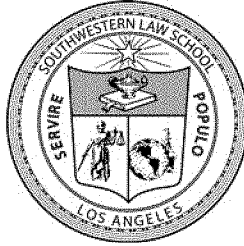


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LUNCHEON KEYNOTE

FAKE NEWS: REFLECTIONS FROM HISTORY

Russell L. Weaver *

“Fake news” is hardly a new phenomenon. Throughout the course of human history, individuals have disseminated false facts and false information in an effort to distort or gain an advantage in public debates. Some of this “fake news” has involved outright lies designed to damage or destroy an individual’s reputation. Other types of fake news came in the form of satire in which newspapers (or others) attributed false characteristics, or exaggerated personal characteristics, in an effort to attack individuals, especially politicians or other prominent individuals.

Fake news has taken on a whole new meaning in recent years because of dramatic changes in communications technologies that enable ordinary people to engage in mass communication. For centuries, with some exceptions, information moved at the speed at which people could move, and mass communication was beyond the realm of most people. When an ancient Roman battle was fought in a place far from Rome, a Roman emperor might have to wait days or weeks to learn the outcome of that battle. Information regarding the battle usually returned to Rome by foot, horse, chariot or boat, but would often be hand-carried by a person (or people). In other words, information moved slowly and inefficiently.

The use of books and pamphlets as a means of mass communication is a relatively recent phenomenon. Although written works have existed for a long time, for centuries most books were handwritten by monks, in Latin, and almost invariably were religious in nature. As a result, prior to the fifteenth century, books were relatively rare commodities. In 1050, Exeter Cathedral had only five books in its entire library. Even as late as the early fifteenth

* Professor of Law and Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law. This article is based on a keynote luncheon speech delivered at Southwestern University Law School on January 26, 2018. That speech was based, in large part, on RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY xi-xii (2013).

century, Cambridge University's library contained only 122 books. The impact of these books was necessarily limited since most people were illiterate even in their native languages.

The first major communications breakthrough came in the fifteenth century when Johannes Gutenberg invented movable type thereby creating the printing press. Although printing had existed for centuries, most printing before that time had involved carved blocks of wood. The carving process was time-consuming, and the printed pages that resulted usually contained only floral motifs. Words were added later by hand. Gutenberg's idea was to cast all of the letters of the alphabet in both lower-case and upper-case. These letters could be relatively quickly assembled into a wooden box to create a page that was ready for printing. After ink and paper were placed over the type, the press would be screwed down to create an impression of the typeset page. The press would then be screwed back up, and the page would be removed and hung up to dry. By repeating this process, a printer could create multiple copies of pages.

Even though the Gutenberg printing press did not alter the speed at which information could move, it did enable individuals to more easily create multiple copies of documents, and ultimately led to the widespread dissemination of information, knowledge and ideas. The end result was revolutionary. The spread of information led to dramatic advances in the areas of science, government and religion, and ultimately to the scientific revolution and the Protestant Reformation.

The Gutenberg press also led to fundamental changes in the way that people viewed their governments. At one point in history, some European monarchies claimed to rule by Divine Right – the idea that monarchs were placed on their thrones by God, and that their actions reflected God's will. The Gutenberg press led to attacks on the concept of Divine Right, and ultimately to the demise of monarchical power.

The U.S. Declaration of Independence reflected Gutenberg's influence. Philosophical books, published in Europe, gradually made their way across the Atlantic Ocean to the American colonies where they influenced American thought, leading Thomas Jefferson to implicitly reject the idea of Divine Right in the U.S. Declaration of Independence and to flatly declare that the power to govern derives from the "consent of the governed." Those same books also led to the demise of many monarchies across Europe, as the Bourbon and Hapsburg dynasties fell, and to limitations on the powers of other monarchies (e.g., the British monarchy).

Communications technologies did not advance much further until the nineteenth century when society was able to harness electricity. Electricity

enabled the creation of a multitude of new technologies, including the telegraph, radio, television, and eventually satellite and cable technologies and the internet. These new technologies were transformative because they allowed information to move much more quickly than the speed at which people could move, and they also enabled relatively high-speed communication over long distances. For example, the telegraph reduced the time required to send a message across the United States from a matter of weeks to a few seconds and led to the demise of the Pony Express relay system. Radio made it possible to broadcast words and information all over the country, almost simultaneously. During World War II, President Franklin Delano Roosevelt used the radio to communicate his fireside chats to all Americans. Also during World War II, Americans could sit in their living rooms and listen to the bombing of London over the radio. Television made it possible to communicate, not only audio content, but also video content, in real time. Satellite impact on communication was similarly revolutionary. During the first Persian Gulf War, CNN journalists, who were holed up in a Baghdad hotel, were able to broadcast images of U.S. cruise missile attacks around the world. Thus, U.S. citizens could witness the U.S. cruise missile attacks from their own homes. Of course, electricity also led to the development of the internet, which involved another revolutionary communications advance. But more about the internet later.

Even though communications technologies have steadily advanced over the centuries, each new technology came with one major drawback: It was almost invariably owned and controlled either by the government, or by relatively rich individuals or corporations, who had the capacity to control their use. In other words, even though new technologies revolutionized communication, these technologies were not generally accessible by the masses for the communication of their ideas.

Although the printing press marked a dramatic communications advance, printing presses were relatively expensive. Even though Benjamin Franklin was well-known as a printer (among a multitude of other things), he came from a family of limited means and struggled for many years to acquire the funds needed to buy a printing press. Those who controlled the few printing presses that existed had the power to decide who could use that technology to communicate their ideas. Not infrequently, the owners of communications technologies discriminated in favor of their preferred views and positions, and against ideas with which they disagreed. In other words, although the printing press led to a flowering of information, it did not necessarily expand the ability of ordinary people to engage in mass communication. Those who controlled the printing presses could easily

communicate their own views. Others had more limited communications possibilities.

The rich and powerful were also able to control other advanced technologies such as radio, television, cable television and satellites. While the radio may have enabled FDR to communicate with the entire U.S. population, it did not enable ordinary people to broadly disseminate their ideas. Technologies, such as radio, television and satellites, were expensive to own, and generally required a license. As a result, they were not freely available to the masses either. Again the rich and powerful were able to control access to those technologies.

As a result, although there were dramatic advances in communications technologies in the nineteenth and twentieth centuries, these new technologies could not necessarily be accessed by ordinary individuals to mass communicate their views. Their ideas and political arguments might or might not be communicated, depending on the whims of those who owned the communications technologies.

The other major historical trend that affected the use of speech technologies was governmental repression of speech. After Gutenberg's development of the printing press, even though governments might have been happy to have the printing press available for their own use, they were not keen on the idea of allowing ordinary people to print their ideas. Monarchs, justly fearful that the printing press might be used to undercut the idea of Divine Right, or to undermine the stability of their societies, sought to restrict its use. Many governments limited the number of printing presses that could exist, by requiring a license to operate a printing press, and by limiting those licenses to their allies and friends. Some governments also imposed content licensing systems that allowed them to censor speech that they found objectionable. These licensing systems required individuals to submit manuscripts in advance, and prohibited publication of the material unless a license was granted. Of course, licensors could deny licenses to documents that they found objectionable, or they might condition the grant or denial on the publisher's willingness to make additions or deletions to the document.

Perhaps the most serious governmental restraint on speech involved the British crime of seditious libel. That offense made it a crime to criticize the King and certain high-level clergy. Under this crime, truth was not a defense. Indeed, if it were shown that the defendant's allegations were true, the British would punish the individual more severely on the theory that true criticisms could harm the monarchy more than false criticisms. Seditious libel was also used in the British colonies in the Americas to repress speech. For example, those who made derogatory remarks about the King or the British governors

could be prosecuted for seditious libel. Benjamin Franklin's brother was among those who were imprisoned for this crime.

Over time, however, it became clear that the British colonists, who became the new Americans after the Revolutionary War, believed that they had (and should have) the right to free expression. For example, Peter Zenger was arrested and prosecuted for mocking the Royal Governor of New York. Although the evidence showed that he had clearly committed the alleged crime, the jury refused to convict him, creating what is widely viewed as the first example of jury nullification in the Americas.

The commitment to free speech was also evident during the adoption of the U.S. Constitution. The Framers of the U.S. Constitution initially decided that a bill of rights was not needed. The Framers, relying on the fact that they had created a government of limited and enumerated powers, and that the Constitution included Montesquieu's ideas regarding separation of powers, took the position that the Constitution need not include a formal bill of rights. There was considerable dissent, and it rapidly became clear that the Constitution would not be ratified absent inclusion of a bill of rights, including explicit protections for free expression. It was finally agreed that the Constitution would be ratified "as is," but that the first Congress would create what became known as the Bill of Rights. That is why the Bill of Rights entered the Constitution as an amendment.

The internet radically altered communication because it is an extremely democratic technology that has enabled ordinary individuals to communicate on a mass scale, allowing them to avoid the traditional media which had historically served as one of the gatekeepers and filters of communication. This broadening of communicative capacity has had a profound impact on modern societies, enabling mass communication on a scale never seen before, and resulting in profound societal changes.

A striking illustration of the internet's democratic potential is revealed by the Arab Spring uprisings in the Middle East. The internet was used by Egyptian protestors to coordinate and promote the protests in that country. Prior to the internet, when the government was in control of the traditional media, it was possible for the Egyptian government to limit the information that ordinary Egyptians received. Thus, the government might have been able to limit Egyptian knowledge of the Tunisian uprisings. In an internet era, the Egyptian people were fully aware of the uprisings that had occurred in Tunisia several weeks before.

The internet also affected the course of the Egyptian protests. Egyptian protestors were able to obtain advice from Tunisian protestors, and they were able to organize protests over the internet. Before the internet, the Egyptian

government would have been able to control the flow of information about the Egyptian uprising through their control of newspapers, as well as of radio and television stations. No longer was the Egyptian government able to control the flow of information to the Egyptian people even though it fervently attempted to do so. The internet made tight governmental control impossible.

In the U.S. itself, the impact of the internet was dramatically revealed by President Barrack Obama's 2008 presidential campaign. At the outset of the presidential primaries, many believed that Hillary Clinton would wrap up the nomination by Super Tuesday. She didn't. Obama used the internet very effectively to organize and recruit supporters, and to raise money. Not only was Clinton unable to wrap up the nomination by Super Tuesday, she was unable to win the nomination at all. She was beaten by Obama. In the general campaign, John McCain accepted campaign financing and was only able to spend \$85 million. By contrast, Obama refused to accept campaign financing, and raised approximately \$750 million for his campaign, thanks to the internet. For Obama, the internet was a game changer.

Although the events in Egypt, and the Obama campaign help illustrate the democratic potential of the internet, the internet also has a dark side: It has created the potential for individuals and governments to create and disseminate "fake news" on a global scale and influence elections in other countries. Numerous examples of "fake news" can be offered. For example, over the internet, individuals disseminated information suggesting that Hillary Clinton was involved in promoting child sexual abuse at a pizzeria. In addition, in political campaigns, individuals have made numerous false allegations against their opponents. President Trump, for instance, routinely dismisses allegations made against him as "fake news."

The existence of "fake news" has troubling implications for the U.S. governmental system. Various justifications have been offered to support the role of free expression in free societies. Many cite and rely on the so-called "marketplace of ideas" theory. In its strict sense, this theory suggests that all ideas should be allowed into the marketplace of ideas, and thereby allowed to compete against each other, and it assumes that the best ideas will ultimately prevail. Of course, there is no assurance that the marketplace of ideas will necessarily lead to the triumph of only "true" ideas. Even if there were some objective standard of "truth" against which ideas could be judged and evaluated, which there is not, there are few mechanisms in the U.S. governmental system for declaring "truth." Unlike countries like France, which have declared that certain facts cannot be denied on pain of criminal sanctions (e.g., the French Gayssot law permits the imposition of criminal

sanctions on those who deny the Holocaust), the U.S. does not allow the government to declare certain ideas to be “true” and to prohibit the expression of contrary opinions. In addition, the U.S. does not have “truth commissions.” By its very nature, freedom of expression allows the people to freely express their own beliefs, free of governmental censorship, and there is no mechanism for determining truth other than public consensus or the outcome of elections. Moreover, elections are hardly effective mechanisms for determining “truth.” The “truths” to be gleaned from elections can be opaque, and often inconsistent. For example, some of the same individuals who voted for Barack Obama openly admitted that they also voted for Donald Trump. While defamation suits are possible, the standards and burdens of proof are extremely high and difficult to satisfy.

Undoubtedly, the most compelling justification for free expression is premised on the nature of the governmental system. If the power to govern derives from the consent of the governed, the people should be free to express their ideas free from governmental restriction and should have the right to try to convince others regarding the correctness of those ideas. In such a system, governmental restrictions on speech are anathema. The U.S. no longer permits seditious libel prosecutions, and no longer allows government to punish those who do nothing more than criticize the government.

Nevertheless, if the governmental system is premised upon the “consent of the governed,” “fake news” can have very disconcerting and troubling implications. Fake news has the capacity to undercut the democratic process by misleading the people with false information and ideas. Thus, as people go to the polls to vote for candidates, or on ballot proposals, there is the potential that they will be misled by false information.

Despite the harms that flow from fake news, it is not clear that society has an effective remedy that will allow it to control the flow of fake news or its impact on the public debate. The nature of the U.S. governmental system necessarily limits the ability of government to regulate or control fake news. In general, government is not free to declare that certain facts are incontrovertible, and it is not allowed to repress ideas simply because it regards them as “false” or “fake.” Of course, although the First Amendment prohibits governmental censorship of speech, it does not require government to be “neutral” on all issues. For example, even though the U.S. government may not prohibit individuals from denying that the Holocaust occurred, it is free to support the establishment of a Holocaust Museum. But it is one thing for government to advocate in favor of an idea (or ideas), and quite another thing for it to repress countervailing ideas. Under the U.S. system of government, government is prohibited from taking the latter action.

In the final analysis, in a free society, there may be no meaningful remedy for fake news other than responsive speech. As James Madison declared:

Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press. It has accordingly been decided, by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.¹

1. James Madison, *The Report of 1800 on the Virginia Resolutions*, in 17 THE PAPERS OF JAMES MADISON 303, 303-351 (William T. Hutchinson et al. eds., Univ. Press of Va. 1991) (1801).

DEFAMATION AND INVASION OF PRIVACY IN THE INTERNET AGE

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I. INTRODUCTION

The era of anonymous defamation and Internet impersonation has arrived. Given a largely unregulated Internet landscape and boundless international access to information online, it is no surprise that the Internet has become a minefield of defamation and invasion of privacy violations.

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Problems with access and anonymity are compounded by the fact that Internet content is largely permanent, allowing victims of Internet defamation and invasions of privacy to suffer continuous harm to their reputation and right to be left alone. In yesteryear, the effects of print libel disappeared as newspapers and magazines were consigned to waste baskets or to the far reaches of stacks in a library. With Internet defamation, however, offending content almost never comes down once it has been posted. In addressing the changes in technology and media, the following will discuss current strategy and legal liabilities for defamation, including international perspectives on litigation abroad.

At the center of increasing Internet defamation is § 230 of the Communications Decency Act (CDA).¹ Passed in 1996, the Act gives Internet service providers (ISPs) virtually complete immunity against claims for Internet defamation. Although § 230 was initially approved with lofty goals of developing the Internet and promoting ISP self-regulation, the Act substantially underestimated the shape the Internet would take and its long-term effects. The rise of social media websites and Internet chat forums have completely transformed the way individuals interact and share information. Notwithstanding the Internet's positive impacts on society, it has also provided individuals with the unlimited ability to post defamatory content online.

The harms caused by callous and sometimes relentless defamers are enormous. Numerous harrowing defamation stories from our legal experience demonstrate why this issue deserves greater political attention.² In one case, for example, a successful attorney was incessantly taunted by a disgruntled former suitor who created a website virtually dedicated to defaming the attorney. While certain ISPs complied with takedown requests, others required injunctions. Even as counsel successfully enjoined offending websites, the defamer, who could never be physically located, continuously changed ISPs. Eventually, the defamer opted to use a foreign ISP to avoid U.S. jurisdiction over the website entity.

In another case, a California resident was falsely impersonated on Facebook by an individual living in Europe.³ This individual executed a vendetta against the California resident by creating a false Facebook profile,

1. Communications Decency Act (CDA) of 1996, 47 U.S.C. § 230 (2012).

2. Victims' identities have been concealed to ensure their safety and privacy.

3. Impersonations have become so widespread that there are a number of support groups dedicated to raising awareness and building a sense of community for victims. See, for example, organizations such as WORKING TO HALT ONLINE ABUSE, <http://www.haltabuse.org> (last visited Aug. 28, 2018); and WITHOUT MY CONSENT, <https://withoutmyconsent.org> (last visited Aug. 28, 2018).

advertising that the victim sought to engage in homosexual activity and was looking for contact from all interested parties. Much like the first example, such personal attacks on the victim significantly impacted the victim's professional life and inflicted a great deal of personal distress. Most unfortunate of all is that the current legal framework made it very difficult for either injured party to recover from such defamation.

II. SECTION 230

A. History Behind Section 230

§ 230 of the CDA arose as an attempt to resolve the inconsistent rulings in *Cubby, Inc. v. Compuserve, Inc.*, and *Stratton Oakmont, Inc. v. Prodigy Services Co.*, regarding the treatment of ISPs as distributors or publishers of online content. In *Cubby*, the plaintiffs sued Compuserve for hosting defamatory content on a web page known as "Rumorville."⁴ Compuserve argued that it was merely an electronic library that gave subscribers access to information sources and special interest forums, classifying it as a distributor of information content and thus relieving Compuserve of liability. Granting summary judgment to Compuserve, the court held that, since the ISP functioned the way a typical print distributor would, it exercised little editorial control and so could not be held responsible for defamation.⁵

In *Stratton Oakmont*, however, the court came to the opposite conclusion, ruling that Prodigy (the ISP) was liable as a publisher.⁶ Unlike Compuserve, Prodigy maintained some editorial control over its webpages. Given this minimal control, the court determined that the ISP functioned like a full-fledged publisher and therefore should be liable for the content uploaded to its pages.⁷ *Stratton Oakmont* created serious problems for ISP self-regulation by increasing the probability that ISPs would be held responsible for their information content.

4. *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

5. *Id.* at 140-41.

6. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 712, at *3-4 (N.Y. Sup. Ct. Dec. 11, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, § 230, 110 Stat. 56, 137-139, *as recognized in* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

7. *Stratton Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS 712, at *4.

To mitigate the effects of *Stratton Oakmont*, and induced by the media and ISP lobbies, Congress passed § 230 of the Communications Act in 1996.⁸ § 230 passed with virtually no opposition as legislators saw ISP immunity as a way to promote Internet growth, protect free speech, and encourage ISP self-regulation. Unfortunately, the section did not achieve these goals as envisioned. Instead of promoting good faith efforts to prevent defamation and invasions of privacy, ISPs have since used their § 230 immunity as an affirmative defense against Internet libel lawsuits.

B. Defamation Litigation After the Passage of Section 230

One of the first cases to successfully utilize § 230 as a defense was *Zeran v. America Online, Inc.*⁹ In *Zeran*, plaintiff Kenneth Zeran was defamed by an anonymous Internet poster who created false advertisements about Mr. Zeran on an online forum. The advertisements suggested Mr. Zeran had produced insensitive T-shirts about the Oklahoma City bombing and that he was looking to sell these T-shirts to all interested buyers, and provided Zeran's home number for inquiries.¹⁰ Although America Online (AOL) eventually removed the posts at Zeran's request, Zeran later sued AOL for negligence, arguing that AOL failed to quickly and adequately respond to the notices posted on the Internet bulletin.¹¹ The court disagreed, and, in looking to § 230, held that plaintiffs seeking to hold ISPs like AOL liable for defamation for failure to exercise some editorial powers (in this case, for not taking down defamatory posts) would be equivalent to placing the ISPs in the publisher's role.¹² Thus, Zeran's claims were preempted by § 230.¹³

8. See Communications Decency Act of 1996, Pub. L. No. 104-104, § 230, 110 Stat. 56, 137-139 ("It is the policy of the United States . . . to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.") (codified as amended at 47 U.S.C. § 230(b) (2012)); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

9. *Zeran*, 129 F.3d at 228, 330-31 (upholding the district court's grant of summary judgment in favor of AOL on the grounds that § 230 of the Communications Decency Act "plainly immunize[d] computer service providers like AOL from liability for information that originate[d] with third parties").

10. *Id.* at 329.

11. The court notes that Kenneth Zeran received an influx of abusive calls and death threats. In just five days after the original post, Zeran "was receiving an abusing phone call approximately every two minutes." *Id.*

12. *Id.* at 328.

13. *Id.* at 330 ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for

Since *Zeran*, courts continue to provide strong protections for ISPs and have upheld immunity in even questionable situations. *Reit v. Yelp!, Inc.* is one such example wherein dentist Glenn Reit sued Yelp for defamation after noticing that Yelp had selectively removed positive reviews regarding Reit's dental practice but left negative reviews.¹⁴ Although Reit argued that Yelp's practices were part of a directed "business model," the court found that such activity was within Yelp's editorial powers and thus protected by § 230.¹⁵

In similar fashion, the court held in *Asia Economic Institute v. Xcentric Ventures, LLC* that a website could not be held responsible for the content of third-party consumer reports, even though the website mechanically altered the reports so that they would be more visible to Internet traffic using search engines such as Google.¹⁶ The court explained that "increasing the visibility of a statement is not tantamount to altering its message."¹⁷ The court thus extended § 230 immunity to any website that did not alter the substantive content displayed on its site.¹⁸

An ISP's selective removal or alteration of posts is also different from actively posting comments to their own site. In *Jones v. Dirty World Entertainment Recordings, LLC*, for example, a cheerleader sued the online tabloid "The Dirty" for several allegedly defamatory submissions published by the tabloid, several anonymous postings, and remarks posted by the manager.¹⁹ Jones requested that The Dirty remove the stories, but her request was denied.²⁰ She subsequently filed a lawsuit against the website and its owners, asserting defamation, false light, and intentional infliction of emotional distress.²¹ The district court held that Dirty World was not immune under the CDA because Dirty World developed the information.²² On appeal, however, the decision was reversed because the district court construed the term "develop," taken from the *Roomates.com* case, too

its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”).

14. *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 412 (N.Y. Sup. Ct. 2010).

15. *Id.* at 412-14.

16. *Asia Econ. Inst. v. Xcentric Ventures, L.L.C.*, No. CV 10-01360 SVW(PJWx), 2011 U.S. Dist. LEXIS 145380, at *21-23 (C.D. Cal. May 4, 2011).

17. The court also noted that liability would only be found in situations where the host had made substantive alterations to the content of the postings. *Xcentric Ventures, L.L.C.*, 2011 U.S. Dist. LEXIS 145380, at *18-20.

18. Xcentric operates the website ripoffreport.com. *See infra* note 121.

19. *Jones v. Dirty World Entm't Recordings, L.L.C.*, 755 F.3d 398, 409-10 (6th Cir. 2014).

20. *Id.* at 403.

21. *Id.* at 404-05.

22. *Id.* at 409.

broadly. The court explained that such a broad interpretation would defeat the purposes of the CDA and would swallow the immunity that § 230(c) provided for the “exercise of a publisher’s traditional editorial functions.”²³

Immunity for ISP hosts extends even so far as to protect those who affirmatively republish information. *Barrett v. Rosenthal* exemplifies how extensive immunity is for ISPs.²⁴ In *Rosenthal*, an alternative medicine advocate republished a defamatory article on her message board, which discussed two “quackbusters” who campaigned against her practices.²⁵ Even though the host took an active role in selecting and disseminating the article, she was granted § 230 immunity because she was found to be “a mere distributor” of content.²⁶ In so stating, the court provided comprehensive immunity to all providers who merely “republish” content.²⁷

§ 230 immunity even protects ISPs that host illegal or obscene material. In *Chicago Lawyers’ Committee v. Craigslist, Inc.*, Chicago Lawyers’ Committee sued Craigslist for hosting offensive and racist housing advertisements.²⁸ Some of the discriminatory language included statements such as “No Minorities” and “Requirements: Clean, Godly Christian Male.”²⁹ While Craigslist maintained a company policy of removing offensive content if such content was reported, the court ruled that Craigslist was not required to pre-screen content for potential violations. The court reasoned that to hold Craigslist liable for third party content hosted on their pages would be

23. *Id.* (rejecting an interpretation of “development” that would make a website operator “responsible for the development of content created by a third party merely by displaying or allowing access to it” as over-inclusive) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1167 (9th Cir. 2008) (“It’s true that the broadest sense of the term “develop” could include the functions of . . . just about any function performed by a website. But to read the term so broadly would defeat the purposes of [§] 230 by swallowing up every bit of the immunity that the section otherwise provides.”)).

24. *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

25. *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 420-21 (Ct. App. 2003) (identifying that the title of the allegedly defamatory messages contained the words “Slea[z]y ‘Quackbuster’ Scam”), *rev’d*, 146 P.3d 510 (Cal. 2006).

26. *Barrett v. Rosenthal*, 146 P.3d 510, 529 (“We conclude there is no basis for deriving a special meaning for the term ‘user’ in [§] 230(c)(1), or any operative distinction between ‘active’ and ‘passive’ Internet use. By declaring that no ‘user’ may be treated as a ‘publisher’ of third party content, Congress has comprehensively immunized republication by individual Internet users.”).

27. *Id.*

28. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

29. *Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 661, 688 (N.D. Ill. 2006), *rev’d*, 519 F.3d 666 (7th Cir. 2008).

tantamount to identifying Craigslist as an information publisher, which the CDA barred.³⁰

Additionally, in *Doe II v. Myspace, Inc.*, Myspace, a large social networking website, was immune from liability for the sexual assault of teenage girls who had met their assailants through the website.³¹ The victims argued that Myspace was responsible for the assault because it should have implemented age verification software and maintained stricter privacy settings. The court ruled otherwise. Because the victims' claims were predicated on holding Myspace liable as a publisher of third-party content, the CDA barred their claims.³² The *Myspace* ruling illustrates not only the level of immunity § 230 affords, but also the almost "wild west," jungle behavior the Act facilitates on the Internet.³³

Recently, however, several cases illustrate a shift in accountability for websites whose users later become victims of sexual assault as a result of their use of the website. This shift is marked by the Ninth Circuit case, *Doe v. Internet Brands, Inc.*³⁴ In *Internet Brands*, an aspiring model created a

30. *Craigslist, Inc.*, 519 F.3d at 670 (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003)).

31. *Doe II v. Myspace, Inc.*, 96 Cal. Rptr. 3d 148, 156 (Ct. App. 2009).

32. *Id.* at 156-57.

33. In an attempt to do an "end-run" around the virtually unlimited protection against defamation actions offered by the CDA, a broad range of torts have been asserted against ISPs who host defamatory content. Most have been flatly defeated through the assertion of CDA immunity. See, e.g., *Herrick v. Grindr, L.L.C.*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018) (finding the CDA barred a products liability claim and the plaintiff's claim that Grindr was required to "do more to remove impersonating profiles" because each claim required holding Grindr responsible "for the content created by one of its users"); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540 (E.D. Va. 2003) ("[G]iven that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief."); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997)) (finding CDA immunity from defamation liability); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998) (barring defamation claims under the CDA for statements made in an on-line gossip column even though defendants had contracted for the reports, retained certain editorial rights as to its content, and aggressively promoted the reports); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 719 (Ct. App. 2002) (unfair competition claims found to be "inconsistent with and barred by [§] 230"); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 780, 781 (Ct. App. 2001) (citing *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 983-84 (10th Cir. 2000)) (barring state claims for misuse of public funds, nuisance, and premises liability as well as declaratory and injunctive relief); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1018 (Fla. 2001) (concluding that the plain language of the CDA preempted "any actions" including a negligence action); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39, 41 (Wash. Ct. App. 2001) (preempting claims for negligent misrepresentation, interference with business expectancy, and contractual liability under the CDA).

34. *Doe v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014).

profile on the Model Mayhem website in hopes of procuring employment.³⁵ At the same time, two other users took advantage of Model Mayhem to further a rape scheme.³⁶ These individuals would contact female members, invite them to a fake audition, then drug and rape the victims.³⁷ The complaint alleged that Internet Brands, shortly after purchasing the website in 2008, learned of the illegal activities transpiring on the site and failed to warn its users of the danger.³⁸ Internet Brands sought to bar Doe's claim by asserting CDA immunity.³⁹ The court ruled, however, that this claim fell outside the scope of the CDA because Doe was not seeking to hold Internet Brands liable for its content. Rather, the plaintiff's claim sought liability for Internet Brands' "fail[ure] to warn her . . . about how third parties targeted and lured victims through Model Mayhem."⁴⁰ The court explained that a "failure to warn claim had nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove [content]. Thus, liability would not discourage the core policy of [§] 230(c)[']s' 'Good Samaritan' filtering of third party content."⁴¹ The court went further and distinguished this case from *Doe II v. Myspace, Inc.*, stating that "[t]he tort duty asserted here does not arise from an alleged failure to adequately regulate access to user content"

35. *Id.* at 895.

36. *Id.* at 895-96.

37. *Id.* at 896. Related to the concern of fake profiles and trolling was the New York State Senate Bill S5871A, which would have imposed harsher penalties to those who impersonate others via website or other electronic channels. Since this bill did not complete the legislative process by the time that the 114th Congress adjourned, it was not made into law and considered "dead." Dead bills can be reintroduced to a new Congress, usually with a new bill number. S5871A was reintroduced to the 115th Congress as New York State Senate Bill S2848, but again did not complete the legislative process by the time that Congress adjourned. This bill has yet to be reintroduced to the 116th Congress which is currently in session. The push for adoption of such laws was due in part to Meaghan Jarensky, who was impersonated on Match.com by an ex-lover of Jarensky's then boyfriend. Alison Leigh Cowan, *Fighting a Fake Dating Profile, Together*, N.Y. TIMES (Mar. 19, 2016), http://www.nytimes.com/2016/03/20/fashion/weddings/brett-barakett-meaghan-jarensky-marriage.html?_r=0. The profile caused a great deal of trouble for Jarensky in her personal and professional life. *Id.* She now uses her non-profit organization to press for adoption of similar laws in other states. *Id.* Growing concern regarding online trolling, shaming, and harassment has also sparked an increase in resources available for victims of online harassment. One such resource is called "Crash Override Network," a private NGO network of experts to help combat online harassment. See CRASH OVERRIDE NETWORK, <http://www.crashoverridenetwork.com> (last visited Oct. 7, 2018). Crash Override Network was founded by Zoe Quinn, a videogame developer, who was herself the victim of online abuse. *About the Network*, CRASH OVERRIDE NETWORK, <http://www.crashoverridenetwork.com/about.html> (last visited Oct. 7, 2018).

38. *Doe v. Internet Brands, Inc.*, 767 F.3d 894, 896 (9th Cir. 2014).

39. *Id.*

40. *Id.* at 897-99.

41. *Id.* at 898.

or to monitor internal communications that might send up red flags about sexual predators.⁴²

C. *The Future of Defamation Litigation*

Is there any way to succeed in litigation for online defamation? The quick answer is, not easily. The first issue is whether additional claims can be brought. In *Barnes v. Yahoo!, Inc.*, for example, the plaintiff sued her ex-boyfriend for creating fake personal pages impersonating the plaintiff.⁴³ Barnes immediately requested that Yahoo take the content down and alerted local news outlets of the story after she received an influx of emails and visits from men expecting sexual favors.⁴⁴ Yahoo, wishing to avoid public outcry over the incident, assured Barnes that they would take down the profile. Two months later, the profile remained and Barnes sued. To avoid § 230 preemption, Barnes argued that § 230 only relieved an ISP of liability for the publication of defamatory content, but that the Act did not remove responsibility for its eventual take down, especially once the ISP had been notified of the content's tortious nature.⁴⁵ Because Yahoo promised that it would remove the profile, Barnes successfully asserted a claim for promissory estoppel and thereby prevailed in a case that the CDA would have otherwise stymied.⁴⁶

Considering the high barriers to successful defamation suits against ISPs, very few cases demonstrate what is required to lift § 230 immunity. One such case, however, is *Fair Housing Council v. Roommates.com, LLC*.⁴⁷ In this case, the court found Roommate.com liable for facilitating unlawful user content. The court distinguished Roommates.com from comparable sites, like Craigslist.org, because, unlike other sites which simply hosted user content, Roommates.com solicited its user's preferences on gender, race, and sexual orientation. Roommates.com then provided content based on such choices and concealed listings that did not conform to those preferences.⁴⁸

42. *Id.* at 899 (citing *Doe II v. MySpace, Inc.*, 96 Cal. Rptr. 3d 148 (Ct. App. 2009) (holding that the CDA bars tort claims based on a duty to restrict access to minors' MySpace profiles).

43. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009).

44. *Id.* at 1098-99.

45. *Id.* at 1102.

46. *Id.* at 1109. However, don't expect ISPs to make this same "mistake" again.

47. *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157 (9th Cir. 2008), *withdrawn and superseded by* *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016).

48. *Roommates.com, L.L.C.*, 521 F.3d at 1166; *see* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008) ("But given § 230(c)(1) it

The court reasoned that such a “collaborative effort” between the website host and the individual poster better classified Roommates.com as a “content provider,” rather than a “republisher,” and therefore placed Roommates.com outside the protection offered under § 230.⁴⁹ While *Roommates.com* demonstrates that defamation lawsuits against ISP hosts are possible in cases where the provider affirmatively acts to create content, there are still substantial barriers which make it exceedingly difficult to proceed against Internet hosts in defamation and privacy cases.

Content providers going beyond traditional editorial functions are less likely to receive CDA immunity. *Fraleley v. Facebook, Inc.*, in which Facebook generated commercial endorsements for companies “liked” by their members utilizing members’ likenesses, illustrates this point.⁵⁰ The court in *Fraleley* rejected Facebook’s CDA immunity claim, rationalizing that Facebook went beyond traditional editorial functions by “transform[ing] the character” of member submissions into endorsements without their members’ consent.⁵¹ Similarly, in *Perkins v. LinkedIn Corp.*, the court rejected LinkedIn’s CDA immunity defense where the plaintiffs alleged that LinkedIn created and developed the content of the reminder email, arranged the plaintiffs’ names and likenesses in those emails to give the impression that the plaintiffs were endorsing LinkedIn, and offered no opportunity for the plaintiffs to edit those emails.⁵²

III. THE NEED FOR INTERVENTION BY THE UNITED STATES SUPREME COURT

The one hope that could alter the bleak picture above is intervention by the Supreme Court of the United States. If the Supreme Court, led by Justices who believe in fidelity to the statutory text they are interpreting, were to take a fresh look at *Zeran* and its progeny, it could effectively reboot and restart all of § 230, starting the interpretation over in alignment with what Congress wrote and intended. § 230, as it is widely applied by courts today, is a creature of judicial invention, untenably divorced from its intended function.

The sweeping immunity that courts have bestowed on Internet service providers cannot be squared with the plain meaning of the statutory text, with the antecedent common law doctrines and judicial decisions that informed

cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.”).

49. *Roommates.com, L.L.C.*, 521 F.3d at 1167.

50. *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

51. *Id.* at 802.

52. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1249 (N.D. Cal. 2014).

the enactment of the statute, with the statute's legislative history, or within any plausible common-sense understanding of the public policy objectives Congress sought to achieve. The U.S. Supreme Court has not yet interpreted § 230. Until the Supreme Court does finally and authoritatively rule, it remains within the right and duty of state and federal courts to continue the ongoing debate over what Congress truly intended when it passed the statute. Until it has been decided correctly, it has not been decided. Acceptance of review by the U.S. Supreme Court would permit the Court to begin with a return to the basics.

The title of § 230 signals its animating purpose: "Protection for private blocking and screening of offensive material."⁵³ Subsections (a) and (b) contain a list of findings and policy objectives, which, in combination, reflect a congressional intent to balance "the vibrant and competitive free market that presently exists for the Internet"⁵⁴ against the congressional purpose "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."⁵⁵ The operative provision of the statute, subsection (c), contains a subtitle that further illuminates the congressional purpose: "Protection for "Good Samaritan" blocking and screening of offensive material."⁵⁶ Subsection (c) provides in its entirety:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent,

53. Communications Decency Act of 1996, Pub. L. No. 115-164, sec. 4, § 230(e), 132 Stat. 1253, 1254-55 (clarifying that § 230 does not affect crime enforcement of prohibited behavior, specifically "providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking and for other purposes").

54. 47 U.S.C. § 230(b)(2).

55. 47 U.S.C. § 230(b)(4).

56. 47 U.S.C. § 230(c).

harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁵⁷

Aside from subsection (c), the only other salient language in the statute resides in two statutory definitions. The statute defines the term “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”⁵⁸ The statute defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”⁵⁹

On its face, and considering its captions, the operative language and definitions, § 230 provides ISP who take affirmative steps to screen and block third party content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” a defense from liability.⁶⁰ § 230 does not, however, explicitly create universal ISP immunity for the content of third parties. A more modest reading of the statutory text is permissible because such reading harmonizes the captions, operative language and definitions of the Act, considered in its entirety. This point was well made by Judge Frank Easterbrook in an opinion for the United States Court of Appeals for the Seventh Circuit:

[§] 230(c)(2) tackles this problem not with a sword but with a safety net. A web host that does filter out offensive material is not liable to the censored customer. Removing the risk of civil liability may induce web hosts and other informational intermediaries to take more care to protect the privacy and sensibilities of third parties. The district court held that subsection

57. *Id.*

58. 47 U.S.C. § 230(f)(2) (“The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”).

59. 47 U.S.C. § 230(f)(3) (“The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”).

60. The Communications Act states “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]” 47 U.S.C. § 230(c)(2)(A).

(c)(1), though phrased as a definition rather than as an immunity, also blocks civil liability when web hosts and other [ISPs] refrain from filtering or censoring the information on their sites[.]

If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the ‘Communications Decency Act’—bears the title ‘Protection for ‘Good Samaritan’ blocking and screening of offensive material,’ hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?⁶¹

Judge Easterbrook continued, stating:

True, a statute’s caption must yield to its text when the two conflict, but *whether* there is a conflict is the question on the table. Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption? On this reading, an entity would remain a ‘provider or user’—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information. The difference between this reading and the district court’s is that § 230(c)(2) never requires ISPs to filter offensive content, and thus § 230(c)(3) would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interests of third parties, such as the spied-on plaintiffs, for such laws would not be ‘inconsistent with’ this understanding of § 230(c)(1).⁶²

61. *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Green v. Am. Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003)).

62. *Id.* at 660 (first citing *Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947); and then citing *Carlisle I v. United States*, 517 U.S. 416, 421 (1996)). Compare *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003); with *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (“Subsection (c)’s caption, ‘Protection for ‘Good Samaritan’ blocking and screening of offensive material’ bodes even less well for StubHub! . . . As earlier decisions in this circuit establish, subsection (c)(1) does not create an “immunity” of any kind.”) (citing *GTE Corp.*, 347 F.3d at 660; and *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008)).

The Seventh Circuit does not stand alone in its § 230 assessment. The Ninth Circuit expressed similar willingness to accept a more narrow construction of § 230 in 2003.⁶³

The context surrounding enactment § 230 could not be more straightforward. Congress passed the statute in reaction to the evolution of common law doctrines defining when a person or entity is deemed “a publisher or speaker” as those doctrines were beginning to be applied in the early days of the Internet. Congress saw that the common law might evolve to create disincentives that would discourage Internet service providers from doing the right thing, affirmatively seeking to screen and block offensive content posted on Internet sites by third parties.

The legislative history of § 230 soundly buttresses this interpretation. The key legislative committee report on the bill explained:

This section provides ‘Good Samaritan’ protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.⁶⁴

Senator Coats, one of the two main authors of the CDA, made clear while discussing § 230 that its intention was to prevent ISPs that try to keep offensive material off the Internet “from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable.”⁶⁵ § 230, understood against this backdrop, was indeed nothing more

63. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); see *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851-52 (9th Cir. 2016) (“As the heading to [§] 230(c) indicates, the purpose of that section is to provide ‘[p]rotection for ‘Good Samaritan’ blocking and screening of offensive material.’ That means a website should be able to act as a ‘Good Samaritan’ to self-regulate offensive third party content without fear of liability.”); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008) (“§ 230 (c)(1) provides ‘broad immunity from liability for unlawful third-party content.’ That view has support in other circuits”) (citing *Univ. Comm’n Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Green v. Am. Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); and *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)).

64. THOMAS BLILEY, TELECOMMUNICATIONS ACT OF 1996, H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 124, 199-200.

65. 141 CONG. REC. S8293, S8345 (daily ed. June 14, 1995) (statement of Sen. Coats); see *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003) (restating Congress’s concerns that “[i]f efforts

nor less than the caption “Good Samaritan” implies. Internet service providers who function as “Good Samaritans,” acting laudably to delete offensive material harmful to others from their websites, are not to be treated as responsible for offensive material merely because they take make such laudable efforts. § 230 must thus be read as a modest congressional elaboration on the common law, most particularly, the common law of defamation:

The common law of libel distinguishes between liability as a primary publisher and liability as a distributor. A primary publisher, such as an author or a publishing company, is presumed to know the content of the published material, has the ability to control the content of the publication, and therefore generally is held liable for a defamatory statement, provided that constitutional requirements imposed by the First Amendment are satisfied A distributor, such as a book seller, news vendor, or library, may or may not know the content of the published matter and therefore can be held liable only if the distributor knew or had reason to know that the material was defamatory.⁶⁶

As the court in *Grace v. eBay, Inc.* originally and correctly held, § 230 speaks only to “publisher or speaker” liability, but leaves untouched liability predicated on an ISP’s status as a distributor or transmitter, with its concomitant higher standard of notice and culpability.⁶⁷

While *Zeran* spawned many offspring, these cases are no more legitimate than *Zeran* itself. *Zeran* wrenched § 230 from its common law antecedents and legislative history. *Zeran* focused exclusively on one sentence of § 230, the naked statement in § 230(c)(1) that Internet service providers are not to be “be treated as the publisher or speaker of any information provided by another information content provider,” as if this stood alone as the *sole* load-bearing declaration giving meaning to the statute.⁶⁸ *Zeran* improperly failed to read this language in the context of the

to review and omit third-party defamatory, obscene or inappropriate material make a computer service provider or user liable for posted speech, then website operators and Internet service providers are likely to abandon efforts to eliminate such material from their site”) (first citing S. REP. NO. 104-230, at 194 (1996), H.R. CONG. REP. NO. 104-458, at 194 (1996), 141 CONG. REC., at H84691-70 (statement of Rep. Cox), and then citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

66. *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192, 198-99 (Ct. App. 2004), *opinion superseded by* *Grace v. eBay, Inc.*, 99 P.3d 2 (Cal. 2004), *and appeal dismissed*, *Grace v. eBay, Inc.*, 101 P.3d 509 (Cal. 2004) (internal citations omitted).

67. *Id.* at 197-99.

68. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (quoting 47 U.S.C. § 230(c)(1)).

captions and other operative provisions of § 230. That context would have harmonized the passage with the entirety of the statute, rendering it merely “definitional,” thereby connecting the overall meaning of § 230 to the modest adjustment of the common law that Congress manifestly intended.

The time has come to unequivocally reject *Zeran*. The analysis in *Zeran* proves too much, leading inexorably to results that stretch far beyond anything Congress could have remotely intended. It was never Congress’s intent to make the law of the land the law of the jungle: “[T]he Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”⁶⁹ In addition, “Congress has not provided an all-purpose get-out-of-jail-free card for businesses that publish user content on the Internet, though any claims might have a marginal chilling effect on Internet publishing businesses.”⁷⁰

Zeran supplied an overly-broad interpretation of § 230 based on the court’s fear that the Internet was a sort of fragile newborn of precarious health and in need of extraordinary paternalistic support from government to keep it alive. That fear, exaggerated even in its time, has long since proved unfounded. The Internet in general, and social media platforms in particular, have assumed dominating influence and power in society. What is needed *today* is a sensible construction of § 230 that does not empower Internet platforms *carte blanche* to operate in derogation of other societal entities, who are bound by the rule of law, or competing societal values, such as protection of individual privacy, reputation, and dignity. As the Ninth Circuit observed:

The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.⁷¹

The court in *Grace* got it right in declaring its disagreement “with the *Zeran* court’s conclusion that for providers and users of interactive computer services to be subject to distributor liability would defeat the purposes of the

69. *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1164 (9th Cir. 2008).

70. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016).

71. *Roommates.com, L.L.C.*, 521 F.3d at 1164 n.15.

statute and therefore could not be what Congress intended.”⁷² In fact, *Zeran* calibrated the incentives all backwards when weighed against what Congress clearly sought to accomplish. The *Grace* court explained that the “broad immunity provided under *Zeran* . . . would eliminate potential liability for providers and users even if they made no effort to control objectionable content, and therefore would neither promote the development of technologies to accomplish that task nor remove disincentives to that development as Congress intended.”⁷³ *Zeran* instead operates to “eliminate a potential incentive to the development of those technologies, that incentive being the threat of distributor liability.”⁷⁴

The Supreme Court of the United States will not lack for opportunities to finally accept review in a § 230 case. Decisions invoking extreme interpretations of § 230 proliferate. In July 2018, for example, the California Supreme Court, in a three-justice plurality opinion written by Chief Justice Cantil-Sakauye and joined by Justices Chin and Corrigan, adopted a sweeping interpretation of § 230, holding that the Internet review site Yelp could not be forced to abide by a court order emanating from a defamation case in which Yelp was not even a party, ordering a defendant to take down a defamatory review. The case, *Hassell v. Bird*,⁷⁵ arose from a defamation action brought by a lawyer, Dawn Hassel, against a former client, Ava Bird. The basis for this action stemmed from an Internet review Bird posted of Hassell after Bird terminated Hassell’s representation in a personal injury matter. Hassell alleged that Bird’s review contained false defamatory statements of fact. After repeated efforts to engage Bird in the litigation, a California trial court entered a default judgment against Bird.⁷⁶ The default judgment, entered only after a “prove up” hearing in which Hassell established the predicate for liability, included a money damages award and an injunction against Bird ordering her to take down the offending Yelp posts

72. *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192, 201 (Ct. App. 2004), *review granted and opinion superseded*, *Grace v. eBay, Inc.*, 99 P.3d 2 (Cal. 2004), *review dismissed*, *Grace v. eBay, Inc.*, 101 P.3d 509 (Cal. 2004).

