect the religious and ethnic harmony in a nation that embodies significant diversity. The ethnic composition of Singapore consists of a Chinese majority

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<sup>197</sup> Human Rights Council, Compilation Prepared by the Office of the United Nations High Commission for Human Rights in accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21: Singapore, ¶¶ 34–35, U.N. Doc. A/HRC/WG.6/24/SGP/2 (Nov. 20, 2015).

<sup>198</sup> OHCHR, *supra* note 192.

<sup>199</sup> Hannah Beech & Zoher Abdoolcarim, *Exclusive: Singapore Prime Minister Lee Hsien Loong Speaks Candidly with TIME*, *TIME* (July 23, 2015), <http://time.com/3969196/singapore-lee-hsien-loong-interview-50th-anniversary/> [<http://perma.cc/VTS2-CUAS>].

group (74.1%) and significant minority groups of ethnic Malays (13.4%) and Indians (9.2%),<sup>200</sup> with Eurasians and other ethnic groups making up the rest. The Pew Research Centre's Religious Diversity Index ranked Singapore as the most religiously diverse country in the world,<sup>201</sup> being home to adherents of religions including Buddhism (33.3%), Christianity (18.3%), Islam (14.7%), Taoism (10.9%), and Hinduism (5.1%), among others.<sup>202</sup> Ethnicity and religious affiliation are closely related,<sup>203</sup> with Chinese making up the majority of Buddhists and Taoists, Malays making up the majority of Muslims, and Indians making up the majority of Hindus in Singapore.<sup>204</sup>

Historically, the tense relations between racial, ethnic, and religious groups served as the basis for violent uprisings. The Maria Hertogh riots, for instance, are a case in point and continue to weigh heavily on the minds of lawmakers as seen in the debates on section 298. The riots took place from December 11–13, 1950,<sup>205</sup> with clashes between Muslims and Christians.<sup>206</sup> Maria Hertogh was a girl born in 1937 to Dutch-Eurasian parents residing in Java, who baptized her as a Catholic.<sup>207</sup> Her parents were imprisoned during the Second World War by the Japanese, and Maria was taken in by a Muslim family and raised as a Muslim.<sup>208</sup> After the war,<sup>209</sup> over

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<sup>200</sup> This is based on the 2010 census results. SING. DEP'T OF STATISTICS, CENSUS OF POPULATION 2010 STATISTICAL RELEASE 1: DEMOGRAPHIC CHARACTERISTICS, EDUCATION, LANGUAGE AND RELIGION (2011), [http://www.singstat.gov.sg/docs/default-source/default-document-library/publications/publications\\_and\\_papers/cop2010/census\\_2010\\_release1/cop2010sr1.pdf](http://www.singstat.gov.sg/docs/default-source/default-document-library/publications/publications_and_papers/cop2010/census_2010_release1/cop2010sr1.pdf) [<http://perma.cc/S2JN-A2NP>].

<sup>201</sup> PEW RESEARCH CTR., GLOBAL RELIGIOUS DIVERSITY: HALF OF THE MOST RELIGIOUSLY DIVERSE COUNTRIES ARE IN ASIA-PACIFIC REGION 4 (Apr. 4, 2014), <http://www.pewforum.org/files/2014/04/Religious-Diversity-full-report.pdf> [<http://perma.cc/Y2A8-T5TF>].

<sup>202</sup> SING. DEP'T OF STATISTICS, *supra* note 200, at 11.

<sup>203</sup> Jaclyn Ling-Chien Neo, *Seditious in Singapore! Free Speech and the Offence of Promoting Ill-Will and Hostility Between Different Racial Groups*, 2011 SING. J. LEGAL STUD., 351, 351–52 & n.8 (2011).

<sup>204</sup> Human Rights Council, Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Githu Muigai, ¶ 10, U.N. Doc. A/HRC/17/40/Add.2 (Mar. 25, 2011).

<sup>205</sup> Syed Muhd Khairudin Aljunied, *Rethinking Riots in Colonial South East Asia: The Case of the Maria Hertogh Controversy in Singapore, 1950–54*, 18 S.E. ASIA RES. 105, 106 (2010).

<sup>206</sup> CHEE KIONG TONG, RATIONALIZING RELIGION: RELIGIOUS CONVERSION, REVIVALISM AND COMPETITION IN SINGAPORE SOCIETY 232 (2007).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*



seven years later,<sup>210</sup> her birth parents successfully sought to reclaim Maria through a court order obtained by the Dutch consul in Singapore.<sup>211</sup> The order was reversed, however, due to technicalities, and Maria returned to her foster parents and married a Muslim man.<sup>212</sup> The Court annulled Maria's marriage, stating that it was legal under Muslim law, but not under Dutch and British law.<sup>213</sup> The Court also placed Maria in a Catholic convent during the trial,<sup>214</sup> and eventually awarded custody to her birth parents.<sup>215</sup> Tensions between Muslims and Christians were aggravated by the Court's actions and the sensationalistic media coverage of the case.<sup>216</sup> A protest by Muslims outside the courtroom sparked a nationwide riot, which ended after two days, with eighteen people dead and 173 wounded.<sup>217</sup>

Furthermore, the year before Singapore's independence, in 1964, ethnic tensions between the Malays and the Chinese which had been building up due to communal politics<sup>218</sup> erupted into two series of riots, eventually contributing to the separation of Singapore from Malaysia.<sup>219</sup> The first series of riots, on the 21st of July during a procession celebrating the Prophet Muhammad's birthday, killed twenty-two people and wounded 454 others over five days of rioting.<sup>220</sup> The second series of riots broke out a month later, killing twelve and wounding 109 people.<sup>221</sup> Thus, the likelihood of ethno-religious violence was critical in the minds of Singapore's political leaders when Singapore gained independence in 1965.