73. *Id.*

74. *Id.* (first citing Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamations Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 683-85 (2002); and then citing Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 616-23 (2001)).

75. *Hassell v. Bird*, 420 P.3d 776 (Cal. 2018), *cert. denied sub nom. Hassell v. Yelp, Inc.*, No. 18-506, 2019 WL 271967, at *1 (U.S. Jan. 22, 2019).

76. *Id.* at 778.

containing the defamatory falsehoods.⁷⁷ The court also ordered Yelp to remove the reviews.⁷⁸

Yelp contested the order to remove, arguing that it could not be bound by an injunction in a case in which it was not an underlying party, and arguing that § 230 conferred upon Yelp immunity from the order to take down the material.⁷⁹ The plurality opinion of Chief Justice Cantil-Sakauye, relying on the broad immunity other courts had conferred under *Zeran* and its progeny, held that § 230 immunized Yelp.⁸⁰ A concurring opinion by Justice Kruger took a narrower view of § 230, but agreed with the plurality that § 230 precluded application of the injunction against Yelp:

The injunction of course recognizes that Yelp is—as a matter of fact—the publisher of Bird’s reviews; the reviews cannot come down without Yelp’s cooperation. But that is not the pertinent question. The question is instead whether the injunction necessarily holds Yelp legally responsible for, or otherwise authorizes litigation against Yelp solely because of, its editorial choices. As the case comes to us, I agree with the plurality opinion that the answer to that question is yes.⁸¹

In a blistering dissent by Justice Cuellar, joined by Justice Stewart, Justice Cuellar attacked all aspects of the sweeping interpretation that § 230 has acquired. Justice Cuellar’s opinion provides the perfect roadmap for review by the U.S. Supreme Court. As Justice Cuellar explained, it is as if the immunities courts have found in § 230 were written in invisible ink.⁸² Justice Cuellar attacked the plurality’s narrow ruling that the immunity

77. *Id.* at 780-81.

78. *Id.* at 781.

79. *Id.*

80. *Id.* at 788, 793.

81. *Id.* at 801 (Kruger, J., concurring).

82. Justice Cuellar, dissenting, stated that:

By its terms, [§] 230 conspicuously avoids conferring complete immunity from all legal proceedings. Its language expressly permits the enforcement of certain federal criminal laws as well as state laws consistent with the section. (§ 230(e)) In the context of state law, the [§] 230 only prohibits causes of action from being brought and liability from being imposed under state laws that are inconsistent with the section. (§ 230(e)(3)) From the statute’s terms, an inconsistent state law is one in conflict with the terms in [§] 230(c). An inconsistent state law under [§] 230(c)(1) is a state law cause of action or liability that treats an interactive computer service as the publisher or speaker of information provided by another information content provider. And an inconsistent state law under [§] 230(c)(2) is a state law cause of action that seeks to hold an interactive service provider liable for voluntary actions taken in good faith to restrict access to obscene, lewd, harassing, or otherwise objectionable material. If [§] 230 conferred complete immunity on an interactive service provider, as the plurality opinion implies, then lurking somewhere in the statute one would need to find an enormously consequential codicil of categorical absolution written in invisible ink to preempt the statute’s more nuanced scheme. There’s no such codicil. Nor does Yelp even face ‘liability’ here at all.

Id. at 810-11 (Cuellar, J., dissenting).

recognized in *Zeran* was meant to immunize Yelp from the take down in the case before the California Supreme Court given that Yelp was in no serious sense being held responsible for “tort liability” arising from content posted by others.⁸³

Far more significantly, however, Justice Cuellar’s opinion cut at the very roots of *Zeran*. “Our society’s legal commitments balance the value of free expression and a relatively unregulated Internet against the harms arising from damaging words or private images that people are not lawfully free to disseminate,”⁸⁴ he wrote. In passing § 230, Congress did not intend for the Internet to be the wild, wild west – a place with no respect for the rule of law: “To the extent the Communications Decency Act merits its name, it is because it was not meant to be—and it is not—a reckless declaration of the independence of cyberspace.”⁸⁵ Yet until the U.S. Supreme Court intervenes, it appears that state and federal courts will likely continue to apply § 230 in manner that largely does render cyberspace a lawless space.⁸⁶

83. *Id.* at 812 (Cuellar, J., dissenting).

All of which underscores why it is a contrast between apples and oranges—or apples and Oreos, for that matter—to compare a defendant’s explicit targeting by a civil lawsuit with a person or entity’s remedial responsibility to avoid helping others engage in prohibited conduct. A defendant to a state law cause of action may be subject to an adverse judgment triggering a responsibility to provide monetary or equitable relief to the plaintiff, and may incur litigation expenses to defend itself. In contrast, an entity that has not been sued is required only to refrain from engaging in prohibited actions. Yelp has not been sued, and its only responsibility in light of the judgment and injunction against Bird is to avoid violating that court order. [§] 230 does not extend protection to a provider or user who violates an injunction by instead promoting third party speech that has been deemed unlawful by a California court. Yelp has an obligation not to violate or assist in circumventing the injunction against Bird, but that does not impose a legal obligation upon Yelp that treats it as a publisher or speaker of third party content.

Id.

84. *Id.* at 824 (Cuellar, J., dissenting).

85. *Id.* (Cuellar, J., dissenting).

86. *Id.* at 824-25 (Cuellar, J., dissenting).

Nothing in [§] 230 allows Yelp to ignore a properly issued court order meant to stop the spread of defamatory or otherwise harmful information on the Internet. Instead the statute’s terms and scheme, applicable case law, and other indicia of statutory purpose make clear that Internet platforms are not exempt from compliance with state court orders where no cause of action is filed against, and no civil liability is imposed on, the provider for its publication of third party speech. Yelp may be subject to a properly issued injunction from a California court. Where an entity had the extensive notice and considerable involvement in litigation that Yelp has had in this case, due process concerns are far less likely to impede a court from fashioning a proper injunction to prevent aiding and abetting of unlawful conduct. But whether Yelp aided, abetted, or otherwise acted sufficiently in concert with or colluded to advance Bird’s defamatory conduct must be addressed using the proper legal standard for an injunction to run to a nonparty, as we explained in *Berger* and *Ross*. Because we cannot establish that the superior court made the necessary factual findings regarding Yelp’s conduct in this situation, applying

A. Anonymity

Aside from § 230 preemption, however, there are many other legal hurdles plaintiffs face in defamation litigation. Consider poster anonymity. Although the law allows victims to sue the poster in place of the ISP, this is not always feasible given that the poster may be seriously imbalanced mentally, a sociopath, psychotic, broke, anonymous, and/or can't be physically located. This problem is further complicated because protections to maintain poster anonymity are strong in the U.S. such that requests to subpoena an anonymous poster's identity are often denied.

Dendrite International, Inc. v. Doe exemplifies this trend. In *Dendrite International*, a company attempted to compel an ISP to reveal the identity of "Doe No. 3" for posting defamatory comments and trade secrets on a message board.⁸⁷ Although the court allowed Dendrite to conduct limited discovery to uncover the identities of the anonymous posters involved, it rejected a motion to compel Yahoo to identify the remaining defendant, Doe No. 3.⁸⁸ In delivering its opinion, the court established a five-prong test to determine whether an entity may be granted a motion to compel: there must be a showing that (1) the plaintiff made efforts to notify the anonymous poster and allowed a reasonable time for him/her to respond; (2) the plaintiff identified the exact statements made by the poster; (3) the complaint set forth a prima facie cause of action; (4) there was sufficient evidence for each element of its claim; and (5) the court balanced the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented.⁸⁹

Doe v. Cahill used some of the prongs of the *Dendrite* test to formulate a "summary judgment" standard.⁹⁰ In *Cahill*, local politician, Patrick Cahill, sued for defamatory comments posted about him on a blog and subpoenaed Comcast to uncover the identity of the poster.⁹¹ After receiving notice of the subpoena, the anonymous poster filed a protective order to prevent the disclosure of his or her identity. The Delaware Supreme Court determined that because the defamatory comments were "incapable of a defamatory

a legal standard consistent with the views expressed in this opinion, we would vacate the judgment of the Court of Appeal and remand for further proceedings not inconsistent with this opinion.

Id.

87. *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

88. *Id.*

89. *Id.* at 760-61.

90. *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

91. *Id.* at 454.

meaning,” the case did not pass the summary judgment test required to compel Comcast to comply with the subpoena, and thus the poster’s identity was kept anonymous.⁹²

B. *Jurisdictional Barriers*

Another issue is jurisdiction. Often, defamatory material is posted online in one state which directly affects individuals of another state. To deal with such cases, the courts have deferred to the “Calder effects test” established in *Calder v. Jones*.⁹³ As applied to cases of Internet defamation, the court must find a “purposeful direction” or showing that the publication was an intentional act that was expressly aimed at the forum state, and with knowledge that the force of the publication would be felt in the forum state.⁹⁴ If purposeful direction is met, the courts are willing to grant jurisdiction in cases that may have otherwise been barred by failure to meet minimal contacts requirement or establish requisite levels of interactivity. The use of this standard reflects a general loosening of requirements to establish personal jurisdiction such that plaintiffs only need to establish that statements were directed at the forum state.⁹⁵

C. *International Litigation and Libel Tourism*

The problems with defamation litigation in the U.S. are especially striking when compared to libel laws around the world. The U.K., for example, particularly England, has had more liberal libel laws which make success in defamation lawsuits much more feasible. However, intense pressure from the U.S. and U.K. publishing industries complaining about the growth of “libel tourism” (which, incidentally, is not supported by the actual

92. *Id.* at 467.

93. *Calder v. Jones*, 465 U.S. 783 (1984).

94. *Id.* at 790 (finding that the acts by the petitioners was not mere negligence, but instead “intentional, and allegedly tortious, actions [which] were expressly aimed at California,” thus they were awarded no protection).

95. Several recent lawsuits support this trend. *See, e.g.*, *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1077 (9th Cir. 2011) (“The ‘effects’ test, which derives from the Supreme Court’s decision in *Calder* . . . requires that ‘the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.’”) (quoting *Brayton Purcell, L.L.P. v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) (quoting *Brayton Purcell, L.L.P. v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)); *Silver v. Brown*, 382 Fed. Appx. 723 (10th Cir. 2010).

statistics)⁹⁶ led to introduction of the 2013 U.K. Defamation Act (except Northern Ireland).⁹⁷ The U.K. is now subject to a single publication rule, similar to that exemplified by California Civil Code §§ 3425.1 to 3425.5.⁹⁸ The California code states that any mass publication of information constitutes one single communication and thus allows for only one cause of action for libel. Additionally, the statute of limitations begins to run as soon as the statements are published.⁹⁹

Substantively, U.S. law diverges from U.K. law in that the U.S. assumes defamatory statements are true, while the U.K. presumes that they are false.¹⁰⁰ Thus, if an individual brings a claim for defamation in the U.K., it becomes the defendant's burden to prove that the libelous statements were true. Not only are libel defendants required to prove the "substantial truth of every material fact," failure to do so may result in an aggravated damages judgment.¹⁰¹ This contrasts with the U.S. law, where defendants, especially media defendants, are strongly shielded from potential litigation. In libel cases brought by public officials or public figures on matters of public concern, U.S. courts require proof that a defendant acted with actual malice.¹⁰² Because the courts have not clearly defined how much evidence is sufficient in proving this burden, most look to evidence showing that the publisher specifically knew the statement was false.¹⁰³ This is often

96. *Libel Tourism is a Very Rare Thing in UK Courts, Finds Study*, OUT-LAW.COM, <https://www.out-law.com/page-11343> (last visited Sept. 12, 2018); *Number of Defamation Cases Falls by a Third in a Year*, THOMSON REUTERS (Nov. 16, 2015), <https://inform.files.wordpress.com/2015/09/thomson-reuters-press-release.pdf> (showing a twenty-seven percent decrease in the number of defamation cases overall from 2013/2014 to 2014/2015).

97. Defamation Act 2013, c. 26, § 8 (Eng.).

98. CAL. CIV. CODE §§3425.1-3425.5 (Deering 2018).

99. *Id.* § 3425.3.

100. See HARRY MELKONIAN, DEFAMATION, LIBEL TOURISM, AND THE SPEECH ACT OF 2010, at 2 (2011).

101. Raymond W. Beauchamp, Note, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 *FORDHAM L. REV.* 3073, 3078 (2006) (citing Maureen Mulholland, *Defamation*, in CLERK & LINDSELL ON TORTS 22, 22-81 (Anthony M. Dugdale ed., 18th ed. 2000)); Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 *N.Y.U.J.L. & LIBERTY* 252, 256, 257 (2009) (citing Hearing on H.R. 6146 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 111th Cong. 3 (2009) (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP)).

102. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (establishing the "actual malice" standard when a defamation suit is brought regarding public officials on matters relating to their performance or fitness for office).

103. Thomas Sanchez, Note, *London, Libel Capital No Longer?: The Draft Defamation Act of 2011 and the Future of Libel Tourism*, 9 *U.N.H.L. REV.* 469, 486 (2011) (citing *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 752-53 (Mass. 2007); and MELKONIAN, *supra* note 100, at 24)).

impossible to prove, however, because such evidence is very difficult to obtain. Since plaintiffs can almost never meet this burden of proof, most media defendants in the U.S. are strongly safeguarded against liability for defamation.¹⁰⁴

Yet, even if litigation overseas appears more promising, there is a serious question as to whether the U.S. will enforce a foreign judgment. Dr. Rachel Ehrenfeld famously tested the waters on this issue when she sued Saudi billionaire, Khalid bin Mahfouz, in U.S. Federal Court to prevent enforcement of a foreign libel ruling against her book, *Funding Evil*.¹⁰⁵ The book made a number of allegations about the Mahfouz family's involvement in international terrorist networks, including that the family personally financed these groups.¹⁰⁶ In the countersuit, Dr. Ehrenfeld argued that Mahfouz's litigation infringed upon her First Amendment rights and had a chilling effect on otherwise valuable journalism.¹⁰⁷ Although she eventually took the case to the New York Court of Appeal, the lawsuit was dismissed for lack of jurisdiction over Mr. Mahfouz.¹⁰⁸ After the lobby of Dr. Ehrenfeld and the media, several state legislatures responded by passing laws to prevent the enforcement of foreign defamation judgments. States that began to adopt such libel tourism laws include California, Florida, Illinois and New York.¹⁰⁹

Federal legislation was also passed in August of 2010. The SPEECH Act,¹¹⁰ as it is known, effectively bars the enforcement of foreign defamation judgments unless they meet First Amendment standards.¹¹¹ Of course, the

104. The standard in most American states for suits brought by private figure plaintiffs on matters of public concern is negligence. *Id.* at 484-85 n.84 (quoting RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977)).

105. *See Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 832-33 (N.Y. 2007) (explaining that, in 2004, the English court had entered a default judgment against Ehrenfeld and publisher Bonus Books which provided an award of damages and an injunction prohibiting further publication of the allegedly defamatory statements in England and Wales); *Bin Mahfouz & Ors v. Ehrenfeld*, [2005] EWHC 1156 (QB).

106. RACHEL EHRENFELD, *FUNDING EVIL* 35-36 (expanded ed. 2005) (2003).

107. *See Ehrenfeld v. Mahfouz*, 489 F.3d 542, 550 (2d Cir. 2004).

108. *Ehrenfeld*, 881 N.E.2d at 833. This decision by the New York Court of Appeal was later affirmed by the Second Circuit in *Ehrenfeld v. Mahfouz*, 518 F.3d 102 (2d Cir. 2008).

109. See codes in California (CAL. CIV. PROC. CODE §§ 1716, 1717 (Deering 2018)); Florida (FLA. STAT. §§ 55.605 (2)(h); 55.6055 (Deering 2018)); Illinois ((735 ILL. COMP. STAT. 5/2-209(b-5); 5/12-621 (b)(7) (repealed 2012) (Deering 2012)); and New York (N.Y. C.P.L.R. §§ 302(d); 5304 (b)(8) (McKinney 2008)).

110. Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act of 2010, 28 U.S.C. §§ 4101-4105 (2012).

111. 28 U.S.C. § 4102(a)(1)(A)-(B).

reality is that there have been very few, if any, attempts to enforce U.K. libel judgments in the U.S., primarily on account of the stance taken by the courts here that they would only enforce a judgment that could otherwise have been obtained within the jurisdiction of that particular state. Accordingly, the SPEECH Act probably has more of a symbolic impact rather than an actual effect on international libel laws, although it does send out a fairly unsubtle warning to Americans that they should not seek to undermine First Amendment rights in overseas courts.

Nonetheless, U.S. citizens can still take legal action against U.K. and other European publications in the British courts without fear of reprisals back home. Indeed, citizens failing to avail themselves of the more favorable U.K. libel laws could create an adverse inference among the public to the effect that they must be guilty of the allegations being made against them; otherwise, they would have litigated immediately like their U.K. counterparts! The successful lobbying campaign undertaken in the U.S. (some would say that it has been the most effective since that undertaken by the tobacco industry several decades ago),¹¹² has directly impacted the thinking of U.K. legislators. It contributed, in no small measure, to the introduction of the English Defamation Act, which aims to make “libel tourists” suits more difficult to bring in the High Court of London. The Defamation Act makes such suits more difficult by imposing stricter criteria that requires a claimant to demonstrate not only their close connections with

[A] domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that— (A) the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or (B) even if the defamation law applied in the foreign court’s adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.

Id.

112. For example, Facebook spent almost \$10 million in 2015 on lobbying, while Google spent \$5.5 million in only the first three months of 2015. *Lobbyists Representing Facebook Inc., 2015*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/clientlbs.php?id=D000033563&year=2015> (last visited Oct. 29, 2018); see Diane Bartz, *Google Lobbying Spending Reached New High in Early 2015*, REUTERS (Apr. 21, 2015, 9:00 AM), <http://www.reuters.com/article/us-google-lobbying-idUSKBN0NC1UO20150421>.

the U.K., but also that the U.K. is the most appropriate forum to bring the claim.¹¹³

Furthermore, although leaving the burden of proof firmly on a publisher's shoulders, a "serious and substantial" harm test was introduced, thereby raising the bar for those who might otherwise have desired to sue for what the Court would regard as more trivial claims. U.K. legislation has also removed the automatic right to jury trial, with the intention being to both limit the number of claims coming before the Courts and the level of damages being awarded by juries. However, this legislation has not been introduced in Northern Ireland, which, along with the Republic of Ireland, remains a "plaintiff friendly" jurisdiction.

D. *Anti-SLAPP Statutes*

Meeting First Amendment standards is not the only essential hurdles in foreign libel pleadings; there are also anti-SLAPP motions. Especially in California, anti-SLAPP statutes present a serious problem to plaintiffs considering litigation for defamation in connection with public issues. This is because Code of Civil Procedure section 425.16 allows defendants to file a motion to dismiss a complaint entirely, provided that the defendant show that their activity fell within the rights of petition or free speech. Once this has been done successfully, the burden then shifts to the plaintiff to show that they have a reasonable probability of prevailing in the action.¹¹⁴ Should the plaintiff fail to meet this burden, the defendant is entitled to both attorney's fees and court costs.¹¹⁵

113. Defamation Act 2013, c. 26, § 9(2) (Eng.). The Act states:

A court does not have jurisdiction to hear and determine an action to which this section applies unless this court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect to the statement.

Id.

114. CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering 2018) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.").

115. *Id.* § 425.16(c)(1) ("Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.").

Moreover, pursuant to section 425.16(g) once a motion for anti-SLAPP is filed, discovery is stayed unless the courts grant permission.¹¹⁶ Thus, anti-SLAPP statutes become a powerful tool to not only dissuade individuals from bringing forth legitimate claims for defamation, but also effectively punishes them for doing so by making litigation extremely costly and difficult.

Global Telemedia International, Inc. v. Doe provides insight into the implications of California's anti-SLAPP legislation.¹¹⁷ There, Global Telemedia attempted to sue posters to an online bulletin board for defamation with regards to negative comments posted about the firm and its officers. The defendants successfully argued an anti-SLAPP defense on the grounds that statements regarding a publicly traded company constituted speech about public issues and were therefore protected.¹¹⁸ Because the plaintiffs had not shown a probability of success on their claims for defamation, the case was dismissed and Global Telemedia was not able to seek damages for its alleged harms.¹¹⁹

IV. WHAT CAN BE DONE?

In light of the problems with current litigation on defamation, including § 230 of the CDA, jurisdictional issues, and anti-SLAPP statutes, recourse is obviously exceedingly difficult. While some remedies are available to defamation victims, most plaintiffs are left at the mercy of the particular ISP they are dealing with to take down the content.¹²⁰

Among the most common options for plaintiffs are to sue the poster directly, to seek injunctive relief and take down the offensive post, and to sue for damages and obtain ownership of the defamatory websites. Some ISPs

116. *Id.* § 425.16(g) (“All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.”). Discovery is not stayed in federal court.

117. *Glob. Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001).

118. *Id.* at 1266.

119. *Id.* at 1270-71.

120. Our experience with such ISPs has been extremely poor, as the ISPs are extremely difficult to get hold of and indifferent to obvious cases of defamation and invasion of privacy. Usually, there is no phone number to call, every communication must be by email. Supposedly Facebook, Twitter, Google and Microsoft have agreed to collaborate with EU officials by reviewing hateful speech and taking down “problematic posts” within 24 hours. See Lisa Eadicicco, *Facebook and Google Are Coming to War Against Hate Speech*, TIME (May 31, 2016), <http://time.com/4352179/facebook-twitter-google-hate-speech/>. Our experience has been that Google will take down defamatory material after a judgment find defamation, but this policy is nowhere publicly stated.

have become so emboldened, however, that they are completely non-responsive or disregard injunctions since there are no legal repercussions for doing so. *Blockowicz v. Williams* illustrates this behavior, as even after the defamation victims secured injunctions against the three offending websites, they were unable to seek enforcement of the injunctions against the remaining offender, ripoffreport.com.¹²¹ With the combination of § 230 immunity and a longstanding tradition of directing injunctions exclusively to the parties of a lawsuit, the court ruled that ripoffreport.com was not legally required to respect the injunction. The reason was twofold: First, because § 230 made ripoffreport.com immune to liability for the posts, they could not be considered parties to the lawsuit. Second, since the website was not a party, the only way to hold ripoffreport.com accountable for injunctions under the Federal Rules of Civil Procedure was to show that the ISP acted in active concert with the poster. Since ripoffreport.com did nothing to aid or abet the defamatory posts made by third party users, it was not liable, and a sister court order finding defamation could not require the content to be removed!

Another option is to sue abroad. Although the SPEECH Act makes enforcement of foreign judgments more difficult, it will not matter if a victim is still able to enforce against a European distributor and/or entity defendant

121. *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010). Ripoffreport.com (“Ripoff”) takes a particularly aggressive stance against the removal of potentially defamatory material from its website, with a stated company policy to never remove reports once they are uploaded. Ripoff refuses to remove statements from its website, even after they have been determined to be defamatory by lower courts, certainly an arguably morally repugnant policy. In *Xcentric Ventures, LLC v. Smith*, the facts demonstrated that Ripoff had an application process in place to remove defamatory posts; it required a \$2,000 non-refundable fee. Ripoff allowed for submission of evidence from both parties which was then submitted for review to the “VIP Arbitration Program” developed by Ripoff. *Xcentric Ventures, L.L.C. v. Smith*, No. C15-4008-MWB, 2015 U.S. Dist. LEXIS 109965, at *11-12 (N.D. Iowa Aug. 19, 2015) (holding that Xcentric had failed to demonstrate a likelihood of success on their claim to declaratory and injunctive relief due substantial evidence that Xcentric materially contributed to the alleged illegality of the information at issue while also stating that the holding was not a final decision as to CDA immunity). The company states it has successfully litigated over 20 times with a defense of CDA immunity. Information on the arbitration process is available at Ripoff’s website. See *Set the Record Straight: Arbitration Program*, RIPOFF REPORT, <https://www.ripoffreport.com/arbitration> (last updated Dec. 14, 2017) (providing information on the arbitration process); see also *GW Equity, L.L.C. v. Xcentric Ventures, L.L.C.*, No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009); *Intellect Art Multimedia, Inc. v. Milewski*, No. 117024/08, 2009 WL 2915273 (N.Y. Sup. 2009 Sept. 11, 2009); *Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008); *Global Royalties, Ltd. v. Xcentric Ventures, L.L.C.*, 544 F. Supp. 2d 929 (D. Ariz. 2008).

which has assets in foreign countries such as the U.K.¹²² In some cases, it may be possible to sue in several territories at once. For example, a “triple threat” lawsuit may be brought, thereby bombarding an ISP with legal action from Dublin, London, and Belfast simultaneously.

Overall, however, there is an extreme lack of remedies for defamation. In response to this scarcity, websites such as reputation.com have emerged in an attempt to manually manipulate search engines to “push down” defamatory content on web searches.¹²³ While the effectiveness of these “self help remedies” is debated, their existence is indicative of the problems in current U.S. law to stem the tide of Internet libel. The increasing prevalence of services such as reputation.com attests to the fact that online defamation and invasion of privacy is a growing problem for individuals and businesses.

A common trend that is also causing serious concern in many quarters is that of ISPs’ relocating to what they regard as the safe havens of the U.S. and Iceland. Such moves are intended to put the ISP outside the reach of the U.K. libel courts and to allow the more ruthless operators to function with a large degree of impunity. On the other hand, the likes of Facebook and Google have decided to take advantage of Ireland’s more favorable tax and other laws to establish a European basis in Dublin, thereby submitting themselves to European Union privacy and other data protection laws. This has already created problems for Facebook, which has been the subject of several high-profile litigations. One such case was brought by a group of Austrian students and in turn led to the Irish Data Protection Commissioner entering Facebook’s Dublin premises to examine its records.¹²⁴

A. *Developments in Privacy Law*

Recent years have seen a number of significant developments in the fields of privacy and data protection in the U.K. and Ireland. In 2014, in a landmark decision, the Court of Justice of the European Union (CJEU)¹²⁵ ruled that search engines such as Google are “*data controllers*” in respect to

122. See SPEECH Act, 28 U.S.C. §§ 4101-4105 (2012).

123. See Susan Adams, *Six Steps to Managing Your Online Reputation*, FORBES (Mar. 14, 2013, 6:17 PM), <http://www.forbes.com/sites/susanadams/2013/03/14/6-steps-to-managing-your-online-reputation/#7f8c5f4fc1ac>.

124. See Kevin J. O’Brien, *Austrian Law Student Faces Down Facebook*, N.Y. TIMES (Feb. 5, 2012), <https://www.nytimes.com/2012/02/06/technology/06iht-rawdata06.html> for details of the campaign initiated by the group of Austrian students. See also Cormac O’Keeffe, *Facebook Won’t ‘Like’ its Seventeenth Complaint*, IRISH EXAMINER (Aug. 27, 2011), <https://www.irishexaminer.com/ireland/facebook-wont-like-its-17th-complaint-165606.html>.

125. Case C-131/12, *Google, Inc. v. González*, 2014 EUR-lex CELEX LEXIS 62012CJ0131 (May 13, 2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131>.

their search engine results, that EU data protection laws apply to their processing of the data of EU citizens and that individuals can therefore request that links appearing in search engine results relating to the individual can be disabled where the data is outdated and irrelevant. This effectively created a “right to be forgotten” online, and Google was forced to develop procedures to deal with the flood of take down requests.¹²⁶ Data Protection rights have been strengthened even further by the implementation of the European Union General Data Protection Regulation (GDPR), which codifies the “right to be forgotten” and introduces punitive sanctions for companies who breach data subjects’ rights.¹²⁷

Further positive reinforcement of privacy rights occurred in November 2015 when the Court of Appeal in London upheld the High Court’s *Weller v. Associated Newspapers Ltd.* decision that MailOnline was liable for misuse of private information and/or breaches of the Data Protection Act by publishing seven unpixelated photographs of Paul Weller’s children taken whilst they were on shopping trip in Los Angeles.¹²⁸ Interestingly, the Court noted that, while it was lawful to take the photographs in California and it would have been lawful to publish them in California, this did not invalidate the children’s right to a reasonable expectation of privacy in respect to publication in the U.K.

A further shift in the legal balance between privacy rights and freedom of expression occurred in the 2018 case of *Sir Cliff Richard OBE v. BBC*.¹²⁹ The legal battle arose over the BBC’s coverage of a police raid on the plaintiff’s premises during an investigation into historical sexual assault allegations. In reaching a decision, the court held that “[a]s a matter of general principle, a suspect has a reasonable expectation of privacy in relation

126. Google’s procedure for removing search results is available as part of their FAQ section at <https://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en>. See also *Transparency Report: Search Removals Under European Privacy Law*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy/> (last visited Oct. 28, 2018) (detailing Google’s removal efforts following the CJEU González ruling).

127. Council Regulation 2016/679, ¶ 65 2016 O.J. (L 119) 1 (EU) (codifying the “right to be forgotten”); Council Regulation 2016/679, art. 83, ¶ 1, 2016 O.J. (L 119) 1 (EU) (“Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.”). Article 83 provides that companies may be fined a specific percentage of their annual global turnover for failing to comply with the provisions of the Regulation. *Id.* ¶ 2.

128. *Weller v. Associated Newspapers, Ltd.* [2015] EWCA (Civ) 1176 [94]-[95] (Eng.).

129. *Richard v. British Broad. Corp.* [2017] EWHC (Ch) 1837 (Eng.).

to a police investigation[.]”¹³⁰ This expectation to privacy was not lost by the fact that the media had become aware (although perhaps in that case by being made aware) of the investigation into Sir Cliff. The judgment has been hailed by privacy rights advocates as it will undoubtedly serve to strengthen an individual’s privacy rights in the context of criminal investigations, although each case will have to be decided on its own particular circumstances.

B. Solutions

While it has been said that legislation takes five or more years to tackle the issues related to new and emerging technologies, it is clear that, over twenty-two years later, reform on this issue is far past due. One way to amend § 230 of the Communications Decency Act is to create a new policy that is structurally similar to the Digital Millennium Copyright Act (DMCA).¹³¹ The DMCA originated because, much like defamation, copyright has encountered a number of violations on the unregulated domain of the Internet.¹³² To mitigate this issue, the government developed a system of notice and takedown procedures to help minimize the volume of violations over the Internet.¹³³ Arguably this model could be directly applicable to a problem like Internet defamation, where individuals must also deal with inappropriate or unauthorized content being posted on the web.¹³⁴ If ISPs can be forced to takedown copyrighted material, why aren’t similar protections afforded to victims of defamation where their very livelihood is at stake? Amending the laws in this arena is necessary if privacy rights and

130. *Id.* ¶ 248.

131. Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 101 (2012).

132. These include including free music downloading, media sharing, and uploading of YouTube videos.

133. 17 U.S.C. § 512(c)(1)(A) (providing no liability for service providers where “the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement”). Internet intermediaries and hosts are shielded from copyright infringement liability only where they act expeditiously to remove infringing material after being properly notified by the copyright owner of the infringing material. § 512(a). Such notice must only contain the “address” of the copyrighted material, and a statement by the copyright owner that the use of the material is not authorized. 17 U.S.C. § 512(c)(3). The original poster then has the option of filing a counter-notice stating that the material is non-infringing, which may result in the information being re-posted. 17 U.S.C. § 512(g)(2).

134. Some argue that DMCA- like libel law is almost unworkable as it would require ISPs to create new infrastructure to deal with processing defamation related claims. Unlike copyright infringement claims which are concrete and clear, analyzing claims for defamation are more subjective and would likely require in house counsel to determine the legitimacy of an Internet defamation claim.

protections against libel and impersonation are to be seriously protected. The new protections may require, for example, that ISPs have a dedicated ombudsman easily available and accessible to discuss the issues.

Likewise, as there is no Constitutional protection for defamatory content or content that invades privacy, why can't Congress pass a law requiring a retraction or deletion of private information? The ISPs typically counter with the argument that it would be burdensome to do so. Really? Facebook and Google, for example, are two of the largest corporations in the world. If the traditional news media can abide by these rules, why can't ISPs? The harm that is caused by defamation and wrongful invasions of privacy can have ruinous effects on victims, their families, and their business endeavors. These are not isolated instances.

That Facebook was incompetent in protecting the United States from Russian influence during the 2016 Presidential campaign has been the subject of many articles and Congressional hearings.¹³⁵ We sense a sentiment in the United States and Congress for increased regulation of the ISPs. Despite the formidable lobbying efforts of the technology companies and ISPs,¹³⁶ and the concomitant fear of legislators to cross them, this can be accomplished.¹³⁷

135. *See, e.g.*, 163 CONG. REC. S1136 (Feb. 14, 2017) (statements of Sen. Durbin) (“November 8, 2016, was not just election day. It was a day that will live in cyber infamy because it turns out that one of the leading enemies of the United States, the nation of Russia, was directly engaged in the Presidential campaign that resulted in the election on November 8. This is not speculation. It is a fact based on conclusions that came from 17 different intelligence agencies that confirmed this reality.”); 164 CONG. REC. H3347-48 (Apr. 17, 2018) (statements of Rep. Hartzler) (“Russia’s interference in the 2016 Presidential election by spreading disinformation on social media is troubling, and it showcases Russia’s success in weaponizing the Internet. Russia has exploited political divisions with the intention to cause individuals to question the legitimacy of our democracy. That is Russia’s ultimate goal, not to sway the outcome of elections, but to call into question the very foundations that make our democracy strong by provoking mistrust and instability into democratic institutions.”); Elizabeth Weise, *Russian Fake Accounts Showed Posts to 126 Million Facebook Users*, USA TODAY (Oct. 30, 2017, 6:19 PM), <https://www.usatoday.com/story/tech/2017/10/30/russian-fake-accounts-showed-posts-126-million-facebook-users/815342001/>.

136. Google spent over \$18 million lobbying politicians in 2017, the first time a technology company has spent the most on lobbying costs in at least twenty years. In addition, “Facebook spent \$11.5 million on lobbying activities in 2017, Amazon spent over \$12.8 million, Microsoft spent \$8.5 million, and Apple spent \$7 million.” Alana Abramson, *Google Spent Millions More Than its Rivals Lobbying Politicians Last Year*, TIME (Jan. 24, 2018), <http://time.com/5116226/google-lobbying-2017>.

137. On April 11, 2018, President Trump signed into law H.R. 1865, the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (commonly known as “FOSTA”). The law is intended to limit the immunity provided under § 230 of the CDA for online services that knowingly host third-party content that promotes or facilitates sex trafficking. The ISP’s initially

This is an ever-present issue in the digital world that victims, as individuals, are powerless to do anything on their own. We, as a society, cannot continue to turn a blind eye to dangers of completely unchecked Internet use when so many livelihoods are regularly threatened. The constituencies for such changes are the past, present, and future victims of Internet libel who are not organized and are powerless against the Internet lobbies supporting the status quo.

The danger is that while Western democracies largely ignore the growing instances of Internet abuse, countries such as China have shown their impatience by taking sweeping and draconian measures against the likes of Google, causing it to shut down completely within China's jurisdiction. The time is surely right for an International Tribunal to be established to examine the options available across the board for the international community to counter this serious problem, which will not be resolved any time soon.

Until such action is taken, regulation of Internet content is done largely on an ad hoc basis by corporations such as Google, which, because of its international presence, must attempt to strike a balance between different international free speech and content laws. Google treats content removal requests on a case-by-case basis and uses a broad set of criteria to guide its decisions, including the wording of local law and whether the request is sufficiently narrow in scope.¹³⁸ The result is a virtual ethical tightrope for American companies who host content internationally. A Google spokesperson stated that the scope of the problem was "really alarming" and "a consistent problem" because "laws are different around the world."¹³⁹ With the kind of assets, market share and profits of the major ISPs, there is no reason these entities cannot meet the needs of modern society. The ISPs, simply put, are reluctant, if not outright refusing, to deal with the moral and societal implications of conduct, which is repugnant to the best interests of society. If it can work in the EEC, it can work in the USA.¹⁴⁰

In the U.K., section 5 of the English Defamation Act, establishes a procedure where a defamation action is contemplated against the operator of

resisted this law, but ultimately caved in the face of public sentiment. See FOSTA, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

138. Google's current policy can be found at <https://support.google.com/websearch/answer/2744324?hl=en>.

139. Paul Sonne, *Google's Censorship Juggle*, WALL ST. J., June 18, 2012, at B3.

140. Since May 29, 2014, Google has received 744,041 "requests to delist" and 2,845,899 URLs requested to be delisted. Of these, 1,075,046 (or 44%) of the URLs requested were in fact delisted. So, it can be done both efficiently and effectively. *Transparency Report: Search Removals Under European Privacy Law*, *supra* note 126.

a website.¹⁴¹ In providing a potential defense for an operator, the section is also intended to enable a claimant to “identify” and pursue the individual who actually posted the offending material rather than the operator.¹⁴² However, this has had little appreciable impact on the fundamental and increasing problem of online abuse threats, harassment, and breaches of privacy.

This escalatory problem is a serious issue that will ultimately have to be addressed by the international community at large, as recent events have demonstrated all too clearly. Change is due, and we predict it will happen for the better, and hopefully sooner rather than later.

141. Defamation Act 2013, c. 26, § 5 (Eng.).

142. *Id.*

FAKE NEWS, FREE SPEECH AND DEMOCRACY: A (BAD) LESSON FROM ITALY?

Roberto Mastroianni*

“[S]i qua possit ratione, competitoribus tuis existat aut sceleris
aut libidinis aut largitionis accommodata ad eorum mores
infamia.”

“[A]s far as possible, arise against your opponents a suspicion,
appropriate to their behavior, of guilt, of luxury or waste.”

– QUINTUS TULLIUS CICERO, HOW TO WIN AN ELECTION 78-79
(Philip Freeman trans., 2012).

ABSTRACT

Using Silvio Berlusconi’s successful campaign for Italy’s President of the Council of Ministers as a case study, this article deals with control and use of media powers to gain and maintain political consensus. First, this article analyzes a precise period of Italy’s recent history when the dissemination of news via major media outlets that were in Berlusconi’s control, primarily television channels, but also newspapers and magazines, became weapons in the hands of a political leader. Recalling Berlusconi’s additional recourse to litigation in order to fend off criticisms from the free press, this article demonstrates the importance of rules against conflicts of interest between media and politics and clarifies the bluntness of general antitrust in tackling such situations. The article further underscores the lack of intervention from both European and international institutions. Considering similar problems arising again in the European States, this paper suggests a solution through common European legislative intervention: adoption of a uniform set of rules for all EU Member States

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promoting media diversity and outlawing any direct or indirect control of media outlets by persons engaged in political activities. Finally, since the case study of this article reveals a strong connection between effective contrast to “fake news” and the existence of a media legal landscape based on the principles of impartiality, transparency and pluralism, it is submitted that the adoption of uniform European rules could significantly limit the impact of false or misleading information pending electoral periods.

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I. INTRODUCTION: FAKE NEWS, FREEDOM OF EXPRESSION AND THE RIGHT TO FREE ELECTIONS IN LIGHT OF EUROPEAN AND INTERNATIONAL HUMAN RIGHTS PRINCIPLES

“Fake news” is not an invention of the Internet. Although the web offers new and easier avenues to disseminate false information,¹ democracies historically must defuse the constant danger of false facts, especially in the context of a political debate. Weaponized defamation, used as a deterrent against the free press, is similarly not a new occurrence. Both phenomena, spreading false information and threats of defamation suits, call into question two of the main pillars of the European human rights system, particularly during electoral campaigns: The right to freedom of information, including the right to be correctly informed, and the right to free elections.

In this connection, Article 10 of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”) provides that the freedom of expression “shall include freedom to hold opinions *and to receive* and impart information and ideas without interference by public authority and regardless of frontiers.”² The same wording appears almost verbatim in Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”).³ The European Court of Human Rights (“ECtHR”) illustrates this emphasis on freedom of information in recent judgments where the court highlighted State

1. In *Delfi v. Estonia*, the Grand Chamber of the European Court of Human Rights (“ECtHR”) underscored that:

[U]ser-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognized by the Court on previous occasions. However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.

Delfi v. Estonia, 2015-II Eur. Ct. H.R. 319 (first citing *Ahmet Yildirim v. Turkey*, 2012-VI Eur. Ct. H.R. 465; and then citing *Times Newspapers Ltd. v. United Kingdom* (nos. 1 and 2), 2009-I Eur. Ct. H.R. 377), https://www.echr.coe.int/Documents/Reports_Recueil_2015-II.pdf.

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter *European Convention on Human Rights*] (emphasis added); see *Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL EUR., https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/signatures?p_auth=mtlQicCmd (last visited Aug. 20, 2018). For a comment on this provision, see JEAN FRANÇOIS RENUCCI, *DROIT EUROPÉEN DES DROITS DE L'HOMME* 183 (2d ed. 2012).

3. International Covenant on Civil and Political Rights, art. 19, ¶¶ 1, 2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*] (“Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers[.]”). The ICCPR entered into force on March 23rd, 1976 and, as of September 2018, has 172 signatories. See SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (3d ed. 2013) for a commentary on the ICCPR.

Parties' obligation to not only respect freedom of speech but to also foster an environment suitable for inclusive and pluralistic public debate. To meet these obligations, the ECtHR dictates that States must refrain from interference and censorship, as well as adopt "positive measures" to protect freedom of information in its "passive" element; that is, the right to be correctly informed.⁴

Considering the special duties and responsibilities freedom of information carries,⁵ the ECHR and the ICCPR permit interference with this right, but only if such interference is prescribed by law, pursues a legitimate aim and is necessary to a democratic society.⁶ Significantly, on several occasions, the Strasbourg Court has held that "there is little scope under Article 10, paragraph 2 of the [ECHR] for restrictions on political speech or on the debate of questions of public interest."⁷

In turn, Article 3 of Protocol 1 to the ECHR and Article 25 of the ICCPR codify the right to free elections.⁸ The ECHR provides that "High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."⁹ Thus, the two fundamental rights share a strong connection: An election process is "free" if the electorate's choice is based on its access to the widest possible range of proposals and ideas, and if false information does not distort or alter election result.

Access to correct information is a precondition for an informed and genuine exercise of the right to vote and this proposition is well established in international case law. This conclusion emerges in several ECtHR

4. *See, e.g.*, *Centro Europa 7 Srl v. Italy*, 2012-III Eur. Ct. H.R. 339, 363-66.

5. Access to information is essential to democracy for at least two basic reasons. First, citizens must have access to government information in order to participate in the political process. Second, access to government information is necessary in order to hold governments accountable and to prevent governmental abuse and corruption. CHERYL ANN BISHOP, *LAW AND SOCIETY* 52-53 (Melvin I. Urofsky ed., 2012).

6. European Convention on Human Rights, *supra* note 2, art. 10, ¶ 2; ICCPR, *supra* note 3, art. 19, ¶ 3.

7. *See* *Salov v. Ukraine*, 2005-VIII Eur. Ct. H.R. 143, 177 (first citing *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986); and then citing *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) at 23 (1992)).

8. Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262; ICCPR, *supra* note 3, art. 25. Article 25 of the ICCPR recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. *Id.*

9. Protocol to the European Convention on Human Rights and Fundamental Freedoms, *supra* note 8, art. 3.

judgments, including, for instance, *Bowman v. United Kingdom*. In *Bowman*, the ECtHR found that:

Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other: for example, freedom of expression is one of the conditions necessary to ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election for opinions and information of all kinds to be permitted to circulate freely.¹⁰

The Human Rights Committee of the United Nations, which monitors the application of the ICCPR, shares this view. In its General Comment on Article 25, the Committee dealt with freedom of expression in the context of participation in public affairs and with the right to vote.¹¹ In paragraph 25, the Committee states that:

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to

10. *Bowman v. United Kingdom*, App. No. 24839/94, 26 Eur. H.R. Rep. 1 (1998). In addition, in *Communist Party of Russia and Others v. Russia*, the ECtHR addressed whether the State had a *positive obligation* under Article 3 of Protocol 1 to ensure that coverage by regulated media was objective and compatible with the spirit of “free elections” even in the absence of direct evidence of deliberate manipulation. *Communist Party of Russ. v. Russia*, App. No. 29400/05, 61 Eur. H.R. Rep. 28 (2012) (finding that the existing system of electoral remedies in Russia was sufficient to satisfy the State’s positive obligation of a procedural nature).

11. Hum. Rts. Comm., General Comment No. 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service Under Article 25 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996), *reprinted in* Rep. of the Hum. Rts. Comm., U.N. GOAR Supp. (No. 40), U.N. Doc. A/57/40, at 98 (1997). Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. ICCPR, *supra* note 3, art. 25.

criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.¹²

All Member States of the European Union are parties both to the ECHR and the ICCPR. Therefore, in addition to the principles enshrined in their national constitutions, Member States share a common, solid legal background of protecting freedom of expression. Furthermore, when Member States implement EU law, they are also bound to the Charter of Fundamental Rights of the European Union (“the Charter”), which codifies the basic right to free expression in Article 11 with similar wording.¹³ Notwithstanding this strong commitment, “free speech crises” still emerged in certain European States, and some proved unable to sufficiently respond to the dissemination of false information that aimed to distort, or at least condition, public discourse. Thus, the purpose of this article is to shed light on a specific – and admittedly, unique – situation that occurred, and still occurs to some extent, in Italy, where dissemination of fake news and recourse to weaponized defamation facilitated a media tycoon’s rise to power and enabled him to retain such position for several years.

II. A TALE OF RECENT HISTORY: POLITICAL CONSENSUS AND MEDIA POWER IN SILVIO BERLUSCONI’S RAISE TO POWER IN ITALY

“*One Italian out of three has already decided to vote for Forza Italia.*” In early 1994, this political claim was broadcast most frequently and any Italian viewer watching Mediaset television channels was constantly exposed to the message. Mediaset made up part of the Berlusconi media empire, Fininvest, which itself consistently comprises roughly one third of Italy’s TV audience shares.¹⁴ The slogan, invented by advertising agency Publitalia,

12. General Comment No. 25, *supra* note 11, ¶¶ 8, 25.

13. Article 11, titled “Freedom of expression and information” reads:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected.

Charter of Fundamental Rights of the European Union, art. 11, Oct. 26, 2012, 2012 O.J. (C 326) 391; see Roberto Mastroianni & Girolamo Strozzi, *Articolo 11*, in *CARTA DEI DIRITTI FONDAMENTALI DELL’UNIONE EUROPEA* 217, 217-35 (Roberto Mastroianni et al. eds., 2017); Lorna Woods, *Article 11: Freedom of Expression and Information*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS* 354, 354-83 (Steve Peers et al. eds., 2014).

14. See AUTORITÀ PER LE GARANZIE NELLE COMUNICAZIONI, 2017 ANNUAL REPORT 8-12 (2017) (“In the free-to-air television, RAI and Mediaset confirmed the two main operators in terms of audience, respectively with 36% and 31% of audience shares.”). See generally Brendan Quigley, *Immunity, Italian Style: Silvio Berlusconi Versus the Italian Legal System*, 34 *HASTINGS INT’L & COMP. L. REV.* 435, 440-41 (2011) (first citing Alberto Vannucci, *The Controversial Legacy of*

also under Berlusconi's control, is a good starting point for the present analysis, since it represents an early model of public opinion manipulation via mass media.

In 1994, when this statement permeated every Italian household, the new political movement *Forza Italia* was just taking its first steps in the political arena and preparing for the general election. The 1994 general elections were unique because they took place after a period of serious turmoil in Italian politics in which the country's most important political parties imploded due to anti-corruption investigations called "Mani Pulite" ("clean hands").¹⁵

Let us travel back to 1994 for a closer look at the social and political atmosphere in Italy. Since 1992, Italy had been in deep crisis – financial, political and cultural crisis – which dissolved the controlling political parties and put an end to the so-called First Republic. Silvio Berlusconi's media assets were also under threat. Fininvest was heavily in debt, and the government was considering revising existing law to limit Fininvest's near monopoly in commercial television.¹⁶ Former prime Minister Benedetto "Bettino" Craxi, Berlusconi's political mentor, friend and one of many politicians under investigation for corruption, resigned from his leadership position in the Socialist Party.¹⁷ By the end of 1993, the "progressive" alliance won municipal elections in Italy's major cities, including Rome, Venice, Naples and Palermo. The left wing had never been so close to power.

To defend his heritage and to fill the void left by the collapse of the old parties, Silvio Berlusconi contemplated his entry into politics.¹⁸ After a long period of indecision¹⁹ (which was probably staged indecision—another

'Mani Pulite': A Critical Analysis of Italian Corruption and Anti-Corruption Policies, 1 BULL. ITAL. POL. 233, 233-34 (2009), http://www.gla.ac.uk/media/media_140182-en.pdf; and then citing MICHAEL E. SHIN & JOHN A. AGNEW, BERLUSCONI'S ITALY 1-2, 10-11 (2008)).

15. See ALEXANDER STILLE, THE SACK OF ROME 121-26 (2006) for an explanation of the "clean hands" investigation.

16. PAUL GINSBORG, ITALY AND ITS DISCONTENTS 289 (2003).

17. Alan Cowell, *Italian Chief Replaces Three Ministers Who Resigned in Bribery Scandal*, N.Y. TIMES, Feb. 22, 1993, at A2.

18. For a complete analysis of the establishment of the *Forza Italia* political movement, see EMANUELA POLI, FORZA ITALIA: STRUTTURE, LEADERSHIP E RADICAMENTO TERRITORIALE (2001); see also GIOVANNI ORSINA, IL BERLUSCONISMO NELLA STORIA D'ITALIA (2013).

19. Between September and December 1993, the Research Institute Diakron, directed by a former manager of Publitalia (not surprisingly elected to the Italian Parliament with *Forza Italia* in the 1994 elections), circulated a long series of its polls in which Silvio Berlusconi was considered the most popular and trustworthy character for the Italian future. On December 19, 1993 Italian newspapers issued a survey, again signed by Diakron, where it turned out that 48.4% of Italians would vote for a center-right coalition led by Silvio Berlusconi. Particular attention should be paid to the date—at the beginning of December 1993, the birth of *Forza Italia* and Berlusconi direct involvement had not yet been officially announced. See Dan Mihalache, *The Italian Political*

strategy inspired by advertising techniques), the national *Forza Italia* association was officially established in November 1993.²⁰ During the campaign, Berlusconi mobilized the extraordinary resources of his media organization to advertising and market research. Absent laws limiting such direct political involvement of persons in control of large media companies, the first Italian party-business (“partito-impresa”) was born.²¹

According to well-respected and neutral polling agencies, *Forza Italia*'s support ranged from three to six percent of voters at the beginning of the pre-electoral period (January 1994), while other survey agencies, those closer to Berlusconi's interests, supplied far more generous estimates.²² At the ballot boxes two months later, *Forza Italia* secured twenty-one of the votes²³ – a huge success for a brand new political party, the highest percentage of votes for the lower house of Parliament, the Chamber of Deputies (Camera dei Deputati), but still twelve points lower than the projection Berlusconi-friendly polling agencies issued at the beginning of the electoral period.

It is rather clear to political analysts²⁴ that the extremely powerful political campaign, facilitated by the conjunction of Berlusconi's status as a media tycoon and as a political candidate, was a weapon which allowed Berlusconi to achieve such an unusual result. For example, the widely-disseminated catchphrase “One Italian out of three,” inspired by commercial advertising techniques,²⁵ was clear and simple. It meant, in brief, that *Forza Italia* was already a winning party, and suggested to voters that it was in their best interest to join the club. In other words, it was a call to jump on the bandwagon, or, in Italian: “salire sul carro del vincitore.”

Thus, the messages Berlusconi used in his campaign was what we would today call “fake news.” It is no surprise that, when combined with other strategies,²⁶ the masterful use of advertising techniques helped *Forza Italia*

System Case Study: Berlusconi – The Invention of the Political Man, 5 COGITO: MULTIDISCIPLINARY RES. J. 67, 72 (2013); STILLE, *supra* note 15, at 252-53.

20. See FEDERICO ORLANDO, *IL SABATO ANDAVAMO AD ARCORE* (1995).

21. See generally PINO CORRIAS ET AL., 1994 COLPO GROSSO (1994).

22. See Interview by Franco Melandri with Giorgio Calò, former CEO, Research Institute Directa, in 38 UNA CITTÀ (1995), <http://www.unacitta.it/newsite/intervista.asp?id=725>.

23. See Duncan McDonnell's survey, *Silvio Berlusconi's Personal Parties: From Forza Italia to the Popolo della Libertà*, 61 POL. STUD. 217, 219 (2013).

24. CORRIAS ET AL., *supra* note 21, at 64.

25. For a statement that, in the case of commercial advertising, such false claims might well be considered (and sanctioned) as “misleading advertising,” see the interview with Giorgio Calò, *supra* note 22.

26. For a more comprehensive and detailed analysis of the political and historical elements that favored Silvio Berlusconi's victory in 1994, see Guido D'Agostino & Riccardo Vigilante, *Le elezioni politiche del marzo 1994*, 195 ITALIA CONTEMPORANEA 221, 221-22 (1994) (It.).

increase its voter appeal and achieve unexpected electoral result. This early success transformed Berlusconi's political movement into a coalition²⁷ that then gained a majority in Parliament and facilitated Berlusconi's first appointment as Prime Minister of the Italian Government.²⁸

III. USING MEDIA POWER FOR POLITICAL CONSENSUS: THE MAIN "WEAPONS"

The foregoing Berlusconi example was selected from a range of mass media "weapons" that were used to influence political choices in Italy. Obviously, not all instances concern Berlusconi and his party. However, Berlusconi's dual role as political leader and media tycoon, which enabled his near total control over the private broadcasting market, newspapers, magazines and the publishing house Mondadori, makes this experience unique, at least among European Union Member States. Several independent observers and supranational institutions recognize this sort of uniqueness as an unprecedented threat to basic democratic rules.²⁹

This article takes a closer look at the main categories of the "weapons" Berlusconi's broadcasting channels used to deploy his mass media power. Before considering those categories, however, it is important to recall that this analysis relates mostly to the "analog" media period. During this period, scarcity of television frequencies limited the Italian public's exposure to the information and messages broadcast by a small number of available channels.³⁰ More precisely, until the advent of satellite transmissions and, for terrestrial transmission, the transition from analog channels towards the new system of digital broadcasting,³¹ the television market was controlled by

27. *Forza Italia* allied in South Italy with the conservative right-wing party *Alleanza Nazionale*, and in the North with the secessionist party *Northern League* – a rather bizarre coalition. See STILLE, *supra* note 15, at 157-58.

28. The first Berlusconi government had a very short life. Due to almost immediate implosion of the coalition and pressure of the public opinion following criminal investigations, Silvio Berlusconi resigned on December 22nd, 1994. *Berlusconi Resigns*, AP ARCHIVE, <http://www.aparchive.com/metadata/youtube/e275f384ef39c6e2bdd17c641948960e> (last visited Aug. 20, 2018); Quigley, *supra* note 14, at 441-42 (citing Alan Cowell, *Italian Premier, Facing Defeat, Resigns Urging Elections*, N.Y. TIMES, Dec. 23, 1994, at A10).

29. See *infra* notes 55-60.

30. Legge 6 agosto 1990, n.223, G.U. Aug. 9, 1990 n.185 (It.). Article 15 allowed a single media company to control three out of eleven of the national networks to the national frequency-allocation plan irrespective of the audience reached and the market share of that company. *Id.*

31. The switch took place with a very slow and controversial process, with the final transition to digital broadcasting completed in July 2012. According to the ECtHR and the Court of Justice of the European Union, the rules adopted in Italy, while intended to open the market to new operators, in fact confirmed the same position of dominance in favor of the incumbents. *Centro Europa 7 Srl v. Italy*, 2012-III Eur. Ct. H.R. 339, 352; Case C-380/05; *Centro Europa 7 S.r.l. v. Ministero delle*

only two operators: One public operator (RAI), and one private operator (Mediaset), both with three channels each.³²

In addition, because specific rules imposing neutrality and free access of all political formations conditioned RAI's programs, the messages diffused via Mediaset channels had an extremely powerful impact on television audiences. Berlusconi, as Head of the Executive branch, also had the opportunity to deeply influence RAI's governance since RAI's Board of Governors and its main executives were chosen either directly by or under proposal of the Executive (i.e., Berlusconi).³³ In brief, Berlusconi's media outlets and immense economic resources distorted the political competition upon which a healthy democracy depends during the 1994 campaign and, in part, subsequent elections as well.

A. Political Advertisements

Berlusconi's use of political advertisements was only one of the most successful uses of such advertisements. More generally (and temporarily bracketing the question of the "fakeness" of the messages diffused),

Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni, 2008 E.C.R. I-00349. For an analysis of these judgments, see Roberto Mastroianni, *Media Pluralism in Centro Europa 7 srl, or When Your Competitor Sets the Rules*, in EU LAW STORIES 245, 253-55 (Fernanda Nicola & Bill Davies eds., 2017).

32. *Italy*, 28 U.S. DEP'T ST. ANN. HUM. RTS. REP. 1332, 1336 (2003); see ALESSANDRO PACE & MICHELA MANETTI, RAPPORTI CIVILI: LA LIBERTÀ DI MANIFESTAZIONE DEL PROPRIO PENSIERO 575 (2006) (presenting a detailed legal analysis of the development of private television broadcasting in Italy).

33. Before the 2015 reform, according to Article 49 of the Consolidated Law on Audiovisual and Radio Media Services ("CLARMS"), the Board of Directors consisted of nine members, seven of which were appointed by the Parliamentary Supervision Committee, whose membership reflects, in proportion, the political composition of the Parliament. The other two members of the Board of Directors – one of which is the Chair of the Board – were appointed directly by the majority shareholder, that is, the Ministry of Economy and Finance. The appointment of the Chair, however, became effective following approval by the Parliamentary Supervision Committee by a two-thirds majority vote. Concerns have been voiced both by scholarly and institutional commentators as to the ability of RAI's governance system to ensure its independence from political and governmental influence. The Parliamentary Assembly of the Council of Europe, in Resolution 1387 dedicated to "[m]onopolisation of the electronic media and possible abuse of power in Italy," noted that RAI "has always been a mirror of the political system of the country" and that it "has moved from the proportionate representation of the dominant political ideologies in the past to the winner-takes-all attitude reflecting the present political system." Eur. Parl. Ass., *Resolution of the Parliamentary Assembly*, 23d Sess., RES. NO. 1387 (2004) [hereinafter RESOLUTION 1387]; see ROBERTO MASTROIANNI & AMEDEO ARENA, *MEDIA LAW IN ITALY* (2d ed. 2012). After the reform, adopted in December 2015, the new rules now provide that seven members comprise the Board: the two chambers of Parliament elect four members, and the Executive chooses two members and RAI employees select one member. Legge 28 dicembre 2015, n.220, G.U. Jan. 15, 2016 n.11 (It.).

Berlusconi's direct control of media channels also meant that the political agenda was substantially determined by Berlusconi's party and its spin-doctors. That is, Mediaset's communication experts "pushed" public opinion towards arguments and questions to follow specific political objectives and, consequently, to gain political consensus.

B. Election Polls

Before a new set of legislative rules entered into force in late 1993 (and thereafter due to totally ineffective rules on sanctions), publication of election polls was not conditional upon use of scientific methods. Therefore, Italian viewers were routinely confronted with substantially different polling projections.³⁴

C. Presence of Political Leaders in Informative and Non-Informative Programs

Furthermore, Berlusconi's dual role as politician and media tycoon made it extremely easy for him to invite himself or other members of his party onto television programs, which reinforced his impact on public opinion. It is worth recalling the nine-minute televised message wherein Berlusconi announced his initial decision to engage directly in the political arena far and wide. The pre-recorded message was widely anticipated and, on January 24th, 1994, broadcast not only on Berlusconi's three channels but on RAI's public channels as well free of charge and absent any debate with journalists or competitors.³⁵

D. Political "Endorsements" by Anchorpersons and Television Show Hosts

Endorsements by media personalities were one of the most powerful weapons in Berlusconi's arsenal. The public opinion was confronted with apparently spontaneous declarations made during the most popular TV programs. In the 1994 campaign, many of the most popular anchorpersons and show hosts on Mediaset channels passionately declared that they were supporting Berlusconi's decision to enter into the political arena. Again, thanks to his direct control of a large part of the TV market, this strategy differentiated (and obviously advantaged) Berlusconi and his party from any other political competitor. In the absence of legislation prohibiting these acts, anchorpersons' direct endorsements were not illegal. Still, these

34. STILLE, *supra* note 15, at 252.

35. *Id.* at 151-54.

endorsements had a strong impact on public opinion due to the popularity of the persons involved.

E. Attacks of political competitors, including fake news: The strange case of Telekom Serbia

Here we return to the realm of more “traditional” fake news, where mass media is used to launch personal attacks against political competitors. This use is rather common in the political arena, as attacks come from any side and are part of the very essence of political confrontation. But things become more complicated when only one of competitor has major television networks at his disposal to freely disseminate personal assaults. In fact, Italian viewers, and therefore voters, witnessed several attacks against political opponents, and, in some cases, attacks directed at judges involved in Berlusconi’s several trails who Berlusconi accused of acting in poor taste!³⁶ When conveyed by mass media in a more neutral, “institutionalized” context, these attacks were even more subtle, as demonstrated by the famous story of Telekom Serbia.

This case deserves a more detailed analysis. In 1997, the Italian public telecom company, Telecom Italia, acquired twenty-nine percent of Telekom Serbia shares for 878 billion lire (equivalent to about €450 million).³⁷ In 2003, Igor Marini, a self-styled financial broker – in fact only a porter for a fruit market in Brescia – accused the most prominent center-left political alliance personalities, including former Prime Minister Romano Prodi (at that time President of the European), and the Secretary of the Democratic Party, Piero Fassino, of taking bribes to facilitate the Telecom Italia deal. These accusations were promptly and widely disseminated in the main mass media, not surprisingly on the TV stations and newspapers owned by Berlusconi and led to two judicial investigations and one parliamentary inquiry. The events also had some comedic results. Memorably, in May 2003, during a trip to Switzerland intended to collect evidence to support the accusations, Mr.

36. On October 16th, 2009, both a magazine and a Mediaset information program presented a “scoop” showing a few minutes on the private life of the judge who, just a few weeks before, had ordered the Fininvest group to pay €750 million in compensation to CIR of Carlo De Benedetti. The big “scoop” was based, among other things, on the Judge’s questionable taste in selecting the colors of his socks! Emilio Randacio, *E Canale 5 “pedina” il giudice Mesiano “Stravaganti i suoi comportamenti,”* LA REPUBBLICA (Oct. 16, 2009), <http://www.repubblica.it/2009/10/sezioni/politica/cir-fininvest/canale-5-mesiano/canale-5-mesiano.html>.

37. Richard Owen, *Berlusconi and Prodi in Bribes Dispute*, TIMES (Sept. 2, 2003, 1:00 AM), <https://www.thetimes.co.uk/article/berlusconi-and-prodi-in-bribes-dispute-ccc5vdlg7xd>.

Marini and two members of the Parliament Committee of inquiry were arrested by local authorities, accused of “economic espionage.”³⁸

The bribery accusations directed at Mr. Prodi and other politicians were blatantly false. In fact, they did not lead to any formal indictments. Still, the allegations occupied mass media headlines for weeks, imprinting a sense of repulsion toward the whole political establishment and, in particular, the most influential leaders of the center-left alliance upon a large segment of the public. Importantly, these accusations were a tactic meant to offset the much more serious criminal allegations against Mr. Berlusconi himself, which years later, on November 27th, 2013, would lead to his conviction and consequent expulsion from the Senate.³⁹

None of the investigations led to any formal charges against Prodi, Fassino or other left-wing politicians, and Mr. Marini was criminally convicted for defaming the accused politicians and sentenced to years of prison time in 2015.⁴⁰ In her judgments against Mr. Marini, Judge Rosanna Ianniello, President of the Tribunal of First Instance in Rome, expressed shock that Mr. Marini had received so much publicity.⁴¹ Judge Ianniello explained that a parliamentary commission of inquiry had not “shed light on the reasons why a person who, with his scams and the small appropriations of money, who had difficulty in guaranteeing to himself and his wife a dignified existence, and who was foreign to institutional environments” was taken so seriously.⁴² “It seems obvious,” she argued, “that Marini did not act alone and that he [was] not the sole architect of this great lie but only the interpreter of a plot ordained by others.”⁴³ Ultimately, the Court described Igor Marini as “a pathological and compulsive liar.”⁴⁴

F. *Threatening press watchdogs with resource-sapping litigation: Berlusconi v. The Economist*

38. Davide Gorni, *Deputati italiani accusati di spionaggio*, *CORRIERE DELLA SERA* (May 9, 2003), http://www.corriere.it/Primo_Piano/Politica/2003/05_Maggio/09/arresto_marini.shtml.

39. *Berlusconi non è più senatore, il Senato approva la decadenza*, *LA REPUBBLICA* (Nov. 27, 2013), http://www.repubblica.it/politica/2013/11/27/news/voto_senato_decadenza-72093870/.

40. *Telekom Serbia, definitiva la condanna a 7 anni per Igor Marini*, *IL FATTO QUOTIDIANO* (Jan. 10, 2015), <https://www.ilfattoquotidiano.it/2015/01/10/telekom-serbia-definitiva-condanna-7-anni-per-igor-marini/1330527/>.

41. *Telekom Serbia, la grana infinita*, *IL FATTO QUOTIDIANO* (Feb. 19, 2012), <https://www.ilfattoquotidiano.it/2012/02/19/telekom-serbia-la-grana-infinita/192331/>.

42. *Id.*

43. *Id.*

44. *Id.*

Recourse to litigation to threaten the free press is a tactic typical of politicians in any corner of the world, and it is no surprise that this occurred frequently in the Berlusconi era. The most telling and famous case is the 2001 civil suit Mr. Berlusconi launched against *The Economist*, one of the most influential international magazines. On April 26th, 2001, *The Economist* published a long editorial, titled “An Italian Story,” about Mr. Berlusconi. The editorial argued that, for reasons mainly linked to his conflicts of interest in many economic fields, including media markets, Berlusconi was “unfit to lead Italy.”⁴⁵ Berlusconi sued *The Economist* before a civil court in Rome, alleging the article defamed him. Berlusconi asked for damages of at least €1 million. In its judgment, issued on September 5th, 2008,⁴⁶ the Court in Milan found that the magazine had exercised its right to journalistic criticism and rejected all of Mr. Berlusconi’s claims, ordering him to bear costs. The judgment was confirmed by both the Court of Appeals in Milan and, in February 2017, by a definitive ruling of the Supreme Court of Cassation.⁴⁷

Though *The Economist* ultimately prevailed in this case, recourse to litigation nonetheless risks a “chilling effect” on media freedom.⁴⁸ Specifically, the director of *The Economist* once declared that he preferred not to publish articles on Berlusconi in Italian to avoid immediate recourse

45. *The Economist* found that, while Prime Minister of Italy, Berlusconi retained control of ninety percent of all national television broadcasting, taking into consideration TV stations he owned directly as well as public service broadcaster RAI, which he had indirect control over as Prime Minister of Italy. In addition, *The Economist* pointed out that, in the pending cases against him for falsifying accounting records and bribing judges, Berlusconi had not defended himself in court, but instead relied upon political and legal manipulations, most notably by changing the statute of limitations, which “extinguishes the crime.” Editorial, *An Italian Story*, *ECONOMIST* (Apr. 26, 2001), <https://www.economist.com/special/2001/04/26/an-italian-story>.

46. Tribunale di Milano, 2 settembre 2008, n.10661, *Giur. it.* 2008, I, 1, 8412 (It.); *see id.*

47. Cass. sez. tre. 28 febbraio 2017, n.5005, *Foro. It.* 2017, I, 820 (It.).

48. The risk of “chilling effect” is often present in the Council of Europe’s approach to journalists’ freedom under Article 10 of the European Convention of Human Rights. See, for example, the Committee of Ministers’ recommendation to member States on the protection of journalism and safety of journalists and other media actors, adopted on 13 April 2016, where the Committee states that “actual misuse, abuse or threatened use of different types of legislation to prevent contributions to public debate, including defamation, anti-terrorism, national security, public order, hate speech, blasphemy and memory laws can prove effective as means of intimidating and silencing journalists and other media actors reporting on matters of public interest. *The frivolous, vexatious or malicious use of the law and legal process, with the high legal costs required to fight such law suits, can become a means of pressure and harassment, especially in the context of multiple law suits.*” COUNCIL EUR., *Recommendation of the Comm. of Ministers*, 1253d Mtg., CM/Rec(2016)4[1] (2016) (emphasis added). See generally DIRK VOORHOOF, EUROPEAN UNIV. INST., THE RIGHT TO FREEDOM OF EXPRESSION AND INFORMATION UNDER THE EUROPEAN HUMAN RIGHTS SYSTEM (2014), http://cadmus.eui.eu/bitstream/handle/1814/29871/RSCAS_2014_12.pdf.

to a civil suit that carried a risk of heavy pecuniary sanctions. The concern was legitimate as Berlusconi, both as an individual and through his companies, often turned to litigation in response to what he considered libel.⁴⁹

Quick recourse to litigation even more profoundly affects small newspapers with more limited financial means than larger organizations like *The Economist*. Initiating a civil action is intimidating and defending against such actions may be costly. Even if the complaint is proved totally unfounded after years of litigation,⁵⁰ the cost of its defense may well bankrupt the media-defendant, and it is nearly impossible for media companies and journalists to obtain redress for the harm suffered.⁵¹ This not only endangers the survival of a small newspaper but also compromises the work of the entire editorial staff as the “chilling effect” has already set in.⁵² That is, journalists are incentivized to write less critically and to strive for “political correctness” to avoid prompting legal retaliation. Dissemination of information suffers as a result.

Undoubtedly, access to litigation is a basic right that cannot be denied or limited. But civil actions that request payments in the millions of euros boarder on abuse of litigation, especially when brought against publishing companies that, directly or indirectly, compete in the media market. In short,

49. For examples of law suits against the newspaper *La Repubblica*, see Max Maine, *Legittime le dieci domande a Berlusconi “Erano diritto di cronaca e di critica,”* LA REPUBBLICA (Sept. 13, 2011), http://inchieste.repubblica.it/it/repubblica/rep-it/2011/09/13/news/assolte_le_dieci_domande-21582192/; and *Prosciolto ‘L’ Espresso Querelato Da Berlusconi,* LA REPUBBLICA (Nov. 3, 1989), <http://ricerca.repubblica.it/repubblica/archivio/repubblica/1989/11/03/prosciolto-espresso-querelato-da-berlusconi.html>. In both cases, the newspaper prevailed.

50. To give just one example, in 2003 a journalist working for the Italian national newspaper *la Repubblica* was accused of libel for a series of articles criticizing Mediaset and the laws that the author considered to have favored the company’s when Berlusconi was head of the Government and leader of the political majority in Parliament. According to Mediaset, the articles represented an unjust defamatory campaign and a violation of the rules on unfair competition. The Tribunal of Rome decided in favor of the media company and the case climbed to the Court of Appeal and then to the Court of Cassation. With its judgment in 2015, *twelve years* after the first legal action, the latter confirmed that *La Repubblica* and the journalist had not defamed the company. It argued that at the center of the political debate “there is the conviction of a close interaction between the business group Mediaset and a political party, Forza Italia,” which “in turn led to the political and entrepreneurial figure of Mr. Berlusconi.” Therefore, “the articles of criticism of the company must be read in the light of political opposition, and fall under the right to political criticism.” David Rampello, *La Verita di Berlusconi,* LA REPUBBLICA (Mar. 10, 1994), <http://ricerca.repubblica.it/repubblica/archivio/repubblica/1994/03/10/la-verita-di-berlusconi.html>.

51. GIOVANNA CORRIAS LUCENTE, *IL DIRITTO PENALE DEI MEZZI DI COMUNICAZIONE DI MASSA* (2000); Giovanna Lucente Corrias, *Il business della diffamazione*, 4 MICROMEGA 108 (2007) (It.).

52. See CATERINA MALAVENDA ET AL., *LE REGOLE DEI GIORNALISTI: ISTRUZIONI PER UN MESTIERE PERICOLOSO* (2012).

if lawsuits serve to protect the reputation of an individual on the one hand, they can also act as a powerful method of limiting freedom of information on the other.

IV. REACTIONS AND LEGISLATIVE RESPONSES

The second part of this article is devoted to a brief account of the legal reactions that the “anomaly” of Berlusconi’s conflicts of interest encountered at both a domestic and an international level. This article will then consider the timid and ineffective response in Italy, and the vehement reactions that were nonetheless ineffective due to a lack of formal legislative power at the European and international level. Considering similar situations arising in other European countries where new democracies face threats to independent mass media, particularly public service broadcasters, a solution is to adopt common European rules that impose a clear distinction between political power and media control.

A. National and International Reactions

Returning to the Berlusconi example, we previously noted that the conflict of interest in favor of *Forza Italia* and its leader distorted the political arena. One might have expected a dramatic reaction, at least from Berlusconi’s political opponents. One might have equally expected that, when a different coalition ascended to power, it would have re-balanced the political arena with new laws that required fairer conduct in electoral campaigns.

Yet, this is not what Italy experienced. This is not the appropriate venue to analyze why Berlusconi’s political opponents, with some exceptions, avoided concrete initiatives against such an unprecedented conflict of interest. It is enough to note here that, when the center-left coalition was in power from 1996 to 2001, from 2006 to 2008 and, at least in part, in the legislature that ended in March 2018, it did not make any such attempts, even at the expense of its own interests.⁵³ As to the second query, the Parliament did enact laws to limit Berlusconi’s enormous media power, at least during the first period of Berlusconi’s entry into the political arena. Still, those laws had a limited effect, leaving the underlying problem unchanged.

53. For details on this point, see MICHELE DE LUCIA, *IL BARATTO* 181 (2008); PETER GOMEZ & MARCO TRAVAGLIO, *INCIUCIO* 120 (2005).

B. Rules on Political Independence of Broadcasters

Before turning to a deeper analysis of the rules devised by the Italian legislature to ensure a level playing field in the access to political broadcasting,⁵⁴ we must bear in mind the de facto situation in Italy. It was characterized, as the European Parliament put it, by “a unique combination of economic, political and media power in the hands of one man – the current President of the Italian Council of Ministers, Mr. Silvio Berlusconi.”⁵⁵ Mr. Berlusconi had been the largest shareholder of the Mediaset network group since its establishment in 1978, and Prime Minister of Italy from 1994 to 1995, from 2001 to 2006 and from 2008 to 2012. According to scholarly commentators, this type of conflict of interest may contravene the balance of electoral competition contrary to the Italian constitutional principles of internal and external pluralism (Article 21), equality (Article 3), impartiality of public administration (Article 97), and equal access to public offices (Article 51).⁵⁶

Moreover, as noted by the European Parliament⁵⁷ and the Parliamentary Assembly of the Council of Europe,⁵⁸ this situation is at odds with the principle of freedom of expression enshrined in Article 10 of the ECHR and Article 11 of the Charter of Fundamental Rights of the European Union.⁵⁹ As summarized by the Council of Europe Parliamentary Assembly in Resolution 1387:

Through Mediaset, Italy’s main commercial communications and broadcasting group, and one of the largest in the world, Mr[.] Berlusconi owns approximately half of the nationwide broadcasting in the country. His role as head of government also puts him in a position to influence indirectly the public broadcasting organisation, RAI, which is Mediaset’s main

54. See ROBERTO MASTROIANNI & AMEDEO ARENA, *MEDIA LAW IN ITALY* ¶ 197 (Peggy Valcke & Eva Lievens eds., 2014) for a more in-depth explanation on this point.

55. European Parliament Resolution on the Risks of Violation, in the EU and Especially in Italy, of Freedom of Expression and Information (Art. 11(2) of the Charter of Fundamental Rights of the European Union), 2004 O.J. (C 104E) 1026, ¶ 60 (Apr. 30, 2004).

56. See, among others, ROBERTO ZACCARIA ET AL., *DIRITTO DELL’INFORMAZIONE E DELLA COMUNICAZIONE* (6th ed. 2016).

57. In addition to the European Parliament resolution cited in note 55, see European Parliament Resolution on the Situation as Regards Fundamental Rights in the European Union, 2002 O.J. (C 76E) 412, ¶ 37 (Mar. 25, 2004) (deploring “the fact that in Italy in particular a situation is continuing in which media power is concentrated in the hands of the Prime Minister, without any rules on conflict of interest having been adopted”).

58. See RESOLUTION 1387, *supra* note 33, ¶ 1 (expressing concern about “the concentration of political, commercial and media power in the hands of one person, Prime Minister Silvio Berlusconi”).

59. Charter of Fundamental Rights of the European Union, *supra* note 13, art. 11, ¶ 2; European Convention on Human Rights, *supra* note 2, art. 10.

competitor. As Mediaset and RAI command together about ninety percent of the television audience and over three quarters of the resources in this sector, Mr.] Berlusconi exercises unprecedented control over the most powerful media in Italy This duopoly in the television market is in itself an anomaly from an antitrust perspective. The status quo has been preserved even though legal provisions affecting media pluralism have twice been declared anti-constitutional and the competent authorities have established the dominant positions of RAI and the three television channels of Mediaset. An illustration of this situation was a recent decree of the Prime Minister, approved by parliament, which allowed the third channel of RAI and Mediaset's Retequattro to continue their operations in violation of the existing antitrust limits until the adoption of new legislation. Competition in the media sector is further distorted by the fact that the advertising company of Mediaset, Publitalia '80, has a dominant position in television advertising.⁶⁰

The debate surrounding the conflict of interest was sparked in 1994, following Mr. Berlusconi's first election and appointment as Prime Minister. Some Members of the Italian Parliament claimed that Berlusconi's election to the Chamber of Deputies was inconsistent with Article 10 of the 1957 Decree of the President of the Republic, which prohibited holders of public concessions of a significant value from election to the Chamber of Deputies.⁶¹ The Chamber's Committee of Elections, made up of members of the Parliament and having sole jurisdiction over electoral issues, however, took the objectionable view that the Decree only concerned persons holding broadcasting concessions "in their own name," not those holding indirectly through shareholdings like Mr. Berlusconi.⁶² A different interpretation would have required Mr. Berlusconi to choose between maintaining his equity holdings in the media sector and taking up public office. Instead, the Committee's decision confirmed a lack of legal instruments to prevent overlap between media power and public service.

In 1996, the Committee confirmed its position when Berlusconi's opponents held majority in the Parliament. Indeed, it was not until 2004 that the legislature passed a bill aimed at regulating conflicts of interest between public officials and professional and entrepreneurial activities: the so-called

60. RESOLUTION 1387, *supra* note 33, ¶¶ 4, 5.

61. Decreto Presidente della Repubblica 30 marzo 1957, n.361, G.U. June 3, 1957, n.139 (It.).

62. See the Committee for Elections of the Chamber of Deputies decisions of July 20th, 1994 and October 17th, 1996. *Esame di ricorsi per ineleggibilità*, GIUNTA DELLE ELEZIONI (July 20, 1994), http://legislature.camera.it/_dati/leg12/lavori/Bollet/39690_01.pdf; *Seguito della verifica dei poteri nella V circoscrizione Lombardia 3*, GIUNTA DELLE ELEZIONI (Oct. 17, 1996), http://leg13.camera.it/_dati/leg13/lavori/bollet/199610/1017/pdf/16.pdf.

Frattini Law.⁶³ Academic commentators and institutional actors have expressed skepticism that the Frattini Law can effectively address the conflict of interest currently tainting the Italian media sector.⁶⁴

In particular, the Council of Europe Commission for Democracy Through Law (“Venice Commission”) highlighted several weaknesses in the Frattini Law.⁶⁵ First, that law “only declares a general incompatibility between the management of a company and public office, not between ownership as such and public office,” despite the fact that the latter appears to be at the heart of the conflict of interest in Italy.⁶⁶ Second, by defining conflict of interest to include measures having “a specific, preferential effect on the assets of the office-holder,” the Frattini Law may be unable to prevent an office-holder “from intervening in matters which generally and indirectly, though surely, affect his or her proprietary interests.”⁶⁷ Moreover, the requirement that this effect be “specific” and “to the detriment of the public interest” implies a very high burden of proof, thus making application of the Law extremely difficult in practice.⁶⁸

Considering these main features of the Frattini Law, it is no surprise that in more than ten years of application of this law, which was adopted when Berlusconi was President of the Council of Ministers, the combination of media and political power that lies at the heart of Berlusconi’s conflict of interest remains totally untouched.

63. The Frattini Law was named after its sponsor Minister Franco Frattini, in charge of the Public Functions Department of the Berlusconi Cabinet. The Frattini Law requires persons holding a government office to devote themselves exclusively to the public good and to abstain from taking measures and participating in joint decisions in situations where there is a conflict of interest. Conflicts of interest are defined as an act of commission or omission by persons holding a government office: (i) when they are also holding an incompatible post as defined above; or (ii) when that act has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest. The Frattini Law provides that holding a government office (e.g., the Prime Minister, ministers, etc.) is incompatible with the occupation of specific kind of posts, such as those involving the management of business undertakings. Individual entrepreneurs must entrust their undertakings to one or more trustees (including family members). Legge 20 luglio 2004, n.215, G.U. Aug. 18, 2004, n.193 (It.).

64. See, e.g., Bruno Valensise, *Il conflitto di interessi nella legge n. 215 del 2004 tra luci (poche) ed ombre (molte)*, in *STUDIUM IURIS* 1034, 1034-41 (2005); ZACCARIA ET AL., *supra* note 56, at 72-77.

65. EUR. COMM’N DEMOCRACY, *Opinion of the Venice Commission on the compatibility of the Laws ‘Gasparri’ and ‘Frattini’ of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*, 63d Sess. Opinion No. 309/2004, ¶ 215 (June 13, 2005).

66. *Id.* ¶¶ 236-37.

67. *Id.* ¶¶ 215, 236.

68. *Id.* ¶ 240.

C. Fair Representation in Election Periods

The Italian Constitutional Court expressly recognizes the right to fair representation in election periods. This right stems from the constitutional principles of freedom of expression (Article 21), freedom of association (Article 49), equal access to public offices (Article 51), and popular sovereignty of the people (Article 1).⁶⁹

The Italian Parliament adopted the first equal-time regime for electoral campaigns in 1993. The equal-time regime originates in the U.S., where it first became apparent that broadcasters could manipulate the outcome of elections by portraying exclusively or predominantly only one angle of the political debate.⁷⁰ The 1993 Italian equal-time regime laid down a new, comprehensive set of rules on access to televised political information, seeking to ensure a level playing field for all political actors, particularly during electoral periods.⁷¹

The law applies to three categories of programs: political communication programs, information programs and self-managed slots (“messaggi autogestiti”). Political communication programs include all broadcasts that contain a political opinion or assessment, but not the diffusion of news in information programs. Information programs include news presented in a narrative or argumentative context. Self-managed slots are airtime segments allotted to political actors where the latter can divulge their political platform.

If broadcasters infringe the equal-time rules, Italy’s communications authority, AGCom, can grant the harmed party additional time during political communication programs or additional self-managed slots to restore the balance. In cases of serious violations, AGCom may enjoin the broadcaster to give notice of the infringement decision and to air a reply by the harmed party, which must be given the same visibility in terms of time-slot and presentation as the offending broadcast.

In addition, during electoral periods, political communication can only take place through political debates, adversarial presentations, interviews and

69. See Art. 1, 21, 49, 51 Costituzione [Cost.] (It.).

70. G. Lane Earnest, *The Equal-Time Provisions: Has Broadcasting Come of Age?*, 36 U. COLO. L. REV. 257, 258-59 (1963) (first citing S. REP. NO. 87-994, at 1 (1962); and then citing Jack H. Friedenthal & Richard J. Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 450 (1959)); see Alan Cowell, *Electoral Reform is the Focus of Italian Referendums*, N.Y. TIMES, Apr. 18, 1992, at L3, <https://www.nytimes.com/1993/04/18/world/electoral-reform-is-the-focus-of-italian-referendums.html>.

71. Legge 22 febbraio 2000, n.28, G.U. Feb. 22, 2000, n.43 (It.).

other formats that enable a pluralistic portrayal of the different political positions. Self-managed slots during electoral periods are subject to stringent rules as to their remuneration and allotment to political actors. On election days, television broadcasts must not directly or indirectly provide voting recommendations. Anchorpersons are required to behave impartially so as not to exert a disguised influence on the audience. Moreover, the law forbids publishing the results of polling projections and voters' political preferences in the fifteen days preceding the elections, even if such surveys were prepared at an earlier date.

D. News and Current Affairs Programs

Article 7 of Consolidated Law on Audiovisual and Radio Media Services ("CLARMS") provides that information programs must be, among other things, truthful and open to all political actors.⁷² This provision was implemented by an AGCom Decision, which sets out the rules for equal access to information programs during non-electoral periods.⁷³

All information programs, including news broadcasts and in-depth features, must comply with the principles of comprehensiveness and accuracy of information, objectivity, fairness, honesty, impartiality, pluralism, and equal treatment.⁷⁴ Political actors' participation in broadcasts must be balanced, and this must be ensured throughout the schedule of a given information program, if possible, by publishing the schedule in advance.⁷⁵ That balance must be restored in the next available broadcast if altered in pre-electoral periods.⁷⁶

Additionally, program presenters must behave in a fair and impartial manner, including with respect to the selection and involvement of studio audiences, so as not to affect the public opinion. The provision of information must be kept quite distinct from its comment and critique.⁷⁷ Entertainment programs, as a rule, should not host political actors, unless those programs deal with topics wherein political actors have a particular

72. Decreto Legislativo 31 luglio 2005, n.177, G.U. Sept. 7, 2005, n.208 (It.), *as amended by* Decreto Legislativo 15 marzo 2010, n.44, G.U. Mar. 29, 2010 n.73 (It.).

73. AGCom, Decision no. 22/06/CSP, 'Disposizioni applicative delle norme e dei principi vigenti in materia di comunicazione politica e parità di accesso ai mezzi di informazione nei periodi non elettorali,' O.J. Feb. 4, 2006, no.29.

74. *Id.* art. 2, ¶ 1; *see also* O. Grandinetti, *Par condicio e programmi di informazione*, in 12 *GIORNALE DI DIRITTO AMMINISTRATIVO* 1157 (2008).

75. Decision 22/06/CSP, *supra* note 73, art. 2, ¶ 2.

76. *Id.* art. 2, ¶ 3.

77. *Id.* art. 2, ¶ 6.

competence or expertise.⁷⁸ In such situation, the relevant segments are considered an “informative window” within an entertainment program. Such informative windows are subject to the same rules applicable to information programs.

E. Political Advertising

While news and current affairs programs must represent a plurality of political views, political advertising enables political actors to unilaterally inform the audience about their political platform and must take the form of self-managed slots (messaggi autogestiti).⁷⁹ Broadcasting self-managed slots are compulsory for the public service media operator, like RAI, and optional for commercial broadcasters.⁸⁰ Self-managed slots must be broadcast in the context of specific container-programs (no more than two) and cannot exceed twenty-five percent of the total airtime devoted to political communication programs each week.⁸¹ Self-managed slots are also allotted to political actors under non-discriminatory terms according to a random process. No political actor can be assigned more than two slots within the same container-program and each slot must clearly identify its political assignee.

The Italian equal-time regime is so detailed in order to counterbalance Berlusconi’s significant media power. Still, it does not *outlaw* the overlap between political and media power in the hands of a single person. That issue remains relevant today: In a world characterized by a hypertrophy source of information, television stations, at least in Italy, remain the most authoritative medium. A 2017 survey revealed that 60.6% of the population (53% of young people between the age of nineteen and twenty-nine) relied on television as its main source of information.⁸² Therefore, television networks may still influence election results, especially in countries like Italy, where elections are traditionally won or lost by a handful of votes.

78. *Id.* art. 3, ¶ 2.

79. AGCom, Decision no. 200/00/CSP, ‘Disposizioni di attuazione della disciplina in materia di comunicazione politica e di parità di accesso ai mezzi di informazione nei periodi non elettorali,’ O.J. July 1, 2000, n.152.

80. Legge 22 febbraio 2000, n.28, art. 3, § 2, G.U. Feb. 22, 2000, n.43 (It.).

81. *Id.* art. 3, ¶ 4.

82. See I Media E Il Nuovo Immaginario Collettivo, 14° *Rapporto Censis-Ucsi sulla comunicazione*, CENSIS 11 (Oct. 4, 2017), http://comunicazione.formez.it/sites/all/files/censis_sintesi_2.pdf.

V. THE NEED FOR A COMMON EUROPEAN REGULATION ON CONFLICTS OF INTEREST AND MEDIA PLURALISM

The intrinsically transnational nature of broadcasting services can hardly be addressed by an exclusively national solution to problems of conflicts of interest and information pluralism. In other words, the protection of pluralism in the media and the prevention of conflict of interest is too sensitive an issue to be left to the competence of only one State. In addition, national rules are easily circumvented – at least in the light of the European principles on free movement of broadcasting and online services⁸³ – by simply establishing a media outlet in another Member State and directing the message concerned to the audience of the home State. Italy’s rules were clearly insufficient to prevent media power from influencing election results, and once a media tycoon acquires political power, it is quite natural that he or she will employ that power to consolidate his or her dominance in the media markets by all possible means, including the adoption of “friendly” legislation.

In Italy, the media concentration debate has faded somewhat in recent years, namely because the conflict of interest that characterized the Italian media landscape apparently vanished in 2013 with Berlusconi expulsion from Parliament following his four-year tax fraud conviction.⁸⁴ Although a new bill on conflicts of interest was introduced in 2013 and approved by the Chamber of Deputies only in 2016, it was not discussed in the Senate. It is fair to say that the new conflict of interest bill does not appear to be a legislative priority.

It is submitted that the recent Italian experience and new troubling situations emerging in other parts of the Continent call for a common European solution. In this connection, regard must be had to the European Citizen Initiative (“ECI”) for Media Pluralism,⁸⁵ which seeks to promote the

83. Consolidated Version of the Treaty on the Functioning of the European Union, art. 56, ¶ 1, May 9, 2008, 2008 O.J. (C 115) 47 (“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”).

84. The Court of Cassation, on August 1st, 2013, convicted Berlusconi and others for tax fraud under section 2 of Legislative Decree number 74. *See* Cass. sez. fer. 1 agosto 2013, n.35729, Foro. it. 2013, II, 11, 601 (It.). In the March 2018 general elections, Berlusconi campaigned as the leader of the center-right alliance and has recently announced his intention to run in the European Parliament elections of 2019.

85. The ECI is a new tool of participatory democracy introduced by the Lisbon Treaty that allows civil society coalitions able to collect one million signatures in at least seven EU member states to submit to the European Commission a draft proposal for an EU Directive. *See Our History*, EUR. MEDIA INITIATIVE, <https://mediainitiative.eu/our-history/> (last visited Aug. 18, 2018). For a

adoption of EU legislation to ensure the independence of the media from political and economic interests. The aim of this initiative is to bring about a partial harmonization of the national rules on media ownership and transparency, conflicts of interest with political offices and the independence of media supervisory bodies.⁸⁶

Its proponents—including the present author—demand an effective legislation to prevent the concentration of media ownership and control of advertising; a guarantee of independence of supervisory bodies from political power; the definition of conflict of interest in order to avoid media moguls occupying high political office; a clear European monitoring systems to regularly check the health and independence of the media in the member States; and guidelines and best practice of new models of publishers sustainability to guarantee the quality of journalism and in support of those who work within the sector.

Unfortunately, the ECI on Media Pluralism so far has not reached the minimum number of signatories the European Commission is to take into account (one million, in at least seven different Member States). Also, the European Parliament has repeatedly called for EU action in the area of media pluralism. In its Resolution of March 10th, 2011 concerning Hungary, for instance, the European Parliament called upon the Commission to propose a legislative initiative, making use of its competences in the fields of the internal market, competition and audio-visual policy, with a view to defining at least the minimum standards of media pluralism that all Member States must meet.⁸⁷ The European Parliament took a similar view in its November 15th, 2017 Resolution concerning the rule of law crisis in Poland.⁸⁸

Despite these calls by the European Parliament and by civil society, so far, the European Commission has contemplated the possibility of an

deeper analysis of the legal aspects of the ECI in light of recent practice see ROBERTO MASTROIANNI, *L'INIZIATIVA DEI CITTADINI EUROPEI* (A. Maffeo ed., 2015).