As a result of these circumstances, the state remains secular and religiously neutral, and attempts to manage these diverse groups

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<sup>209</sup> *Id.*

<sup>210</sup> Aljunied, *supra* note 205, at 106.

<sup>211</sup> TONG, *supra* note 206, at 232.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Aljunied, *supra* note 205, at 106.

<sup>216</sup> *Id.*

<sup>217</sup> TONG, *supra* note 206, at 232.

<sup>218</sup> Mathew Mathews & Mohammad Khamsya Bin Khidzer, *Preserving Racial and Religious Harmony in Singapore, in 50 YEARS OF SOCIAL ISSUES IN SINGAPORE* 751, 75–76 (David Chan ed., 2015).

<sup>219</sup> Neo, *supra* note 203, at 353.

<sup>220</sup> TONG, *supra* note 206, at 233–34.

<sup>221</sup> TONG, *supra* note 206, at 234.

of people in many ways.<sup>222</sup> While race and religion are both key issues in Singapore, race is more salient and used as an organizing principle by the government.<sup>223</sup> And on the whole, the Singapore government has been largely successful in preserving the peace between these disparate groups for the last fifty years. As the U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance commented in 2010, “Considering that violent communal riots occurred just a few decades ago . . . the peaceful coexistence of the diverse communities is a remarkable achievement in itself.”<sup>224</sup>

According to the official narrative, and popular understanding, because of the diversity of Singapore’s population, and incidents of ethno-religious riots in the 1950s and 1960s, the harmony between the different ethnic and religious groups is fragile and must be fiercely protected as any racial or religious strife could have the potential to tear Singapore apart.<sup>225</sup> Since Singapore’s independence,<sup>226</sup> which was marked by turbulence and ethnic and religious divisions,<sup>227</sup> the government has emphasized racial and religious harmony, and taken great steps to prevent ethno-religious conflict, a strategy which has been described as “pro-active, preemptive and interventionist.”<sup>228</sup> This was driven by a need to unite a diverse and divided young nation, and to maintain social order in order to attract foreign investment in a “resource-scarce economy.”<sup>229</sup> Even until today, with no ethno-religious conflict since 1969, the government continues to emphasize the need for maintaining racial and religious harmony for the nation’s survival.

The state promotes racial and religious harmony through three broad methods—the principle of multiculturalism, laws, and policies.<sup>230</sup> Multiculturalism, more commonly referred to in

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<sup>222</sup> See TONG, *supra* note 206, at 231–63 (discussing strategies the state implements to maintain peaceful coexistence between different cultural groups).

<sup>223</sup> Chua Beng Huat, *Multiculturalism in Singapore: An Instrument of Social Control*, 44 RACE & CLASS 58, 60–61 (2003).

<sup>224</sup> Human Rights Council, *supra* note 204, ¶ 23.

<sup>225</sup> Mathews & Bin Khidzer, *supra* note 218, at 76.

<sup>226</sup> Khun Eng Kuah, *Maintaining Ethno-Religious Harmony in Singapore*, 28 J. CONTEMP. ASIA, 103, 105 (1998).

<sup>227</sup> Mathews & Bin Khidzer, *supra* note 218, at 76.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 77.

Singapore as a multiracial and multi-religious system, refers to a policy where all ethnic groups and religions have the right to retain their culture<sup>231</sup> and receive equal treatment and consideration by the state.<sup>232</sup> The Singapore constitution guarantees freedom of religion<sup>233</sup> and the state's official policy is to treat all religions equally. For instance, religious festivals of the major religions are declared public holidays, including Christmas, Hari Raya, Vesak Day, Good Friday and Diwali.<sup>234</sup> Diversity is embraced, mutual understanding of other religions is encouraged,<sup>235</sup> and Singaporeans of all ethnicities and religions are forced to interact in their communities, schools, work, and everyday life.<sup>236</sup> In addition, the state has policies in place to protect minorities and to ensure minority representation and equal treatment.<sup>237</sup>

In addition to section 298, the Sedition Act, and the Maintenance of Religious Harmony Act of 1992 serve to create a strong legal infrastructure to prosecute those who attempt to disrupt the delicate racial and religious stability.<sup>238</sup> In addition, the state actively censors content that may potentially be offensive to religion, including preventing the film *The Last Temptation of Christ* from being screened, banning Salman Rushdie's book *The Satanic Verses*,<sup>239</sup> and most recently in 2016, prohibiting pop singer Madonna from performing songs which contain religiously sensitive

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<sup>231</sup> *Id.* at 78.

<sup>232</sup> *Id.* at 76–77.

<sup>233</sup> Constitution of the Republic of Singapore s 15; TONG, *supra* note 206, at 237–38 (“Religious freedom, however, only extends to the point that it does not undermine the authority of the state. The state does not hesitate to take decisive action against religious groups which it perceives as a threat to social stability or the state’s authority. . . . Several religious groups are in fact banned.”)

<sup>234</sup> TONG, *supra* note 206, at 237.

<sup>235</sup> Mathews & Bin Khidzer, *supra* note 218, at 78.

<sup>236</sup> *Id.* at 78.

<sup>237</sup> *Id.* at 77.

<sup>238</sup> The Maintenance of Religious Harmony Act empowers the Minister for Home Affairs to make a restraining order against a person who is in a position of authority in any religious group or institution if the Minister is satisfied that the person has committed or is attempting to commit any of the following acts: causing feelings of enmity, hatred, ill-will or hostility between different religious groups; or promoting a political cause, carrying out subversive activities, or exciting disaffection against the President or the Government under the guise of propagating or practicing a religious belief. Maintenance of Religious Harmony Act, (Cap 167A, 2001 Rev. Ed.) (Sing.).