86. See EUROPEAN MEDIA INITIATIVE, *supra* note 85.

87. See European Parliament Resolution on Media Law in Hungary, EUR. PARL. DOC. PVII_TA(2011)0094 (2011), where the Parliament “[c]alls on the Commission to act, on the basis of Article 265 TFEU, by proposing a legislative initiative pursuant to Article 225 TFEU on media freedom, pluralism and independent governance before the end of the year, thereby overcoming the inadequacies of the EU's legislative framework on the media, making use of its competences in the fields of the internal market, audiovisual policy, competition, telecommunications, State subsidies, the public-service obligation and the fundamental rights of every person resident on EU territory, with a view to defining at least the minimum essential standards that all Member States must meet and respect in national legislation in order to ensure, guarantee and promote freedom of information and an adequate level of media pluralism and independent media governance.”

88. See European Parliament Resolution on the Situation of the Rule of Law and Democracy in Poland, EUR. PARL. DOC. PVIII_TA(2017)0442; (2017/2931(RSP)) (2017).

initiative to harmonize national media ownership regulations and conflicts of interest but has never formally tabled a legislative proposal to that effect. As the European Commission holds a quasi-monopoly in proposing EU legislation,⁸⁹ its failure to submit a proposal has nipped in the bud any prospect of enacting EU legislation to promote media pluralism.⁹⁰

The main reason the European Commission failed to act upon these calls to action is that the EU lacks a clear legislative competence to regulate media pluralism issues. This argument is rather unpersuasive, however.⁹¹ Suffice it to say that an existing piece of EU legislation – the so-called Audiovisual Media Services (“AVMS”) Directive⁹² – has already carried out a (partial) harmonization of national laws in the area of media freedom: Article 28 requires Member States to guarantee the right of reply in case “incorrect facts” are broadcast in a television program.⁹³

89. Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 83, art. 17, ¶ 2 (establishing the European Union).

90. On the failed attempt to intervene with an EU Directive harmonizing European laws governing media ownership, see Rachael Craufurd-Smith, *European Community Media Regulation in a Converging Environment*, in REGULATING THE INTERNAL MARKET 105 (Niamh Nic Shuibhne ed., 2006); Rachael Craufurd-Smith, *Rethinking European Union Competence in the Field of Media Ownership: The Internal Market, Fundamental Rights and European Citizenship*, 29 EUR. L. REV. 652 (2004); and Alison J. Harcourt, *EU Media Ownership Regulation: Conflict over the Definition of Alternatives*, 36 J. COMMON MKT. STUD. 369 (2002).

91. See Roberto Mastroianni, *Promoting Information Pluralism Through EU Law: Regulation of Competition Law in the Audiovisual Sector?*, in EU COMPETITION LAW 333, 334 (Bernardo Cortese ed., 2013).

92. Directive 2010/13/EU, of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive), 2010 O.J. (L 95) 1, 20.

93. The relevant text of the Directive is the following:

(1) Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.

(2) A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.

(3) Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.

(4) An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil-law proceedings or would transgress standards of public decency.

The issue of media pluralism resurfaced two years after the adoption of the AVMS Directive, when the European Commission set up a High-Level Group on Media Pluralism to provide a set of recommendations for the respect, support and promotion of media freedom and pluralism.⁹⁴ These encompass limitations to media freedoms caused by political interference (state intervention or national legislation); limitations to media independence caused by political and economic interference; the issue of media ownership concentration and its impact on the freedom of media outlets; pluralism in the media; and the role and independence of regulatory authorities.

The High-Level Group drafted a Report, presented in January 2013, confirmed both that the EU has competence to act in media pluralism and that there was a need for EU legislation in this area.⁹⁵ The general expectation was thus that the findings of the High-Level Group would have provided sufficient momentum for new European legislation, overcoming the predominantly political obstacles that had hitherto prevented its enactment. Yet, more than five years later, no such action has been taken at the EU level, while the risk of conflicts of interest and limited public media independence have spilled over from Italy into other EU Member States. One would thus be excused for lacking optimism.

CONCLUSION: FAKE NEWS IN POLITICAL CAMPAIGNS AS A EUROPEAN ISSUE

It is widely recognized that “fake news” in political communications, particularly in the context of electoral campaigns, is not new, and this Symposium moves exactly from this assumption. The Italian case that we summarized above is a clear example of how disinformation characterizes the electoral debate, risking distortion of correct political confrontation and the basic, constitutional right of the electors to be correctly informed when exercising their right to vote. At the same time, the Berlusconi case is rather specific, since it is based on an “anomaly” – the overlap of media control and political power that was not solved in time and that was difficult to envisage, at least in those years, in other angles of the old continent. This anomaly is

(5) Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

Id.; see András Koltay, *The Right of Reply in a European Comparative Perspective*, 54 ACTA JURIDICA HUNGARICA 73, 74-75 (2013) (Hung.).

94. See VAIRA VĪĶE-FREIBERGA ET AL., EUR. COMM'N: HIGH LEVEL GRP. ON MEDIA FREEDOM AND PLURALISM, A FREE AND PLURALISTIC MEDIA TO SUSTAIN EUROPEAN DEMOCRACY 3 (2013), <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf>.

95. See *id.* at 3, 7, 19-20.

the direct consequence of a weakness in Italian legislation which failed to impose a formal separation between media and political interests. No substantial legislative initiative has since been taken to address this issue. Thus, as submitted previously, a common European regulation must be adopted to prevent similar situations in the future.

The case study in this article reveals a strong connection between effective contrast to “fake news” and the existence of a media legal landscape based on the principles of impartiality, transparency and pluralism. Unsurprisingly, in a Joint Statement of March 3rd, 2017 dedicated to “Freedom of expression and ‘fake news,’ disinformation and propaganda,”⁹⁶ the U.N. Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe (“OSCE”) Representative on Freedom of the Media, dealing with measures that States should adopt to contrast the dissemination of false information in accordance with their international obligations, called for “Enabling Environment for Freedom of Expression.” Specifically, according to the Joint Statement, States “are under a positive obligation to promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda.”⁹⁷

In the wake of the latest Presidential election in the U.S., debate is rising in many European countries as to whether adopting legal measures aimed at preventing or limiting the dissemination of fake news, especially in electoral periods, is necessary, or whether traditional legal instruments, including right of reply, defamation laws and so on, are sufficient shields against the spread of false information online.

Moreover, a vivid debate is taking place among Italian scholars. For example, Oreste Pollicino calls for a “public law” approach to the question of fake news.⁹⁸ He strongly disagrees with the theory that the Internet is the

96. U.N. Special Rapporteur on Freedom of Opinion and Expressions, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression & African Commission on Human and People’s Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, ¶ 3, OSCE FOM.GAL/3/17 (Mar. 3, 2017) [hereinafter Joint Declaration], <https://www.osce.org/fom/302796?download=true>.

97. *Id.* (emphasis added).

98. Oreste Pollicino, *Fake News, Internet and Metaphors (to be Handled Carefully)*, 9 ITALIAN J. PUB. L. 23, 23-25 (2017). The same view is taken by the President of the Italian Competition Authority, Giovanni Pitruzzella, who asks for the establishment of new independent agencies entitled to intervene rapidly on request by interested parties and impose on line operators to remove “manifestly false” information. See Giovanni Pitruzzella, *La libertà di informazione nell’era di Internet*, in GIOVANNI PITRUZZELLA, ORESTE POLLICINO & STEFANO QUINTARELLI, *PAROLE E POTERE: LIBERTÀ D’ESPRESSIONE, HATE SPEECH E FAKE NEWS* 57, 57 (2017) (It.). Such proposal

“new free marketplace of ideas,” where intervention by public authorities (and public law) against fake news is unwarranted. First, he argues that, while it may be the case that the problem of scarcity of technical resources does not affect the Internet, our attention and time continue to be scarce “products.” Secondly, Pollicino believes it is reasonable to ask whether the marketplace of ideas metaphor is well suited to the scope and limits of free speech protection under the European constitutionalism paradigm, which he considers in contrast the American model.

Other commentators reject the claim that the peculiar traits of the online dissemination of fake news online call for a new approach and argue instead that any legislative intervention can be justified only if the protection of other constitutional values is at stake. For instance, Marco Bassini and Giulio Enea Vigevani assume that there is no qualified connection between the rise of the Internet and the spread of fake news and call for a more precise definition of fake news in order to determine which categories of false statements may affect constitutionally-protected interests and those which are merely irrelevant.⁹⁹

It is difficult to reconcile additional measures, for instance, imposing specific ex ante monitoring mechanism on traditional media and online operators or establishing new agencies or authorities aimed at analyzing the content of some information, with the right of information as enshrined in Article 21 of the Italian Constitution, Article 10 of the ECHR and other international instruments protecting free speech.¹⁰⁰ If it is true that the second paragraph of Article 10 of the ECHR and Article 19 of the ICCPR make it possible for States Parties to adopt legislation aimed at limiting or restricting free speech, this can only be done if such measures are prescribed by law,

met firm dissent by Pablo Pagliaro. See PAOLO PAGLIARO, PUNTO: FERMIAMO IL DECLINO DELL'INFORMAZIONE 112 (2017).

99. Marco Bassini & Giulio Enea Vigevani, *Primi appunti su fake news e dintorni*, 1 RIVISTA DI DIRITTO DI MEDIA 11, 11 (2017) (It.), <http://www.medialaws.eu/wp-content/uploads/2017/10/Bassini-Vigevani.pdf>.

100. See Art. 21 Costituzione [Cost.] (It.). As Dirk Voorhoof recalled, “the main characteristic of Article 10(2) is precisely that, by imposing the so-called ‘triple test,’ it substantially reduces the possibility of interference with the right to express, receive and impart information and ideas. Interferences by public authorities are only allowed under the strict conditions that any restriction or sanction must be ‘prescribed by law,’ must have a ‘legitimate aim’ and finally and most decisively, must be ‘necessary in a democratic society.’” VOORHOOF, *supra* note 48, at 2. At the international level, the Joint Declaration on freedom of expression and “fake news,” disinformation and propaganda states at point 2a that “[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information,’ are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.” Joint Declaration, *supra* note 96, § 2(a).

have a legitimate aim and are necessary in a democratic society.¹⁰¹ In addition, legislation should pass a proportionality test, which seems rather difficult in the case of laws that allow private operators to restrict other individuals' or companies' freedom to be informed.¹⁰² Not surprisingly, the Strasbourg Court adopts a strict interpretation of Article 10(2) of the ECHR. In its recent judgment in *Rolf Anders Daniel Pihl v. Sweden* on March 9th, 2017, for example, the Court clarified that liability of website or online platform operators containing defamatory user-generated content is limited.¹⁰³

Nevertheless, some European countries are adopting – or plan to adopt – new legislation, aimed at contrasting or mitigating the effects of fake news on public opinion. A proposed solution, creating a governmental Task Force, as recently established in the Czech Republic, empowered to intervene in politically-sensitive periods, has not been particularly successful and seems at odds with Article 10 of the ECHR.¹⁰⁴ Another possible solution is to impose obligations and high fines in case of non-compliance on online operators and require them to act as “guardians” of the truthfulness of the information they carry. An important example in this direction is the recent German Act to Improve the Enforcement of the Law in Social Networks, adopted on September 1st, 2017 and in force since October 1st.¹⁰⁵

The Law targets only online hate crimes and false news reports, requiring social networks to ensure, through an effective and transparent procedure, that complaints are immediately examined. Social networks must

101. ICCPR, *supra* note 3, art. 19.

102. See DAMIAN TAMBINI, FAKE NEWS 1, 11 (2017), https://eprints.lse.ac.uk/73015/1/LSE%20MPP%20Policy%20Brief%202020%20-%20Fake%20news_final.pdf.

103. According to Voorhoof “the Court’s decision is also to be situated in the current discussion on how to prevent or react on ‘fake news,’ and the policy to involve online platforms in terms of liability for posting such messages, since ruling expresses concerns about imposing liability on internet intermediaries that would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via internet.” Dirk Voorhoof, *ECHR in Pihl v. Sweden: Blog Operator Not Liable for Promptly Removed Defamatory User Comment*, MEDIA REP. (Mar. 23, 2017), <http://www.mediareport.nl/en/press-law/23032017/echr-in-pihl-v-sweden-blog-operator-not-liable-for-promptly-removed-defamatory-user-comment>.

104. See Rick Noack, *Czech Elections Show How Difficult It Is to Fix the Fake News Problem*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/10/20/czech-elections-show-how-difficult-it-is-to-fix-the-fake-news-problem/?noredirect=on&utm_term=.19396270da54.

105. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], June 30, 2017, Deutscher Bundesrat: Drucksachen [BT] 536/17, http://www.bundesrat.de/SharedDocs/drucksachen/2017/0501-0600/536-17.pdf?__blob=publicationFile&v=1 (Ger.). For a short analysis of the new law, see Bianca Borzucki, *Germany Network Enforcement Act Enters into Force*, IRIS (Jan. 15, 2018), <http://merlin.obs.coe.int/iris/2018/1/article15.en.html>.

remove content that is “manifestly unlawful” within twenty-four hours of the reception of the complaint; all other unlawful content must be removed within seven days.¹⁰⁶ The law also provides for a fine up to €5 million in case of infringements.¹⁰⁷ The obvious question here is whether private operators are fit to judge and balance the constitutional values at stake in such decisions?

A different solution is currently in development in France. In view of the future European elections, as announced by the President Macron in January 2018, a bill on contrast to false information was submitted to the National Assembly on March 21st,¹⁰⁸ along with a draft implementing act to ensure that the bill will apply during the presidential election campaign. According to its explanatory memorandum, the bill aims to counteract any attempts at destabilization that could emerge during the forthcoming elections.

Three areas of reform are planned, the first of which involves the introduction of new tools aimed at combating the spread of such information. This legislation will probably be adopted within the end of this year and will confer to French courts the power to adopt emergency measures to remove or block certain content deemed “fake” during sensitive election periods. It would also require greater transparency for sponsored content and would enable the Conseil Supérieur de l’Audiovisuel to combat “any attempt at destabilization” by foreign-financed media organizations.¹⁰⁹

Compared to German Law, the French solution appears more in line with the European constitutional model. Following the example of European Union e-commerce and copyright legislation, it will give a court or an Independent Authority whose decisions can be challenged before a court, the responsibility to ensure adequate balance between the fundamental rights and principles at stake, and to decide whether a given piece of information is “fake” and deserves to be taken down.

It is evident that, given the nature and the international dimension of the problem of fake news, a solution can only come, at least, at the European Union level. For example, it would be useful to extend the scope of the provisions on the right of reply, currently confined to the audiovisual media

106. NetzDG, *supra* note 105.

107. *Id.*

108. Proposition de loi 799 du 21 mars 2018 relative à la lutte contre les fausses informations, enregistré à la présidence de l’assemblée nationale, [Law Proposition 799 of March 21, 2018 on the fight against the false information] (Fr.), <http://www.assemblee-nationale.fr/15/pdf/propositions/pion0799.pdf>.

109. *Id.*

services sector, to include the dissemination of fake news online.¹¹⁰ In addition, in the light of the imperatives of the relevant international treaties, a good starting point would be to adopt measures intended to strongly protect the genuine exercise of the right to vote.¹¹¹

Unfortunately, the European Commission's response to this problem is, for the moment, rather unsatisfactory. After a stakeholders' consultation process,¹¹² the Commission established a High-Level Expert Group on fake news and online disinformation ("HLEG") in November 2017 required to advise on policy initiatives to counter disinformation online. In March 2018, the HLEG released a detailed Report designed to identify the best answers to the fake news problem in the light of fundamental principles.¹¹³ The Group specifically promoted a series of medium and long-term proposals. For the purpose of this work, it is sufficient to note the HLEG points out that disinformation problem can be handled most effectively, and in manner that is fully compliant with freedom of expression, free press and pluralism, only if all major stakeholders collaborate ("multi-dimensional approach").

Any form of censorship either public (by a public authority) or private (by platforms) should be avoided, as well as fragmentation of the Internet or other harmful consequences to its technical functioning. The Report briefly takes into consideration – but clearly does not suggest – a possible "harder" approach with adoption of binding obligations on Member States and online platforms to contrast fake news. The Report limits itself, stating that after the actual implementation of the "soft" measures envisaged by the Report, it will rest on the Commission to decide whether legally binding rules are necessary.¹¹⁴

110. This solution does not appear to be taken into consideration in a recent proposal. See Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, at 6, COM (2016), 0287 final (May 25, 2016).

111. See Joint Declaration, *supra* note 96.

112. See EUR. COMM'N, HIGH-LEVEL GRP. ON FAKE NEWS & ONLINE DISINFORMATION, A MULTI-DIMENSIONAL APPROACH TO DISINFORMATION 5-6 (2018), <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>. The European Commission initiative is based on the European Parliament Resolution PVIII_TA(2017)0272 on online platforms and the Digital Single Market, adopted June 15, 2017. In that document, the European Parliament considers the role of online platforms and fake news and calls on the Commission to analyze in depth the current situation and legal framework with regard to fake news, and to verify the possibility of legislative intervention to limit the dissemination and spreading of fake content. *Id.*

113. *Id.*

114. See *id.* at 35 ("In a second step, an intermediate evaluation of the effectiveness and efficiency of these short and medium-term measures should then lead the Commission to re-examine the matter in Spring 2019, with a view to deciding whether further measures, including

Based on the indications provided by the Report, on April 26th, 2018, the European Commission adopted a communication called Tackling Online Disinformation: a European Approach.¹¹⁵ This Report puts forward an action plan that basically consists in some self-regulatory tools. More to the point, the Commission approach appears to take into consideration the link between democracy and the existence of free and independent media. It underlines that disinformation may harm our democracies “by hampering the ability of citizens to take informed decisions,” so impairing freedom of expression, a fundamental right enshrined in the Charter.¹¹⁶ It also recognizes that the “primary obligation of State actors in relation to freedom of expression and media freedom is to refrain from interference and censorship,” but also “to ensure a favorable environment for inclusive and pluralistic public debate,” particularly in election times.¹¹⁷

Nevertheless, as to the concrete measures to be taken, the Commission follows the “soft” approach and the suggestions of the HLEG. It is also conscious that several Member States are currently exploring possible measures to protect the integrity of political processes from online disinformation and to ensure the transparency of online political advertising. It even underlines that “inaction is not an option.”¹¹⁸ Although temporarily, it adopts a rather cautious position, confining itself basically to suggest platforms to adopt self-regulatory measures.

In brief, the Commission main request to online platforms is to adopt a “Code of Practice on disinformation” with the aim of ensuring transparency about sponsored content, in particular political advertising, as well as restricting targeting options for political advertising and reducing revenues for purveyors of disinformation; providing greater clarity about the functioning of algorithms with which they select and diffuse the news and enabling third-party verification; making it easier for users to discover and access different news sources representing alternative viewpoints; introducing measures to identify and close fake accounts and to tackle the

(co)regulatory interventions, competition instruments or mechanisms to ensure a continuous monitoring and evaluation of self-regulatory measures, should be considered for the next European Commission term.”).

115. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Online Disinformation: A European Approach*, at COM (2018) 236 final (Apr. 26, 2018), <https://ec.europa.eu/digital-single-market/en/news/communication-tackling-online-disinformation-european-approach>.

116. *Id.*

117. *Id.*

118. *Id.* at 6.

issue of automatic bots; and enabling fact-checkers, researchers and public authorities to continuously monitor online disinformation.

In this respect, the Commission also points out that by December 2018, it will deliver a report focused on the progress achieved and on the possible need to adopt subsequent measures to guarantee the ongoing monitoring and evaluation of the actions agreed upon. Only under this circumstance and should the results of the implemented measures be unsatisfactory, binding legal measures will be taken into further consideration.

At least in the short term, then, the Commission intends to suggest exclusively self-regulatory instruments. This is reminiscent of the slow and rather inconclusive approach that the Commission had in relation to the problem of media ownership and independence in the late 1990s.¹¹⁹ It is plain to see that much more can (and should) be done: Fake news is a legal and political challenge the EU can no longer afford to ignore. In addition, the increasing unilateral initiatives of Member States might create a patchwork of legislative solutions such that it will be difficult to harmonize at a later stage. A good starting point could be to forestall the negative effects of disinformation and propaganda with measures aimed at precluding media concentration and conflicts of interest, while simultaneously promoting transparency, diversity and other democratic values.

119. *See supra*, section IV.

I VOTED FOR WHAT?

Gabriel Latner *

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I. INTRODUCTION

The call for papers sent out by this symposium’s organizers highlighted two themes: “fake news” and “weaponized defamation.” At the symposium itself, presentations and discussions centered on a question that touched on both: Does, can, or should, the law protect politicians and office seekers (or even the ever-elusive and amorphous “the public”) from the false speech of their opponents? This paper does not address that question, however, for the simple reason that I believe the issue has been sufficiently answered by cases like *United States v. Alvarez* and *R v. Zundel*, and discussed in articles like Professor Hasen’s *A Constitutional Right to Lie in Campaigns and Elections?*¹ Instead, this article investigates the influence that fake news

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1. *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down the Stolen Valor Act as an unconstitutional content-based regulation because the prohibition on false claims in general violated the First Amendment); *R. v. Zundel*, [1992] 2 S.C.R. 731 (Can.) (striking down a Canadian law that

might have on the passage of specific statutes, and how, if at all, courts should account for that influence when called upon to interpret those statutes. This article addresses two questions in turn: First, is there any reason to believe that fake news, liberally defined, influences the legislative process? Second, how (if at all) should a court account for the influence of fake news on the legislative process when interpreting a statute's text?

II. HOW FAKE NEWS CAN INFLUENCE THE LEGISLATIVE PROCESS: WHO WRITES STATUTES?

While a statute is said to be the “Act” of a legislative body, the legislature itself is a corporate entity that acts—and writes—through individual agents. Maybe one member of the body writes the actual text of the bill. Maybe several members work together to write it as part of a committee. Maybe that committee hires research staff and legislative counsel to do the actual drafting, or maybe several committees work together on a single bill, along with all their staff. Maybe that committee receives additional “assistance” from lobbyists or members of the executive branch.

Whichever individuals actually type up the text of a bill, for the bill to become law it must be voted on – that is, voted for – by the legislators, the majority of whom inevitably did not author the bill. In an ideal world, their knowledge of the bill's contents would be based on having carefully read the text themselves and by analyzing how the bill's provisions interact with each other as well as with the pre-existing body of law. But this is not an ideal world. Whatever the theory, in practice we can say with some certainty that most legislators are not reading most of the bills that come before them. Bills are too long, too complicated, and too numerous. Instead of reading hundred- or even thousand-page bills themselves, legislators must necessarily base their opinions (and votes) on summaries and assessments prepared by supporting staff, party leadership, government agencies, advocacy groups, and, increasingly, media outlets.² Even when a media outlet doesn't produce its own summary of a bill, it will disseminate the summaries prepared by other parties.

criminalized “willful publication of what are known to be deliberate lies” on the grounds that the prohibition violated freedom of speech); Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53 (2013) (analyzing U.S. courts' treatment of false campaign speech in the United States).

2. See Brian Christopher Jones, *Don't Be Silly: Lawmakers “Rarely” Read Legislation and Oftentimes Don't Understand It . . . But That's Okay*, 118 PENN ST. L. REV. 7 (2013).

Even if you take the optimistic view that legislators *generally* actually read the bills they vote on, there are many situations where this is exceedingly improbable, if not outright impossible.

For example, the United States PATRIOT Act,³ which was 300 pages long and amended a dozen federal statutes, was introduced in the House on October 23rd, voted on and passed by the House on the 24th, voted on and passed by the Senate on the 25th, and signed into law by the President on October 26th.⁴ Now, it isn't *technically impossible* that 357 Representatives, 98 Senators, and one President each carefully read the entire text of the Act, as well as the existing statutes that the Act amended, before voting it into law, but I doubt it. There are other scenarios where legislation has been introduced and passed so quickly that not even a talented speed reader could read the full text in the time allotted, let alone understand its implications. In the Province of Ontario, for example, which has a unicameral legislature but requires that bills pass three votes, legislation is occasionally introduced and passed in a matter of minutes.⁵

This is how fake news can work its mischief on the legislative process. If legislators base their votes not on the text of a bill, but what they are *told* is the text of a bill (or more accurately, what they are told the text of a bill accomplishes), then inaccurate summaries or assessments of a bill – “fake news” about a bill – could lead to a legislator voting for a bill that has provisions different than what that the legislator thought he was voting for.⁶

3. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections at 18 U.S.C. §§ 2510-2523 (2012)).

4. Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001); H.R. 3126, 107th Cong., 147 CONG. REC. pt 14, at 40400, pt. 15, at 20669 (2001) (passed by the House on October 23rd, 2001) (passed by the Senate on October 25th, 2001). Despite how little time Congress had to read the bill and to consider its impact on other federal laws, the PATRIOT Act passed with overwhelming support in both houses. In the Senate, the Act passed 98 to 1. See Actions Overview, *H.R.3162: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, CONGRESS.GOV, <https://www.congress.gov/bill/107th-congress/house-bill/3162/actions> (last visited Nov. 5, 2018).

5. See, e.g., Ontario, Legislative Assembly, *Official Reports of Debates* (Hansard), 39th Parl., 1st Sess., No. 34 (27 Apr. 2008), at 1401 (Can.), https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2008/2008-04/house-document-hansard-transcript-1-EN-27-APR-2008_L034.pdf. On Sunday, April 27th, 2008, the Ontario Legislature convened to pass “back to work” legislation ending a transit strike. The process began at 1:30, and the legislature adjourned at 2:01. *Id.* In 2009, this was done again to end a university strike. That took 27 minutes. Ontario, Legislative Assembly, *Official Reports of Debates* (Hansard), 39th Parl., 1st Sess., No. 104 (25 Jan. 2009), at 4685, 4688 (Can.), https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2009/2009-01/house-document-hansard-transcript-1-EN-25-JAN-2009_L104.pdf.

6. Admittedly, this analysis does exclude “whipped votes,” where legislators vote for a bill for no other reason than that their party leaderships tells them to.

A simple hypothetical highlights the potential influence this kind of fake news can have. Suppose a state wanted to reform its traffic laws. In particular, the government wanted to change the speed limits that were set decades before. The resulting New Traffic Bill is over 1,000 pages long and contains a complicated formula for determining the speed limit of each specific stretch of road. Figuring out the effect of the New Traffic Bill on speed limits requires a thorough reading of the Bill to see how several different cross-referenced provisions interact with each other.

The government trots out Pundit A, who says the New Traffic Bill would raise all speed limits by five miles an hour. Pundit B says that Pundit A is wrong, and the New Traffic Bill would actually lower all speed limits by five miles. Neither Pundit's statement was an opinion, and only one of them can be correct (though they both could be wrong). Each Pundit's claim could be verified (or falsified) by reading the New Traffic Bill with sufficient care and skill – but the legislators don't do that. Pundit A was a very wise looking, very venerable, very respected, law professor with years of experience studying traffic legislation in a multitude of jurisdictions. Pundit B, on the other hand, looked like Uncle Fester, talked like Doc Brown, had no legal background, and worked for a “think tank” he ran out of his garage. Most people, including legislators, believed Pundit A. Support for raising speed limits was high in-and-out of the legislature, and the New Traffic Bill passed almost unanimously. The legislators who spoke in favor of the bill during committee meetings and floor debates always highlighted the fact that the bill would raise speed limits, and how good they thought this would be. The only legislator to vote “no” gave an impassioned speech where he said he believed Pundit B, and he could not in good conscience vote for a law that would lower speed limits. His colleagues ignored him, and the bill became law. Once it went into effect and workers started changing all the speed limit signs, it turned out that Pundit B was correct. Dismayed citizens called their local representatives and complained “why'd you vote to make my commute slower?” To which the representatives responded: “I didn't! I voted to *raise* speed limits.”

What happened here? Aren't both the complaint and rebuttal true? The representatives, by voting for the New Traffic Bill, did factually vote to lower speed limits. But their belief – their *intention* – in voting was to raise speed limits. This actually happens, though there isn't always a “Pundit B” advertising what the actual effect of the law will be, and so these cases are typically analyzed as errors in the drafting process.

For example, Professor Jonathan Siegel has identified what was almost certainly a substantial drafting error in the statutes controlling the venue

where a plaintiff can bring a civil suit against defendants in a federal court under diversity jurisdiction.⁷ As Professor Siegel explains, at the time the article was written, the statute's primary rule was that a plaintiff could bring a case "in a judicial district where any defendant resides, if all defendants reside in the same state."⁸ So, if defendants A and B reside in Districts 1 and 3 of the same state, a plaintiff could bring suit in either of Districts 1 or 3, but not in District 2. However, a secondary rule in the venue statute says that a corporate defendant is deemed to reside in any district where it would be subject to personal jurisdiction.⁹ Because of their nature, a corporate defendant might be subject to the personal jurisdiction of multiple judicial districts, in multiple states. Since the primary rule allows the plaintiff to file "in any judicial district where any defendant resides," Siegel shows that, as the law was written, a plaintiff in California suing an individual defendant resident in Louisiana and a corporate defendant headquartered in Louisiana but with offices around the country, including in Alaska, could bring suit against both defendants in Alaska.¹⁰

Why? Because, by virtue of its headquarters, the corporation is resident in the same state as the individual defendant, and, therefore, the primary rule allows the plaintiff to sue in *any* district where *either* defendant resides. And by virtue of the secondary rule, the corporate defendant will also be deemed to reside in the District of Alaska.¹¹ Siegel convincingly argues that this is a result that could not have been intended, and the primary rule should probably have read "a judicial district where any defendant resides, *in a state*

7. Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 311-15 (2001).

8. The general venue rule was originally given under 28 U.S.C. § 1391(a)(1). The statute was amended in 2011, and the successor provision, now articulated in 28 U.S.C. § 1391(1)(b), states that a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(a)(1) (2002), *amended by* 28 U.S.C. § 1391(b)(1) (2012) (quoted in Siegel, *supra* note 7, at 313).

9. Former 28 U.S.C. § 1391(c), now § 1391(c)(2), establishes that "an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business." 28 U.S.C. § 1391(c)(2). Importantly, here, the 2011 amendment struck out former subsections (a) and (d) relating to venue when the defendant is a corporation. *See* Act of Jun. 25, 1948, Pub. L. No. 112-63, § 202(1), 125 Stat. 763 (2011).

10. Siegel, *supra* note 7, at 313-15.

11. *Id.* at 314-15. Siegel uses the states of New York, California, Delaware, and Michigan. I changed the states to make the problem more extreme.

in which all defendants reside, if all defendants reside in the same State.”¹² That is, the plaintiff in this hypothetical should have been limited to suing in Louisiana.

While that might have been a drafting error, it wouldn’t be considered a “Scrivener’s Error” – a typo so obvious and unmistakable that it’s considered proper for a court to just ignore it and interpret the statute the way it “ought” to have been written. Another example along the same lines is New Hampshire’s Senate Bill 66, which as originally introduced would have made it legally impossible to charge a woman with murder if the killing occurred while she was pregnant.¹³ But both of these examples seem to have more to do with poor draftsmanship than “fake news,” except in the technical sense that legislators in New Hampshire were probably not told SB 66 would in effect legalize murder for one segment of population, and the Congressmen who voted for the venue statute were probably told that the law would restrict cases to states and districts where all defendants were resident. However, as Professor Siegel pointed out, the problem in this sort of case is the “divergence between intention and utterance.”¹⁴

There certainly are cases where this divergence is the result of legislators being misled. Judge Abner Mikva told a story about a congressman who had spent decades trying to pass a controversial bill regulating strip mining. Finally, near the end of his career, the political stars aligned, opening a small window for the congressman to push through the bill. He was relentless. Whenever one of his colleagues asked him a question, the congressman made sure to respond with the answer his questioner wanted to hear, even if this meant contradicting himself.¹⁵ Though the congressman’s answers changed

12. *Id.* at 315 (emphasis in original).

13. New Hampshire Senate Bill 66 created criminal liability for purposely or knowingly causing the death of “a fetus.” The concern, however, was that the original text providing that “[n]othing in this section shall apply to . . . [a]ny act committed by the pregnant woman,” exempted pregnant women from criminal murder charges. As adopted, the text instead provides that “[n]othing in paragraph IV shall apply” to acts of pregnant women. N.H. REV. STAT. ANN. § 630:1-630:6 (LexisNexis 2018); see Allie Morris, *N.H. Fetal Homicide Bill Unintentionally Gives Pregnant Women Impunity to Murder*, CONCORD MONITOR (June 23, 2017), <https://www.concordmonitor.com/fetal-homicide-bill-has-pregnant-woman-loophole-10658835>.

14. Siegel, *supra* note 7, at 315.

15. Abner J. Mikva, *A Reply to Judge Starr’s Observations*, 36 DUKE L. REV. 380, 380-81 (1987). In the same day, the congressman told a West Virginian colleague that the bill would not impinge on state sovereignty in any form, and an Arizona congressman that the bill set firm federal standards. *Id.* When an observer informed the congressman that these could not both be accurate, he agreed that the observer was absolutely correct. *Id.*

frequently, he never altered the text. He simply told whomever was asking that the bill said what that individual wanted it to say. And since legislators do not read bills, or at least do not read them thoroughly before voting on them, the bill passed, with some serious ambiguities.¹⁶

So, whether this divergence is the result of legislators “meaning” one thing and the text accidentally saying something else, or the result of legislators being misled (innocently or intentionally) by inaccurate descriptions of the text (“fake news”), the question remains the same: What should a court do when there is evidence of a mismatch between the provisions legislators believed they were voting for, and the provisions actually provided for by the statute’s text?

III. THE PROBLEM FOR COURTS

Legislators’ reliance on third-party summaries of bills in place of reading the bills themselves can lead to three different problematic situations. The first is a problem of *inclusion*, where the text of the bill includes one or more provisions that the legislators did not believe would be part of the law. The second problem is one of *omission*, where the text of the bill does not include one or more provisions that the legislators believed would be part of the law. Finally, there is the problem of *contradiction*, a combination of omission and inclusion, where the text of a bill contains a provision that is the opposite of, or at least substantially different from, what the legislators believed. In each case, the dilemma for a court asked to interpret and construe the law is the same: should it follow legislative belief or legislated text?

In this paper, I argue that the answer is “neither and both.” While fidelity to statutory text is generally preferable to a free-flowing judicial inquiry into what the legislature intended to accomplish, the fact that legislators are basing their votes on summaries and descriptions of bills makes strict textualism untenable. A rule, or at least a principle, is necessary to determine when extra-textual evidence of legislative intention can supplement or even overrule a statutory text. I argue that a rule allowing courts to consider evidence of legislative intent only to *nullify* certain textual provisions, as opposed to reading in intended-but-omitted provisions, fits best with the

16. *Id.* In particular, the Act was unclear about when a state and when the federal government should act. *See* Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, §§ 501-506, 91 Stat. 445, 467-476 (codified at scattered sections of 18 U.S.C. and 30 U.S.C. (1982)).

philosophical and political assumptions underlying textualism. However, it is a somewhat circuitous argument.

A. *The Argument for Textual Supremacy*

“We’re all textualists now,” said Justice Kagan, and she may be right.¹⁷ Textualism of some form or another does seem to be the dominant interpretive theory of the day, and few in the mainstream argue that the clear text of a statute should be ignored in favor of a gloss based on what the court thinks the legislature intended to accomplish. Still, it would be useful at this point to review and summarize one of the foundational arguments for textualism: sticking to the text respects and protects the legislative process.

Textualism is inherently tied to positive theories of the law, and to formalism in particular. Textualism says that what is law is what legislators actually said – actually wrote – when they enacted a new bill, not what they wished they said, would have said if they’d thought about the issue more carefully, or should have said if they had a proper regard for fairness, justice, welfare, or some other abstract virtue.¹⁸ As Judge Easterbrook explains:

For the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation. [A] Constitution . . . establishes rules for the making and enforcement of law. In [Anglo-American] systems what counts as law is texts enacted by . . . the legislature and signed by the [Executive] . . . and these laws are effective from the date of their enactment until their repeal. To carry forward the program of such a constitution, which limits what counts as law and makes laws hard to enact and change, the judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills. An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for

17. Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE.COM (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

18. See *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004) (“If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”); *United States v. Granderson*, 511 U.S. 39, 68 (1994) (“It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.”).

making law. *That* is what textualists say, and it is antithetical to the proposition that "will" matters.¹⁹

Textualism is only called that – it is only concerned with ‘text’ – because the Constitution²⁰ and its accompanying brand of legal formalism defines the legislative process in reference to a piece of text. A legislative proposal is reduced to text. That text is voted on. If it gets the right number of votes, that text is offered to the executive for assent or veto. Only then is that text considered “law.” Text is a useful way of tracking and identifying the legislative proposals that have satisfied the formalities of the legislative process. But text is not the *only* way of doing that. Some medieval Scandinavian states relied instead on a *lagman*, or lawspeaker, whose job it was to attend the meetings of the legislative body, identify which proposed rules received sufficient support to become law, and then commit them to memory. In other words, if you wanted to know what the law was, you asked the lawspeaker.²¹

In such a society, the equivalent of textualism would be the argument that the rules which should be given legal effect are those the lawspeaker identifies as law, and not what the members of the legislative body wished to enact, believed they enacted, or intended to enact. So, if the lawspeaker said “last session the legislature passed a law that dog owners are to pay a special tax,” and members of the legislature showed up and said “actually, we passed a law that *cat* owners are to pay a special tax,” the “textualist”²² would argue that under the constitution, the law is what the lawspeaker says it is, and the tax is on dog owners. If members of the legislature think the tax should actually be on cat owners, then they should change the law at their next session. (Similarly, if legislators in a text-based culture believe the text of a statute does not accurately reflect the law they wanted to promulgate, that’s something they can fix through legislation, and they shouldn’t rely on courts to clean up after them.)²³

19. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119-20 (1998) (emphasis in original).

20. Be that the constitution of Canada, the United States, any of their constituent states or provinces, or some other English-speaking democracy.

21. THE LAWS OF EARLY ICELAND: GRÁGÁS I, at 12, 187 (Andrew Dennis et al. trans., 1980) (It was “the Lawspeaker’s duty ‘to tell everyone who asks him what the article of the law [was]’ . . . It is possible that a Lawspeaker’s declaration of what he thought was law was tantamount to initiation of law, though always subject to the final approval of the Law Council.”).

22. Lawspeakerist?

23. *See, e.g.*, *Chung Fook v. White*, 264 U.S. 443, 445-46 (1924) (“The words of the statute being clear . . . the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.”).

Leaving aside the possibility of a malicious and self-serving lawspeaker, trusting the memory of one person (the lawspeaker), over the memory of several (the members of the legislature claiming the tax targeted cat owners) seems a silly way to run a country. However, this isn't a strong argument against textualism. As a substantive matter, a rigid text is even better evidence than group memory, and as a theoretical matter the "Scandinavian textualist" is still right for wanting to follow the lawspeaker: If a constitution spells out specific rules for distinguishing between actual statutes, and mere legislative proposals, then those are the rules a court needs to follow, even if the substantive results may sometimes be less than ideal.

Non-textualist theories of statutory interpretation are problematic for those concerned with niceties like the rule of law and legal positivism, because they allow for judicial recognition and enforcement of something other than a duly promulgated statute as positive law. Legislative intention is not voted on. Legislative wishes are not presented to the executive for signature or veto. What the legislature intended to do is not published in a gazette, enrolled in the national archives, or otherwise announced to the public. Fidelity to the text ensures everyone is literally on the same page when determining what the law is and is not.

The point is that Textualism does not advocate for the supremacy of the text in statutory interpretation because of anything special or magical about "text" in itself, but because under our constitutional systems, text is not just the *best* evidence of which proposals have made it through the mandated legislative process, but *necessary* evidence.

B. *Sometimes Text Is Not Supreme*

There are cases where mainstream textualism says that courts should alter a statute's text by adding, removing, or changing words. One minor but important example is the aforementioned rule of "Scrivener's Error," which says that courts can and should ignore or correct obvious typos. This rule has two parts. First, the error must be blatant. If it's possible that the text as written is what the legislature actually intended, then it is not a proper Scrivener's Error. Second, if the court is to correct the error, it must be equally clear how the text was "supposed" to read. Under the doctrine of Scrivener's Error, a court could properly delete an unintentionally repeated

word (so that the phrase “third party partly” is read as “third party”),²⁴ or insert a missing article. However, it could not rewrite the New Traffic Bill to raise speed limits, as this ‘fix’ would require more than correcting a typographical error and the rule “does not include substantive errors arising from a drafter’s failure to appreciate the effect of certain provisions.”²⁵

The doctrine of Scrivener’s Error is just one of many “canons of interpretation” that judges – including textualists judges – resort to when reading statutes. For example, masculine pronouns are deemed to include the feminine (and singulars plurals), *expressio unius est exclusio alterius*.²⁶ So, while a statute’s enacted, printed text might read simply: *No man shall walk a Rottweiler in this park*. A textualist would read it slightly differently: *No man (or woman, or group) shall walk a Rottweiler (or Rottweilers) in this park (but any other breed of dog is allowed)*. Because of these additions to the written text, a woman accused of walking her Rottweiler, or a man walking *three* Rottweilers, would not be able to claim that according to the plain meaning of the law, they did nothing wrong.

Like Scrivener’s Error, the principled basis for these canons concerns the relationship between the text and the legislators responsible for it. These canons and their like are based on assumptions about how language is ordinarily used, and the further assumption that the legislators chose to use language ordinarily. (And, prior to this, a textualist would have to assume that the “author” of the no-Rottweilers law intended to legislate in English, as opposed to some obscure language or an idiolect in which “No man shall walk a Rottweiler in this park,” means “It is legal to rob banks, as long as it is a Thursday.”) These assumptions are a logically necessary part of basing textualism in legal formalism. If courts did not assume that legislators were using English in its common form, then the text would not usefully indicate what legislative proposals had successfully passed through the legislative process. Another way of putting it is that these canons assume that legislative text is produced by a fallible, human, process. A jurist in a theocracy who is presented with a textual commandment believed to be written by God would have a much harder time justifying even minor emendations to the wording.

24. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 234-35 (2012); see also Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289 (1989) (“If the directive contains a typographical error, correcting the error can hardly be considered disobedience.”).

25. SCALIA & GARNER, *supra* note 24, at 238.

26. The specific mention of one member of a class excludes application to the others.

The question now is whether that same awareness of the fallibility of those involved in the legislative process would justify judicial disregard for statutory text because of the influence of “fake news”?

C. How Should Courts Respond to Divergence Caused by Textual Manipulation?

The argument is simplified if we can use a model legislative process, free of historical baggage. Imagine under the Constitution of Freedonia that for a bill to become law, it must first be passed by its unicameral legislature, and then be signed by the Premier. Like the United States,²⁷ Freedonia has an Enrolled Bill rule, which says that the hardcopy of a bill passed by the legislature, then signed by the Premier, and then stored in the National Archives, is the official version of the law. If a discrepancy is found between the Enrolled Bill, the Freedonian Statutes at Large, or the collected Freedonian Code, the version of the text found in the Enrolled Bill is controlling.

Imagine further that there is a forger, Frank, who is so skilled that his work is indistinguishable from the original article, and that Frank has gained access to the National Archives, where he’s replaced the official copy of the Omnibus Act (which is 1000 pages and amends numerous statutes) with his own version. Frank’s version of the Omnibus Act is identical to the original in all respects, except for Section 666, in which Frank amended the Criminal Code to grant himself total immunity from prosecution.

Sometime later, Frank is arrested and charged with unrelated offences. In court, Frank’s defense rests entirely on the presence of Section 666 in the enrolled version of the Omnibus Act. While there is no evidence of what Frank has done, the prosecution introduces testimony from every legislator that voted for the Omnibus Act, and the Premier that signed it, to the effect that Section 666 was not part of the Omnibus Act when the legislators voted or when the Premier signed it, and they would not have supported any bill which included such a provision. What should the judge do?

Maybe this seems like a case best handled by the Absurdity Doctrine – closely related to the rule concerning Scrivener’s Error – which says that a statutory provision may be “disregarded . . . as an error . . . if failing to do so would result in a disposition that no reasonable person could approve.”²⁸ While granting total legal immunity to one individual may be terrible policy, it is not necessarily absurd, and it certainly doesn’t look like a simple

27. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670 (1892).

28. SCALIA & GARNER, *supra* note 24, at 234.

typographical error. Resorting to the absurd or unreasonable content of Frank's Section 666 in order to invalidate it feels like a cheap way out. Perhaps Frank was an ardent environmentalist, and his Section 666 introduced stronger penalties for illegal logging and poaching in Freedonia's national parks. Is such a law so absurd that courts would be justified in ignoring it?

Perhaps the evidentiary record before the court is more muddled as well. On cross examination, the Premier and some percentage of legislators, admitted that they actually hadn't read every page of the Omnibus Act, and therefore for all they knew, the drafts they saw *did* contain Section 666. Maybe Frank was able to bribe or persuade a handful of legislators to testify that they *did* remember seeing section 666 when the Omnibus Act was before them as a bill, and its inclusion was part of the reason they voted the way they did. In this case, I think the judge would be obligated to enforce Section 666 as it appears in the (supposedly) enrolled version in the National Archives.

If that strikes you as a repulsive result, remember that the judge doesn't know what you know. What the judge knows is that the Constitution says the "law"²⁹ consists of those rules approved by the majority of the legislature and the Premier, and the authoritative version of a law is found in the National Archives. The judge also knows that the Omnibus Act in the National Archives includes Section 666, and that after the Omnibus Act was passed some of the politicians who helped create the Omnibus Act have turned up in court to argue that Section 666 should not be given legal effect because they don't remember it.

Yet some number of politicians say they *do* remember Section 666 and many who testified that they did not read the entire bill. There are strong policy reasons for not allowing politicians to overrule the clear text of statutes they promulgated (or seem to have promulgated) by claiming "this isn't what we meant to do."³⁰ The line between a legislator claiming, "I don't remember that being part of the text" and "I didn't think the text meant what you're

29. Or at least the statutory component of the law.

30. *See, e.g.*, *Chung Fook v. White*, 264 U.S. 443, 446 (1924) ("the words of the statute being clear . . . the remedy lies with Congress."); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669-70 (1892) ("[U]pon well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislatures and the approval of the governor . . . was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode."); SCALIA & GARNER, *supra* note 24, at 237 ("Yet error-correction for absurdity can be a slippery slope. It can lead to judicial revision of public and private text to make them (in the judges' view) more reasonable.") (citing John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2476-79 (2003)).

saying it means when I voted for it” seems awfully hazy, and there are probably many provisions of any statute that the legislators who voted for it would not remember.

The evidence could tell a different story. Maybe security tapes in the National Archives show Frank breaking in, destroying the real copy of the Omnibus Act, and replacing it with his forgery. Maybe he told a confederate what he was planning and that confederate testified against him. Maybe that combined with the fact that Frank’s version of Section 666 does not appear in any of the “working copies” of the bill that were sent out to legislators and their staffers convince the judge that the version of the statute in the Archives is a forgery, and the real enrolled Omnibus Act, prior to its destruction, did not include Frank’s Section 666. In this case, the judge should obviously *not* follow the text of Section 666.

However, this is qualitatively different than a court ignoring or re-writing a statutory provision under the Absurdity Doctrine. The judge in Frank’s case is not engaging in an interpretative task, rather he is fact-finding. The judge is weighing the evidence to answer the *factual* question: what is the text that was voted through the legislature and signed by the Premier? While the enrolled copy of a statute found in the National Archives is deemed to be the best evidence of what that text was, in this case, the Judge has determined that it was not unimpeachable evidence.

There are (at least) two ways of analyzing this. The first, more limited, interpretation is that the judge has resolved an apparent divergence between the statutory text and legislative intention when he determined the text giving rise to the apparent conflict (the version of Section 666 found in the Archives) is not actually statutory text at all, since it had been proven to the court’s satisfaction that the text in question did not make it through each stage of the constitutionally mandated legislative process. The second, more expansive, interpretation is that the court resolved the divergence between text and intention when it invalidated the text on the basis that the evidence showed that legislature did not intend for it to become law.

I think that most people would agree with a rule based on the first interpretation of Frank’s case. If it is proven that the text of a statute has been manipulated post-enactment, then it should not have legal effect. The validity of a rule based on the second interpretation becomes important if we change the timing of the alterations to the text, or the bad actor’s identity.

Suppose Claire, the chief clerk of the Freedonian Legislature, is responsible for preparing the final version of a bill before the vote. Before her retirement, Claire slips Section 999 into the Budget Act. Section 999 could be anything: a massive increase to Claire’s pension; a criminal

immunity clause; stiffer penalties for environmental offenses; or changing the lyrics to Freedonia's anthem to make it more egalitarian. It is important to note, no legislator *asked* Claire to do this and she did not tell anyone about her addition. The Budget Act is properly enacted, somehow the government finds out about Section 999, and its validity is challenged in court. As in Frank's case, the government argues Section 999 is not law, relying on legislators testifying that Section 999 was not in the text they negotiated, and they didn't know that it was part of the Budget Act when they voted for it.

To simplify the evidentiary issues, assume that when questioned, Claire admitted that she added Section 999 on her own initiative, told no one about it, and was careful to add it to a section of the Budget Act she thought no one was going to bother reading. What should the judge do?

The first interpretation of Frank's case offers no help. Here, it is clear that the text of Section 999 actually *did* make it through the legislative process set out in Freedonia's Constitution. Does the second interpretation work? Does the judge's finding that, as a matter of fact, Freedonia's legislators and Premier were not aware Section 999 was included in the Budget Act and never intended (and couldn't have intended) to enact it into law, justify the judge denying it legal effect?

"No" seems like a perfectly acceptable answer. Even if they weren't aware of what they were doing, a majority of legislators voted for Section 999 to become law and the Premier agreed. In any bill of moderate length, there are probably sections that some percentage of legislators (and perhaps even a majority) are unaware of. Given that a single piece of legislation, particularly budgets and omnibus bills, usually address many different topics and issues, some which may not be of interest to most legislators (like pork barrel amendments benefiting only one legislator's constituents). It is probably fair to say that the legislators who pass these bills each vote for the sections they are interested in and are not consciously aware of (or in agreement with) every provision the bill contains. Requiring litigants who want to rely on an otherwise duly-enacted statutory provision to prove that at least a majority of legislators knew about that provision would open up a terrible can of worms.

At the same time, "no" seems deeply unsatisfactory. The difference between what Claire and Frank did seems minimal and can be made smaller if we say that instead of forging and replacing the Omnibus Act when it was in the National Archives, Frank made the swap while it was sitting in Claire's office. The difference then is one of timing only. Sometimes bright-line rules are necessary or proper, and a rule that textual changes made after the legislative moment are invalid (since they fall outside of the mandated

legislative process), while changes made prior to the legislative moment should be given effect (since legislators should be presumed to have read and agreed to any bills they vote for) is at least a nominally defensible position. However, it is a position that unduly privileges the formalities of the legislative process over its substance.

If textualism doesn't hold that statutory text is "magically" co-extensive with the enacted law, and instead treats the text as just the best evidence of which legislative proposals have made it through the legislative process, and we make the not-unreasonable assumption that the legislative process was designed to ensure that only proposals with sufficient support among the "legislative class" become law, then there must be some threshold where enough "non-best" evidence of contrary legislative intent (i.e. a lack of support amongst the legislative class) is sufficient to overrule the "best evidence" offered by the text. Textualism and legal positivism both assume that legislation is a conscious, intentional act (if this were not so, then the canons of interpretation, which depend on the assumption that legislators are using language in a commonly accepted fashion, would be hard to justify). If Frank was not a forger, but some sort of comic-book mesmerist able to hypnotize members of the legislature into voting for a bill he crafted while they were in trance state – no more conscious than while sleeping – should that statute be given legal effect just because it passed through all the formalities? Allowing either Frank's "hypno-bill" or Claire's Section 999 to be treated as law would be to say that legislation can be accomplished without any conscious will behind it. To be consistent with positivism and textualism, a judge ought to invalidate these statutory provisions, where there is evidence to show a total or near-total lack of legislative intention to enact a specific statute or provision.

But how is this any different from the case of a New Traffic Bill, or the real-world examples of New Hampshire's State Bill 66 and the federal venue statute examined in Professor Siegel's paper? In all cases, there is some – let us stipulate for the sake of argument *compelling* – evidence that the legislature did not intend to enact a specific provision. If we accept that that legislation is something that can only be accomplished consciously, then *none* of these accidental enactments should be given legal effect. However, I would suggest that there is a meaningful difference between evidence that legislators did not intend a provision to be interpreted a specific way, or for multiple provisions to interact to achieve a certain effect on the one hand, and evidence that legislators did not intend to enact a specific text *at all* on the other. While still requiring some degree of mind-reading (or at least an inquiry into the mental state of the legislature's members), the latter is much

less problematic. Unlike asking what legislators thought a law meant, asking whether legislators knew that a specific section of text was part of a bill they were voting for does not kick-off an open-ended inquiry, and only requires a “yes” or “no” answer. Either there’s evidence legislators were aware of the provision, or there isn’t.

In other words, there is a difference between poorly thought out legislation and *unconscious* legislation. Textualism does not accept poorly thought out legislation as a justification for courts departing from the otherwise unambiguous meaning of the enacted text. However, nothing in textualism requires (or necessarily supports) courts giving effect to unintentional legislation, and the same arguments that sustain textualism point against enforcing a legislature’s unconscious acts.

D. *Divergence Arising from Alterations of Belief*

So far, these examples have dealt with covert alterations to statutory text and seem to have little to do with fake news. However, if the core problem is the divergence of legislative intent and enacted text, then the same principles ought to apply regardless of whether that divergence was the result of covert manipulation of the text or manipulation of legislator’s minds.

Imagine that Claire’s job as Chief Clerk also required her to prepare a summary of each bill. This is not required by Freedonia’s Constitution, but it is provided for in the Rules of the legislature and the practice goes back to the earliest days of Freedonia. These summaries have two parts. The first is an executive summary that briefly explains the bill’s context and highlights the key changes proposed. The second part is a plain English, bullet point, list of every legal change (the introduction, deletion, or alteration of any legal rule) the bill proposes. As it is a non-partisan position, generations of Freedonian legislators have put their faith in the Chief Clerk and based their votes on the Chief Clerk’s summaries. Obviously, when it comes time to prepare the summary for the Budget Act, Claire completely omits Section 999. In my view, that only strengthens the argument for disregarding Section 999, since its enactment was the result of intentional deceit. But can we extend this principle any further?

Imagine one day a bill comes across Claire’s desk that she *desperately* wants to see become law. The only problem is that it contains a single provision that she knows will be hugely unpopular – so unpopular it will doom the bill from the beginning. So, she leaves it out of the summary. Obviously, the bill’s author is aware of that provision (as may be some number of allies), but thanks to the “fake news” about the bill spread by Claire, the vast majority of legislators remain ignorant. As in the Budget Act

example, they could discover the “hidden” provision if they bothered to actually read the text of the bill. Since they are busy legislators and rely on summaries provided by a third party, they do not discover the provision. But once Claire’s deception becomes known, should that specific provision be given legal effect by courts?

I personally do not see how this is significantly different from the prior hypothetical. In fact, the Budget Act case can easily be rephrased as an instance where “fake news” was the culprit, without materially changing the facts: if legislators read the bill, they would have discovered Section 999. However, they didn’t read the bill – or didn’t re-read the bill after it came out of Claire’s office – and instead must have relied on others to tell them what the bill contained. Those summaries were evidently inaccurate (or at least incomplete). Does it matter whether the inaccuracy was the result of malice (like the intentional omission in Claire’s summaries), or an accident (like an omission in the summary prepared by an overworked staffer who only skimmed the bill) if the end result is the same, and the majority of legislators are left with the false belief that the bill’s text does not contain a specific provision?

I think not. If you accept that sufficient evidence that legislators were unaware that they were voting for a specific section of a text justifies invalidating that section, then there is no principled reason for distinguishing between cases where a provision was illicitly inserted into a bill, and cases where legislators were convinced—through any other means—that a provision was not part of the bill, even though it actually was.

E. *Omissions*

So far, these examples have dealt with what I called “Inclusions,” cases where the divergence between text and intention is the result of legislators being unaware of some textual provision. What about the opposite problem of “omissions,” where legislators believe that they were voting for a provision which was actually *not* included in the enacted text?

Suppose that the Health Bill was dropped on Claire’s desk, and it included a provision that Claire found detestable. It could be a provision outlawing abortion, permitting (or forbidding) physician-assisted suicide, imposing mandatory vaccinations, or forbidding parents from vaccinating their children. Claire deleted it on her own volition and without telling anyone. Is that deleted provision still law? Or, there could be the Library Bill, which Claire supports, but knows is not popular enough to pass the legislature. To fix this, she adds an incredibly popular provision to the summary she prepares, but she does not actually add it to the text of the

Library Bill. Should that “ghost” provision be considered law? Stipulating that in both cases there is clear evidence that the legislators *wanted* these omitted provisions to become law and believed they voted on bills which included such provisions. Should the analysis be any different than in cases of Inclusion? Should a court be able to enforce a “ghost” provision for the same reason they could refuse to enforce Section 999?

I think the answer is a definite “no.” Invalidating a provision despite there being textual evidence that it made it through the legislative process is meaningfully different from enforcing a provision when there is no evidence that the text actually made it through the legislative process. This would still hold true even if the rationale in both cases would be overwhelming evidence that the legislators *meant* to either omit or include the provision in question. What I’ve argued so far is that inclusion in the enacted text should not guarantee a provision’s legal status, if there is clear evidence that the legislature’s members did not know the provision had been included in the text they voted for. In other words, I have argued that the text should not be considered coextensive with the enacted law.

I have *not* argued that legislative intent is coextensive with enacted law. That is not the justification offered for the judge’s decision to invalidate Section 999. Nullifying Insertions is justified not because of the overpowering importance of legislative intention, but because of evidence that the provision’s inclusion in the text was not an intentional legislative act, on the most basic level. What is relevant to the judge’s determination in those cases is the evidence of a lack of legislative intent. Nothing in this suggests that evidence of legislative intent should allow provisions to be inserted into a properly enacted statute.

There needs to be some boundary on what can be considered a “statute” and a dividing line between “legislative proposal” and “law.” In our system (and certainly in Freedonia) that line is drawn in reference to text. In ancient Scandinavia, the defining threshold between law and proposal was the Lawspeaker’s memory. There is a difference between saying that there are circumstances where a court should be able to say, “Even though this provision bears all the hallmarks of having become law, there is sufficient evidence that it was not actually enacted through a conscious legislative process, therefore it is invalid,” and arguing that a court should be allowed to give legal effect to a provision which *clearly* does not bear the hallmarks of a properly enacted statute, even if there is evidence that legislators intended to enact it.

The principle I have suggested is that evidence of legislative intent and evidence that a provision has passed through the formalities of the legislative

process (i.e. that the provision is included in the enacted text) are each necessary-but-insufficient basis for that provision to be considered law. Before a court should treat any provision as law, there must be sufficient evidence of both.³¹ In other words, any divergence between legislative intent and legislative text should be resolved by treating the provision as a nullity and preserving the status-quo ante. Allowing judges to insert “ghost” provisions into enacted statutes creates a second problem. When dealing with errant Inclusions, the judge only has to answer one, yes-or-no question: is there sufficient evidence that the legislature intended to enact the textual provision before me? Omission cases first require the court to decide if there is evidence the legislature intended to enact a provision that did not make it into the text, and, if the answer is “yes,” the court must additionally determine the exact content and wording of that provision.

In some cases, like the Health Bill example where Claire deleted a provision she disliked, that may not be very difficult. If there is a clear record of the language that was deleted and no persuasive arguments to the effect that the text would or could have been changed in some manner later in the legislative process, then its restoration by the court might be unproblematic. In such a case, with clear evidence, it might even make sense to think of the deletion as an extreme example of Scrivener’s Error. If something had just “gone wrong” in the machine that printed out the bill, and one or two lines didn’t get printed before they were voted on, and this could be proven satisfactorily, then all the judge would be doing by giving those sections legal effect is correcting a literal printing error. Still, to prevent the appearance of legislating from the bench, it might be safer to insist that the legislature pass a corrected version of the law.

What about the *harder* cases? What about cases where Claire does not delete anything from the text, but adds provisions to her summary (like with the Library Bill)? The description of the provisions in the summary might be quite specific (e.g. “this section makes it a crime to beat your dog”), but it does not give us the actual language of the section, which leaves many questions unanswered: does the law apply to dogs you don’t own? Is the offense a felony or a misdemeanor? What is the penalty? What are the elements of the crime? What counts as “beating?” Does it cover other forms of canine-focused violence, like intentionally hitting a dog with a car?

With no text to guide and restrain its analysis, the court could only answer these questions by trying to decide “what the legislature would have

31. As a practical matter, the inclusion of a provision in the text would seem to create a very strong, yet still rebuttable, presumption that the legislators intended it to become law.

said, if they had said it.” In reality, that means the court could answer those questions based on pretty much anything, or nothing. If we say it is okay for the judge to answer all those question and fill in all the blanks just because there is clear evidence that the legislature wanted to “make it a crime to beat your dog,” then we are endorsing an exceptionally liberal form of purposive interpretation that ultimately holds that a judge’s job in interpreting and applying the law is to do whatever he thinks best fits the legislature’s abstract wishes. The problems with such an approach are dealt with at length elsewhere.³² I am not aware of any mainstream philosophy of statutory interpretation that says judges should be free to enforce the free-floating wishes and desire of the legislature, absent a textual anchor.³³

F. Contradictions

If the rule I propose is that both Inclusions and Omissions should result in the putative provision having no legal effect, what should be done with Contradictions? What if instead of deleting or adding a provision, Claire altered one? What if Claire increased a \$1,000 fine to \$10,000, or halved a tax hike from ten percent to five?

With the right evidentiary record, these alterations could be undone as Scrivener’s Errors. But what answer is offered by the principles set out above? One approach would be to treat a Contradiction as a simultaneous Omission and Inclusion. Claire deletes one provision, and substitutes another, and the fact they are very similar does not change the analysis at all. The provision Claire deleted lacks a presence in the enacted text (and therefore is not law) and the provision she included in its place was not intended to be included by the legislature (and therefore is also not valid law). A second approach would say there is some overlap in these cases, thus, the judge should honor the text and intention. There is evidence the legislature intended to impose a \$1,000 fine, and the enacted text authorizes fines up to \$10,000, so there is no real divergence between text and intention when it comes to fines of up to \$1,000. Similarly, both statutory text and legislative intention agree on a five percent tax cut. In fact, describing “the law” as the overlap between text and intention is a good description of the principle

32. See generally SCALIA & GARNER, *supra* note 24, at 1-28.

33. Such an analysis would completely disregard the public. It is one thing to say that individuals are presumed to know criminal law. Such a position seems especially absurd, however, if a criminal defendant is expected to also know what criminal laws the legislature “meant” to create if there is no written record of those laws.

argued for in this paper. It is also somewhat similar to the phenomenon of legal bilingualism in Canada, under which every law is passed in both French and English. The version in each language is considered equally authoritative and only provisions found in *both* versions have legal effect.³⁴

Looking for overlap works when you are dealing with differences between numbers or other points on a spectrum. But what about alterations that create a genuine Contradiction? Imagine a statute originally said that the power to declare when the statute comes into force is vested in the Premier, however, Claire changed it so that the power is given to the Chief Justice. What should a court do? Following the first approach and holding that both the original version (giving the power to the Premier) and Claire's version (giving the power to the Chief Justice) are void would frustrate the entire statute. Clearly, some official needs to give the go-ahead for the new statute to take effect, but the second approach does not offer any better result, since there is no overlap between "Premier" and "Chief Justice" akin to the overlap between "\$1,000" and "\$10,000."

I favor a third approach which would say that in Contradiction cases, where there is no overlap between versions, the court should treat the text as ambiguous – as if the words giving rise to the Contradiction are unreadable or have no ordinary meaning. In this case, the court would read the section "This Act shall come into force on the date declared by the Chief Justice" as "This Act shall come into force on the date declared by the _____."

The court should then apply all the tools normally used to resolve textual ambiguity. For example, a court will generally avoid an interpretation that clearly frustrates the legislation entirely, so *someone* must have to the power to order the Act into force. Based on context (and common legislative practice) that person is supposed to be a public official. Unfortunately, context and custom only take the court so far, because in Freedomian history, the power to decide when a statute comes into effect is variously given to the

34. At least in principle. See Pierre-Andre Cote, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, 29 BROOK. J. INT'L L. 1067, 1069-70 (2004) ("Since both linguistic versions of bilingual legislation constitute authentic expressions of the law (in effect, it might be better to say that they form together but one bilingual and authoritative text of the law), someone cannot claim to correctly interpret a bilingual text if they ignore one half of the text being interpreted. Thus, bilingual legislation requires bilingual interpretation, that is, an interpretation that takes into account the complete text of the law, which includes both an English and a French version.") (first citing Roderick A. MacDonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 160-61 (1997); and then citing RUTH SULLIVAN, SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES (4th ed., 2002)), available at <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1319&context=bjil>.

Premier, the Chief Justice, the Speaker of the legislature, and on occasion the legislature's chief clerk.

Giving the power to any one of those public officials is a reasonable interpretation of the ambiguous text. Choosing between reasonable alternative interpretations of an ambiguous statutory provision is a core judicial function. It is not controversial that judges exercising this function can and should look for evidence of which reasonable alternative (if any) was intended by the legislature. Disagreements may arise as to how much weight should be given to legislative intent, but it is not controversial to say that it should be given *some* weight. Sometimes, evidence of legislative intent is found within the statute's "four corners" (e.g. a preamble explaining what the legislature was trying to do). But courts also accept evidence of intent from other sources: comments made during legislative debates; speeches; reports produced by legislative committees and their staffers; and comments made by and in the media.³⁵

In this case, would it be proper for the court to consider and rely upon Claire's false summary of the statute as evidence of legislative intent? On the one hand, reliance on the chief clerk's summaries is a well-established Freedomian convention and would seem like rich source information about what legislators thought they were voting for. On the other hand, to endorse the court's reliance on the summary would be to endorse a court's reliance on a description of a statute that is known to be inaccurate – "fake news" – in order to interpret an ambiguous statute. And that brings us back full circle to the question asked at the top of this paper: How, if at all, should courts account for "fake news" when interpreting statutes?

IV. A POTENTIAL ANSWER MASQUERADING AS A CONCLUSION

The problem of Contradictions gets the closest to what might be the real-world applications of these arguments. I am not ready to confine the rest of the paper to the realm of the purely theoretical, since it remains possible that some hacker or Deep State Agent might find a way to alter a bill's text right before it is voted on by Parliament or Congress, or that every legislative staffer will conspire to mislead their bosses about a bill's contents. However,

35. For example, the district court that initially issued the temporary restraining order against President Trump's Executive Order barring immigrants from a list of Muslim-majority countries, relied in part on the President's repeated promises during his campaign to enact a "Muslim Ban." See *Washington v. Trump*, 847 F.3d 1151, 1157-58 (9th Cir. 2017) (upholding the district courts temporary restraining order on President Trump's Executive Order barring immigrants from a list of Muslim-majority countries, but reserving consideration on the State's establishment and equal protection clause claims until the merits had been fully briefed).

these scenarios seem unlikely. It is far more probable that there will be – and already may be – cases where a court, needing to resolve statutory ambiguity, chooses to use legislative intent as a factor in its analysis and confronts the fact that the legislators were exposed to fake news about the bill.

I believe the forgoing hypotheticals and arguments make a convincing case that judges can and should look to even *undeniably* fake news for evidence of legislative intent, when there is evidence that the fake news influenced a legislator's belief about what a bill contained or would accomplish, so as to create a divergence between legislative intent, and the enacted text.

How much weight any instance of fake news should be given would be a question for the court to answer (the case for all evidence), but some guiding principles are suggested. For instance, it seems sound to say that the closer the fake news is to the legislative "action," the more weight it should be given. A summary like Claire's would be the kind of "fake news" that could be given a lot of weight, while the rants of a clearly demented protestor outside the legislative building should be given very little or no weight, even if heard by every legislator. As with determining how much weight to give any other piece of extra-statutory evidence of legislative intent, the guiding principle should be whether it is credible evidence of what legislators believed about the bill at the time they voted. All else being equal, a committee report that contains "fake news" about a bill should be given the same weight as a factually correct committee report.

That means the falsity of a bill's description or summary is not an important factor in considering whether it is good evidence of legislative intent. An inquiry into what legislators believed is a factual inquiry. Thus, the threshold for evidence to be included in that inquiry should be whether it is material and probative: is it logically connected to the question asked and does it make one or more answers more probable? The objective truth or accuracy of propaganda about a bill is not relevant. Even undeniable falsity is no reason for a judge to exclude it from the analysis. What matters is whether the propaganda was *effective*.

The truth, however uncomfortable, is that propaganda and fake news can influence legislators, like the individual voters who elect them, and this influence may be determinative where legislators do not bother to actually read bills. But asking judges to try and retroactively undo the impact of fake news on the legislative process by choosing to ignore the influence that fake news had on how legislators thought about the bills they voted on, simply because we are morally dismayed by fake news and don't want it corrupting the legislative process, would itself do damage to the integrity of that process.

So how should courts allow for the influence of “fake news” on the legislative process? In the exact same way that they allow for the influence of “real news.” Influence is influence. If a court thinks that an op-ed or speech by a bill’s sponsor that contains a description of the bill is good evidence of legislative intent, then what should matter is evidence of that op-ed or speech’s influence, not the accuracy of its description of the bill’s text.

And that leads to a final, curious, thought: At the end of the day, once the court is finished interpreting the Act, a description of it once dismissed as “fake news,” may end up being *true*.³⁶

36. And so a fine might be revealed to have been a tax all along.

FAKE NEWS FROM A LEGAL PERSPECTIVE: THE UNITED STATES AND SOUTH KOREA COMPARED

Ahran Park & Kyu Ho Youm*

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I. INTRODUCTION

“Fake news” has emerged as a pressing concern since the 2016 U.S. presidential election. As media columnist Jim Rutenberg of *The New York Times* noted in November of 2016, “[t]he internet-borne forces that are eating away at print advertising are enabling a host of faux-journalistic players to pollute the democracy with dangerously fake news items.”¹ Similarly, *The Washington Post* media columnist Margaret Sullivan, a former *New York*

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1. Jim Rutenberg, *Media’s Next Challenge: Overcoming the Threat of Fake News*, N.Y. TIMES, Nov. 6, 2016, at B1, https://www.nytimes.com/2016/11/07/business/media/medias-next-challenge-overcoming-the-threat-of-fake-news.html?_r=0.

Times public editor, wrote one month later that “the era of fake news causing real trouble” has arrived in the United States.²

Publishing fake news has been around as a legal issue for many years.³ As early as the late 18th century, fake news was already addressed by the United States Congress. When Congress passed the Alien and Sedition Act in 1798, one of its objectives was to punish “malicious” falsehoods about the government as a crime.⁴

Fake news and its counterpart – “real news” – is not limited to the United States. The impact of fake news is global. Freedom House reports that fake news was spread in 30 of the 65 countries examined between June 2016 and May 2017.⁵ South Korea is no exception in confronting fake news as a sociopolitical and legal issue. Koreans dealt with fake news during a presidential impeachment in early 2017⁶ and a snap presidential election in May 2017.⁷ Fake news has been often abused to calumniate political opponents in Korea.

In the United States, where freedom of speech and the press is the rule, not the exception, however, “[t]he real question is not whether fake news is

2. Margaret Sullivan, *Sick of the News? This is No Time to Tune Out*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/lifestyle/style/sick-of-the-news-this-is-no-time-to-tune-out/2016/12/08/97ff1e70-bd61-11e6-91ee-1adddf36cbe_story.html?utm_term=.44e3a68d4882.

3. See Steven Seidenberg, *Fake News Has Long Held a Role in American History*, A.B.A.J. (July, 2017), http://www.abajournal.com/magazine/article/history_fake_news/ (noting American fake journalism of the 19th century, which was for entertainment, not objective information).

4. Alien and Sedition Act of 1798, ch. 75, 1 Stat. 596 (criminalizing writing or publishing “any false, scandalous and malicious writing or writings against the government of the United States,” including Congress or the President “with intent to defame” the government; or to bring them “into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States”), *cited with disapproval in* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); see Eugene Volokh, *Fake News and the Law, From 1798 to Now*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now/?utm_term=.26a0422650ef.

5. FREEDOM HOUSE, FREEDOM ON THE NET 2017, at 1 (2017), https://freedomhouse.org/sites/default/files/FOTN_2017_Full_Report.pdf; Keith Wagstaff, *The Even Uglier Truth About ‘Fake News,’* MASHABLE (Nov. 14, 2017), <https://mashable.com/2017/11/14/fake-news-freedom-house-report/#MnlgPw6TSZqO>.

6. See Seung Lee, *How South Korea’s Fake News Hijacked a Democratic Crisis*, GIZMODO (Mar. 10, 2017, 10:32 AM), <https://gizmodo.com/how-south-korea-s-fake-news-hijacked-a-democratic-crisi-1793146533>.

7. Choe Sang-Hun, *South Korea Elects Moon Jae-in, Who Backs Talks With North, as President*, N.Y. TIMES, May 9, 2017, at A1, <https://www.nytimes.com/2017/05/09/world/asia/south-korea-election-president-moon-jae-in.html>.

protected, but under what circumstances would fake news *not* be protected.”⁸ But in other countries, which are less speech-friendly, disseminating fake news is rarely not discussed as a part of free speech. In Ireland, for example, a new law proposed would criminalize spreading fake news on social media.⁹ In Germany, a social media law came into force in October of 2017 that requires social media sites to remove fake news promptly.¹⁰ The German law gives social media networks twenty-four hours to take actions on fake news after they have been alerted.¹¹

From a comparative perspective, South Korea and the United States deserve careful attention, given that American law has exerted a considerable impact on Korea’s democratic process as a rule-of-law-nation over the years.¹² Fake news and freedom of expression is a timely topic for comparatists, since it illustrates how society approaches evolving free speech issues like fake news. This Article first examines the definitional framework of fake news in the United States and Korea. Second, it analyzes where fake news is placed as a legal issue in the United States and Korea. And finally, the contrast of the United States with Korea is analyzed by looking at how fake news is framed as a new or not so new issue in free speech jurisprudence.

II. “FAKE NEWS” AS A DEFINITIONAL QUESTION

What is fake news? This is quite a challenging question to legal and non-legal scholars because there is no universally agreed-upon definition. It is often understood as fabricated news stories. But its definition is less than useful, since the term is being loosely bandied about.

8. Daniel Faltesek, *Should Publishing Fake News Be a Crime?*, OZY (Aug. 9, 2017), <https://www.ozzy.com/opinion/should-publishing-fake-news-be-a-crime/80180>.

9. Online Advertising and Social Media (Transparency) Bill (Act. No. 150/2017) (Ir.); Max Jaeger, *Spreading Fake News on Social Media Could Become a Crime in This Country*, N.Y. POST (Dec. 5, 2017, 10:03 AM), <https://nypost.com/2017/12/05/spreading-fake-news-on-social-media-could-become-a-crime-in-this-country/>; *New Laws Propose Five Years in Prison for Spreading Fake News*, IRISH NEWS (Dec. 5, 2017, 1:00 PM), <http://www.irishnews.com/news/2017/12/05/news/new-laws-propose-five-years-in-prison-for-spreading-fake-news-1202749/>.

10. *Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act]*, § 3, ¶ 2 (Ger.).

11. *Id.* § 3, ¶ 2; *Germany Starts Enforcing Hate Speech Law*, BBC NEWS (Jan. 1, 2018), <http://www.bbc.com/news/technology-42510868>.

12. See Kyu Ho Youm, *Free Speech Jurisprudence in South Korea: Legal Transplants from the United States*, in *THE GLOBAL IMPLICATIONS OF KOREAN LAW*, 135, 137-55 (2014).

A. *The United States*

Narrowly defined, fake news refers to “a made-up story with an intention to deceive, often geared toward getting clicks.”¹³ *The Washington Post’s* Margaret Sullivan focuses on fake news within the context of “deliberately constructed lies” designed to “mislead the public” in the form of news.¹⁴

In American law, a definition of fake news cannot be overly encompassing because that would overreach the definition into speech that is protected by the First Amendment. In U.S. law, false information is protected not because falsity is valuable enough but because truthful information can be suppressed. Hence, the First Amendment allows “breathing space.” This explains, in part, why fake news should be narrowly defined.

According to journalism researchers at the University of Florida, fake news should be limited to “articles that suggest, by both their appearance and content, the conveyance of real news, but also knowingly include at least one material factual assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege.”¹⁵ This proposed definition of fake news reflects how fake news is countered in the United States with the aim of safeguarding Americans’ settled free speech values. That is, the First Amendment principles of American constitutional democracy are adaptable to the fake news challenge inherent in the Internet-based media world.¹⁶

B. *South Korea*

Defining fake news is a work in progress in Korea. Academic and non-academic commentators and lawmakers in Korea have struggled with the definitional question about fake news this past year. In February 2017, a

13. Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES, Dec. 6, 2016, at A1, <https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html>.

14. Margaret Sullivan, *It’s Time to Retire the Tainted Term “Fake News,”* WASH. POST (Jan. 8, 2017), https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a-76f69a399dd5_story.html?utm_term=.b9c1877e9c00.

15. Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 UNIV. CIN. L. REV. 99, 103 (2018) (citations omitted); David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 6 (2017) (defining “fake news” as “the online publication of intentionally or knowingly false statements of fact”).

16. Michael Chertoff, *Fake News and the First Amendment*, HARV. L. REV. BLOG (Nov. 10, 2017), <https://blog.harvardlawreview.org/156-2/>.

Korean communication professor stressed a need to distinguish fake news from parodies, rumors, satire and other protected expressions online.¹⁷ He considered fake news “deceptive information for commercial or political purpose.”¹⁸ Meanwhile, media law scholar Ahran Park at the Korea Press Foundation has limited fake news to “information in a news format published with a knowledge of its falsity, regardless of whether its author is a traditional journalist.”¹⁹ Park reasoned that the definition of fake news cannot hinge on the status of its publisher, for it is difficult to determine who should or should not be a qualified journalist in the digital age.²⁰

At a fake news forum organized by the Korea Journalist Association in Seoul, Professor Jaejin Lee, a leading communication law scholar in Korea, offered his own definition of fake news: “false or deceptive information in a news format, including an advertorial.”²¹ To other fake news researchers, fake news is “1) deceptive information disseminated for commercial or political purpose; 2) fraudulent information packaged in a news format to deceive others; and 3) information disguised as being factually verified.”²² Likewise, law professor Chang-guen Hwang considers fake news as “false information formatted as news designed to mislead news consumers.”²³

Introducing a bill on fake news in May 2017, seventeen Korean lawmakers stated: “We define fake news as the intentionally fraudulent act of deceiving others via the Internet for commercial or political purposes with information that is packaged as factually verifiable news, although no journalistic function of informational and factual checking was involved.”²⁴

To understand the fake news issues in Korea, the Korea Press Foundation conducted a survey in March 2017 and collected 1,000-plus

17. Yongsuk Hwang, *Is Fake News a Satire or a Deceit?* (Korean) (paper presented at the conference of the Korean Society for Journalism & Communication Studies & Korea Press Foundation, Feb. 14, 2017) (on file with authors).

18. Yongsuk Hwang & Osung Kwon, *A Study on the Conceptualization and Regulation Measures on Fake News: Focused on Self-Regulation of Internet Service Providers*, 16 PRESS & L. 53-101 (2017).

19. Ahran Park, *Fake News: Legal Issues and Regulations* (Korean) (paper presented at the conference of the Korean Society for Journalism & Communication Studies & Korea Press Foundation, Feb. 14, 2017) (on file with authors).

20. *Id.*

21. Jaejin Lee, *Fake News and Journalism in the Age of Post-Truth* (Korean) (paper presented at the forum of the Korea Journalist Association, Feb. 24, 2017) (on file with authors).

22. Hwang & Kwon, *supra* note 18.

23. Chang-guen Hwang, *Legal Solution to Fake News*, PRESS ARBITRATION Q. (Korean) 26-37 (2017).

24. Bill in Partial Amendment of the Act on Promotion of Information and Communications Network Utilization and Information, etc., Bill No. 7095, May 30, 2017, presented by National Assemblyman Ho-young Ahn on behalf of seventeen National Assemblymen.

responses.²⁵ In the survey, fake news was presented in a traditional news format and in a social messenger format to two groups: Group A viewed the fake news in a traditional news format and Group B in a social messenger format. Nearly 24% of Group A stated that they trusted the fake content, while more than 11% of Group B indicated their trust in fake news. So, more people tend to trust fake news in a traditional news format with the news title, byline, and publication date. Fake news in news format has more impact on media users than private online rumors via SNS or social messenger, so far as the news format gives more trust to people.

On the concept of fake news, 80% of the respondents agreed that fake news means “fake contents in a news format,” while slightly more than 40% of the respondents agreed that fake news includes “exaggerated or distorted news by the traditional news media.”

Furthermore, three quarters of the respondents noted that they received fake news through the Internet. Almost 40% of the respondents said they accessed fake news via social messengers such as Kakao Talk. By contrast, fake news came to more than 27% of the respondents via social platforms such as Facebook and Twitter.

III. LAWS AND REGULATIONS OF FAKE NEWS

At the moment, there is no such thing as direct or special law governing fake news in the United States or in Korea. Fake news is too new a legal issue to evolve into a full-fledged subject that demands legislative or judicial attention. American legal commentators noted in April 2017: “[M]ore lawmakers, regulators, courts, and private citizens will explore legal and regulatory solutions that balance the societal importance of truth-seeking with the constitutional right to speak freely (and, at times, to lie).”²⁶

A. *The United States*

Under the First Amendment, the protection or non-protection of fake news as speech can be analyzed doctrinally (e.g., strict scrutiny and under-inclusiveness—fake news not censored) and theoretically (e.g., marketplace of ideas and democratic self-governance—fake news censored).²⁷ But from

25. Sewook Oh & Ahnan Park, *Survey of Fake News*, 3(3) MEDIA ISSUE (Mar. 29, 2017), <http://www.kpf.or.kr/site/kpf/research/selectMediaPdsView.do?seq=574068> (S. Kor.).

26. Klein & Wueller, *supra* note 15, at 12.

27. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press[.]”). See generally Calvert et al., *supra* note 15.

the structural-rights perspective,²⁸ the dissonance between the fake news doctrinal and theoretical framework is more apparent than real. As the authors of a recent study on fake news under the First Amendment observed:

Simply put, permitting the government to tell society what is and is not true is treacherous, for it vests officials temporarily in charge of the country with the power to twist narratives to serve their own purposes. That is disturbingly akin to the function of the Ministry of Truth in George Orwell's *Nineteen Eighty-Four*. Its 'purpose was to dictate and protect the government's version of reality.'²⁹

In a similar vein, Professor Richard Hasen of the University of California-Irvine has argued that the First Amendment doctrine should not be "fundamentally rework[ed]" because it prevents government from censoring speech "in an ostensible effort to battle 'fake news.'"³⁰ He added: "We do not want the cure to be worse than the disease."³¹

Outlawing fake news outright is undoubtedly questionable in the United States because it would create a chilling effect on real news. This does not necessarily mean that no legal system is in place against fake news in the United States. Defamation litigation is a key legal recourse against fake news. Indeed, "no legal claim is invoked more frequently against fake news publishers."³²

False, harmful publications concerning public officials and public figures are actionable only if the publications were published with "actual malice" – that is, with knowledge of falsity or with reckless disregard for the

28. Structural rights are "constitutional provisions that structure the government's interaction with its citizens and limit the power of government in order to prevent governmental overreaching and ensure over the long term the preservation of popular consent to the exercise of political power." Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 4 (2009) (cited in Calvert et al., *supra* note 15).

29. Calvert et al., *supra* note 15, at 137 (quoting Flemming Rose & Jacob Mchangama, *Shutting Down Fake News Could Move Us Closer to a Modern-Day '1984'*, WASH. POST, Feb. 10, 2017, at A17) (citing Steven G. Gey, *The Procedural Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U.L. REV. 1, 22 (2008); GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Alfred A. Knopf ed., 1992) (1949)).

30. Richard L. Hasen, *Cheap Speech and What It has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 202 (2017).

31. *Id.*

32. Klein & Wueller, *supra* note 15, at 6; see also *What Legal Recourse do Victims of Fake News Stories Have?*, NPR (Dec. 7, 2016, 7:04 PM), <https://www.npr.org/2016/12/07/504723649/what-legal-recourse-do-victims-of-fake-news-stories-have> (quoting media law professor Derigan Silver at the University of Denver: "Fake news sites are clearly a situation where they're engaging in a defamatory statement, a false statement about another that damages that person's reputation. In that situation, that is certainly actionable.").

truth.³³ When a private individual sues a fake news publisher, comparatively, the plaintiff is only required to establish negligence.³⁴ If fake news is at issue in a defamation claim, it is limited to intentional or knowingly false statement. Under the so-called republication rule, “one who republishes a defamatory statement ‘adopts’ it as his own, and is liable in equal measure to the original defamer.”³⁵ So, fake news liability may extend to anyone who repeats the fake news.

In February of 2017, the *Daily Sentinel*, a newspaper in Grand Junction, Colorado, threatened to sue Ray Scott, a Colorado state lawmaker, for defamation over Scott’s Twitter claim that one of the newspaper’s columns on an access to information bill was “a fake news story.”³⁶ The newspaper decided not to pursue the lawsuit because Scott would have had the Colorado taxpayers pay for his defense and he would have used legislative immunity to shield him against liability.³⁷ One of the reasons for the Colorado newspaper’s initial plan to file a legal action over Scott’s “fake news” allegation, however, was that the paper wanted a *judicial* definition of fake news.³⁸

Criminal libel is more or less passé in American law. But it is still on the books in more than a dozen states, and the U.S. Supreme Court has not

33. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

34. *Gertz v. Robert Welch, Inc.*, 418 U.S. 325, 350 (1974); *Gertz*, 418 U.S. at 353-54 (Burger, J., dissenting).

35. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988).

36. Bente Birkeland, *When a Politician Says “Fake News” and a Newspaper Threatens to Sue Back*, NPR (Feb. 17, 2017, 12:36 PM), <https://www.npr.org/2017/02/17/515760101/when-a-politician-says-fake-news-and-a-newspaper-threatens-to-sue-back>. Media law scholar Eric Robinson at the University of South Carolina speculated about “commercial disparagement” as another possible cause of action for the Colorado newspaper. Eric P. Robinson, *Fake News Is a Real Dilemma for the Law*, BLOG L. ONLINE (Feb. 15, 2017), <https://bloglawonline.blogspot.com/2017/02/fake-news-is-real-dilemma-for-law.html>. “Trade libel” or “injurious falsehood,” which subsumes “commercial disparagement,” comprises “the knowing publication of false matter derogatory to the plaintiff’s business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment.” ROBERT D. SACK, *SACK ON DEFAMATION* § 13:1.3 (5th ed. 2017) (first citing *Waste Distillation Tech., Inc. v. Blasland & Bouck Eng’rs*, 523 N.Y.S.2d 875, 877 (N.Y. 1988); then citing *State ex rel. BP Prods. N. Am., Inc. v. Ross*, 163 S.W.3d 922, 928 (Mo. 2005); and then citing *Rehak Creative Servs. Inc. v. Witt*, 404 S.W.3d 716, 728 (Tex. App. 2013)).

37. Paul Fletcher, *Colorado Newspaper Publisher Backs Off Defamation Lawsuit for “Fake News” Tweet*, FORBES (Apr. 29, 2017, 3:39 PM), <https://www.forbes.com/sites/paulfletcher/2017/04/29/colorado-newspaper-publisher-backs-off-defamation-lawsuit-for-fake-news-tweet/#79aed4c358ea>.

38. *Id.*

repudiated criminal libel as such.³⁹ Criminal libel law, however, is rarely used against the mainstream media, while the alternative media and the Internet publishers are likely to be targeted for criminal libel sanctions. In this connection, lesser fake news publishers can be investigated for criminal libel.⁴⁰

Fake news can result in a false light lawsuit in states where it is recognized as a tort when “one gives publicity to a matter concerning another that places the subject in a false light that is highly offensive to a reasonable person.”⁴¹ This should come as no surprise, given that a false light claim is often brought together with a defamation claim – they are related yet distinguishable from each other.⁴²

False light through fake news as a legal claim can be no longer ignored as blithely as it was in the pre-Internet era. In her comprehensive study of privacy as a newly enhanced right in American law, Professor Amy Gajda at Tulane Law School asserted: “[P]ublishing is different today [and] courts must bolster privacy and other related causes of action in response.”⁴³

Intentional infliction of emotional distress (IIED) is similar to defamation as a “regularly” invoked tort against fake news publishers under state law.⁴⁴ It’s called an “end-run” approach for those who feel injured by the media in avoiding the wide legal berth allowed to professional communicators.⁴⁵ IIED arises when one’s publication of fake news results in “intentionally or recklessly causing another person severe emotional distress through one’s extreme or outrageous acts.”⁴⁶

The leading First Amendment case on IIED was precipitated by a dispute between Larry Flynt, publisher of *Hustler Magazine*, and the Reverend Jerry

39. Kyu Ho Youm, *Defamation*, in COMMUNICATION AND THE LAW 83, 86-87 (W. Wat Hopkins ed., 2018) (citing Eric P. Robinson, *Another One Bites the Dust: Minnesota’s Criminal Libel Law Struck Down*, BLOG L. ONLINE (May 28, 2015), <https://bloglawonline.blogspot.com/2015/05/another-one-bites-dust-minnesotas.html>).

40. Klein & Wueller, *supra* note 15, at 9.

41. Lincoln D. Bandlow & Rom Bar-Nissim, *United States*, in INTERNATIONAL LIBEL AND PRIVACY HANDBOOK § 6.01, § 6.01[15][d] (Charles J. Glasser, Jr. ed., 2016) (citing RESTATEMENT (SECOND) OF TORTS § 652E (1977)).

42. RODNEY A. SMOLLA, LAW OF DEFAMATION § 10:10 (2d ed. 2017).

43. AMY GAJDA, THE FIRST AMENDMENT BUBBLE 53 (2015) (noting that many American courts have followed the Ohio Supreme Court’s reasoning in *Welling v. Weinfeld*, 866 N.E.2d 1051, 1058-59 (Ohio 2007), explicitly recognizing false light as a legal possibility for the innocent to protect against Internet-facilitated harm).

44. Klein & Wueller, *supra* note 15, at 7.

45. Sigman Splichal & Samuel A. Terilli, Jr., *Privacy Rights in an Open and Changing Society*, in COMMUNICATION AND THE LAW 287, 305 (W. Wat Hopkins ed., 2018).

46. *Intentional Infliction of Emotional Distress*, Black’s Law Dictionary 932 (10th ed. 2014).

Falwell, a prominent TV evangelist in the 1980s. In one of the “first-time” interviews that the magazine ran as a take-off of Campari Liqueur’s advertising, *Hustler Magazine* portrayed Falwell as having his first-time sexual experience with his mother in an outhouse. Falwell won \$200,000 on the IIED claim, and the U.S. Fourth Circuit Court of Appeals upheld the judgment.⁴⁷ The U.S. Supreme Court reversed, however. The Supreme Court instead held that allowing public figures like Falwell to collect damages without proving actual malice would unconstitutionally chill social and political debates. Also, the outrageousness requirement was subjective and “would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”⁴⁸

Few IIED claims are successful against *satirical* fake news publishers, although “particularly extreme fake news publications remain susceptible to IIED claims, especially when involving private individuals.”⁴⁹

Fake news publishers can be subject to administrative rules and regulations, including the standards of the Federal Trade Commission (FTC) for unfair and deceptive trade practice. The FTC finds an act or practice to be deceptive where “[1] a representation, omission, or practice misleads or is likely to mislead the consumer; [2] a consumer’s interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and [3] the misleading representation, omission, or practice is material.”⁵⁰

Broadcasting fake news is prohibited by the Federal Communications Commission (FCC). The FCC rule on “broadcast hoaxes” provides:

No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if:

- (a) The licensee knows this information is false;
- (b) It is foreseeable that broadcast of the information will cause substantial public harm, and

47. *Falwell v. Flynt*, 797 F.2d 1270, 1272 (4th Cir. 1986), *rev’d*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

48. *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

49. Klein & Wueller, *supra* note 15, at 8.

50. U.S. BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER COMPLIANCE HANDBOOK, FEDERAL TRADE COMMISSION ACT SECTION 5: UNFAIR OR DECEPTIVE ACTS OR PRACTICES § IV, at 1 (2017), <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>; *see* Federal Trade Commission Act of 1914, 15 U.S.C. § 45(4)(A) (2012) (“For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that (i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States.”).