<sup>239</sup> Eugene K. B. Tan, *Keeping God in Place: The Management of Religion in Singapore*, in RELIGIOUS DIVERSITY IN SINGAPORE 55, 67 (Lai Ah Eng ed., 2008).

content such as “Holy Water” during her concert in Singapore.<sup>240</sup> Limits on free speech in Singapore are not only enshrined legally but also unofficially, in the form of “OB Markers,” a golfing term referring to out-of-bounds markers used by the government to delineate the boundaries for acceptable public discussion. Taboo topics include race and religion.<sup>241</sup>

Furthermore, education is a key strategy in maintaining peaceful relations between the different religious and ethnic communities. Government-run schools, which the majority of Singaporeans attend, emphasize racial and religious harmony. As part of the “National Education” syllabus, students learn about the fragility of the harmony in Singapore and are reminded to be on their guard against threats against this harmony.<sup>242</sup> Since 1997, Racial Harmony Day has been observed on the 21st of July every year in schools to commemorate the riots that began on 21st July 1964 and to emphasize the importance of maintaining racial and religious peace.<sup>243</sup> The “Singapore Pledge,” which students at government schools recite every day during school assemblies, contains the phrase “We, the citizens of Singapore, pledge ourselves as one united people, regardless of race, language or religion. . . .”<sup>244</sup> Ministers and members of Parliament frequently make statements on the importance of maintaining racial and religious amicability, especially as the threat of terrorism and Islamophobia has increased in recent years.<sup>245</sup>

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<sup>240</sup> Eddino Abdul Hadi, *Madonna Not Allowed to Perform Religiously Sensitive Songs Such as Holy Water at Her Concert Here*, STRAITS TIMES (Jan. 7, 2016), <http://www.straitstimes.com/lifestyle/entertainment/madonna-not-allowed-to-perform-religiously-sensitive-songs-such-as-holy> [<http://perma.cc/HQ49-Y2K8>].

<sup>241</sup> LAURENCE WAI TENG LEONG, *The ‘Straight’ Times: News Media and Sexual Citizenship in Singapore*, in JOURNALISM AND DEMOCRACY IN ASIA 159, 161–62 (Angela Romano & Michael Bromley eds., 2005).

<sup>242</sup> Charlene Tan, *Creating ‘Good Citizens’ and Maintaining Religious Harmony in Singapore*, 30 BRIT. J. RELIGIOUS EDUC. 133, 135 (2008).

<sup>243</sup> *Racial Harmony Day*, NAT’L LIBR. BOARD SING., [http://eresources.nlb.gov.sg/infopedia/articles/SIP\\_965\\_2004-12-31.html](http://eresources.nlb.gov.sg/infopedia/articles/SIP_965_2004-12-31.html) [<http://perma.cc/BK4Y-CVVR>] (last visited Nov. 17, 2016).

<sup>244</sup> *National Pledge*, NAT’L LIBR. BOARD SING., [http://eresources.nlb.gov.sg/infopedia/articles/SIP\\_84\\_2004-12-13.html](http://eresources.nlb.gov.sg/infopedia/articles/SIP_84_2004-12-13.html) [<http://perma.cc/RWL4-4V97>] (alteration in original) (last visited Jan. 15, 2017).

<sup>245</sup> Nur Asyiqin Mohamad Salleh, *Religious Harmony Needs Continuous Tending: Masagos*, STRAITS TIMES (Dec. 15, 2014), <http://news.asiaone.com/news/singapore/religious-harmony-needs-continuous-tending-masagos> [<http://perma.cc/SB42-HT65>]; *PM Lee Warns of New Fault Lines in Singapore*, ASIAONE (July 22, 2012),

In addition, in response to the terrorist threat highlighted by the capture of members of the Jemaah Islamiyah terrorist network in Singapore in 2001 and 2002,<sup>246</sup> the government created a Declaration of Religious Harmony to be declared every year in honor of the 1964 racial riots,<sup>247</sup> as well as the Inter-Racial and Religious Confidence Circles (IRCC) in an effort to encourage interreligious dialogue.<sup>248</sup> There are also other organizations to promote religious harmony, such as the Inter-Religious Organization<sup>249</sup> and the Presidential Council for Religious Harmony.<sup>250</sup> Thus, in Singapore, section 298 does not stand alone

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<http://news.asiaone.com/News/Latest+News/Singapore/Story/A1Story20120722-360540.html> [<http://perma.cc/DG82-VHWY>].

<sup>246</sup> MINISTRY OF HOME AFFAIRS, WHITE PAPER: THE JEMAAH ISLAMIYAH ARRESTS AND THE THREAT OF TERRORISM. *cmd* 2 (2003) (Sing.), <http://www.indopubs.com/complete.pdf> [<http://perma.cc/MK5S-UR8Q>].

<sup>247</sup> The text of the declaration is as follows:

We, the people in Singapore, declare that religious harmony is vital for peace, progress and prosperity in our multi-racial and multi-religious Nation.

We resolve to strengthen religious harmony through mutual tolerance, confidence, respect, and understanding.

We shall always:

Recognise the secular nature of our State,

Promote cohesion within our society,

Respect each other's freedom of religion,

Grow our common space while respecting our diversity,

Foster inter-religious communications, and thereby ensure that religion

will not be abused to create conflict and disharmony in Singapore.

*Declaration of Religious Harmony*, INTER-RELIGIOUS ORGANISATION SINGAPORE, <http://iro.sg/about/declaration> [<http://perma.cc/9J9Y-BWRF>] (last visited Jan. 13, 2017).