(c) Broadcast of the information does in fact directly cause substantial public harm.

Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.⁵¹

The FCC rule has been applied “sparingly” against broadcasters.⁵²

B. South Korea

Defamatory fake news can be punished under Korean law. Unlike in the United States, reputation is constitutionally protected in Korea against the abuse of free speech,⁵³ and defamation is both a crime and a civil wrong.⁵⁴ The Criminal Act punishes defamation, regardless of whether it is true or false:

(1) A person who defames another by publicly alleging facts shall be punished by imprisonment or imprisonment without prison labor for not more than two years or by a fine not exceeding five million won.

(2) A person who defames another by publicly alleging false facts shall be punished by imprisonment for not more than five years, suspension of qualifications for not more than ten years, or a fine not exceeding ten million won.⁵⁵

When fake news publishers distribute *false* and defamatory stories, the originator of fake news shall be punished under Article 307(2) of the Criminal Act.⁵⁶ If fake news is published by means of newspaper, magazine, radio, or other publication “with intent to defame another,” Article 309 shall provide for an aggravated punishment of defamatory fake news. According

51. FCC Broadcast Radio Services, 47 C.F.R. § 73.1217 (2017).

52. Volokh, *supra* note 4.

53. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(4) (S. Kor.). Article 21(4) of the Constitution states: “Neither speech nor the press may violate the honor or rights of other persons Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.”

54. *See generally* Kyu Ho Youm et al., *Korea*, in *MEDIA, ADVERTISING, & ENTERTAINMENT LAW THROUGHOUT THE WORLD* § 21:1, § 21:11 (2018 ed. 2018) (first citing Hyeongbeop [Criminal Act], Act No. 293, Sept. 18, 1953, *amended by* Act No. 14415, Dec. 20, 2016, art. 307-10, 312 (S. Kor.); then citing Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act No. 14965, Oct. 31, 2017, art. 751, 765 (S. Kor.); and then citing Gwahakgisulgibonbeop [Framework Act on Science and Technology], Act No. 3848, May 12, 1986, *amended by* Act No. 14839, July 26, 2017, art. 70 (S. Kor.)).

55. Criminal Act, Act No. 14415, art. 307 (S. Kor.).

56. *Id.* art. 309(2).

to a recent study of Korean criminal and insult law, criminal defamation law is “still being vigorously enforced” in Korea.⁵⁷

Defamation is a tort under the Civil Act. If fake news defames an individual’s reputation, the reputational victim may use: (1) Article 751, which authorizes monetary compensation for libelous injury;⁵⁸ or (2) Article 764, which allows the court to order the defendant to take “measures appropriate” to restore the plaintiff’s reputation, either in lieu of or together with compensation for damages.⁵⁹

Fake news attracted public attention during the national elections in Korea, when it swirled around major presidential candidates. The Public Official Election Act⁶⁰ can cover fake news relating to political candidates. Article 250 states that any person who publishes false information about a candidate and his/her family will be punished by imprisonment with prison labor or by fine.⁶¹ So, if fake news is disseminated about political candidates and their family members, its publisher will be subject to penalty under the Public Official Election Act.

In November 2017, a person who posted false information to Facebook and other social media sites was indicted under the Public Official Election Act. The Cheongju District Court ruled that the defendant violated the election law by posting false and defamatory statements to badmouth the presidential candidate Moon Jae-in.⁶² Although it made no specific mention of the postings at issue as fake news, the court stated that the defendant made no effort to verify the online rumors about Moon Jae-in before posting, although other Facebook users pointed out the falsity of his online postings. The defendant was ordered to pay 5 million *Won* (U.S. \$5,000) in fines.

When fake news harms public interest, such as national security or social safety, by spreading false rumors, there does not exist a special law on point. In the past, the Framework Act on Telecommunications could be applicable. Article 47(1) provides: “Any person who exercises false communication via electronic device for the purpose of ruining public interest will be punished by prison term up to 5 years or by penalty by 50 million *Won* (U.S. \$50,000).”

57. Criminal Act, Act No. 14415, art. 309(1) (S. Kor.); Kyung Sin Park & Jong-Sung You, *Criminal Prosecutions for Defamation and Insult in South Korea with a Leflarian Study in Election Contexts*, 12 U. PA. ASIAN L. REV. 463, 465 (2017).

58. Civil Act, Act No. 14965, art. 751 (S. Kor.).

59. *Id.* art. 764.

60. Gongjiksongeobeop [Public Official Election Act], Act No. 4739, Mar. 16, 1994, amended by Act No. 14839, July 26, 2017 (S. Kor.).

61. *Id.* art. 250.

62. Cheongju District Court [Dist. Ct.], 2017Ga-Hhap22, Nov. 9, 2017 (S. Kor.).

But the article was held unconstitutional due to the so-called Minerva case of the late 2000s.

A blogger with the pseudonym “Minerva” became popular after he posted a series of comments to the Korean major web-portal *Daum Agora* forum that accurately forecast sharp falls in Korea’s currency, the national stock market, and the demise of a U.S. investment bank, Lehman Brothers.⁶³ In January 2009, Minerva was arrested for violation of the Framework Act on Telecommunications,⁶⁴ which punishes “any person who has publicly made a false communication” via electronic device for the purpose of ruining public interest.⁶⁵ The Korean finance minister claimed that Minerva had spread malicious rumors about the country’s finance policy. Prosecutors argued that Minerva had hurt the Korean currency by publishing false information online. Yet, the Seoul Central District Court released Minerva in April 2009 on the grounds that he did not intend to injure the public interest.⁶⁶

In December 2010, the Korean Constitutional Court struck down Article 47(1) of the Framework Act on Telecommunications, which applied to the Minerva case.⁶⁷ The Constitutional Court held that the telecommunications law’s original purpose was to regulate cable telephone or telegram communication of using false or fake name. Furthermore, because “false information” and “public interest” were too vague, the Constitutional Court ruled that Article 47(1) of the telecommunication law violated freedom of expression and constitutional principle of clarity. As a consequence, there is no specific statute governing fake news that harms the public interest.

III. “REINVENTING THE WHEEL” IN THE FAKE NEWS WORLD?

When it comes to fake news and similar issues amidst the breathtaking communication revolutions driven by the Internet, some countries err on the

63. For more information about the Minerva story, see Mattathias Schwartz, *The Troubles of Korea’s Influential Economic Pundit*, WIRED (Oct. 19, 2009, 3:00 PM), https://www.wired.com/2009/10/mf_minerva/.

64. *Id.*; see Jeongitongsingibonbeop [Framework Act on Telecommunications], Act No. 3685, Dec. 30, 1983, *amended by* Act No. 14839, July 26, 2017 (S. Kor.).

65. Framework Act on Telecommunications, Act No. 14839, art. 47(2) (“A person who has publicly made a false communication over the telecommunications facilities and equipment for the purpose of benefiting himself or the third party or inflicting damages on the third party shall be punished by imprisonment for not more than three years or by a fine not exceeding thirty million won.”).

66. Seoul Central District Court [Dist. Ct.], 2009kodan304, Apr. 20, 2009 (S. Kor.).

67. Constitutional Court [Const. Ct.], 2009Hun-Ba88 (consol.), Dec. 28, 2010 (22-2(B) KCCR, 249) (S. Kor.).

side of experimenting with more freedom and less regulations. Others react quickly by adopting sweeping actions in the name of safeguarding individual and societal interests. Needless to say, each system ought to take into account the balancing of conflicting interests involved. But the U.S. approach to free speech versus fake news stands in sharp contrast with that of South Korea. What informs the diverging methods of the United States and Korea in tackling fake news?

A. *The United States*

No matter how its intent or purpose is analyzed, fake news is not one-dimensional. Whether it is satire, hoax, propaganda, or trolling,⁶⁸ it defies quick and simple solutions. So overreaching government-dictated anti-fake news solutions are, more often than not, cautioned against in the United States, since the so-called legislative or judicial or administrative cure may aggravate the alleged disease.⁶⁹ In their detailed analysis of fake news problems and their solutions, researchers at the University of Arizona College of Law took issue with the “monopolistic and mandatory” state solutions because they leave no room “to experiment with different mechanisms to solve a problem.”⁷⁰

The “privileged” First Amendment on freedom of expression⁷¹ is a formidable hurdle against institutionalizing new mechanisms targeting fake news, although few doubt that fake news creates little positive sociopolitical and cultural benefit for American society. In U.S. law, false statements are not necessarily without value and so unprotected.⁷²

Equally significant is that the U.S. Supreme Court is discerningly reluctant to rush in drawing the boundaries on freedom of cyberspeech. In

68. Mark Verstraete et al., *Identifying and Countering Fake News 5-7* (Ariz. Legal Studies, Discussion Paper No. 17-15, 2017) (“Trolling is presenting news or information that has biased or fake content, is motivated by an attempt to get personal humor value [and] is intended by its author to deceive the reader.”) (citations omitted).

69. FAKING NEWS, PEN AMERICA: FREEDOM TO WRITE 16 (2017), <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf>.

70. Verstraete et al., *supra* note 68, at 14 (citing Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 215-16 (1996)).

71. *See generally* STEVEN H. SHIFFRIN, *WHAT’S WRONG WITH THE FIRST AMENDMENT?* (2016).

72. *United States v. Alvarez*, 132 S. Ct. 2537, 2539, 2544 (2012) (Justice Kennedy rejecting the government’s argument that “false statements have no value and hence no First Amendment protection”).

its first ever ruling on the First Amendment and access to social media, the Court held in 2017:

While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.⁷³

The Supreme Court's message is loud and clear: The traditional First Amendment doctrine will guide the Court in addressing Internet speech issues and allowing Americans a digital experiment with democratic free speech.

It is true that the open marketplace of ideas envisioned by the U.S. Supreme Court Justices, like Justices Oliver Wendell Holmes and Louis Brandeis in the formative period of the First Amendment, is being disrupted by "cheap speech" enabled by the Internet.⁷⁴ As a consequence, a regulatory role of the government is advocated in rectifying the fake news-skewed marketplace.⁷⁵

But Professor Richard Hasen of the University of California-Irvine strongly disagrees: "[I]n an era of demagoguery and disinformation emanating from the highest levels of government, First Amendment doctrine may serve as a bulwark against censorship and oppression that could be enacted by the government in the name of preventing 'fake news.'"⁷⁶

From a broad ideological perspective, the conservative-libertarian approach to more speech, not less, under the First Amendment⁷⁷ is making potential proponents of new fake news regulations rethink legislative actions against fake news. And whether fake news should be subject to existing or new restrictions in American law may be rather obvious a question for those familiar with free speech as a nation-defining characteristic of Americans to belabor. Professor Eugene Volokh of the UCLA Law School cogently highlights the fundamental problems with new fake news-centric governmental restrictions:

73. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

74. *See generally* Hasen, *supra* note 30.

75. *See* Noah Feldman, *Fake News May Not Be Protected Speech: Is Lying on Facebook Any Better Than Shouting Fire in a Crowded Theater?*, BLOOMBERG (Nov. 23, 2016, 10:22 AM), <https://www.bloomberg.com/opinion/articles/2016-11-23/fake-news-may-not-be-protected-speech>.

76. Hasen, *supra* note 30, at 216.

77. SHIFFRIN, *supra* note 71, at 166-83.

I haven't said much about the 'fake news' debate, largely because so much about it is obvious — 1) false statements are bad, but 2) various actions (especially by the government) to try to stamp out such false statements can be even worse But [libel] lawsuits and prosecutions for lies about the government are forbidden, and I think the same should apply to lies about current events, history, science and the like (at least so long as no particular person or business is targeted). It's not that the lies are constitutionally valuable as such, generally speaking; but threatening to punish them unduly deters even true statements, as well as expressions of opinion.⁷⁸

B. South Korea

The raging fake news controversy led the National Assembly to take ongoing legislative efforts to address fake news problems in 2017, apparently in response to former U.N. Secretary-General Ban Ki-mun's plea in early 2017 to the Saenuri Party to make anti-fake news laws.⁷⁹ The bills were drawn from the German Act to Improve the Enforcement of the Law in Social Networks (Netzwerkdurchsetzungsgesetz), known as the Network Enforcement Law or the NetzDG.⁸⁰ The German law provides that Internet Service Providers (ISPs) must take down fake news promptly and, if ISPs fail to take prompt actions on fake news complaints, they shall pay a fine up to €50 million (U.S. \$60 million).⁸¹

In 2017 and 2018, a total of fourteen anti-fake news bills were proposed or revised to amend the information network, public elections, and press arbitration statutes. According to the first bill on the Information Network Act, presented on April 11, 2017, fake news is "defamatory or false information in news format to deceive others."⁸² This bill mandates that ISPs pay a fine up to 30 million *Won* (U.S. \$30,000) if they fail to delete or block fake news.⁸³

78. Volokh, *supra* note 4.

79. Hak-jae Kim, *Meeting with Saenuri Lawmakers, Ban Ki-mun: "Legislate Regulation of Fake News,"* FINANCIAL NEWS (Jan. 25, 2017, 10:46 AM), <http://www.fnnews.com/news/201701251044319696> (mentioning German anti-fake news law).

80. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], June 30, 2017, Deutscher Bundestag: Drucksachen [BT] 536/17 (Ger.).

81. For a discussion of the German anti-fake news law, see Evelyn Douek, *Germany's Bold Gambit to Prevent Online Hate Crimes and Fake News Takes Effect*, LAWFARE (Oct. 31, 2017, 11:30 AM), <https://www.lawfareblog.com/germanys-bold-gambit-prevent-online-hate-crimes-and-fake-news-takes-effect>.

82. Bill No. 200 6708 (Apr. 11, 2017), art. 44(1) (S. Kor.).

83. *Id.* art. 76(1-6).

The second proposed amendment to the Information Network Act, which followed the first bill two weeks later, provides a slightly different definition of fake news. Emphasizing the underlying purpose and format of fake news, the bill states that fake news is “false or distorted information to obtain political or economic gain” and “information that shall be misunderstood as news.”⁸⁴ Article 44(8) of the bill requires the Korea Communications Commission (KCC) to order ISPs to designate as “under review” illegal online information, such as fake news. The bill stipulates a maximum of two years in jail and 20 million *Won* (U.S. \$20,000)⁸⁵ against fake news originators, and it imposes penalties up to 30 million *Won* (U.S. \$30,000) on ISPs that disregard the KCC order.⁸⁶

The third bill of May 30, 2017, on the Information Network Act includes a rather lengthy definition of fake news in connection with its fraudulent news format.⁸⁷ Article 2(1) reads: Fake news is “deceptive information in a news format or a deceptive action which entails no journalistic function of verification and which cheats people for political or commercial purposes.” The bill stipulates that ISPs must eliminate fake news “without delay” and punishes ISPs when failing to remove it.⁸⁸

The three other bills⁸⁹ to revise the Information Network Act also use the similar definitions of fake news and subject ISPs to punitive sanctions when they fail to delete fake news immediately.

More recently, a bill of April 2018 to revise the Information Network Act required that information and communication service providers take “necessary measures” to delete or block fake news if it is clearly deemed to fall into the banned categories of information injuring an individual’s privacy and reputation.⁹⁰

In April of 2017, ten National Assemblymen took note of fake news as “a serious issue” facing public elections in introducing a fake news bill in partial amendment of the Public Official Election Act. While mentioning the fake news phenomenon in the United States and Europe, they feared that the rapid dissemination of fake news through the Internet would undermine the

84. Bill No. 200 6804 (Apr. 25, 2017), art. 44(7) (S. Kor.).

85. *Id.* art. 73(5), 73(6).

86. *Id.* art. 76(3-5).

87. Bill No. 2007095 (May 30, 2017) (S. Kor.).

88. *Id.* art. 44(2), 76.

89. *See* Bill No. 2008194 (July 26, 2017); Bill No. 2008392 (Aug. 4, 2017); Bill No. 2008920 (Sept. 1, 2017) (S. Kor.).

90. Bill No. 20013251 (Apr. 25, 2018), art. 44 (S. Kor.). False or distorted facts would be subject to deletion or blocking especially if they are mistaken for “news reporting” under the Press Arbitration Act.

fairness of public elections in Korea. The proposed revision of the Public Official Election Act contains a new clause on prohibition on fake news during the national elections.⁹¹ Article 82(8) of the bill states that no one is allowed to distribute fake news through the information networks, and fake news victims may request the Election Management Commission to mark the complained-of online information as “fake news.” If the Election Commission finds that the challenged information is fake news, the Election Commission must request ISPs or Internet Operators to identify “fake news” on the content. If the ISPs do not comply with deletion requests, they will be penalized with fine up to 30 million *Won* (U.S. \$30,000).⁹²

A fake news bill to amend the Press Arbitration Act⁹³ will impose heavier liability on the traditional news media for fake news.⁹⁴ Article 33 states: “(1) The Press Arbitration Commission may ask the Minister of Culture, Sports, and Tourism to order correction to the news media company that publishes false facts intentionally or recklessly; (2) When the PAC request is proper, the Minister of Culture, Sports, and Tourism shall order the correction to the news company.”⁹⁵ If the news organization ignores the Minister’s correction order, it shall be subject to a fine up to 50 million *Won* (U.S. \$50,000).⁹⁶

Another fake news revision of the Press Arbitration Act was introduced by fourteen lawmakers in May, 2018. It proposes inserting a new paragraph into Article 4 of the Act that would state: “The press shall make efforts to prevent false or distorted facts from being deliberately distributed for political or economic gains.”⁹⁷

In the spring of 2018, more than forty Korean lawmakers approached fake news as a legal issue separately from the Information Network Act, the Press Arbitration Act, and the Public Official Election Act. Nearly thirty of the National Assemblymen argued that their “Bill on Prevention of Fake Information Distribution” is urgently needed to “comprehensively and systematically prevent the distribution of fake information.”⁹⁸ They further

91. Bill No. 2006807 (Apr. 25, 2017) (S. Kor.).

92. *Id.* art. 262(2).

93. Eollonjungjae Mit Pihaeguje Deunge Gwanhan Beomnyul [Act on Press Arbitration and Remedies, Etc. for Damages Caused by Press Reports], Act No. 7370, Jan. 27, 2005, *amended by* Act No. 10587, Apr. 14, 2011 (S. Kor.).

94. Bill No. 2006906 (Apr. 25, 2017) (S. Kor.).

95. *Id.* art. 33.

96. *Id.* art. 34.

97. Bill No. 20013494 (May 9, 2018), art. 4(4) (S. Kor.).

98. Bill No. 20012927 (Apr. 5, 2018) (S. Kor.).

claimed that their 22-article bill, the most detailed of its kind, was intended to clearly define fake information and to offer the IC service providers with the procedures to delete such information.⁹⁹

One month later, fifteen lawmakers expressed their intent to create a government agency in charge of anti-fake news under the supervision of the Prime Minister. The bill, titled “Commission on Fake News,” provides for the structure of the commission and its responsibilities and the definition of fake news,¹⁰⁰ which seems to be drawn from the bills on the Press Arbitration Act and the Information Network Act.

The fake news-oriented efforts for certain National Assemblymen to revise the Network Information Act, the Public Official Election Act, and the Press Arbitration Act or to enact new fake news statutes might have derived from good motives and for justifiable ends: Fake news should be eliminated as soon as possible. But some might be wondering, what has led to a raft of similar anti-fake news bills during the period of thirteen months?

On closer examination, few of the bills at the National Assembly demonstrate the legislative attention of the kind that is required when freedom of speech and the press is at stake. This is probably due to those lawmakers’ overly enthusiastic desire to address the unending controversies over fake news as a sociopolitical and legal hot issue in Korea (and abroad).

Consider the definitional problems with fake news, as evinced by the bills in varying degrees. The bills are conceptually vague and excessively encompassing in barring fake news as a matter of law in Korea. The applicational scope of fake news as a crime is not clearly drawn. Fake news, as defined by the bills’ proponents at the National Assembly, would cover a wide range of legitimate *real news* publications and statements.

Moreover, it is not difficult to imagine the chilling effect of the anti-fake news law, if enacted, on freedom of online speech. ISPs might choose to delete or prohibit the allegedly false online information. This will be more a reality than a hypothesis when ISPs are facing what to do when challenged to eliminate online expression or face sanctions. The proposed fake news amendment of the Press Arbitration Act permits the government to issue a correction order to a news media organization. The government’s correction order would constitute a direct illegal interference with the editorial right of the news media because no independent judicial review of the correction requirement is part of the process.

99. *Id.*

100. Bill No. 20013495 (May 9, 2018) (S. Kor.).

IV. SUMMARY AND CONCLUSIONS

Fake news is not easy to define. What constitutes fake news? What motivates it? What is its real or imagined impact? These and related fake news questions continue to challenge media professionals, lawmakers, scholars, law practitioners, free speech advocates, and others globally. At the moment, there is no shared definition of fake news, yet fake news ought to include intentionally fraudulent information that is presented as news whether politically or non-politically.

Although there is no legislative effort, whether at a federal or state level, fake news as a free speech issue has been a cause of concern in the United States. No matter how fake news has been defined, it should be compatible with the First Amendment if it is regulated to protect the social and individual legitimate interests such as reputation, privacy, and truthful advertising. But, just because some information is considered “fake news” does not mean it is presumed to fall outside the protection of the First Amendment. For falsity is not necessarily fatal under the exceptionally speech-protective American law.

In Korea, where freedom of speech is not in a preferred position as it is in the United States, several laws on the books in Korea can be invoked against fake news with some qualification. Defamation and public election laws are a case in point. But a number of Korean lawmakers have introduced several anti-fake news bills that are less than sensitive to their short- and long-term repercussions for freedom of expression online and off. They should have been better informed about what underlies the fake news phenomenon in Korean society and what is the actual or perceived impact of their legislative attempts on free speech. For freedom of speech and the press is not something expendable that allows politicians to use for their political posturing.

NIGERIA’S SAME SEX MARRIAGE (PROHIBITION) ACT AND THREAT OF SANCTIONS BY WESTERN COUNTRIES: A LEGITIMATE CASE OF HUMAN RIGHTS ADVANCEMENT OR WHAT?

Dr. Obiajulu Nnamuchi *

“Between Europe, America and Africa there is a huge culture gap. Some of the things that are considered fundamental rights abroad also can be very offensive to African culture and tradition and to the way we live our lives here.”

– Labaran Maku, Nigeria’s Minister for Information, Dec. 9, 2011.

“If the U.S. or any other foreign country wants to strip us of aid because we still hold on tightly to our values, then so be it. We are Africans, not Americans. We do not influence other countries when they are making their laws, so it is ridiculous that they’ll attempt to influence the way we make our own laws. Africans view homosexuality as immoral. It has never been condoned in Africa, and it will certainly not be tolerated here in Nigeria.”

– Tosin Omole, Nigerian Pastor, Dec. 9, 2011.

“The wealthier States, therefore, while providing various forms of assistance to the poorer, must have the highest possible respect for the latter’s national characteristics and timehonored civil institutions. They must also repudiate any policy of domination. If this can be achieved, then ‘a precious contribution will have been made to the formation of a world community, in which each individual nation, conscious of its rights and duties, can work on terms of equality with the rest for the attainment of universal prosperity.’”

– *Pacem In Terris*, Encyclical of Pope John XXIII, ¶ 125, April 11, 1963 (quoting John XXIII’s Encyclical Letter *Mater et Magistra*, AAS 53 (1961) 443).

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ABSTRACT

Political posturing and grandstanding aside, no international human rights instruments exist—not a single legal framework—that accord human rights recognition to homosexual or same-sex marriage. The closest the global community has ever come to recognizing this genre of interest as a human right is the adoption by a human rights group of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. Significantly, since this adoption in 2006, the United Nations has not come forth to project the Yogyakarta Principles as setting a universal human rights standard. Regardless, international law does not prohibit individual States from elevating homosexual marriage or any other contentious human rights claim to the status of a right within their respective domestic realms as part of legitimate exercise of national sovereignty. But there is no principle of international law which entitles these same States to compel other nations to accept their own municipal interpretations of, or ideas about, sexual “rights.” Therefore, attempts by these States to impose sanctions on, or otherwise denounce, those nations whose worldview regarding homosexuality is irreconcilably at odds with theirs, is a violation of the human rights of the people in the maligned nations to self-determination – the right to conduct their affairs in accordance with the dictates of their own value system.

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I. INTRODUCTION AND PRELIMINARY BACKGROUND

When Pope John XXIII issued the encyclical *Pacem in Terris* in 1963, the global community did not think of it as having any relevance to homosexuality. Yet, the prophetic message of the Papal document now resonates in global discourse more than half a century after its publication. The Papal pronouncement stated in bold terms that:

A new order founded on moral principles is the surest bulwark against the violation of the freedom, integrity and security of other nations, no matter

what may be their territorial extension or their capacity for defense. For although it is almost inevitable that the larger States, in view of their greater power and vaster resources, will themselves decide on the norms governing their economic associations with small States, nevertheless these smaller States cannot be denied their right, in keeping with the common good, to political freedom No State can be denied this right, for it is a postulate of the natural law itself, as also of international law It is only with the effective guaranteeing of these rights that smaller nations can fittingly promote the common good of all mankind, as well as the material welfare and the cultural and spiritual progress of their own people.¹

These pointed remarks obviously targeted the arrogance and condescending attitudes of powerful, wealthy nations in their dealings with developing countries, mostly in Africa, Asia and South America.

The thorny subject of abortion provides just one illustration of the manifestation of Pope John's concerns in modern international relations. In broad terms, it is strange that Africa, the most impoverished part of the world, is nonetheless the only region with an established human rights framework that also explicitly recognizes abortion as a human right.² Article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) requires States Parties to take all appropriate measures to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the [fetus]."³

1. Encyclical of Pope John XXIII, *De pace omnium gentium in veritate, iustitia, caritate, libertate constituenda [Pacem in Terris]* [*On Establishing Universal Peace in Truth, Justice, Charity, and Liberty*], 55 ACTA APOSTOLICAE SEDIS [AAS] 257, 291 (1963) (Vatican) (quoting with approval Pope Pius XII, Nuntius radiophonicus, datus pridie Nativ. D.N.I.C. anno 1941 [Broadcast Message, Christmas 1941] (Dec. 24, 1941), in 34 ACTA APOSTOLICAE SEDIS [AAS] 1, 16-17 (1942) (Vatican), <http://www.vatican.va/archive/aas/documents/AAS-34-1942-ocr.pdf>), translated in The Holy See, *Pacem in Terris*, VATICAN (Apr. 11, 1963)).

2. See African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982), http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf [hereinafter African Charter]; PIERO A. TOZZI, INT'L L. GROUP ORGS. LEGAL STUDIES SERIES, INTERNATIONAL LAW AND THE RIGHT TO ABORTION 2-4 (2010) (noting that the African Union Convention on the African Charter on Human and People's Rights on the Rights of Women is the "one hard law regional treaty that mentions abortion"), <https://c-fam.org/wp-content/uploads/International-Law-and-the-Right-to-Abortion-FINAL.pdf>; *The World's Abortion Laws: 2018*, CTR. REPRODUCTIVE RTS., <http://worldabortionlaws.com/map/> (showing that the majority of African countries allow abortions in order to save the life of the mother or for health reasons if at all) (last visited Oct. 16, 2018).

3. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(c), opened for signature July 11, 2003, OAU Doc. CAB/LEG/66.6 [hereinafter Maputo Protocol], <http://www.achpr.org/files/instruments/court->

To be sure, the African Charter on Human and Peoples' Rights is "the single exception" to the otherwise complete lack of abortion rights in any binding treaty law.⁴ That is, there is no equivalent provision in any other regional or international human rights framework. The Universal Declaration of Human Rights (UDHR),⁵ International Covenant on Civil and Political Rights (ICCPR),⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷ European Convention on Human Rights,⁸ American Convention on Human Rights⁹ and even the women-centered global human rights instrument, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁰ are silent on the right to abortion. So, why would Africa, a region perennially lampooned as showcasing an atrocious human rights record, suddenly position itself as the pace-setter in the protection of human rights by recognizing abortion, a universally controversial procedure, as a human right? This question becomes even more poignant considering that domestic statutes in the vast majority of African countries maintain strict anti-abortion stipulations.

The Guttmacher Institute, for example, reports that approximately ninety percent of African women of childbearing age reside in countries where the legal system restricts access to abortion.¹¹ Why, then, would these same countries embrace a regional abortion-friendly human rights framework

establishment/achpr_instr_proto_court_eng.pdf (entered into force Nov. 25, 2005), *reprinted in* Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights in Africa*, 1 AFR. HUM. RTS. L.J. 40, 53 (2001).

4. TOZZI, *supra* note 2, at 2 ("No global UN treaty contains the word 'abortion,' nor can a 'right' to abortion be inferred from the 'ordinary meaning of the words of any such treaty.'").

5. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

6. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

7. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, *as amended by* Protocols Nos 3, 5, 8, and 11 (entered into force 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 respectively) [hereinafter European Convention on Human Rights].

9. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, S. TREATY DOC. NO. 95-21, 1144 U.N.T.S. 123, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82doc.6 Rev. 1, at 25 (1992), https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf.

10. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

11. FACT SHEET, ABORTION IN AFRICA: INCIDENCE AND TRENDS, GUTTMACHER INST. (2018), https://www.guttmacher.org/sites/default/files/factsheet/ib_aww-africa.pdf.

when the provisions conflict so starkly with domestic legal regimes?¹² Are these countries operating out of a conviction or an internalization that abortion is consistent with African values and therefore worthy of recognition as a human right, or are there some other forces at play? The Human Life International (HLI) provides a useful response to this question:

The Maputo Protocol is a classic Trojan Horse. It appears to be one thing – a gift to the African people – but is actually another thing which is far deadlier. The Maputo Protocol was written in large part by the London based International Planned Parenthood Federation, or IPPF, the largest abortion-promoting organization in the world. The values of this group are not African in any way, shape or form. IPPF has no regard for national or local traditions and customs in its efforts to legalize abortion worldwide. It has stated in its *VISION 2000* Strategic Plan that the objective of its affiliated organizations is to: ‘Campaign for policy and legislative change to remove restrictions against safe abortions.’¹³

Portraying the Maputo Protocol as a non-home-grown, even fraudulent legal framework, the HLI continued:

Since the people never want abortion, IPPF and other pro-abortion groups must resort to deception. The Maputo Protocol is the ideal instrument to legalize abortion all over Africa. The Protocol allegedly is an instrument to fight female genital [cutting] [FGC], but in all of its 23 pages, it mentions [FGC] *in only one sentence*.¹⁴

The HLI’s point is that outside powers conceived the right to abortion in the Maputo Protocol off the shores of Africa and then imposed the Protocol upon the region against the wishes of the African people.

Archbishop of Mbarara, Paul Bakyenga, warned of the Maputo Protocol’s imposition on African countries at the Ugandan Catholic Bishops’ Conference in 2006, stating that “[n]ever before has an international protocol gone so far,” and that the Ugandan Catholic Bishops’ Conference “believe[d] strongly that the people of Africa ha[d] no wish to see such a protocol introduced into their laws.”¹⁵ Despite Archbishop Bakyenga’s strong warning,

12. As of December 2017, thirty-six out of fifty-four countries ratified the Maputo Protocol. *Ratification Table: Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, AFR. COMM’N HUM. & PEOPLE’S RTS., <http://www.achpr.org/instruments/women-protocol/ratification> (last visited Sept. 8, 2018) [hereinafter *Ratification Table*].

13. HUM. LIFE INT’L, *THE MAPUTO PROTOCOL I* (2007).

14. *Id.*

15. Paul Bakyenga, Archbishop of Mbarara, UGANDA CATHOLIC BISHOPS’ CONFERENCE, *Open Letter to the Government and People of Uganda*, in *L’OSSERVATORE ROMANO* (Vatican), Feb. 8, 2006, at 10; *see id.* at 14.

the Ugandan government ratified the Maputo Protocol on July 22nd, 2010.¹⁶ Yet, the question remains: Why would the Maputo Protocol, the one binding multilateral treaty to explicitly acknowledge abortion as a human right, be adopted in a region that, more than any other, limits access to abortion?

The dissonance between the positions of the Ugandan people, represented by the statements of the Church and the government, is explicably based on gross underdevelopment¹⁷ and extreme poverty in the country – in Uganda 34.6% of the population live below \$1.90 per day, the international poverty line.¹⁸ Political scientist Adam Branch affirmed that, “[s]ince the mid-1990s, Uganda has enjoyed an influx of foreign aid amounting to [eighty percent] of its development expenditures and has been the beneficiary of a number of generous donor initiatives.”¹⁹ As a major aid-dependent nation, therefore, Uganda lacks the luxury of independent action, free of coercion from its Western benefactors. This evokes the maxim, “he who pays the piper dictates the tune,” as most third world countries, not just Uganda, assume obligations under international human rights regimes out of fear of losing foreign aid rather than from a commitment to the imperatives of the frameworks.

Human rights scholars Adamantia Pollis and Peter Schwab are quite adamant, insisting that “[r]atification of the various covenants and conventions . . . is an assertion of membership in the world community and not a commitment to the implementation of these rights or to their legitimacy.”²⁰ Therefore, widespread ratification of a human rights instrument does not translate to a consensus on the terms of the provisions. Nevertheless, because ratification of such instruments provides *prima facie* evidence of agreement to be bound by the terms of such frameworks, powerful nations are undeterred in forcing their values on less powerful nations as the on-going politics of homosexuality and homosexual marriage clearly demonstrate.

The title of a report published by *The Guardian* in 2011 is quite telling of the power Western countries willfully exert over aid-recipient countries:

16. See *Ratification Table*, *supra* note 12.

17. U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2016, at 200 (2016), http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf.

18. *Id.* at 219.

19. ADAM BRANCH, DISPLACING HUMAN RIGHTS 84 (2011) (citing William Reno, *Uganda's Politics of War and Debt Relief*, 9 REV. INT'L POL. ECON. 415, 428 (2002)).

20. Adamantia Pollis, *A New Universalism*, in HUMAN RIGHTS 9, 15 (Adamantia Pollis & Peter Schwab eds., 2000).

“Gay rights must be criterion for U.S. aid allocations.”²¹ *The Guardian*’s report centered on a memorandum issued by President Obama’s administration, which directed officials to “consider how countries treat their gay and lesbian populations when making decisions about allocating foreign aid.”²² In other words, Obama was prepared to use the economic might of the United States to force the hands of the political leadership in aid-receiving countries.

While this tactic is hardly objectionable in cases of clear human rights abuses, withholding aid is acutely disconcerting when used to compel a country to abandon its core values when those values do not yield implications adverse to human rights, like the proscription of same-sex marriage in traditional societies. The swift condemnation by Western countries of Nigeria’s Same Sex Marriage (Prohibition) Act of 2014 should be viewed within this context.²³ In 2014, U.S. Secretary of State John Kerry quickly pointed out that “the United States [was] ‘deeply concerned’ by a law that ‘dangerously restricts freedom of assembly, association, and expression for all Nigerians.’”²⁴ The U.N. High Commissioner for Human Rights, Navi Pillay, was similarly forceful when she remarked that “[r]arely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights[.]”²⁵

Not to be outdone, the group “Aids-Free World” rushed a letter to the U.N. Secretary-General, expressing its dismay over the law, particularly the clause that seemingly affected the organization’s operation, *to wit*, “[a] person or group of persons who . . . supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.”²⁶ The organization petitioned the U.N. to ask that the Nigerian government vacate its newly assumed Security Council seat “until such

21. Karen McVeigh, *Gay Rights Must be Criterion for US Aid Allocations, Instructs Obama*, GUARDIAN (Dec. 6, 2011, 7:03 PM), <https://www.theguardian.com/world/2011/dec/07/gay-rights-us-aid-criteria>.

22. *Id.*

23. *See Same Sex Marriage (Prohibition) Act, 2014*, CTR. L. FED’N NIGERIA, <https://www.lawnigeria.com/LawsOfTheFederation/Same-Sex-Marriage-Prohibition-Act,-2014.html> (last visited Sept. 8, 2018).

24. Associated Press, *Nigeria Passes Law Banning Homosexuality*, TELEGRAPH (Jan. 14, 2014, 8:28 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html>.

25. *UN Human Rights Chief Denounces ‘Draconian’ Anti-Homosexuality Law in Nigeria*, UN NEWS (Jan. 14, 2014), <https://news.un.org/en/story/2014/01/459642-un-human-rights-chief-denounces-draconian-anti-homosexuality-law-nigeria>.

26. Okoro Chinedu, *NGO Petitions UN Over Same-Sex Act*, CAJ NEWS AFR. (Jan. 14, 2014), <https://allafrica.com/stories/201401140777.html>.

a time as the Member State was no longer acting in violation of its international obligations.”²⁷ Britain even more categorically warned that “[t]he U.K. opposes any form of discrimination on the grounds of sexual orientation.”²⁸ Earlier, the British government had “threatened to cut aid to African countries that violate the rights of gay and lesbian citizens.”²⁹

But what exactly does the “right of gay and lesbian citizens” mean? When understood as quintessential civil and political (CIPO) rights such as freedom of association or expression, both of which are proscribed by Section 4 of Nigeria’s Same Sex Marriage (Prohibition) Act, it is arguable that legal challenges could be mounted against the statute on the ground that the statutory language is overly broad. But even at that, a counter argument could be advanced, relying on Article 19(3) of the ICCPR, to the effect that freedom of expression could be restricted for purposes of respecting “the rights or reputations of others” and “protection of national security or of public order . . . or of public health or morals.” In other words, the argument is far from settled. But not so regarding the substance or major goal of the statute, namely, criminalization of a “marriage contract or civil union entered into between persons of same sex”³⁰ and affirmation of the traditional definition of marriage as “[o]nly a marriage contracted between a man and a woman.”³¹ Legal challenges to these latter items seem likely unsustainable.

This delineation is essential to proper contextualization of the central theme or thesis of this paper – that is, repudiation of homosexual matrimony as a human right. The paper argues that since global consensus on same-sex marriage as a human right is lacking, any attempt to denounce nations like Nigeria, which restrict marriage to heterosexual couples, or deny assistance to them on the basis of such restriction amounts to a violation of human rights, specifically the right to self-determination – the right of sovereign nations to govern themselves according to the dictates of their values and culture.³² This thesis is consistent with the current state of international law. Aside from elevating the practice of one’s culture to the status of a human right, Article 15 of the ICESCR imposes an obligation on States Parties to take steps which are “necessary for the conservation, the development and the diffusion of . . . culture” in their respective jurisdictions.³³ For traditional societies, this is obviously a very important obligation under international

27. *Id.*

28. *Nigeria Passes Law Banning Homosexuality*, *supra* note 24.

29. *Id.*

30. Same Sex Marriage (Prohibition) Act (2014), § 1 (Nigeria).

31. *Id.* § 3.

32. See U.N. Charter, art. 1, ¶ 2; ICCPR, *supra* note 6, art. 1; ICESCR, *supra* note 7, art. 1.

33. ICESCR, *supra* note 7, art. 15.

law, and compliance is compatible with proscription of homosexual matrimony – precisely the kind of legislative action that is represented in Nigeria’s Same Sex Marriage (Prohibition) Act.

This paper consists of four sections. Following this introduction, section II projects autonomy as a fundamental principle upon which justification could rest for according human right status to particular action or conduct. The principal argument of the section is that although the concept of autonomy bestows liberty upon competent adults to act or pursue their individual goods as they deem fit, the liberty guarantee is not absolute and can be restricted on justifiable grounds such as morality, public good, national security and so forth. These exceptional grounds, contends the section, are sufficiently robust to encompass prohibition of gay matrimony.

In section III, the paper adopts a theoretical and empirical approach to analyzing the often-contentious issue of universality vis-à-vis relativity of human rights – in this case, regarding same-sex marriage. Considering that there is minimal relevance to the overall goal of this paper in engaging in a comprehensive discussion of the controversy, the section adopts a parochial approach, focusing specifically on the question of whether there is a universal agreement or an international consensus regarding homosexual matrimony as a human right. Relying on the jurisprudence of the U.N. Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the U.S. Supreme Court, the section argues that, whilst certain aspects of the rights of homosexual population such as private sexual acts, have been recognized as human rights, there is no recognition of same-sex marriage as a human right.

Having established that international law does not recognize gay matrimony as a human right, section IV (the Conclusion) holds that there is no legitimate basis for Western countries to threaten sanction or denounce nations like Nigeria that, in exercise of their right to self-determination, chose to proscribe same-sex marriage.

II. INDIVIDUAL AUTONOMY AS THE FOUNDATION OF HUMAN RIGHTS: ANY LIMITS?

*Tarasoff v. Regents of the University of California*³⁴ is indisputably, indelibly etched in the annals of American jurisprudence and even beyond. Widespread analysis of the decision in academic journals and recurrent citations throughout the common law world vividly attest to its seminal status in reconciling the conflicting interface between confidentiality of medical information and public interest. The judgment also has a compelling human

34. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

rights resonance. This magisterial stipulation by judge Tobriner that “[t]he protective privilege ends where the public peril begins,” is not only a powerful restatement of a foundational human rights principle, but it also speaks profoundly to the tentacles or ambits of the rights of individuals as an integral member of a larger society.³⁵ In other words, the case’s significance rests in its recognition that the principle of respect for autonomy or the right to autonomy, although a core human rights principle, is not without limits. It is the circumscription of the tentacles or ambit of this principle that makes it relevant to the issue of same-sex marriage and, *a fortiori*, the centerpiece of this section.

Before dissecting the precise application of this circumscription, a clear understanding of the thrust of the term “autonomy” is warranted. The term was derived from the Greek word “autos” (self) and “nomos” (rule) and was originally used in reference to self-rule or self-governance of Greek city states.³⁶ But over the years, autonomy has been reconceptualized and its application extended to individuals, encapsulating diverse concepts such as “self-governance, liberty rights, privacy, individual choice, freedom of the will, causing one’s own behavior, and being one’s own person.”³⁷ The principle of respect for autonomy, strictly speaking, projects the individual as a lord over his or her own affairs. It mandates that every adult individual of sound mind is entitled to make decisions, take actions or otherwise pursue his good without let or hindrance from any person or institution, except where the decisions, actions, or pursuit of good detrimentally impact a third party.³⁸

In defense of this principle, nineteenth century English philosopher John Stuart Mill argued that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”³⁹ This dovetails with the classic postulation of philosopher and physician John Locke that “all men are naturally in . . . a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit . . . without asking leave, or depending upon the will of any

35. *Id.* at 347.

36. TOM. L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 57-58 (5th ed. 2001).

37. *Id.* at 58.

38. THOMAS HOBBS, LEVIATHAN 262 (Crawford B. Macpherson ed., Penguin Books 1985) (1651) (equating autonomy to being a freeman, defined a freeman as “he, that in those things, which by his strength and wit he is able to do, is not hindered to [do] what he has a will to”).

39. JOHN STUART MILL, ON LIBERTY 10-11 (Paul Negri & Kathy Casey eds., Dover Publ’ns thrift ed. 2002) (1859).

other man.”⁴⁰ This Lockean argument, which Mill endorsed, holds that as autonomous agents, human beings are entitled to organize and lead their lives in a manner they deem fit and to engage in actions or associations that they consider promotive of their interests without interference by a third party, provided that the manner they choose to operationalize the entitlement does not negatively impact the interests of others.⁴¹

This principle grounds a constellation of human rights such as the right to personal liberty, right to life, right to self-determination, respect for human dignity, right to privacy, right to assembly/association, freedom of expression and so forth, making autonomy or liberty the most important of all human rights. If there is one word that best captures the meaning of autonomy, it is “liberty” or “freedom” (to act as one pleases), which political philosopher Thomas Hobbes defines as the absence of opposition or external impediments to action.⁴² Its supreme position in human rights law is highlighted in this plea by Patrick Henry, one of the most influential U.S. founding fathers, in 1788: “Liberty the greatest of all earthly blessings – give us that precious jewel, and you may take everything else.”⁴³

That is to say, there is nothing that is of more importance or better treasured than liberty:

The liberty to independently direct one’s own actions makes it possible for human beings to be valued, in the Kantian sense, as ends in themselves, and not merely as means to another’s end. And this is so whether we are talking about collective or individually-directed courses of action, or in the political realm or one’s private life. Liberty is the foundation of all human rights, the fountain from which other human rights draw nourishment. When we say that a person has a right to this or that, we mean, in essence, that the person has liberty to do anything he chooses.⁴⁴

40. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT AND A LETTER OF TOLERATION* 2 (Paul Negri & Tom Crawford eds., Dover Publ’ns thrift ed. 2002) (1689).

41. See *Lochner v. New York*, 198 U.S. 45, 58 (1905) (stating that legislation by State actors needs to have “a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor”).

42. HOBBS, *supra* note 38, at 261.

43. Patrick Henry, Address at the Virginia Convention (June 5, 7, 1788), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 199, 200 (Ralph Ketcham ed., 2003).

44. Obiajulu Nnamuchi, “Circumcision” Or “Mutilation”? *Voluntary Or Forced Excision? Extricating The Ethical And Legal Issues In Female Genital Ritual*, 25 *J.L. & HEALTH* 85, 106 (2012); see IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 44 (Mary Gregor & Jens Timmermann eds., rev. ed. 2012) (1785) (“[f]or all rational beings stand under the law that

What the passage is saying is that, constructed as “liberty to act according to individual preferences,” the principle of respect for individual autonomy could be relied upon as a basis for the claim that adults of sound mind are free to engage in private homosexual sex with other consenting adults. Certainly, some people might squabble with this claim. Nonetheless, such opposition would readily lose steam when subjected to the full beam of the principle of autonomy:

[T]he point being made is that in secular morality (as opposed to religious/Christian morality) or as a matter of human rights *stricto sensu*, even in absence of legislative or judicial [authority], the right to follow one’s sexual preferences cannot be abridged unless operationalizing the right detrimentally impacts the right of another person.⁴⁵

It was on this basis that the U.S. Supreme Court struck down a Texas statute criminalizing private homosexual sex between two consenting adults as unconstitutional in *Lawrence v. Texas*, holding the statute to be violative of the Due Process Clause.⁴⁶ Strikingly, it was this decision, as will be seen in section III of this paper, that triggered the chain of events that crystalized into the recognition of same-sex marriage in the U.S. as a human right in 2015.⁴⁷ One way to interpret the decision of the Court is to characterize it as a strict application of the principle of autonomy not to abridge individual liberty even when in conflict with public interest or morality. This is consistent with the rugged individualistic ethos of the country where, as in the rest of Western culture, the individual is seen as “an isolated and autonomous” agent whose actions are driven primarily by self-preservation and must be respected.⁴⁸ More pointedly, as canvassed by anthropologist Asmarom Legesse, “[i]n the liberal democracies of the Western World the ultimate repository of rights is the human person. The individual is held in a virtually sacralized position” and “concern with the dignity of the individual, his worth, personal autonomy and property” is sacrosanct.⁴⁹

But this cosmology is not universally shared. Non-Western societies cling to a different moral view of the individual and his role in society, which

each of them is to treat itself and all others *never merely as a means*, but always *at the same time as an end in itself*.”).

45. See Obiajulu Nnamuchi, *Hands Off My Pudendum: A Critique of Human Rights Approach to Female Genital Ritual*, 15 QUINNIPIAC HEALTH L.J. 243, n.151 (2012).

46. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

47. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

48. Adamantia Pollis, *Liberal, Socialist, and Third World Perspectives of Human Rights*, in TOWARD A HUMAN RIGHTS FRAMEWORK 1, 7 (Peter Schwab & Adamantia Pollis eds., 1982).

49. Asmarom Legesse, *Human Rights in African Political Culture*, in THE MORAL IMPERATIVES OF HUMAN RIGHT 123, 124 (Kenneth W. Thompson ed., 1980).

underscores the controversy regarding gay matrimony in different parts of the world. What we have, therefore, is a dichotomy of moralities, whether morality is constructed on an individualistic or communalist platform, how each morality conceptualizes personhood and the relationship between the individual and the community. To be sure, in the West:

[P]ersonhood seeks to protect the freedom of individuals to define themselves in contradistinction to the value of the society in which they happen to live. The premise of such freedom is an individualistic understanding of human self-definition: a conception of self-definition as something that persons are, and should be, able to do *apart from society*.⁵⁰

This view of personhood and its impact on social relationship is at variance with African cosmology. The major dividing line between African morality and that of the West is that Africa is communitarian oriented. The community, not the individual, is the basic social unit of an African society. Person or personhood in African ontology is “defined in terms of affinity to family, clan, village and so forth, to which the individual owes his existence” and this “affinity or relationship not only gives individuals their identities but also structures their very existence.”⁵¹ African philosopher John Mbiti explicated this relationship quite clearly:

Only in terms of other people does the individual become conscious of his own being, his own duties, his privileges and responsibilities towards himself and towards other people. When he suffers, he does not suffer alone but with his corporate group: when he rejoices, he rejoices not alone but with his kinsmen, his [neighbors] and his relatives . . . Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: ‘I am, because we are; and since we are therefore I am.’ This is the cardinal point in the understanding of the African view of man.⁵²

In essence, the interest of the individual in African society is submerged or integrated within that of the community and streamlined to form a coherent whole – one interest designed to serve the goal of the community. This is not to suggest that the principle of respect for individual autonomy is completely ignored in Africa. Autonomy is accorded recognition but not as exalted as in the West. A cardinal distinction from Western morality is that community or

50. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 761 (1989) (emphasis added), reprinted in MADELEINE SCHACHTER, INFORMATIONAL AND DECISIONAL PRIVACY 778, 783 (2003).

51. See Obiajulu Nnamuchi, *Toward a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question*, 14 CHI.-KENT J. INT’L & COMP. L. 24, 41 (2014).

52. JOHN S. MBITI, AFRICAN RELIGIONS AND PHILOSOPHY 106 (2d. rev. ed. 1990).

public good is prioritized over that of the individual. In other words, as philosopher Ifeanyi Menkiti noted, “the reality of the communal world takes precedence over the reality of individual life histories whatever these may be,”⁵³ and this is the reason “group rights” are “stressed over individual rights” in Africa.⁵⁴ It is this diminished state of autonomy or nullification of “excessive individual autonomy,”⁵⁵ which underlies African morality, that accounts for the dichotomy between African and Western ontological frameworks regarding the place of man in society.

This is not a novel argument. As far as Africans are concerned, this worldview has strands of support in international law. Article 29 of the UDHR is quite illustrative: Everyone has duties to the community in which alone the free and full development of his personality is possible.

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Note the striking similarity between the language of Article 29(1) – duties to the community as definitive of personhood – and the postulation by Mbiti above, *to wit*, “[o]nly in terms of other people does the individual become conscious of his own being.”⁵⁶ Both speak to the submergence and collapsing of individual good into that of the community. Aside from Article 29(2) of the UDHR, the ICCPR restricts individual autonomy by explicitly subjecting many of its rights to exceptions such as public health or morals or the rights and freedoms of others.⁵⁷ Along a similar trajectory, Article 27(2) of the African Charter on Human and Peoples’ Rights stipulates that the “rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”⁵⁸ And in Nigeria, the Constitution places limitation on human rights in the interest of defense, public safety, public order, public

53. Ifeanyi A. Menkiti, *Person and Community in African Traditional Thought*, in *AFRICAN PHILOSOPHY* 157, 172 (Richard A. Wright ed., 3d ed. 1979).

54. Rhoda E. Howard, *Group Versus Individual Identity in the African Human Rights Debate on Human Rights*, in *HUMAN RIGHTS IN AFRICA* 159, 161 (Abdullahi Ahmed An-Na’im & Francis M. Deng eds., 1990).

55. Peter Kasenene, *African Ethical Theory and the Four Principles*, in *CROSS-CULTURAL PERSPECTIVES IN MEDICAL ETHICS* 347, 351 (Robert M. Veatch ed., 2d ed. 2000).

56. MBITI, *supra* note 52, at 108.

57. ICCPR, *supra* note 6, art. 12, 14, 18, 19, 21, 22.

58. African Charter, *supra* note 2, art. 27(2) (“The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”).

morality or public health or for the purpose of protecting the rights and freedom of other persons.⁵⁹ The import of these provisions is to show that autonomy restrictions are grounded not only on African morality but also international law. Noted African philosopher and bioethicist Peter Kasenene summed up the argument coherently, stating that “[t]he community will restrict the free action of [the] individual for his or her own good. The good of the individual and of the group is more important than personal freedom or autonomy.”⁶⁰

III. UNIVERSALITY OR RELATIVITY OF HUMAN RIGHTS: EMPIRICAL AND THEORETICAL ANALYSIS

There may perfectly properly be different answers to some human rights issues in different states on different facts. I think the Strasbourg court should recogni[z]e this . . . [U]nder the pressure of the Strasbourg court, the law of human rights has got[en] too big.

– John Laws, former Lord Justice of Appeal (U.K.), 2013

One might attempt to reconcile universalist and relativist strands of moral analytical frameworks from the premise that, at its core, human beings everywhere share universal values, that the norms (at least at a broad, general level) are the same, and that differences observed in various cultures only exist at the lower level – that is, on the particularities or specifics of the norms. What we reckon as difference in attitudes, beliefs or practices relate to the variegated ways each culture implements or operationalizes the norm. In other words, norms or rights can be universal at the macro level, yet relative at the micro level in the way the norms are operationalized and in what each society considers the right or wrong way of implementing them. This may be illustrated with respect for the right to life and respect for the right to marriage. There is no organized society that does not respect these prescriptions.

It is beyond dispute that every society accords recognition to a right to life in this general sense, the effect of the recognition being that no one may be deprived of his life except under “justifiable circumstances,” as permitted by law. These exceptional circumstances that are considered “justifiable” are always narrowly defined, and it is within this narrow construction that relativism of moral or cultural beliefs and practices manifest themselves. Consider, for illustrative purposes, this question: Does having a right to life also

59. CONSTITUTION OF NIGERIA (1999), § 45.

60. Kasenene, *supra* note 55, at 352.

imply a right to die? Unlike the more general question (whether there is a right to life?) in respect to which there is a general consensus (universal morality), on this narrower question (right to die), the answer varies across cultures. Therefore, one particular right can have a universalist aspect as well as a relativist dimension. Contemporary expressions of the right to die include physician-assisted suicide and euthanasia.

While euthanasia (“mercy” killing) is recognized as encompassed within the right to life in some societies, such as Netherlands, Belgium, Luxembourg and Colombia,⁶¹ and six states in the United States of America (Oregon, Vermont, Washington, California, Colorado and Montana) and Washington D.C.,⁶² the vast majority of the world, including the rest of the U.S. states, morally regard such actions differently – holding a contrary view and a basis upon which prohibitory legal frameworks exist in those societies.

Morality, in the sense of what is right and wrong, also varies even across different communities in the same society. For instance, a 2012 Pew Research Center poll shows that, in contrast to trends in more secular parts of the United States, the majority of the residents of Southern states (Bible belt states) oppose same-sex marriage.⁶³ While fifty-six percent of the people in Alabama, Kentucky, Louisiana, Oklahoma and Texas oppose same-sex marriage, only about thirty-five percent favor it.⁶⁴

Regarding marriage or the right to marry, the second of the two instances mentioned previously, there is no society that does not respect the institution of marriage or the right of its members to marry each other. There is some consensus on the broad outline of the right, deriving from the notion that the institution, because it promotes procreativity and community cohesion, provides the best means of perpetuating society. Nonetheless, on its specific contours, what really counts as a morally defensible marriage, there is no universal agreement. Is marriage an exclusive preserve of heterosexuals? Are homosexuals also entitled to marry? Just a few years ago, the response to both questions could have been the same regardless of geography or culture. But not anymore. Beginning in Western Europe and spreading to North America, an increasing number of countries are altering their views regarding

61. Rita L. Marker & Kathi Hamlon, *Frequently Asked Questions: Euthanasia and Assisted Suicide*, PATIENTS RIGHTS COUNCIL, http://www.patientsrightscouncil.org/site/frequently-asked-questions/#_edn8 (last visited Dec. 31, 2017).

62. Each of these U.S. states consider physician-assisted suicide to be a morally justifiable action. See *Physician-Assisted Suicide Fast Facts*, CNN (Aug. 13, 2018, 2:27 PM), <http://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html>.

63. *Behind Gay Marriage Momentum: Regional Gaps Persist*, PEW RES. CTR. (Nov. 9, 2012), <http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/>.

64. *Id.*

the definition of marriage, with some (albeit a small minority) positioning homosexual and heterosexual marriages as moral equivalents.

Rather than douse the debate, equating what was once called the “sin of Sodom” with the traditional understanding of the institution of marriage is raising more questions than answers, one of which is particularly of great value to human rights scholarship and which was broached earlier in this section. The question is whether human rights are universal in the sense that what counts as a human right in “Country A” equally retains that character in “Country B”? Or are there some norms on which there is some cross-cultural consensus, accepted as human rights globally, whilst in others agreement is far from being achieved? Philosopher Charles Taylor, for instance, found that, presumably all cultures share moral “condemnations of genocide, murder, torture, and slavery, as well as of, say, ‘disappearances’ and the shooting of innocent demonstrators.”⁶⁵

Yet, there are some other actions whose foundations are still being debated, years after gaining recognition as human rights, such as the right to abortion in the U.S. Although it has been more than four decades since the U.S. Supreme Court handed down the controversial ruling in *Roe v. Wade*,⁶⁶ recognizing the right to abortion, the contours of the right are still being debated.⁶⁷ Attempts in various U.S. states to whittle down the force of the judgment by promulgating laws restricting abortion in varying ways signals quite strongly that there is an absence of national consensus on the status of abortion as a human right in the U.S.⁶⁸ Justice Rehnquist’s dissent in *Roe* is undoubtedly representative of the opinion of many Americans today:

65. Charles Taylor, *A World Consensus on Human Rights?*, 43 DISSENT 15 (1996), reprinted in THE PHILOSOPHY OF HUMAN RIGHTS 209, 411 (Patrick Hayden ed., 2001).

66. *Roe v. Wade*, 410 U.S. 113 (1973), overruled in part by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873, 878 (1992) (abandoning the trimester framework standard for analyzing government regulations on access to abortions and adopting a new, less rigid standard).

67. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007) (finding that the Partial-Birth Abortion Act of 2003, which prohibited termination of late term pregnancy, was not unconstitutionally vague and imposed no undue burden on the right to abortion); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding that a Nebraska law that criminalized partial-birth abortion was unconstitutional as it placed an undue burden on a woman’s right to have an abortion and because the Act failed to provide an exception in cases where the woman’s health was threatened); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade* in holding that the Pennsylvania Abortion Control Act of 1982, which required a married woman seeking an abortion must sign a statement indicating that she has notified her husband, except where certain exceptions apply, was unconstitutional).

68. See, e.g., *Casey*, 505 U.S. 833 (1992). *Casey* questioned the Pennsylvania Abortion Control Act of 1982 which, unlike *Roe v. Wade*, mandated that women seeking abortion give informed consent, required minor seeking an abortion to obtain parental consent or judicial waiver (the provision included a judicial waiver option), compelled married women to notify husbands prior to

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental[.]' Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe.⁶⁹

This lack of universality regarding the right to abortion is buttressed by a finding by the Pew Research Center in 2015, which showed that of 196 countries whose legal frameworks were studied, only fifty-eight permit abortions on request (for any reason) while 137 countries do not allow this exception.⁷⁰ This finding incontrovertibly dilutes the claim that abortion is a universal human right. Is the situation the same with the claim that homosexual matrimony is a human right? If the answer is affirmative – as this section seeks to show – then, a follow up question would be, what does the discord mean in the field of human rights? These questions are examined under three headings, namely, the jurisprudence of the HRC, European Court of Human Rights, and the U.S. Supreme Court.

A. *The Human Rights Committee*

Established under Article 28 of the ICCPR, the HRC is a body of independent experts responsible for overseeing the implementation of the ICCPR, with a mandate to examine reports submitted by States Parties (on the measures they have adopted which give effect to the rights recognized by the ICCPR and on the progress made in the enjoyment of those rights).⁷¹ The HRC also issues concluding observations on the reports it examines, publishes general comments on the provisions of the ICCPR, and considers inter-

obtaining abortion and required abortion-providing clinics to supply certain information to a woman seeking an abortion along with a 24-hour waiting period. *Id.* The original Abortion Control Act was found unconstitutional in part but remain largely still in force. See Pennsylvania Abortion Control Act of 1982, *invalidated in part by Casey*, 505 U.S. 833; *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 476 U.S. 747 (1986), *overruled in part by Casey*, 505 U.S. 833 (1992) (overruling *Thornburg* on the same point as *Roe v. Wade* – the rigid trimester framework); *Elizabeth Blackwell Health Ctr. For Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995); *Fischer v. Dep't of Pub. Welfare*, 482 A.2d 1148 (Pa. Commw. Ct. 1984).

69. *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

70. *Worldwide Abortion Policies: Circumstances Under Which a Woman Can Legally Obtain an Abortion*, PEW RES. CTR. (Oct. 5, 2015), <http://www.pewresearch.org/interactives/global-abortion/>; <http://www.pewresearch.org/interactives/global-abortion/>.

71. ICCPR, *supra* note 6, art. 40.

State complaints⁷² as well as individual complaints from residents of States which have ratified the Optional Protocol to the ICCPR.⁷³

Relying on its mandate under the Optional Protocol, the HRC has made a number of pronouncements which have far-reaching significance to the subject of this paper. In *Toonen v. Australia*, the author, an activist for the promotion of the rights of homosexuals in Tasmania, challenged two provisions of the Tasmanian Criminal Code, namely Sections 122(a) and (c), and 123, which criminalized various forms of sexual contacts between men, including all forms of sexual contacts between consenting adult homosexual men in private.⁷⁴ The HRC concluded that the challenged provisions violated Article 2(1) and 17(1) of the ICCPR, which, respectively, bar discrimination and offer protection against arbitrary or unlawful interference with the privacy of the individual. Curiously, the HRC undertook an expansive view of the interpretation to be accorded to the term “sex,” as a prohibited ground under Articles 2(1) and 26, to include sexual orientation, and ordered the repeal of the offending provisions of the Tasmanian Criminal Code.

Unlike the previous case, which involved the rights of a gay male, this second case, *Joslin v. New Zealand*, was brought by lesbian couples who claimed a violation of Articles 16, 17, 23 and 26 of the ICCPR in that the failure of the New Zealand Marriage Act to provide for homosexual marriage discriminated against them directly on the basis of sex and indirectly on the basis of sexual orientation.⁷⁵ Disagreeing with the authors of the complaint, the HRC held that the complaint had to be considered in light of the provisions of Article 23(2) (affirming the right of men and women of marriageable age to marry and to found a family), which, unlike other general provisions of the ICCPR, uses the term “men and women” (not “everyone,” “all persons,” or “every human being”) to recognize marriage as only the union between a man and a woman. The distinction between this case and *Toonen v. Australia* is that, while the HRC had objections to laws that interfere with private homosexual sex between consenting adults, the Committee was not prepared to expand the privacy right recognized in *Toonen* to include same-sex marriage, as demonstrated in the HRC’s *Joslin* decision.⁷⁶

72. *Id.* art. 41.

73. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

74. *Toonen v. Australia*, Communication 488/1992, U.N. Human Rights Committee [UNHCR], 226 (Mar. 31, 1994).

75. *Joslin v. New Zealand*, Communication 902/1999, U.N. Human Right Committee [UNHRC], 214 (July 17, 2002).

76. Compare *id.*, with *Toonen supra* note 74.

In another case, *Fedotova v. Russian Federation*, the author, an openly lesbian woman and an activist in the field of lesbian, gay, bisexual and transgender (LGBT) rights in the Russian Federation, complained that in 2009 she, together with other individuals, tried to hold a peaceful assembly in Moscow (the so-called “Gay Pride”) but was prevented from doing so and that a similar initiative to hold a march and a “picket” to promote tolerance towards gays and lesbians in the city of Ryazan in 2009 was also interrupted by the Police.⁷⁷ The author’s argument, *to wit*, that her right to freedom of expression guaranteed under Article 19 as well as her rights under Article 26 (which bars discrimination) of the ICCPR had been violated by Russian authorities. The HRC agreed. This decision is consistent with *Toonen* but differs from *Joslin* in terms of the contours of sexual rights the HRC is willing to extend to homosexual couples.

The conclusion to be drawn from the jurisprudence of the HRC seems to be that the body is opposed to legal and policy frameworks that discriminate against LGBT population solely on the basis of their sexual orientation and preferences and would not hesitate to strike down such discriminately regimes. Regarding homosexual matrimony, however, the HRC’s position is that there is no inequality or discrimination where a State retains the traditional definition of marriage⁷⁸ – a view that is consistent with an earlier clarification that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].”⁷⁹ Stated differently, the HRC would not disturb a same-sex marriage proscriptive domestic framework of a State Party to the ICCR and its Optional Protocol. At any rate, it is noteworthy that, although the HRC is not a judicial body, its views under the Optional Protocol have “some important characteristics of a judicial decision”⁸⁰ and, therefore, should be seen as “an authoritative determination” by a quasi-judicial body “established under the Covenant itself [and] charged with the interpretation of that instrument.”⁸¹

77. *Fedotova v. Russian Fed’n*, ¶ 2.1, U.N. Doc. CCPR/C/106/D/1932/2010 (2012).

78. Mark Fowler, *Same-Sex Marriage: What does Human Rights Law Say About Claims of Equality?*, ABC NEWS (Aug. 31, 2017, 11:55 AM), <http://www.abc.net.au/news/2017-09-01/what-does-human-rights-law-say-about-marriage-and-equality/8856552>.

79. U.N. Hum. Rts. Comm., General Comment No. 18: Non-Discrimination, ¶ 13, U.N. Doc. HRI/GEN/1Rev.9(Vol. I) (1994).

80. U.N. Hum. Rts. Comm., Draft General Comment No. 33 on The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 11, U.N. Doc. CCPR/C/GC/33 (2008).

81. *Id.* ¶ 13.

B. *The European Court of Human Rights*

The European Court of Human Rights (ECtHR) was established under Article 19 of the European Convention on Human Rights to ensure the observance by States Parties of the provisions of the Convention.⁸² All Member States of the European Council are Parties to the Convention and “accession to the Council of Europe must go together with becoming a party to the European Convention on Human Rights.”⁸³ Established in 1949, the Council of Europe is a completely separate entity from the European Union (EU) and has larger membership – forty-seven compared to the EU, which has just twenty-eight members.⁸⁴ Every Member State of the Council of Europe is required to respect its obligations under the Statute of the Council of Europe (also known as the Treaty of London,⁸⁵ the European Convention on Human Rights and all other conventions to which it is a Party, including compliance with the decision of the ECtHR.⁸⁶ The ECtHR hears inter-State complaints as well as individual complaints and issues advisory opinion. Based in Strasbourg, France, the Court became operational in 1959 and has delivered more than 10,000 judgments,⁸⁷ distinguishing it as the most productive regional human rights adjudicatory institution. It is to some of these judgments, the ones which are of profound importance to the human rights of LGBT population, that we now turn.

One such decision is *Dudgeon v. United Kingdom*, a case brought by a homosexual man from Northern Ireland. In *Dudgeon*, the question was whether Section 11 of the Criminal Law Amendment Act of 1885, which criminalized homosexual sex, whether in private or public, violated Article 8 of the European Convention (respect for privacy and family life).⁸⁸ The Court held that there was a violation of Article 8. However, in a more recent case, *Chapin and Charpentier v. France*, the applicants, two homosexual males, argued that France’s restriction of marriage to individuals of the

82. European Convention on Human Rights, *supra* note 8, at 234.

83. EUR. PARL. ASS., *Resolution 1031 Hono[r]ing of Commitments Entered into by Member States when Joining the Council of Europe*, ¶ 9 (Apr. 14, 1994), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16442&lang=en>.

84. *What is the European Convention on Human Rights?*, EQUAL. & HUM. RTS. COMM’N, <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> (last updated Apr. 19, 2017).

85. Statute of the Council of Europe, art. 3, *open for signature* May 5, 1949, E.T.S. 1 (entered into force Aug. 3, 1949).

86. EUR. PARL. ASS. *Resolution 1031*, *supra* note 83, ¶ 1.

87. *European Court of Human Rights*, INT’L JUSTICE RES. CTR., <http://www.ijrcenter.org/european-court-of-human-rights/#History> (last visited Dec. 31, 2017).

88. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 14 (1981).

opposite sex infringed Article 12 (right to marry) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights.⁸⁹ They contended that the restriction discriminated against them on the basis of their sexual orientation.⁹⁰ The Court disagreed, holding that Article 12 does not compel the French government to recognize same-sex marriage.⁹¹ Relying on its earlier holding in *Schalk and Kopf v. Austria*, the Court affirmed that there was no European consensus on the issue of homosexual marriage and that, notwithstanding Article 12, the decision as to whether or not to permit same-sex marriage lies within the domestic competence of States Parties.⁹²

In a subsequent case, *Oliari v. Italy*, the ECtHR approved its decision in *Schalk and Kopf*, holding that, although European attitude toward same-sex marriage is changing, with some States Parties recognizing such marriages, neither Article 8 (privacy guarantees) nor Article 12 (in conjunction with Article 14) could be interpreted to mean that States Parties are under an obligation to open marriage to gay couples, and that such decisions are left for the domestic legislative regime of each contracting Party.⁹³

C. *The United States Supreme Court*

An apt point to initiate a discussion on the jurisprudence of the U.S. Supreme Court in the realm of homosexuality and homosexual matrimony is *Bowers v. Hardwick*.⁹⁴ In *Bowers*, respondent Hardwick, whose act of consensual homosexual sex with another adult male in his bedroom was observed by a police officer, argued that the Georgia statute criminalizing consensual sodomy violated his fundamental rights. The Supreme Court disagreed, holding that the Georgia statute was constitutional and that the United States Constitution did not confer a fundamental right upon homosexuals to engage in sodomy. The Court explained that none of the fundamental rights announced in the Court's prior cases involving family relationships,

89. Chapin & Charpentier v. France, 40183/07, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-163436>.

90. *Id.*

91. Note that, under Law of May 17, 2013, homosexual partners could now marry in France. Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 opening marriage to same-sex couples] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2013, art. 1.

92. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409. The Court unanimously found no Article 12 violation, explaining that the Article did not impose an obligation to grant same-sex couples' access to marriage. *Id.* at 411-12.

93. *Oliari v. Italy*, App. Nos. 18766/11 & 36030/11, 65 Eur. H.R. Rep. 957, 960 (2015).

94. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

marriage, or procreation, had any resemblance to the right asserted by Hardwick in this case of homosexuals to engage in acts of sodomy.⁹⁵ On this point, Justice White, writing for the majority, emphasized that “any claim that [prior] cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.”⁹⁶

Nearly two decades later, in *Lawrence v. Texas*, the U.S. Supreme Court reversed its prior holding in *Bowers*, declaring instead that a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct did violate the Due Process Clause.⁹⁷ Although homosexual sex was not ascribed the status of a fundamental right, for the first time ever the Supreme Court held that intimate sexual relationship between consenting adults is protected by the Fourteenth Amendment, concluding that laws making same-sex intimacy a crime “demean the lives of homosexual persons.”⁹⁸ This holding laid the foundation for the gradual but steady evisceration of sodomy prohibitory frameworks in the U.S. Fast-forward to 2013, to the case of *United States v. Edith Windsor*, a case which challenged the constitutionality of § 3 of the Defense of Marriage Act (DOMA).⁹⁹

One of the questions presented for determination before the U.S. Supreme Court was whether DOMA, which defined the term “marriage” under federal law as a “legal union between one man and one woman,” deprived same-sex couples who are legally married under state laws of their Fifth Amendments rights to equal protection under federal law? A bitterly split

95. *Id.* at 190-91 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)) (“[In *Carey*,] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were described as dealing with childrearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut*, [381 U.S. 479 (1965)], and *Eisenstadt v. Baird*, [405 U.S. 438 (1972)], with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion.”).

96. *Id.* at 191 (referencing the case law mentioned *supra* note 95).

97. *Lawrence v. Texas*, 539 U.S. 558 (2003).

98. *Id.* at 575.

99. *United States v. Windsor*, 570 U.S. 744, 752 (2013). Section 7 of the Defense of Marriage Act of 1994 amended 1 U.S.C. § 3 to state that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act of 1994, Pub. L. No. 104-199, § 7, 110 Stat. 2418, *declared unconstitutional in part by* *United States v. Windsor*, 570 U.S. 744 (2013).

Supreme Court¹⁰⁰ answered this question in the affirmative, effectively abrogating § 3 of DOMA as unconstitutional despite the overwhelming support of DOMA by the people through their elected representatives in Congress. On the significance of this decision, a recent paper surmised:

A sharply [bifurcated] court speaks to different conceptualization of human rights, informed by individual beliefs or value systems of the justices. The history of DOMA, a widely popular legislation that had the support of 85 senators and 342 representatives, is quite revealing as to what the statute expresses: 'moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' But the gentlemen in black robes (at least the majority) know better, or so they think, explaining why *Windsor* . . . has succeeded in opening a new frontier of controversy in traditional values and, what some might call, new-age human rights. At stake is the precise limit or boundary of human rights, the process that would determine it, and who ultimately determines it.¹⁰¹

This search for the "precise limit or boundary of human rights," in terms of whether same-sex marriage is a human right in the United States, is continuing despite the more recent decision in *Obergefell v. Hodges*.¹⁰² There, the question before the U.S. Supreme Court was whether denying the right of same-sex couples to marry or to have marriages lawfully performed in another State given full recognition amounts to a violation of the Fourteenth Amendment. A similarly bitterly divided Court held that the Fourteenth Amendment's guarantee of Equal Protection required a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

This controversial decision, handed down on June 26, 2015, overturned *Baker v. Nelson*¹⁰³ – a case in which the Supreme Court dismissed an appeal from a ruling of the Minnesota Supreme Court, which had determined that a state law limiting marriage to persons of the opposite sex did not violate the

100. *Windsor*, 570 U.S. at 770-75. The *Windsor* decision was reached 5-4, with a slim majority of Justices agreeing that DOMA violated the Fifth Amendment.

101. See Nnamuchi, *supra* note 51, at 77-78. All the five liberal justices, two of whom were appointed by Obama, voted to strike down the traditional family value-oriented statute (Sonia Sotomayor, Stephen G. Breyer, Elena Kagan, Anthony Kennedy and Ruth Bader Ginsburg) in contrast to the four conservatives on the Court (Chief Justice John Roberts, Samuel A. Alito, Antonin Scalia and Clarence Thomas) that filed scathing dissent to the majority opinion.

102. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2013).

103. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2013).

United States Constitution.¹⁰⁴ In effect, *Obergefell* compelled states, for the first time ever, to recognize same-sex marriages as equivalent to heterosexual ones. The Court held that the fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extended to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. According to the Court, the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same sex may not be deprived of that right and that liberty.¹⁰⁵

Significantly, all four conservative members of the Court, namely justices Roberts, Scalia, Thomas, and Alito, offered separate dissenting opinions. Chief Justice Roberts' conclusion was quite apposite in its dismissal of the majority opinion as unconstitutional:

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it. I respectfully dissent.¹⁰⁶

Projecting *Obergefell v. Hodges* as unconstitutional is a theme that runs through the dissenting opinions of all the conservative members of the Court. But Justice Antonin Scalia authored by far the most scathing attack on the majority opinion. Assailing the decision as a "threat to American democracy,"¹⁰⁷ he wrote that the question whether to legalize same-sex marriage or otherwise belongs to the people, through their elected representatives, not an unelected Supreme Court.¹⁰⁸ Justice Scalia argued that prescription regarding marriage is not enshrined in the Federal Constitution, a reason that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."¹⁰⁹

Moreover, Justice Scalia elucidated:

104. *Obergefell*, 135 S. Ct. at 2604-05.

105. *Id.*

106. *Id.* at 2626 (Roberts, C.J., dissenting).

107. *Id.* at 2626 (Scalia, J., dissenting).

108. *Id.* at 2624 (Scalia, J., dissenting); *see id.* at 2629 (Roberts, C.J., dissenting) (arguing that "[t]hose who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges").

109. *Id.* at 2628 (Scalia, J., dissenting) (quoting *United States v. Windsor*, 570 U.S. 744, 745-76 (2013)).

When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue. But the Court ends this debate, in an opinion lacking even a thin veneer of law.¹¹⁰

Just as Justice Scalia predicted, the controversy regarding mainstreaming same-sex marriage into American life has shown no sign of abating. However, owing to renewed infusion of resources to the gay agenda from different quarters (Hollywood, academia, mass media, and so forth), attitudes toward the subject are gradually changing. Although a Pew Research Center polling in 2001 found that Americans opposed same-sex marriage by a margin of 35-57%, recent data shows that a majority of Americans (62%) now support same-sex marriage, while only 32% oppose it.¹¹¹ Strikingly, the ideological split in the Supreme Court witnessed in the *Obergefell* decision (with liberal Justices voting in support of upholding same-sex marriage whereas the conservative-leaning Justices vehemently opposed the ruling) is reflected among the general population.

About seven-in-ten Democrats (73%) and Independents (70%) favor same-sex marriage, while a smaller share of Republicans favor same-sex marriage (40%).¹¹² Journeying outside the U.S. to the rest of the world, what do we find? A recent survey found that acceptance of same-sex marriage is geographically and culturally determined. While there is a broader acceptance of same-sex marriage in more secular societies of North America, the European Union and some parts of Latin America, widespread rejection permeates the rest of the world, particularly in predominantly Muslim

110. *Id.* (Scalia, J., dissenting).

111. *Changing Attitudes on Gay Marriage: Public Opinion on Same-Sex Marriage, Fact Sheet*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

112. *Id.*

nations, Russia and countries in Africa as well as those in Asia.¹¹³ In the Middle East, acceptance rates range from forty percent in Israel to two percent in Tunisia.¹¹⁴ Similar patterns appear in Africa, where a relatively high acceptance rate of thirty-four percent was recorded in South Africa (the only country in Africa to recognize same-sex marriage) vis-à-vis eight, four, three, three and one percent respectively in Kenya, Uganda, Ghana, Senegal and Nigeria.¹¹⁵ This low level of tolerance of same-sex marriage in traditional societies is a pointer to heterogenous conceptualizations of human rights in different societies – embraced in the West but shunned in other regions of the world. So, what is the basis for castigating non-receptive countries, acting in accordance with their shared sense of culture and morality, as human rights violators?

Considering that the focal point of this paper is Nigeria and since, as evident from the preceding discussion, there is no international consensus on same-sex marriage as a human right, recourse must be had to key regional and domestic legal frameworks applicable in the country. The starting point of our analysis is the African Charter on Human and Peoples' Rights.¹¹⁶ In this connection, the charge given to African experts gathered in Dakar, Senegal in 1979, is quite helpful, "to prepare an African human rights instrument based upon an African legal philosophy and responsive to African needs."¹¹⁷ The experts were commissioned to prepare a legal regime that unambiguously reflects an "African conception of human rights."¹¹⁸

That the experts internalized the seriousness of this charge is evident in the various provisions of the Charter. The Preamble was quite explicit as to

113. *The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries*, PEW RES. CTR. (June 4, 2013) [hereinafter *The Global Divide on Homosexuality*], <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf>.

114. *Id.* at 22.

115. *Id.* at 23. South Africa is unlike many other countries in Africa in this respect. While homosexual acts are legal and discrimination based on sexual orientation is illegal in South Africa, however, in 2013, sixty-one percent of those surveyed by the Pew Research Center still believed society should not accept homosexuality. *Id.* at 3.

116. African Charter, *supra* note 2.

117. Yougindra Khushalani, *Human Rights in Africa and Asia*, 4 HUM. RTS. L.J. 403, 436 (1983), cited in James Silk, *Traditional Culture and the Prospect for Human Rights*, in HUMAN RIGHTS IN AFRICA 308 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990).

118. Meeting of Experts, Dakar, OAU Doc. CAB/LEG/67/3, Rev. 1, at 1 (1979), quoted in *Organization of African Unity and Human Rights*, Amnesty International, AI Index IOR 63/001/1991, at 8 (June 30, 1991), <https://www.amnesty.org/download/Documents/196000/ior630011991en.pdf>; see El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atua, *Human Rights in Africa: A New Perspective on Linking the Past to the Present*, 41 MCGILL L.J. 819, 836 (1996) (quoting Amnesty International, *The Organization of African Unity and Human Rights*, *supra*).

the concept of human rights in the region, requiring special consideration to be taken of the “virtues of [the] historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights”¹¹⁹ as well as the duty of States Parties “to promote and protect human and people’ rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.”¹²⁰ These provisions are very important because they speak to the specifics of the human rights to be protected in Africa; that is, one that is founded on African values.

Similar thinking undergirds the European Convention on Human Rights.¹²¹ Regarding the Eurocentric nature of the regional human rights system in Europe, parties to the European Convention on Human Rights are in agreement that “[g]overnments of European countries [are] likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law” and, as such, are resolved “to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration [on Human Rights].”¹²² The term “certain of the Rights” of the UDHR was not fortuitous, and this is quite significant—it reflects quite explicitly an indication that not all human rights will be accorded recognition, only those that are consistent with European beliefs and cultural heritage.¹²³

As such, Nigeria and other African countries are on firm grounds in institutionalizing and pursuing an indigenous or Afrocentric concept of human rights, one that is consistent with the region’s cosmology and epistemology. In light of the cacophony of approaches to same-sex marriage across the globe, there are no grounds to argue that Africa is not at liberty to chart its own cause of action, particularly given the obligations of States Parties to the African Charter on Human and Peoples’ Rights.

Regarding the African Charter on Human and Peoples’ Rights, three provisions are noteworthy. The first is Article 17(3), which imposes an

119. African Charter, *supra* note 2, at 246.

120. *Id.*

121. See European Convention on Human Rights, *supra* note 8.

122. European Convention on Human Rights, *supra* note 8, at 222, 224; see Nnamuchi, *supra* note 51, at 45 (elaborating on this point).

123. See Nnamuchi, *supra* note 51, at 45-46 (“There is no doubt, as legal scholar James Hart explains, that the reference in the Preamble to Europe’s ‘common heritage of political traditions, ideals, freedom and the rule of law . . .’ was an explicit indication ‘that one of the [European Convention on Human Rights] intentions is to delineate and embody the political and ethical culture of Western Europe’ and, presumably, not that of any other peoples. To this extent, therefore, one could rightly characterize the [European Convention on Human Rights] as the first treaty-based challenge to the universality of human rights.”).

obligation upon States Parties to promote and protect the morals and traditional values recognized by the community.¹²⁴ Implicit in this stipulation is the question of whether the moral and traditional values of communities in Africa accord same-sex marriage the status of a human right? A response to this question is provided by Article 27(2) – the second noteworthy provision – which requires that the “rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”¹²⁵ What is at stake, therefore, is the communitarian underpinning of African society, the idea that individual interests are subsumed under collective will, a common morality which supersedes and nullifies contrary individual preferences.

Communitarianism or communalism is definitive of morality amongst the people, a point underscored by an observation made a few years ago, that the community will restrict individual autonomy in appropriate cases since the common good takes precedence over personal freedom or autonomy. In other words, the concept of individual autonomy, which is at the base of several key decisions of the U.S. Supreme Court involving the relationship between individual liberty and law enforcement authority of the government – such as *Griswold v. Connecticut*, which held for the first time that marital privacy regarding use of contraceptives is a constitutionally protected right,¹²⁶ *Lawrence v. Texas*, establishing, again for the first time, the right to consensual homosexual sex as a constitutional right encapsulated within the right to privacy,¹²⁷ and *Obergefell v. Hodges*¹²⁸ – does not attract the same seal of approval or importance in Africa. As argued elsewhere:

Had these cases been decided in a communal setting, the operational prism being that of communities insulated from the assault of modernity, the result would have certainly been different. The reason is because the ethics of communitarianism prescribes that ‘your business is my business’ and vice versa, and this powerfully dilutes the force of privacy in individual lives. It

124. African Charter, *supra* note 2, art. 17(3) (“The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.”).

125. *Id.* art. 27(2) (“The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”).

126. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); *see Eisenstadt v. Baird*, 405 U.S. 438, 453-54, n.10 (1972) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled on other grounds by Katz v. United States*, 389 U.S. 347 (1967), *and Berger v. New York*, 388 U.S. 41 (1967).

127. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

128. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015).

would be odd in these societies to defend allegations of what is generally perceived as wrongdoing on the basis of one's privacy interests.¹²⁹

Indeed, although in Western morality, individual autonomy is regarded as the basis of social relationships, the reverse is the case in Africa. Paternalism is the norm, acclaimed as being consistent with Africa communitarian ethos – rooted as it is, “not in individual claims against the state, but in the physical and psychic security of group membership.”¹³⁰ This understanding is the reason Article 29(7) of the African Charter, the last of the three key provision, imposes a duty upon every individual to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society.

This stipulation echoes the injunction by judge Tobriner in *Tarasoff v. Regents of the University of California*, which was alluded to in section II of this paper, that “[t]he protective privilege ends where the public peril begins.”¹³¹ The question then becomes whether, in light of the remarkable distinction between Western and African conceptualizations of the status of individual preferences versus that of the community, same-sex marriage is consistent with African morality and value system? The response is not far-fetched. A recent Pew Research poll found dastardly poor support for homosexuality in Africa, ranging from eight percent of the population in Kenya to one percent in Nigeria,¹³² underscoring burgeoning legislative response to the social upheaval, an instance of which is Nigeria's Same Sex Marriage (Prohibition) Act of 2014 as well as other criminalization statutes in several other African countries. Out of the fifty-four countries in Africa, twenty-two allow same-sex sexual acts¹³³ whereas more than half (thirty-three) have prohibitory regimes, twenty-three of which apply to women.¹³⁴ Regarding same-sex marriage, it is significant to note that South Africa remains a pariah, the lone country in Africa that has legalized the practice.¹³⁵ Even more striking, only twelve percent of U.N. Member States recognize homosexual marriage.¹³⁶

129. Nnamuchi, *supra* note 51, at 43.

130. Howard, *supra* note 54, at 166.

131. *See Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 442 (Cal. 1976).

132. *The Global Divide on Homosexuality*, *supra* note 113, at 1.

133. *See* AENGUS CARROLL & LUCAS RAMÓN MENDOS, STATE-SPONSORED HOMOPHOBIA 26 (12th ed. 2017), https://ilga.org/sites/default/files/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

134. *Id.* at 37.

135. *Id.* at 196.

136. *Id.* at 68.

Where then lies the validity of the claim that same-sex marriage is a universal human right?

IV. CONCLUSION

When the U.S. Supreme Court heard *Washington v. Glucksberg* in 1997, the Justices had no idea that their opinion would, in later years, prove eminently relevant to the current global homosexual marriage debacle. Yet, one of the cardinal principles upon which the Court's decision was based bears strongly on the question of whether homosexual marriage should be accorded the status of a fundamental human right:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'¹³⁷

What the U.S. Supreme Court was saying, in essence, was that to succeed in establishing a claim as a fundamental human right, the applicant was tasked with establishing that the claim in question was embedded in national psyche, beliefs and practices as to be undeniable as part and parcel of the nation's cosmology. In the instant case, because appellants were unable to meet this burden, in the sense of satisfying the Court that assisted suicide was consistent with the history and tradition of the United States, their claim failed. The Court's elucidation is quite helpful:

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.¹³⁸

This case, described in *Obergefell* as "the leading modern case setting the bounds of substantive due process,"¹³⁹ reflects the proper

137. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1992) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 309, 325 (1937); and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.")).

138. *Id.* at 728; see *District Att'y for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009); *United States v. Salerno*, 481 U.S. 739, 751 (1987); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

139. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting).

contextualization of Nigeria's Same Sex Marriage (Prohibition) Act and the vitriolic response from Western powers. Applying the *Glucksberg* standard to Nigeria raises a very simple question, *to wit*, is homosexual marriage compatible with the tradition or culture – in short, the way of life – of the various ethnic groups in Nigeria? Put differently, is there any shared value, some sort of common morality, that validates same sex union in the country? Recall the Pew Research findings, which found that only one percent of the population in Nigeria approve of same-sex marriage.¹⁴⁰

Moreover, judging from the nation's history and near unanimous support of the government in enacting the Same Sex (Prohibition) Act, the response to these questions seems resoundingly negative. In other words, to assert homosexual matrimony as a human right is to lay claim to an 'entitlement' that lacks foundation in the history, experience or morality of the people of Nigeria. This response in a national newspaper is an accurate portrayal of the view of the vast majority of Nigerians:

[T]he hostile reaction of Europeans and the United States to the recent signing into law of the bill that [proscribes] marriages and sexual relations between people of the same sex has not taken into consideration the socio-cultural differences between people of different racial backgrounds, and more importantly the religious beliefs of our people . . . We value the bilateral and multilateral relationships between Nigeria and its international partners and we believe that no unnecessary pressure will be brought to bear on us to accept what our people consider to be abhorrent . . . [T]he US and EU should respect the sensibilities of those in the majority who abhor the practice of same sex relations.¹⁴¹

Driving this point home, Phillip Adeyemo, an Anglican Bishop, added the following:

I think the president has rekindled the hope of the citizenry in his ability to protect the country's sovereignty and its cultural values by his signing of the same-sex marriage prohibition bill into law. The signing to me has put to rest the dictatorial tendencies of some countries trying to meddle in the internal affairs of the nation. We commended in strong terms President Goodluck Jonathan for having the zeal and political will to sign this bill into law, in the interest of the people of the country.¹⁴²

140. *The Global Divide on Homosexuality*, *supra* note 113, at 2.

141. Victoria Ojeme, *Gay-Marriage Law: Canada Cancels Jonathan's Visit*, VANGUARD (Jan. 20, 2014, 1:53 AM), <https://www.vanguardngr.com/2014/01/gay-marriage-law-canada-cancels-jonathans-visit/>.

142. *Same-Sex Marriage Law: Xtian Leaders Commend Jonathan*, VANGUARD (Jan. 26, 2014, 4:12 PM), <http://www.vanguardngr.com/2014/01/sex-marriage-law-xtian-leaders-commend-jonathan/>.

Significantly, despite massive outpouring of support throughout the country for the prohibitory regime, Western countries were undeterred in threatening the country with sanctions. This brazen display of arrogance and ethnocentrism, the idea that the “West is right” (documented in section I of this paper) represents a disturbing phenomenon in inter-State relationships – disturbing because of the demonstrative lack of respect for the wishes of Nigerians implicit in the language used by the threatening nations. In this, there is an important lesson for the population as well as the political leadership in the country. The Igbo have a saying, *onye me onwe ya ka nwata, e me ya ka nwata*, meaning, “if you act like a child, you are bound to be treated like a child.” It is precisely because political leadership in the country has, for decades, been in the hands of people whose conduct leaves much to be desired – indeed, child-like – that it is possible for Western countries, even small insignificant ones, to attempt to force the country’s action, and thus to thwart the will of the people. That is the most philosophically astute way of explicating threats upon threats issued against the country for exercising its right to self-determination, to govern itself according to the dictates of its culture and values, just as European and North American countries, which have arrogated to themselves the power to determine which values should count as human rights and which should not.

Recall that Russia has one of the most draconian anti-homosexual legislative frameworks in the world. Aside from explicitly prohibiting same-sex marriage, the law in Russia prohibits the spread of propaganda of “nontraditional sexual relations” amongst minors.¹⁴³ The law defines homosexual propaganda as anything “aimed at the formation of nontraditional sexual behavior” and imposes stiff penalties upon violators, such as fines up to \$150 for individuals and up to \$30,000 for companies including media organizations.¹⁴⁴ Not only was there no credible threat of sanctions against Russia, the country was allowed to host the February 2014 XXII Olympic Winter Games in Sochi. There is no doubt that had the event been scheduled to take place in Nigeria or any other country in Africa with same-sex prohibitory legal framework, it would have been cancelled by the powers that be. This evokes the doctrine of “might is right,” in that different standards are being applied to different countries, depending on the extent of sociopolitical and economic independence of the country – and not on a strict interpretation of what constitutes human rights. This is troubling.