<sup>248</sup> An inter-racial and religious confidence circle (IRCC) is a group composed of leaders of different races and religions from a particular constituency in Singapore. The primary purpose of IRCCs is to provide a regular platform for leaders of various racial and religious communities to interact and get to know one another better, in order to build confidence, friendship and trust among them.

<sup>249</sup> The Inter-Religious Organization, Singapore (IRO), originally known as the Inter-Religious Organization of Singapore and Johor Bahru, was founded on March 18, 1949 to promote friendship and cooperation among members of different religions. It originally represented six religions: Hinduism, Judaism, Buddhism, Christianity, Islam and Sikhism. Over the years, it expanded to include Zoroastrianism, Taoism, the Bahá'í Faith and Jainism. The IRO is involved in many local activities and events, and plays an important role in educating the Singapore public about different religions. Lai Ah Eng, *The Inter-Religious Organization of Singapore*, in RELIGIOUS DIVERSITY IN SINGAPORE, *supra* note 239, at 605–06.

<sup>250</sup> The establishment of the Presidential Council for Religious Harmony (PCRH) was provided under the Maintenance of Religious Harmony Act passed on November 9, 1990.

but is part of a larger framework of laws and policies to maintain peace between different racial and religious groups in Singapore.

Therefore, due to Singapore's experiences with ethno-religious riots, the political leaders of post-independent Singapore are wary of how ethnic and religious sentiments "could easily be exploited to cause inter-communal conflicts" in multicultural Singapore.<sup>251</sup> Section 298 is but one law among many to help Singapore avoid a recurrence of ethno-religious violence.

### *B. Singapore after September 11, 2001*

In the post-9/11 climate, the increased threat of terrorism and the rise in Islamophobia have changed the global landscape.<sup>252</sup> Singapore is exceptionally at risk of both, being situated in Southeast Asia, a region with terrorist activity,<sup>253</sup> and having a diverse population including a significant Muslim population that may become the target of Islamophobia. Thus, the Singapore government recognizes that post-9/11, there are not one but two concerns. The first concern, the terrorist threat, has been addressed by many countries through counter-terrorism military strategies. However, few have addressed the second concern: maintaining religious harmony and good relations between Muslims and non-Muslims, which may be further threatened by religiously offensive speech and Islamophobia.<sup>254</sup>

In Singapore, in addition to counter-terrorism policies, the government has responded to the risk of strained racial relations and social divisions by ramping up efforts to maintain religious harmony, and increasing vigilance on speech that may threaten it. These efforts include legal strategies, for instance, the addition of section

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The act was introduced "to prevent religious tensions and conflict caused by insensitive and provocative acts, and to promote understanding, moderation, tolerance and respect for other religions." Maintenance of Religious Harmony Act (Cap 167A, 2001 Rev. Ed.) (Sing).

<sup>251</sup> TONG, *supra* note 206, at 234.

<sup>252</sup> *Islamophobia: Understanding Anti-Muslim Sentiment in the West*, GALLUP (last visited Nov. 17, 2016), <http://www.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx> [<http://perma.cc/7DJA-U7KJ>].

<sup>253</sup> MINISTRY OF HOME AFFAIRS, *supra* note 246, at 6–7.

<sup>254</sup> Lee Hsien Loong, Prime Minister, Republic of Singapore, Speech at the Official Opening of the Harmony Centre at An-Nahdhah Mosque (Oct. 7, 2006), <http://www.nas.gov.sg/archivesonline/speeches/view-html?filename=2006100701.htm> [<http://perma.cc/MD9A-VV42>].

298(a) as part of the response to the *Jyllands-Posten* Muhammad cartoons controversy. In the case of *Public Prosecutor v. Koh Song Huat Benjamin*, the Court considered the “heightened Islamic sensitivities in the post 9-11 security climate,” alongside “the specific historical and present context of Singapore’s diverse society,” thus sentencing Koh with the objective of deterrence.<sup>255</sup> In addition, political leaders continually urge Singaporeans to guard against religiously insensitive speech and to maintain peaceful relations between religions. After members of Jemaah Islamiyah were arrested in 2001 and 2002 for planning terrorist attacks in Singapore, the government “called on Singaporeans not to place the blame on the Muslim community or Islam,” urging Singaporeans to “stay united and maintain social harmony.”<sup>256</sup> More recently, in January 2016, after twenty-seven Bangladeshi migrant workers were arrested in Singapore for radicalization and planning terrorist attacks,<sup>257</sup> the government cautioned Singaporeans not to react to the news by criticizing Islam or Muslims, as it would “tear our society apart.”<sup>258</sup>

Furthermore, preventing relations between Muslims and non-Muslims in Singapore from deteriorating is also crucial to counter-terrorism efforts,<sup>259</sup> with the government’s stance being that

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<sup>255</sup> Neo, *supra* note 203, at 359 (discussing *Pub. Prosecutor v. Koh Song Huat Benjamin*, [2005] SGDC 272).

<sup>256</sup> Muhammad Haniff Bin Hassan & Kenneth George Pereire, *An Ideological Response to Combating Terrorism—The Singapore Perspective*, 17 *SMALL WARS & INSURGENCIES* 458, 463–64 (2006).

<sup>257</sup> Lee Min Kok, 27 *Radicalised Bangladeshis Arrested in Singapore Under Internal Security Act: MHA*, STRAITS TIMES (Jan. 20, 2016), <http://www.straitstimes.com/singapore/courts-crime/27-radicalised-bangladeshis-arrested-in-singapore-under-internal-security-act> [<http://perma.cc/4RMM-WLWR>].

<sup>258</sup> In a speech, Minister K. Shanmugam said that there would be new policies to “tackle acts that denigrate other races or religions, preach intolerance, or sow religious discord,” citing two recent incidents of Islamophobic speech in Singapore and saying, “Islamophobia will tear our society apart. We have to guard against it. It is completely unacceptable.” Walter Sim, *Government Looking at New Steps to Protect Social Harmony: Shanmugam*, STRAITS TIMES (Jan. 20, 2016), <http://www.straitstimes.com/politics/government-looking-at-new-steps-to-protect-social-harmony-shanmugam> [<http://perma.cc/S3AS-7QYX>].

<sup>259</sup> See Lim Yan Liang, *Security and Unity are Key to Safeguarding Republic*, STRAITS TIMES (Jan. 26, 2016), <http://www.straitstimes.com/singapore/security-and-unity-are-key-to-safeguarding-republic> [<http://perma.cc/Z26D-PPEC>] (“MPs Low Yen Ling (Chua Chu Kang GRC) and Tan Wu Meng (Jurong GRC) also stressed the importance of strengthening social cohesion and national identity across the various races and religions in light of the terror threat. Both noted that the fight against extremism was not just about

“if Singaporeans of all races and religions build for themselves a more cohesive and tolerant society, groups such as JI (Jemaah Islamiyah) would find it much harder to establish a foothold in Singapore.”<sup>260</sup> Thus, religiously insensitive speech and other actions that may worsen relations between the diverse communities in Singapore would be counterproductive to the fight against terrorism. In this light, laws like section 298 may in fact also function as part of the fight against terrorism and its effects on society. Hence, Singapore has two reasons to limit religiously insensitive speech in the post 9/11 climate. The first is to maintain the peace between Muslims and non-Muslims in a religiously diverse country, especially guarding against the rise of Islamophobia and its threat to religious harmony and social order. The second reason is to guard against alienation, radicalization, and the exploitation of religious differences by terror elements, which would render Singapore more vulnerable to terrorist attacks.<sup>261</sup>

Lastly, in societies like Singapore, where there is racial and religious diversity but with a significant majority group, limits on certain kinds of speech that may target minorities may be justified, in order to protect minorities from oppressive speech. In particular, section 298 can and has been used to protect Muslim minorities from oppressive and hateful speech.<sup>262</sup> In 2010, Andrew Kiong, a Chinese Singaporean, deliberately targeted Muslims by placing cards insulting Islam on the windshields of their cars, parked in a condominium car park.<sup>263</sup> He was convicted under section 298 and sentenced to two weeks’ imprisonment. In *Public Prosecutor v. Koh Song Huat Benjamin*, another Chinese Singaporean insulted Malays and Islam.<sup>264</sup> Although he was prosecuted under the Sedition Act, changes to the law in 2007 would have allowed him to be prosecuted under section 298. Given that the Chinese are the

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hardening physical security measures, but also one for hearts and minds to safeguard Singapore’s harmony.”).

<sup>260</sup> MINISTRY OF HOME AFFAIRS, *supra* note 246, at 23.

<sup>261</sup> Joyce Lim, *Cohesion in Singapore ‘Key to Combating Terror Threat’*, STRAITS TIMES (Jan. 26, 2016), <http://www.straitstimes.com/singapore/cohesion-in-singapore-key-to-combating-terror-threat> [<http://perma.cc/CB3A-TFJ2>].

<sup>262</sup> Neo, *supra* note 203, at 366–67.

<sup>263</sup> Leonard Lim, *3 Possible Outcomes to Amy Cheong’s Case*, ASIAONE (Oct. 13, 2012), <http://news.asiaone.com/print/News/Latest%2BNews/Singapore/Story/A1Story20121011-377046.html> [<https://perma.cc/9NME-JE8W>].

<sup>264</sup> Pub. Prosecutor v. Koh Song Huat Benjamin, *supra* note 175.



ethnic majority in Singapore and that the Malay-Muslims are an ethnic minority, the presence of section 298 may help to protect Malay-Muslims and other ethnic minorities from the harmful speech of the majority.

*C. Questioning “Racial Harmony” and Problems with Applying Section 298*

While section 298 preserves religious harmony, and aims to fight off the marginalization and potential radicalization of Singapore’s minority communities, it is undeniable that this approach may not be right for all nations, and furthermore, even in nations where the law works, there can still be negative consequences, as well as problems with its application. One problem with restrictions on speech that offends religious sentiments is that there is the danger of restricting other types of speech as well. First, restrictions on speech that may cause racial or religious offence, whether legal or normative, may have a chilling effect on all speech that concerns race or religion. For instance, restrictions on speech relating to race and religion in Singapore can limit the opportunities for ethnic minorities “who may have legitimate grievances in a Chinese-dominated society” to voice their concerns publicly.<sup>265</sup> Speaking up about discrimination could easily be considered to be “prejudicial to the maintenance of harmony,” which is prohibited under section 298A.<sup>266</sup> Thus, such limits on speech may be counterproductive to the goal of protecting minorities if it restricts them from speaking up about discrimination.

In addition, the limits on racially and religiously sensitive speech in Singapore may discourage meaningful discussions about race and religion, and thus be counterproductive to maintaining racial and religious harmony. Law professor Jaclyn Neo argues, “repressing open communication may lead to suspicion, resentment and division, thereby impeding true integration and the creation of a true community.”<sup>267</sup> Similarly, Mathews and bin Khidzer argue that discussions about sensitive issues are needed “to allow the public to confront racial and religious insensitivities and develop the appropriate mechanisms to deal with them based on the spirit of

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<sup>265</sup> LEONG, *supra* note 241, at 162.

<sup>266</sup> Penal Code (Cap 224, 2008 Rev Ed), s 298A (Sing).

<sup>267</sup> Neo, *supra* note 203, at 371–72.

respect and tolerance,” which would build “a more resilient population.”<sup>268</sup>

Furthermore, while early Singapore may have needed such laws, contemporary Singapore, with decades of peaceful coexistence between different ethnic and religious groups, might now be mature enough and ready to maintain harmony without such restrictions. For instance, in recent years, when there were cases of discriminatory speech, Chinese Singaporeans have publicly come out in defense of minority Singaporeans.<sup>269</sup> Thus, some argue that Singaporean society is ready to do away with this law, and that such restrictions on the constitutional right to free speech are no longer justified on the grounds of maintaining racial and religious harmony. In 2010, the U.N. Special Rapporteur for racism echoed these concerns about the restrictions on free speech, particularly with regard to ethnicity. He argued that these restrictions on racially-sensitive speech are no longer justified as Singapore “had evolved substantially from the days of the violent confrontations 45 years ago.”<sup>270</sup> In particular, he expressed concern about “legislative provisions which deal with the promotion of feelings of ‘enmity,’ ‘ill-will,’ or ‘hostility’ between members of the different ethnic groups in Singapore.”<sup>271</sup> The Special Rapporteur’s comments highlight the problems with a law like section 298 that restricts both racially and religiously sensitive speech. Although Mr. Muigai, as the Special Rapporteur for Racism, only referred to restrictions on free speech with regard to ethnicity, the concerns he highlighted may reasonably be applied to religion as well. Thus, such restrictions may in fact run counter to promoting a meaningful and more deeply-rooted racial and religious harmony and indeed even contribute to inter-ethnic and inter-religious tensions.

The success of the Singaporean government’s strategies to maintain racial and religious harmony has also been questioned by scholars. Mathews and bin Khidzer point out that “the Singapore brand of harmony has encountered its fair share of problems,”<sup>272</sup> while Barr argues that Singapore’s “harmony” has resulted in

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<sup>268</sup> Mathews & Bin Khidzer, *supra* note 218, at 90.

<sup>269</sup> *Id.* at 89.

<sup>270</sup> Human Rights Council, *supra* note 204, ¶ 28.

<sup>271</sup> *Id.* ¶ 26.

<sup>272</sup> Mathews & Bin Khidzer, *supra* note 218, at 77–78.

conformity and timidity among the population.<sup>273</sup> Tong suggests that this harmony is only present on the surface, and that “there may be underlying ethnic and religious tensions” which may lead to conflict if one group perceives discrimination.<sup>274</sup> Sociologist Chua Beng Huat asserts that the government’s strategies, including restrictions on sensitive speech, are underpinned by a logic of deterrence, with the idea of ‘harmony’ used to repress and pre-empt public discussion which results in a “minimalist” racial harmony.<sup>275</sup> He adds that true harmony in a democratic society should “be achieved by unhindered and undistorted public debates.”<sup>276</sup> Thus, restrictions on speech pertaining to race and religion may be an obstacle to achieving an enduring form of harmony. Chua contends that the “absence of racial violence in Singapore since 1969 suggests that the ‘danger’ of riots might have been exaggerated,” and that rising educational levels among the population could explain the fall in ethno-religious violence,<sup>277</sup> thus calling into question the need for such restrictions on speech. In addition, the absence of any ethnic or religious public unrest could be partly attributed to the stringent limits on free assembly and expression in Singapore, which have suppressed all kinds of demonstrations or protests.

Moreover, as with all laws, there is the risk that the law may not be evenly applied or that it may be misused for purposes other than those intended at the time of legislation. As Neo asserts, prosecutions for racially and religiously sensitive speech in Singapore may be perceived as being disproportionately applied to speech against the Malay-Muslim community.<sup>278</sup> Charges under the Sedition Act have mainly been regarding speech offensive to Islam and the Muslim community, with the government declining to charge a blogger for posting offensive caricatures of Jesus in 2006 and declining to prosecute three youths who posted offensive content against Indians in 2010.<sup>279</sup> This could result in the

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<sup>273</sup> Michael D. Barr, *Harmony, Conformity or Timidity? Singapore’s Overachievement in the Quest for Harmony*, in GOVERNANCE FOR HARMONY IN ASIA AND BEYOND 73, 74 (Julie Tao et al. eds., 2010).

<sup>274</sup> TONG, *supra* note 206, at 258.

<sup>275</sup> Huat, *supra* note 223, at 75.

<sup>276</sup> *Id.* at 74.

<sup>277</sup> *Id.* at 75.

<sup>278</sup> Neo, *supra* note 203, at 364.

<sup>279</sup> *Id.* at 364–65.

perception of unfairness and become a source of ethno-religious frustration. While Amos Yee's case serves as a counter example, his situation is unusual and complicated by the fact that he engaged in what the court deemed "obscene" behavior, and because his criticisms of Lee Kuan Yew prompted a number of complaints.

Finally, when there is a law restricting religiously sensitive speech, there is the question of how to, and who will, decide whether content has contravened the law. In the case of section 298, the issue is how and who decides if content has wounded religious feelings. This is an issue which was also brought up in Yee's case. In determining whether speech has contravened the law, it is either the state or the individual who decides.<sup>280</sup> If solely in the hands of the state, then there is the potential for abuse. If the individual decides, then, as Neo argues, "feelings are an unreliable basis upon which to find a constitutional violation," thus, "a court cannot simply rely on the subjective feelings of the subject group," and there must be an objective test.<sup>281</sup> Otherwise, "it renders speakers concerned with racial and religious issues in Singapore hostage to the possibly irrational sensitivities of some segments of society or, more specifically, segments of some groups."<sup>282</sup> However, this raises the question of what an objective test might look like. Regardless, in restricting a constitutional right, there must be clear and judicious balancing of the right to freedom of speech with the public interest.

## V. CONCLUSION

The purpose of this Article is to highlight some relevant issues that have been side-lined in the current global debates on religiously sensitive speech. First, while the "West" opposes the Defamation of Religions resolution because it restricts free speech, places Islam "beyond criticism," and oppresses minorities, this

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<sup>280</sup> Chloe Smith, *Law Should Protect, Not Curtail, Freedom of Speech*, LAW SOC'Y GAZETTE (May 6, 2015), <http://www.lawgazette.co.uk/analysis/comment-and-opinion/law-should-protect-not-curtail-freedom-of-speech/5048608.fullarticle> [<http://perma.cc/UD4C-8Y9B>] (Matrix Chambers' David Wolfe QC quoted as saying, "Who is going to judge? Either the state decides or the individual decides.").

<sup>281</sup> Neo, *supra* note 203, at 361. Neo made this point in relation to a case under the Sedition Act for religiously sensitive speech when the Court relied on testimony from Muslim complainants and a police officer.

<sup>282</sup> *Id.* at 361–62.

Article shows how laws restricting free speech have existed in the U.S. and continue to exist in Europe. In the United States, blasphemy laws have existed for over 100 years and restricted free speech to protect the largely Christian population, and in Europe denial of Holocaust laws have placed the existence of the Holocaust “beyond criticism” and have been held in place to protect an “identifiable group based on ethnicity and religion.”<sup>283</sup> Moreover, even though the Defamation of Religions resolution is considered a “Defamation of Islam” resolution, section 298 and its surrounding provisions share similar roots and aims with the Defamation of Religions resolution, and exist in a nation which is not a predominantly Islamic country.

An examination of Singapore’s section 298 and its uses and effects has highlighted some considerations that should be taken into account in the Defamation of Religions and in the larger freedom of speech versus freedom of religion debates. Religious harmony is a key issue in the management of religiously insensitive speech in Singapore. This consideration has not been a key part of the debate, and the Singaporean example illustrates how it can be an issue in certain contexts, especially in the post-9/11 climate. Moreover, the Singaporean example highlights the implications of the U.N. Resolution by showing how a law like the one advocated by the U.N. Resolution may work in practice, how the presence or absence of a law like this may affect society, and what factors may influence the effects of having or not having such a law. Much like the now defunct blasphemy laws in the U.S., or the denial of Holocaust laws in Europe, laws like section 298 are what legal anthropologist Moore describes as “legal interventions that reshape society,” which are “oriented toward forming the future.”<sup>284</sup> At the same time, with these laws come the concern of “law and context” and “comparative situations.”<sup>285</sup> As Moore highlights, similar laws placed in different social contexts can have varying local outcomes.<sup>286</sup> The myriad and specific concerns with such a law in Singapore society illustrate the extent to which context matters.

However, while context has significant effects on laws, they are both not static and unchanging. As Moore describes, “laws,

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<sup>283</sup> Cohen-Almagor, *supra* note 88.

<sup>284</sup> Moore, *supra* note 3, at 343.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 344.

inserted into ongoing social contexts undergo transformations. Both law and the socio-cultural context into which they have been inserted are moving entities.”<sup>287</sup> Thus, an argument for taking context into account should not be interpreted as an argument for adhering to the past and to tradition. In addition, while context is important, descriptions of context must be critically examined. For instance, narratives of history are constructed and this must be considered in assessing the historical element of context. In the Singapore case, Michael Hill argues that the state has “constructed a number of key myths in order to legitimate political policy and to mobilize social action, especially with the goal of creating consensus.”<sup>288</sup> He describes one such narrative as the one that “identifies persistent underlying communal tension as a possible source of ethnic conflict.”<sup>289</sup> Chua Beng Huat suggests that within this narrative, the likelihood of such conflicts may have been exaggerated.<sup>290</sup>

In this vein, the wider context must also be considered. This includes Singapore’s performance in international indicators such as the Economist Intelligence Unit’s Democracy Index, which from 2006 to 2013 categorized Singapore as a “hybrid regime,” and since 2014 has labeled Singapore a “flawed democracy,”<sup>291</sup> as well as the description of Singapore as an authoritarian state by scholars such as Michael Barr, Jothie Rajah and Garry Rodan.<sup>292</sup> Some scholars argue, therefore, that laws that have been described as necessary to protect religious harmony may have other motivations. Jothie Rajah<sup>293</sup> and Tsun Hang Tey<sup>294</sup> suggest that the introduction of the

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<sup>287</sup> *Id.* at 343.

<sup>288</sup> Michael Hill, *Conversion and Subversion: Religion and the Management of Moral Panics in Singapore* 14 (Asian Studies Inst., Working Paper No. 8, 1999).

<sup>289</sup> *Id.* at 1–2.

<sup>290</sup> Huat, *supra* note 223, at 75.

<sup>291</sup> Raymond Tham, *Singapore Improves Marginally in EIU’s Democracy Index*, TODAY (Jan. 22, 2016), <http://www.todayonline.com/singapore/singapore-improves-marginally-eius-democracy-index> [http://perma.cc/JS4R-2FCU].

<sup>292</sup> Michael D. Barr, *The Bonsai Under the Banyan Tree: Democracy and Democratisation in Singapore*, in 21 DEMOCRATIZATION 29, 29–42 (2014); JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* (2012); GARRY RODAN, *TRANSPARENCY AND AUTHORITARIAN RULE IN SOUTHEAST ASIA: SINGAPORE AND MALAYSIA* (2004).

<sup>293</sup> JOTHIE RAJAH, *supra* note 292, at 219.

<sup>294</sup> Tey Tsun Hang, *Excluding Religion from Politics and Enforcing Religious Harmony—Singapore-Style*, 2008 SING. J. LEGAL STUD. 118, 118 (2008).

Maintenance of Religious Harmony Act may have been politically motivated. Tey argues that this Act and other laws used to protect religious harmony like the Sedition Act and section 298A of the Penal Code are “part of an extensive corpus of very powerful legislative weapons, the choice of specific response to the situation on the ground is one to be exclusively determined by the executive. This exposes the potential arbitrariness of its employment.”<sup>295</sup>

International news organizations reported Yee’s prosecution as an attempt to silence criticism of the former Prime Minister,<sup>296</sup> and the authorities’ handling of his case was heavily criticized by international human rights organizations.<sup>297</sup> The U.N. Special Rapporteur on freedom of expression further said, “the mere fact that a form of expression was considered to be insulting to a public figure was not sufficient to justify the imposition of penalties.”<sup>298</sup> It is relevant to note here that not all cases of religiously sensitive speech have been prosecuted,<sup>299</sup> and that in 2016, Singapore’s Minister for Law, K. Shanmugam, stated that over the last five years, 70% of young people under police investigation were eventually not charged, and that the police’s approach for young offenders is to “try to avoid criminalizing the young person’s conduct where possible,” in order to give them “a second chance” by pursuing a course of rehabilitation instead.<sup>300</sup> However, Yee, a young, first-time and non-violent offender, was prosecuted to the full extent of the law.

It is relevant then to consider the two arguments that, with regards to religiously sensitive speech, other laws can serve the

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<sup>295</sup> *Id.* at 141.

<sup>296</sup> Robert Mackey, *Teenager Faces Charges After Mocking Singapore’s Founding Father on YouTube*, N.Y. TIMES (Mar. 30, 2015), <http://www.nytimes.com/2015/03/31/world/asia/teen-faces-charges-after-mocking-singapores-founding-father-on-youtube.html> [<http://perma.cc/J54U-66EK>]; Tessa Wong, *Amos Yee: The Boy Who Criticised Lee Kuan Yew*, BBC (May 12, 2015), <http://www.bbc.com/news/world-asia-32604122> [<http://perma.cc/RHG4-8CRA>].

<sup>297</sup> HUM. RIGHTS WATCH, *supra* note 192.

<sup>298</sup> Human Rights Council, *supra* note 197, ¶ 35.

<sup>299</sup> Neo, *supra* note 203, at 365 (stating a blogger who posted an offensive cartoon of Jesus in 2006, and three youths who posted offensive content against Indians in 2010, were not prosecuted).

<sup>300</sup> Lee Min Kok, *Shanmugam on Death of Benjamin Lim: Charges Brought Against Young People Only When There Are ‘Aggravating Factors’*, STRAITS TIMES (Mar. 1, 2016), <http://www.straitstimes.com/singapore/shanmugam-on-death-of-benjamin-lim-charges-brought-against-young-people-only-when-there> [<http://perma.cc/2N83-A6VZ>].

same function, and that law should only play a limited role. As Matthias Mahlmann states, “there is not only criminal law, but of course other legal, political, and cultural mechanisms for religions to use against critique.”<sup>301</sup> Javier Martínez-Torrón argues that, “we should not lose sight of the limited role that law must play in this area . . . Democracy and pluralism could be more endangered by a possible abuse of the power to restrict free speech than by the potential harm that abusive forms of expression cause to religious beliefs.”<sup>302</sup>

The study of the Singapore case therefore illustrates the reasons for and against restrictions on religiously sensitive speech, that arise from context-specific characteristics, to hopefully add to the discussion on whether freedom of speech and freedom of religion can coexist without infringing upon one another. As legal scholar George Letsas points out, there may exist many possible reasons to restrict such speech.<sup>303</sup> While he, like many scholars and voices in the debate, refutes the right not to be offended in one’s religious beliefs as a sound reason, he acknowledges that there may be other reasons that may justify the state restricting such speech.<sup>304</sup> Professor Vineeta Sinha adds that in multicultural contexts such as Singapore, regulating religious expression can expand and protect one’s religious rights, as opposed to infringe upon them.<sup>305</sup>

What this Article ultimately shows is that while many consider the concept of human rights “universal,” laws that implicate these universal rights are, in reality, context-dependent in their formation, usefulness, and effects. Rights such as freedom of speech and freedom of religion are complicated, and different contexts result in different types of legal approaches. As opposed to rejecting different approaches outright, a perspective that takes into account context, where one seeks to understand the conditions under

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<sup>301</sup> Matthias Mahlmann, *Free Speech and the Rights of Religion*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 41, 69 (András Sajó ed., 2007).

<sup>302</sup> Javier Martínez-Torrón, *Freedom of Expression Versus Freedom of Religion in the European Court of Human Rights*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD, *supra* note 301, at 233, 269.

<sup>303</sup> George Letsas, *Is There a Right Not to be Offended in One’s Religious Beliefs?*, in LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 239, 243 (Lorenzo Zucca & Camil Ungureanu eds., 2012).

<sup>304</sup> *Id.*

<sup>305</sup> SINHA, *supra* note 5.



which laws emerge and the positive and negative consequences of such laws in different societies, can further enrich the dialogue—especially in this case where the discussion seems to dangerously hinge on becoming a “West” vs. “Islam,” or “Us vs. Them” debate.