143. *Russian Politician Behind Anti-Gay Law Champions President Putin’s Conservative Cause*, ASSOCIATED PRESS, <http://www.foxnews.com/world/2013/08/09/russian-politician-behind-anti-gay-law-champions-president-putin-conservative/> (last updated Jan. 13, 2015).

144. *Id.*

The conclusion of this paper is quite straightforward: Despite political grandstanding and posturing from several quarters, same-sex marriage as a human right is unknown to international law. Section III of this paper showed that although certain expressions of homosexuality, such as private homosexual sex, have been upheld as human rights, no international adjudicatory body or legal framework has decreed that there is a right to gay matrimony. Moreover, despite foreign pressure, many States continue to criminalize sodomy and same-sex marriages. That a few countries have independently accorded recognition to such marriages is irrelevant to the question of whether such marriages represent a globally shared value or a universal human right. The holding by the ECtHR in *Schalk and Kopf v. Austria*, that there is no European consensus on the issue of homosexual marriage and, therefore, States are at liberty to decide whether to permit same-sex marriage or otherwise,¹⁴⁵ as well as the decision of the HRC in *Joslin v. New Zealand* to the effect that the ICCPR does not recognize gay marriage, represents the current position of international law.

Accordingly, the claim that the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity “affirm binding international legal standards with which all States must comply”¹⁴⁶ and constitute “an authoritative statement of the human rights” of homosexual population,¹⁴⁷ lacks merit. The global consensus is that the Yogyakarta Principles do not establish a human rights standard, neither do they impose legally binding obligation on States. That was the basis for the criticism of Vernor Muñoz, U.N. Special Rapporteur on the Right to Education when he presented his report to the organization in 2010, for relying on the Yogyakarta Principles as setting a human rights standard.¹⁴⁸ This denunciation of the Report by the representative of Malawi (on behalf of African Group) reflects the sentiment of most States:

[The Special Rapporteur] had sought to: over-step the terms of his mandate; introduce ‘controversial concepts’ that were not recognized under international law; create new human rights; relied on information from non-credible sources that was not verified; failed to incorporate information provided by Member States; selectively quoted from the work of the treaty bodies in

145. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409.

146. *About the Yogyakarta Principles*, YOGYAKARTA PRINCIPLES, <http://yogyakartaprinciples.org> (last visited Dec. 22, 2017).

147. *The Yogyakarta Principles Plus 10*, YOGYAKARTA PRINCIPLES (Nov. 10, 2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

148. Vernor Muñoz (Special Rapporteur on the Right to Education), *Rep. of the U.N. Special Rapporteur on the Right to Education*, ¶¶ 23, 67, U.N. Doc. A/65/162 (July 23, 2010).

a manner that distorted their views; and sought to propagate controversial principles (the Yogyakarta Principles) that were not endorsed at the international level. Each of these criticisms was in contravention of the Code of Conduct and if left unchecked, would undermine the entire system of special procedures.¹⁴⁹

For these reasons, the Report was overwhelmingly rejected by the Third Committee of the General Assembly of the U.N. and permanently shelved. Therefore, while Western countries are within their legislative and jurisprudential competence to stamp homosexual marriage with the imprimatur of human rights in their respective territories and even to rely on the Yogyakarta Principles if they choose, it does not follow that they are at liberty to compel countries whose culture and morality are irreconcilably opposed to such marriages to act likewise. As affirmed by the HRC in *Leo Hertzberg v. Finland*,¹⁵⁰ “public morals differ widely” and since there “is no universally applicable common standard . . . a certain margin of discretion must be accorded to the responsible national authorities.”¹⁵¹ The blatant failure of Western countries to abide by this prescription, on a subject in which there is no global consensus nor support under international law, does nothing to advance human rights; instead—and this is the central argument of this paper—the action undermines the human rights of the people in those countries, such as Nigeria, to self-determination.

149. *Majority of GA Third Committee Unable to Accept Report on the Human Right to Sexual Education*, INT’L SERV. HUM. RTS. (Oct. 26, 2010), <http://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education>.

150. *Hertzberg v. Finland*, Communication 61/1979, U.N. Doc. CCPR/C/OP/1, at 124 (1985).

151. *Id.* ¶ 10.3.

REVIEWING A BAN ON TRANSGENDER TROOPS FROM AN INTERNATIONAL PERSPECTIVE

Cindy K. Suh*

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INTRODUCTION

Transgender individuals have served and died for the U.S. military for decades without recognition or support. A blanket ban to prevent transgender soldiers from enlisting in the United States armed forces inappropriately conveys to the world that transgender individuals are unfit for military service.¹ A policy that excludes transgender service members undermines military cohesiveness and contradicts the nation's foundations of democracy, freedom and equality.²

Currently, approximately nineteen countries aside from the U.S. allow soldiers to openly serve as transgender individuals in their militaries.³ In 1974, the Netherlands became the first country to allow transgender individuals to serve in its military.⁴ Australia, Canada, Israel and the United Kingdom followed suit.⁵

The United States became the last country to join the list when President Barack Obama lifted the ban on transgender soldiers in 2016.⁶ However, the move was an ephemeral win. On July 26, 2017, President Donald Trump

1. See Steve Hendrix, *A History Lesson for Trump: Transgender Soldiers Served in the Civil War*, WASH. POST (Aug. 25, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/07/26/a-history-lesson-for-trump-transgender-soldiers-served-in-the-civil-war/?utm_term=.37365a4d5596; Ryan Thoreson, *President Trump's Despicable Move to Ban Transgender People from Military Service*, HUM. RTS. WATCH (July 2, 2017, 3:50 PM), <https://www.hrw.org/news/2017/07/26/president-trumps-despicable-move-bar-transgender-people-military-service>.

2. Kara Milstein, Katy Steinmetz & Kim Bubello, *I Will Forever be an American Soldier: Transgender Service Members Respond to Trump's Ban*, TIME (July 28, 2017), <http://time.com/donald-trump-president-transgender-troops/>.

3. See AGNES GEREKEN SCHAEFER ET AL., RAND CORP., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY 50 (2016) (citing POLCHARET AL., THE HAGUE CTR. FOR STRATEGIC STUDIES, LGBT MILITARY PERSONNEL 11-14 (2014), http://hcss.nl/sites/default/files/files/reports/HCSS_LGBT_webversie.pdf), https://www.rand.org/pubs/research_reports/RR1530.html (Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom); Paul LeBlanc, *The Countries that Allow Transgender Troops to Serve in their Armed Forces*, CNN (July 27, 2017, 9:11 AM), <http://www.cnn.com/2017/07/27/us/world-transgender-ban-facts/index.html>; Tessa Weinberg, *U.S. is One of Many Countries Allowing Transgender Military Personnel*, L.A. TIMES (July 8, 2016, 12:29 PM), <http://www.latimes.com/nation/la-na-transgender-military-20160707-snap-story.html>.

4. LeBlanc, *supra* note 3.

5. *Id.*

6. U.S. SEC'Y OF DEF., DTM-16-005, MILITARY SERVICE OF TRANSGENDER SERVICE MEMBERS (2016); Matthew Rosenberg, *Transgender People Will be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/transgender-military.html>.

revealed that he intended to reinstate the blanket ban on transgender troops.⁷ The President advised via his dispensable “twitter” social media account:

[T]he United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.⁸

The President’s “tweet” message, despite its casual nature, was not “fake news.”⁹ On August 25, 2017, the White House released an official memorandum that directed the military to (1) stop enlisting transgender individuals and (2) halt the use of government resources to fund sex-reassignment surgeries for military personnel, unless the procedures had already begun.¹⁰ For transgender service members already serving in the military, the President directed the departments of Defense and Homeland Security to determine how to deal with these individuals.¹¹ The President’s directives were scheduled to take effect on March 23, 2018.¹² President Trump gave Defense Secretary James Mattis six months, by February 21, 2018, to submit a plan on how to implement the President’s directives.¹³

In response, The National Center for Lesbian Rights (NCLR) and GLTBQ Legal Advocates and Defenders (GLAD) filed a lawsuit in federal district court in Washington, D.C. to challenge President Trump’s directives

7. Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>; Donald Trump, @realDonaldTrump, TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>; Donald Trump, @realDonaldTrump, TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369>.

8. @realDonaldTrump, *supra* note 7.

9. Maria Perez, *Donald Trump’s ‘Fake News’ the Second-Most Annoying Phrase of 2017, Americans Say*, NEWSWEEK (Dec. 19, 2017, 1:30 PM), <http://www.newsweek.com/donald-trump-fake-news-annoying-phrase-poll-752882> (President Trump commonly refers to false stories or unfavorable news reports as “fake news”); see Donald Trump (@realDonaldTrump), TWITTER (Dec. 19, 2017, 7:07 AM), https://twitter.com/realDonaldTrump/status/943135588496093190?ref_src=twsrc%5Etfw%7Ctwamp%5Etweetembed%7Ctwtterm%5E943135588496093190&ref_url=https%3A%2F%2Fwww.newsweek.com%2Fdonald-trump-fake-news-annoying-phrase-poll-752882.

10. Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 25, 2017).

11. *Id.*

12. *Id.*

13. *Id.*

to reinstate the ban.¹⁴ NCLR and GLAD represented five anonymous transgender soldiers and two recruits in *Doe v. Trump*.¹⁵ The plaintiffs claimed that the transgender ban violated their Equal Protection and Due Process rights under the Fifth Amendment of the U.S. Constitution.¹⁶ Presently, at least three other federal lawsuits are also pending. Advocacy groups in Maryland, Washington, and California have similarly challenged the ban.¹⁷

On October 30, 2017, Judge Colleen Kollar-Kotelly of the District of Columbia granted a preliminary injunction against the ban.¹⁸ The injunction returned the policy on transgender service members to the “status quo” prior to President Trump’s July 2017 transgender ban.¹⁹ As a result, the court granted the plaintiff’s motion preventing President Trump from implementing his directives until final resolution of *Doe v Trump*.²⁰ Moreover, the court enjoined the government from implementing a ban that rejected transgender individuals from military service solely on the basis of his or her trans status.²¹ However, Judge Kollar-Kotelly’s ruling was only a partial injunction: The court refused to enjoin the ban on government-funded sex reassignment surgeries.²² Judge Kollar-Kotelly reasoned that none of the plaintiffs showed that they would likely be affected by the funding ban.²³ On

14. Amended Complaint, *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17CV1597 (CKK)).

15. *Doe v. Trump*, 275 F. Supp. 3d 167, 196 (D.D.C. 2017).

16. *Id.*

17. *See* *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017), *appeal dismissed*, No. 1:17CV2459, 2018 WL 2717050 (4th Cir. Feb. 2, 2018); *Stockman v. Trump*, No. 5:17CV01799, 2018 WL 4474768 (D. Cal. Sept. 18, 2018); *Kamoski v. Trump*, 328 F. Supp. 3d 1156 (D. Wash. 2018); Travis J. Tritten, *California Group Files Fourth Transgender Lawsuit Against Trump*, WASH. EXAMINER (Sept. 5, 2017), <https://www.washingtonexaminer.com/california-group-files-fourth-transgender-lawsuit-against-trump>; Press Release, GLBTQ Legal Advocates & Defs., GLAD, NCLR Join as Co-Counsel in Equal. CA Lawsuit Against Transgender Military Ban (Oct. 2, 2017), <https://www.glad.org/post/glad-nclr-join-co-counsel-equality-california-lawsuit-transgender-military-ban/>.

18. *Doe v. Trump*, 275 F. Supp. 3d at 176-77.

19. *Id.* at 177.

20. *Id.* at 207.

21. *Id.* at 216 (finding that “[a]bsent an injunction, Plaintiffs will suffer a number of harms that cannot be remediated after that fact even if Plaintiffs were to eventually succeed in this lawsuit. The impending ban brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities”).

22. *Id.* at 217.

23. *Id.* at 203.

November 21, 2017, the U.S. Department of Justice appealed the October injunction, which was dismissed by the D.C. Circuit on January 4, 2018.²⁴

In another federal decision, *Stone v. Trump*, Maryland District Court Judge Marvin J. Garbis granted the preliminary injunction that Judge Kollar-Kotelly denied, enjoining the government from withholding government funds for sex reassignment surgeries for military personnel.²⁵ The Maryland court held that the plaintiffs had successfully

demonstrated that they [were] already suffering harmful consequences such as the cancellation and postponements of surgeries, the stigma of being set apart as inherently unfit, facing the prospect of discharge and inability to commission as an officer, the inability to move forward with long-term medical plans, and the threat to their prospects of obtaining long-term assignments.²⁶

On March 23, 2018, President Trump issued another memorandum revoking his prior August 25, 2017 memorandum.²⁷ This time President Trump disqualified transgender persons who “may require substantial medical treatment, including medications and surgery . . . except under certain limited circumstances.”²⁸ The limited circumstances were not specified in the President’s second memorandum.²⁹ This new memorandum would still generally bar most transgender people from the military.³⁰ On April 13, 2018, the amended policy was stayed in *Karnoski v. Trump*.³¹ The U.S. District Court ruled that the new memorandum was not “new,” but was essentially the same as the prior memorandum and, importantly, that the ban must survive a strict scrutiny standard of review.³² The case is set for trial in April 2019.³³

24. *Id.* at 167.

25. *Stone v. Trump*, 280 F. Supp. 3d 747, 767-69 (D. Md. 2017) (granting a preliminary injunction enjoining enforcement of the Retention, Accession, and Sex Reassignment Surgical Directives pending the final resolution of the case).

26. *Id.* at 767.

27. Memorandum on Military Service by Transgender Individuals, DAILY COMP. PRES. DOC. 1 (Mar. 23, 2018).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Karnoski v. Trump*, No. 2:17-CV-01297 (W.D. Wash. Apr. 13, 2018).

32. *Id.* slip. op. at 6 (“The Court finds that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place.”).

33. Order Denying Motion to Stay at 9, *Karnoski v. Trump*, 2018 WL 1784464 (2018) (No. C17-1297-MJP).

Contrary to President Trump's assertions, transgender individuals in the military do not harm national security. The U.S. government should not impose a ban on transgender military persons because (1) this ban would fail under the scrutiny of international human rights law that provides transgender people, regardless of military or civilian statuses, equal protection and privacy rights; (2) international human rights decisions have previously struck down bans on gay military personnel and thus a similar fate would likely ensue for a ban on transgender service members; (3) United States courts have previously derived persuasive authority from international human rights practices and can similarly look to international practices on the issue of transgender soldiers; and (4) several other countries have successfully implemented inclusive transgender military policies so the United States should be able to succeed as well.

Thus, the U.S. government's failure to join its international counterparts in rejecting a ban on transgender soldiers subjects it to the scrutiny of the international community and increases the chance that the U.S. will soon be in violation of general principles of international law.

I. BACKGROUND: THE U.S. MILITARY HAS ALWAYS RECRUITED TRANSGENDER INDIVIDUALS, THOUGH PERHAPS WITHOUT REALIZING

There is no universally recognized definition for transgender, the term is generally fluid, broad and inclusive.³⁴ According to the advocacy organization, Gay & Lesbian Alliance Against Defamation (GLAAD), transgender is:

An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms – including *transgender* Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures.³⁵

Commonly, discussions of transgender issues are associated with the term “gender identity,” which is defined as:

34. See *National Glossary of Terms*, PFLAG, <https://www.pflag.org/glossary> (last visited Oct. 25, 2018) (“Transgender [is] [a] term describing a person’s gender identity that does not necessarily match their assigned sex at birth This word is also used as a broad umbrella term to describe those who transcend conventional expectations of gender identity or expression.”).

35. *Media Reference Guide: Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Mar. 22, 2018).

One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.³⁶

By contrast, the term “transsexual” is an older term that originated in the medical and psychological communities and differs from transgender because it is not an umbrella term.³⁷ Transsexuals have changed or seek to change their bodies through medical interventions such as hormones or surgery.³⁸ The terms are arguably interchangeable, depending on one's preference.³⁹

Although definitions and awareness of transgender communities may not have been as pervasive in the past, transgender individuals participation in the military is hardly a novel concept.⁴⁰ Transgenderism has been woven into the military for centuries.⁴¹ Historically, women who wished to enlist but were barred from gender restrictive policies often identified themselves as male in order to render service.⁴² On numerous occasions, women posed as men to serve in the Civil War.⁴³ Although the reasons for women enlisting in the military ranged from joining their male partners who were in service to contributing to the war effort, the phenomenon of transgender service members is not new.⁴⁴

For example, Albert Cashier, born Jennie Rodgers, enlisted in the Union Army in 1862 as a male soldier and fought as an infantryman in forty battles.⁴⁵ Cashier evaded detection during service; no one thought anything

36. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Mar. 22, 2018).

37. See GLADD, *supra* note 35.

38. *Id.*

39. *Id.*

40. See M. Sheridan Embser-Herbert, *Transgender Military Service: A Snapshot in Time*, in *THE PALGRAVE INTERNATIONAL HANDBOOK OF GENDER AND THE MILITARY 177*, 178 (Rachel Woodward & Claire Duncanson eds., 2017).

41. *Id.*

42. *Id.*

43. Bonnie Tsui, *Long Before Transgender was a Word, Women Posed as Men to Serve in the Army*, L.A. TIMES (July 30, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-tsui-transgender-history-wars-20170730-story.html>.

44. Embser-Herbert, *supra* note 40.

45. Vicksburg Nat'l Military Park, *Jennie Rodgers, aka Private Albert Cashier*, NAT'L PARK SERV., <https://www.nps.gov/articles/jennie-hodgers-aka-private-albert-cashier.htm> (last updated Aug. 14, 2017).

of his seeking privacy when bathing or dressing.⁴⁶ Cashier continued to identify as a man after the war.⁴⁷ Although his fellow soldiers eventually discovered he was born a woman, Cashier was buried with full military honors and dressed in his Union uniform.⁴⁸ Cashier's male name was inscribed on his tombstone, along with the details of his military service.⁴⁹ Thus, regardless of how Cashier chose to personally identify himself, his military efforts garnered acceptance and praise by his compatriots.⁵⁰

Despite its history, transgenderism in the military has been discouraged. The military has alleged that exclusionary policies are necessary because trans persons are medically unfit for service.⁵¹ For instance, in *Doe v. Alexander*, the Army disqualified the female plaintiff on medical fitness grounds because her sex-reassignment surgery that transitioned her from male to female could require continued hormonal and psychological treatment.⁵² Although the court declined to reach the merits of the case, the court noted that the Army "might well conclude" that the plaintiff's trans status could cause her to "lose excessive duty time and impair her ability to serve" around the world.⁵³ Despite previously having served in the Air Force for eight and one-half years as a man prior to seeking enlistment in the Army as a woman, Doe was denied admission into the Army.⁵⁴

Additionally, in *Leyland v. Orr*, the court upheld the military's decision to discharge the plaintiff from military service because of her sex reassignment surgery from male to female.⁵⁵ Her genital surgery was likened to an amputated limb.⁵⁶ The Air Force argued that Leyland's surgery would cause potential health risks that would impair her ability to serve.⁵⁷ The court denied Leyland's request to have an opportunity to prove that she could perform her duties despite her sex change surgery.⁵⁸

The exact number of transgender military personnel throughout history is unclear because the trans community was not widely known, not accepted,

46. *Id.*

47. Tsui, *supra* note 43.

48. *Id.*

49. *Id.*

50. *See id.*

51. *See* Stone v. Trump, 280 F. Supp. 3d 747, 753-54 (D. Md. 2017) (quoting Memorandum on Military Service by Transgender Individuals, *supra* note 10).

52. *Doe v. Alexander*, 510 F. Supp. 900, 905 (D. Minn. 1981).

53. *Id.*

54. *Id.* at 902.

55. *Leyland v. Orr*, 828 F.2d 584, 586 (9th Cir. 1987).

56. *Id.*

57. *Id.*

58. *Id.*

and undistinguished from homosexual individuals.⁵⁹ The current number of transgender personnel in the United States military is likewise unclear.⁶⁰ The Pentagon has not revealed an accounting.⁶¹ Considering that openly serving as a transgender person was banned until 2016, an accounting would likely be an estimate at best.⁶² A 2016 study by the RAND Corporation (a contraction of research and development),⁶³ commissioned by the Defense Department, estimated that between 1,320 to 6,630 transgender people were actively serving in the military.⁶⁴ The study further noted that between 830 and 4,160 transgender members served in the Selected Reserves.⁶⁵ These numbers pale in comparison to the total 1.3 million servicemen on active duty as of September 2017.⁶⁶

As to legally recognizing a trans individual, there is debate over whether sexual reassignment surgery is necessary to legally change one's identifying documents such as licenses and birth certificates.⁶⁷ Many people say that sexual reassignment surgery or hormone treatment is required to fully transition, others say that simply identifying with another gender is sufficient.⁶⁸ For instance, the U.S. is divided on whether states should require proof of one's sex reassignment surgery to change a gender marker on identification cards.⁶⁹

Because the military has long been formatted in a binary system that addresses the physical needs of men versus women, this comment will

59. Angela Jude & Jessie Earl, *A History of Trans People in the Military*, ADVOCATE (July 28, 2017, 5:05 PM), <https://www.advocate.com/transgender/2017/7/28/history-trans-people-military>.

60. Tom Kertscher, *How Many People in the Military are Transgender*, POLITIFACT WIS. (July 26, 2017, 3:42 PM), <https://www.politifact.com/wisconsin/statements/2017/jul/26/mark-pocan/how-many-people-military-are-transgender/>.

61. *Id.*

62. *Id.*

63. *Frequently Asked Questions*, RAND CORP., <https://www.rand.org/about/faq.html#is-rand-an-acronym-> (last visited Oct. 4, 2018).

64. SCHAEFER ET AL., *supra* note 3, at x-xi.

65. *Id.*

66. DMDC, *Active Duty Military Personnel by Service by Rank/Grade*, U.S. DEP'T OF DEF. (Sept. 30, 2017), https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp.

67. *See* Embser-Herbert, *supra* note 40, at 192, n.13 (asking at what point has one "transitioned?"); GLAAD, *supra* note 35.

68. *See* Embser-Herbert, *supra* note 40, at 179; GLAAD, *supra* note 35 (maintaining that "a transgender identity is not dependent upon medical procedures").

69. *Frequently Asked Questions*, NAT'L CTR. TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>; *see also* Mary Emily O'Hara, *AMA Says Transgender People Shouldn't Require Surgery to Change their Birth Certificate*, VICE NEWS (June 11, 2014, 1:30 PM), <https://news.vice.com/article/ama-says-transgender-people-shouldnt-require-surgery-to-change-their-birth-certificate>.

primarily discuss those service members with an end goal to transition from one gender to another, regardless of where they stand in hormone therapy and surgery. This is not to undervalue or overlook the spectrum that exists for gender identity issues.

II. INTERNATIONAL HUMAN RIGHTS LAW EXTENDS TO TRANSGENDER INDIVIDUALS

A. *The Broad Reach of International Law*

There is currently no international treaty on LGBT rights.⁷⁰ Although international human rights law does not specify transgender individuals as categorically covered by equal protection and privacy rights, international law implicitly extends these rights to transgender individuals. For instance, Article 1 of the Universal Declaration of Human Rights (UDHR), states, “*All* human beings are born free and equal in dignity and rights.”⁷¹ The UDHR also states, “*All* are equal before the law and are entitled without any discrimination to equal protection of the law.”⁷² Certainly, transgender individuals would fall under such a broad umbrella.

Similarly, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states, “All persons are equal before the law and . . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.”⁷³

Although the ICCPR does not define or explain the use of the term “other status,” the term appears in a similar provision in Article 2 of the International Covenant on Economic, Social, and Cultural Rights [ICESCR].⁷⁴ Arguably, the drafters of these provisions intentionally included “other status”

70. See generally MICHAEL HAAS, INTERNATIONAL HUMAN RIGHTS 326 (2008).

71. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 1 (Dec. 10, 1948) (emphasis added).

72. *Id.* at 7 (emphasis added).

73. International Covenant on Civil and Political Rights art. 26, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

74. International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Article 2 of Part II states that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.” *Id.*

individuals as a catch-all to protect persons not listed.⁷⁵ According to the Committee on Economic, Social and Cultural Rights, the “other status” category is necessary because discrimination varies and evolves over time.⁷⁶

Because international human rights law has a broad reach and was drafted with the general purpose to shield a wide variety of individuals, transgender individuals are inherently recognized and protected by international law. Thus, the U.S. government should rethink its discriminatory transgender military, which directly contradicts principles of international law.

B. *Privacy and Equal Protection for the Transgender Community*

Transgender individuals have human rights to privacy and equal protection. Although not specifically mentioned in broad international human rights treaties, transgender issues have been specifically addressed in case law. Most frequently, these cases have raised violations of Article 8 of the European Convention on Human Rights, which provides everyone with the right to a “private and family life.”⁷⁷

In 1992, in the case of *B. v. France*, the European Court of Human Rights (ECtHR) held that the French government’s refusal to amend its civil status register to reflect a trans female’s new gender identity violated Article 8.⁷⁸ Specifically, the court agreed with the French court that the plaintiff’s status

75. See U.N. Comm. on Econ., Soc., & Cultural Rts., General Comment No. 18 on Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989); INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW 29 (2009), <https://www.icj.org/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf> (citing General Comment No. 18, *supra*).

76. U.N. Comm. on Econ., Soc., & Cultural Rts., General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights Under Article 2, Paragraph 2, of Covenant, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

77. European Convention on Human Rights art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection for the rights and freedoms of others.

Id.

78. *B. v. France*, App. No. 13343/87, 16 Eur. H.R. Rep. 1, 20 (1992) (“In the circumstances, the Commission is of the opinion that the French legal system does not provide the applicant with practical, effective protections, if appropriate by the adoption of positive measures, of her private life within the meaning of Article 8(1) of the Convention.”).

should be amended in the register because the plaintiff was wrongly put in a “daily situation which was not compatible with the respect due to her private life.”⁷⁹ Thus, the court recognized that trans individuals rightfully have personal and private lives, and a government’s refusal to modify its civil records to correctly reflect personal life choices was unwarranted.

Later in 1997, the Court in *X, Y, and Z v. the United Kingdom* acknowledged that a family life existed between a trans individual and his partner’s child.⁸⁰ A trans man (X) and his female partner (Y), lived together and had a child (Z) by artificial insemination.⁸¹ The court determined that X had acted as Z’s father in every respect since Z’s birth and⁸² recognized that adults, regardless of trans status, have the same right to parenthood and to a family life as anyone else.⁸³

Moreover, *Goodwin v. United Kingdom*, a landmark decision in which the ECtHR acknowledged that trans individuals were entitled to “personal development and to physical and moral security in the full sense enjoyed by others in society,” overturned prior decisions that denied gender changes on birth certificates.⁸⁴ Goodwin, a trans woman, faced harassment during employment and had problems receiving insurance payments because her sex at birth remained unchanged on legal documents.⁸⁵ The ECtHR reasoned that such changes had “no concrete or substantial hardship or detriment to the public interest,” and that society should “tolerate a certain inconvenience to enable individuals to live in dignity and worth.”⁸⁶ Because of *Goodwin*, the U.K. Parliament enacted the Gender Recognition Act of 2004, which allowed transgender individuals to obtain new birth certificates.⁸⁷

One could argue that although the above cases seem to support a recognition of transgender rights in society, these cases are limited to the civilian context. However, these concepts are applicable in the military context: Absent a showing that transgender soldiers are detrimental to public interest, transgender soldiers should have the private right to choose their genders and serve with dignity and worth. Certainly, the discomfort of

79. *Id.* at 33.

80. *X, Y & Z v. United Kingdom*, App. No. 21830/93, 24 Eur. H.R. Rep. 143, 157 (1997).

81. *Id.* at 143.

82. *Id.*

83. *Id.*

84. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 30.

85. *Id.* at 9, 10.

86. *Id.* at 31-32.

87. Natasha Holcroft-Emmess, *The Long Road to Legal Recognition of Transgender Rights*, RTS. INFO. (Mar. 31, 2016), <https://rightsinfo.org/long-road-legal-recognition-transgender-rights/>; see Gender Recognition Act 2004, c.7, Explanatory Notes ¶ 4 (Eng.), <http://www.legislation.gov.uk/ukpga/2004/7/notes>.

having to have to conceal one's private life to enlist in the military would infringe upon the right to lead a life outside the military.

C. "Gender Identity" Laws Reflect Acceptance of Transgender Individuals

An onslaught of recent "Gender Identity" laws mirrors the growing acceptance of the transgender community and the need to tailor laws to the community's unique needs. For instance, in 2012, Argentina enacted what is likely the most progressive of gender identity laws.⁸⁸ Under Argentina's *Ley de Género* [Gender Law], individuals may freely develop their gender identities without undergoing psychiatric diagnosis or surgery prior to changing official documents.⁸⁹ Trans people are also given access to comprehensive health care.⁹⁰ Moreover, the sex reassignment surgery is included in both public and private health care plans.⁹¹ This law suggests that the concept of gender is breaking away from the rigidity of a binary system.

Similarly, in 2014, Denmark enacted its form of gender identity law that allowed anyone over the age of eighteen to change their identities on legal documents without requiring medical intervention.⁹² Thus, a Danish citizen may self-determine his or her own gender without surgery or hormone treatment.⁹³ In addition, the Netherlands, Vietnam, India, Australia, Ecuador, Bolivia, and Japan have also passed gender identity legislation.⁹⁴ Thus, recent legislation of gender identity laws reflects a growing acceptance of equal transgender rights on an international scale. And a transgender

88. See Law No. 26.743, May 23, 2012, B.O. 544 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>; see also Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, N.Y. TIMES (May 24, 2012), <http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html>.

89. Law No. 26.743, May 23, 2012, B.O. (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>.

90. See Ley 26.743: Identidad de Género (2012), IDENTIDAD & DIVERSIDAD, <http://identidadydiversidad.adc.org.ar/normativa/ley-26-743-identidad-de-genero-2012/> (last visited Oct. 20, 2018) (Arg.); *id.* art. 11.

91. Law No. 26.743, May 23, 2012, B.O. (Arg.), art. 11; Azadeh Ansari, *Transgender Rights: These Countries are Ahead of the US*, CNN (Feb. 23, 2017, 12:28 PM), <http://www.cnn.com/2017/02/23/health/transgender-laws-around-the-world/index.html>.

92. See TGEU PR: *Denmark Goes Argentina!*, TGEU TRANSGENDER EUR. (June 11, 2014), <http://tgeu.org/denmark-goes-argentina/>.

93. *Id.*

94. See *Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity*, HUM. RTS. WATCH, <https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity> (last updated June 23, 2017).

military ban in the U.S. is not only in conflict with this growing trend but reflects poorly on U.S. policy-making.

III. INTERNATIONAL ACCEPTANCE OF LESBIAN AND GAY SERVICEMEMBERS IN THE MILITARY SUPPORTS REPEAL OF THE TRANSGENDER BAN

The discussion of transgender individuals in the military is invariably linked to the discussion of gay and lesbian servicemembers in the military. Several countries that previously denied openly homosexual soldiers have since repealed their policies. Australia, Canada, the Czech Republic, Switzerland, the United Kingdom, Uruguay, Italy and France are among the many countries that now allow openly gay servicemembers in the military.⁹⁵

European Court of Human Rights decisions upholding the rights of gay and lesbian individuals to serve in the military have established a pathway for courts to similarly uphold transgender rights in the military. For example, the ECtHR held in *Smith v. United Kingdom* that discharging soldiers based on homosexual status violated soldiers' rights to privacy.⁹⁶ Moreover, the court rejected claims that gays in the U.K. military would damage the military's "morale and fighting power."⁹⁷ The ECtHR anticipated that the military would experience *some* difficulties from lifting the ban on gays in the military, but suspected these difficulties would not be unlike those when the military had accepted women or racial minorities.⁹⁸ Thus, international human rights courts are likely to invalidate claims that accommodations for transgender individuals are too burdensome. Some transitional difficulty is naturally expected and acceptable.

Similarly in 2002, in *Perkins and R. v. United Kingdom*, the ECtHR held that the military, under Article 8 of the European Convention on Human Rights, violated both the complainant's right to private and family life as well as the right to privacy by investigating and discharging them from the military due to their homosexuality.⁹⁹ Thus, a similar fate will likely ring true for transgender individuals who are also discharged for their identities.

95. PALM CENTER, COUNTRIES THAT ALLOW MILITARY SERVICE BY OPENLY GAY PEOPLE (2009), <http://archive.palmcenter.org/files/active/0/CountriesWithoutBan.pdf>.

96. *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45, 74-75.

97. *Id.* at 48.

98. *Id.* at 72-73.

99. *Perkins v. United Kingdom*, Eur. Ct. H.R. (2002), ¶ 38, 41.

A. Repealing the Ban on Homosexual Soldiers did not Disrupt Military Effectiveness and is Indicative of Repealing the Ban on Transgender Soldiers

Repealing the ban on gay and lesbian servicemembers did not disrupt military effectiveness in other countries. In Australia, a study conducted in 2000 by Aaron Belkin and Jason McNichol concluded that the 1992 lift on the Australian Defense Force's (ADF) ban on gay service members had "not led to any identifiable negative effects on troop morale, combat effectiveness, recruitments and retention, or other measures of military performance."¹⁰⁰ Rather, the evidence suggested that the policy changes may have contributed to "improvements in productivity and working environments for service members."¹⁰¹

A 2010 research study by the Palm Center found that twenty-five nations allow gays and lesbians to serve openly in the military.¹⁰² Among those States, Canada and Australia have allowed gay service members to serve in the military since 1992.¹⁰³ Israel lifted its ban in 1993 and South Africa in 1998.¹⁰⁴ The research concluded that transitions to policies of equal treatment for gays and lesbians in the military were "highly successful and [] had no negative impact on the morale, recruitment, retention, readiness, or overall combat effectiveness."¹⁰⁵ None of the policies to include gay military personnel were later reversed.¹⁰⁶ The study also found that none of the countries studied installed separate facilities for gay troops, nor did they retain rules treating service members differently based on their sexual orientation.¹⁰⁷

B. Repeal of "Don't Ask Don't Tell" is Indicative of Transgender Ban's Future

Those that previously favored upholding a ban against homosexual soldiers in the U.S. military claimed that gays in the military would detract

100. AARON BELKIN & JASON MCNICHOL, THE EFFECT OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE AUSTRALIAN DEFENSE FORCES 2 (2000), http://www.palmcenter.org/files/active/0/Australia_Final_Report.pdf.

101. *Id.*

102. NATHANIEL FRANK ET AL., GAYS IN FOREIGN MILITARIES 2010, at 2 (2010).

103. *Id.* at 6, 7.

104. *Id.* at 7.

105. *Id.* at 2.

106. *Id.*

107. *Id.* at 3-4.

from military effectiveness.¹⁰⁸ President Trump is attempting a similar argument with his transgender ban.

The history behind the repeal of the ban on openly gay and lesbian service members suggests that a ban on transgender service members will similarly prove unsuccessful. In 1993, the Clinton Administration adopted the military policy “Don’t Ask, Don’t Tell” (“DADT”), which prohibited discrimination against homosexual troops, yet at the same time, barred service members from being openly gay, lesbian, or bisexual in the military.¹⁰⁹ This prohibition sent the message that discrimination in the military was acceptable.¹¹⁰

The DADT policy created a culture of intolerance, mistrust, deception, prevarication, harassment and violence.¹¹¹ In 2010, the Obama Administration repealed DADT, allowing gay and lesbian soldiers to serve openly.¹¹² Prior to signing the repeal, Obama stated:

No longer will our country be denied the service of thousands of patriotic Americans who are forced to leave the military – regardless of their skills, no matter their bravery or their zeal, no matter their years of exemplary performance – because they happen to be gay. No longer will tens of

108. See Philip Bump, *Trump’s Argument Against Transgender Soldiers Echoes One Used Against Gays, Women and Blacks*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/news/politics/wp/2017/07/26/trumps-argument-against-transgender-soldiers-echoes-one-used-against-gays-women-and-blacks/?utm_term=.a86d434107fe.

109. See DAVID F. BURRELLI, CONG. RESEARCH SERV., R40782, “DON’T ASK, DON’T TELL”: THE LAW AND MILITARY POLICY ON SAME-SEX BEHAVIOR 2 (2010) (quoting President’s News Conference, in *Public Papers of the Presidents of the United States, William J. Clinton, 1993, Book 1*, July 19, 1993: published 1994: 1111 (“One, service men and women will be judged based on their conduct, not their sexual orientation. Two, therefore the practice . . . of not asking about sexual orientation in the enlistment procedure will continue. Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption. . . . And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And thanks to the policy provisions agreed to by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members.”).

110. See *The Repeal of “Don’t Ask, Don’t Tell,”* HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-repeal-of-dont-ask-dont-tell> (last visited Oct. 20, 2018).

111. See Helena Carreiras, *Gendered Organizational Dynamics in Military Contexts*, in THE PALGRAVE INTERNATIONAL HANDBOOK OF GENDER AND THE MILITARY 105, 113 (Rachel Woodward & Claire Duncanson eds., 2017).

112. *Id.*; Elisabeth Bumiller, *Obama Ends “Don’t Ask, Don’t Tell” Policy*, N.Y. TIMES (July 22, 2011), <https://www.nytimes.com/2011/07/23/us/23military.html>; *The Repeal of “Don’t Ask, Don’t Tell,” supra* note 110.

thousands of Americans in uniform be asked to live a lie, or look over their shoulder in order to serve the country that they love.¹¹³

Research conducted one year after the repeal of DADT showed that the repeal had “no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale. If anything, [the] DADT repeal appears to have enhanced the military’s ability to pursue its mission.”¹¹⁴

The transgender military ban will inevitably fail like DADT because both bans against homosexuals and transgender individuals deny skilled military personnel from serving their countries without justification. Being openly gay in the military did not undermine the U.S. military’s effectiveness, nor will being openly transgender.

C. U.S. Courts May Rely on International Practices

The U.S. Supreme Court has used international authority in its opinions and may do so to decide the future of the transgender ban. For example, in *Lawrence v. Texas*, Justice Kennedy cited to *Dudgeon v. United Kingdom*, a case decided by the European Court of Human Rights (ECtHR), in invalidating a Texas law that criminalized sexual conduct between two consenting adults of the same sex.¹¹⁵

Further, in *Roper v. Simmons*, the Court looked to international standards to conclude that the death penalty for juvenile criminals was unconstitutional.¹¹⁶ In *Hamdan v. Rumsfeld*, the Court applied interpretations of Common Article 3 of the Geneva Conventions.¹¹⁷ The Court also

113. Press Release, Office of Press Sec’y, Remarks by the Pres. & Vice Pres. at Signing of the Don’t Ask Don’t Tell Repeal Act of 2010 (Dec. 22, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a>; see William Branigin et al., *Obama Signs DADT Repeal Before Big, Emotional Crowd*, WASH. POST (Dec. 22, 2010, 11:49 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122201888.html>.

114. Aaron Belkin et al., *Readiness and DADT Repeal: Has the New Policy of Open Service Undermined the Military?*, 39 ARMED FORCES & SOC’Y. 587, 588 (2012); Carreiras, *supra* note 111, at 112-13 (“In September 2011, the US Congress voted the repeal of the ban and since then gay and lesbian soldiers have been allowed to serve openly. Research conducted one year after, showed that the ‘DATA repeal has had no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale. If anything, DADT repeal appears to have enhanced the military’s ability to pursue its mission.’”) (quoting Aaron Belkin et al., *supra*).

115. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 14 (1981)).

116. *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

117. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-35 (2006).

reviewed international authority in *Graham v. Florida* to determine the constitutionality of life imprisonment without the possibility of parole for juvenile offenders.¹¹⁸

Because the Supreme Court has previously relied on international practices, a similar influence on the ban on transgender military personnel could be possible; international practices have favored equal privacy rights for all.

IV. INCLUSIVE TRANSGENDER POLICIES PROVE SUCCESSFUL IN OTHER COUNTRIES

The President's claim that open acceptance of transgender soldiers would disrupt the military is without merit. A 2016 RAND Corporation study stated that "available research found *no evidence* from Australia, Canada, Israel, or the United Kingdom that allowing transgender personnel to serve openly has had any negative effect on operational effectiveness, cohesion, or readiness."¹¹⁹ Thus, a meritless ban on transgender soldiers is discriminatory and in violation of equal protection laws.

In 2014, the Hague Centre for Strategic Studies released a LGBT Military Index ranking 103 countries according to their inclusive policies towards the LGBT community.¹²⁰ New Zealand ranked number one, followed by the Netherlands, United Kingdom, Sweden, Australia and Canada.¹²¹ The United States ranked number forty, in part because of its then existing ban on transgender troops.¹²²

Although President Trump cites "tremendous" medical costs to defend his decision to ban transgender soldiers, a 2016 study by the Department of Defense (DOD) concluded transgender military service would increase health care costs by \$2.4 million to \$8.4 million annually, a "minimal impact" on the \$6.27 billion total budget.¹²³ The U.S. military spends \$41.6 million annually on Viagra alone, nearly five times the amount for estimated transgender military care.¹²⁴

118. *Graham v. Florida*, 560 U.S. 48, 80-82 (2010).

119. SCHAEFER ET AL., *supra* note 3 (emphasis added).

120. JOSHUA POLCHAR ET AL., HAGUE CTR. FOR STRATEGIC STUD., LGBT MILITARY PERSONNEL 56 (2014).

121. *Id.* at 58.

122. *Id.*

123. Press Release, RAND Corp. Impact of Transgender Personnel on Readiness and Health Care Costs in the U.S. Military Likely to be Small (June 30, 2016) (citing SCHAEFER ET AL., *supra* note 3, at 36), <https://www.rand.org/news/press/2016/06/30.html>.

124. Christopher Ingraham, *The Military Spends Five Times as Much on Viagra as It Would on Transgender Troops' Medical Care*, WASH. POST (July 26, 2017),

Additionally, an August 2017 report by the Palm Center estimated that the financial cost of fully implementing President Trump's ban on transgender service members would be \$960 million.¹²⁵ This \$960 million is incomparable to the maximum annual cost of \$8.4 million per year to provide transition related health care.¹²⁶ The report warned policymakers to take into account the costs of discharging transgender service members, not just the costs of retaining them.¹²⁷ Thus, the President's position to ban transgender military personnel for budgetary reasons is unfounded.

Other countries such as Israel, Canada, Australia, and the United Kingdom have successfully incorporated transgender individuals into their militaries, proving that inclusive military policies work. The United States is well equipped to either implement other countries' policies or to create its own policies that implement the themes of education, openness and acceptance that pervade other countries' military strategies.

A. *Israel*

Enduring decades of threats to its national borders, Israel was not dissuaded from opening its military to transgender soldiers in 1993.¹²⁸ The Israel Defense Force (IDF) recognizes that transgender identity is neither a disability nor a liability.¹²⁹ In April 2017, Shachar Erez became the first

https://www.washingtonpost.com/news/wonk/wp/2017/07/26/the-military-spends-five-times-as-much-on-viagra-as-it-would-on-transgender-troops-medical-care/?utm_term=.a6ead8fe81bf; see Patricia Kime, *DoD Spends \$8.4M a Year on Viagra, Similar Meds*, MIL. TIMES (Feb. 13, 2015), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2015/02/13/dod-spends-84m-a-year-on-viagra-similar-meds/>.

125. AARON BELKIN ET AL., PALM CTR., DISCHARGING TRANSGENDER TROOPS WOULD COST \$960 MILLION 1 (2017).

126. *Id.*

127. *Id.* at 2 (“If decisions concerning whether to allow transgender personnel to serve are based on financial considerations, then policymakers should take into account the costs of discharging the service members, not just the costs of retaining them under a policy of equal treatment.”).

128. Rachel E. Gross, *What Other Countries Can Teach America About Transgender Military Service*, SLATE (Aug. 10, 2015, 3:41 PM), http://www.slate.com/blogs/outward/2015/08/10/transgender_military_service_lessons_from_around_the_world.html; see Paul LeBlanc, *The Countries that Allow Transgender Troops to Serve in Their Armed Forces*, CNN (July 27, 2017, 9:11 AM), <https://www.cnn.com/2017/07/27/us/world-transgender-ban-facts/index.html>.

129. See Yair Rosenberg, *Trump Just Banned Transgender Soldiers, Claiming They Make Us Less Safe*, TABLET (July 26, 2017, 1:23 PM), <https://www.tabletmag.com/scroll/241764/trump-just-banned-transgender-soldiers-claiming-they-make-us-less-safe-israel-begs-to-differ>.

openly transgender officer in the IDF.¹³⁰ The IDF supported Erez' transition over his years of military service and funded his gender reassignment surgery and hormone treatments.¹³¹ When Erez was asked why he became *openly* transgender in the IDF, he stated that, as a commanding officer, "to have an open and honest relationship with my soldiers, I must be first open and honest with them."¹³² Certainly, a ban on transgender soldiers would only promote secrecy where open and honest leadership is essential on the battlefield.

B. Canada

In Canada, a ban on transgender soldiers was lifted in 1992.¹³³ In response to President Trump's tweet, the official Twitter account for the Canadian Forces responded "[w]e welcome [Canadians] of all sexual orientations and gender identities. Join us!"¹³⁴

Corporal Natalie Murray, who has served with the Canadian Armed Forces for twenty-seven years, transitioned in 2003.¹³⁵ She works as an electronics technician and plans to continue her military career to reach thirty-five years.¹³⁶ Although she stated that her transition has not always been a smooth process, her situation improved over the years. Murray emphasizes that education is the key to changing the way the military perceives transgender individuals.¹³⁷

Canadian researchers Alan Okor and Denise Scott published a 2014 study which investigated whether openly transgender military service undermined the effectiveness of the Canadian Forces (CF). The study, which

130. Naomi Zeveloff, *Meet Shachar Erez, Israel's First Transgender IDF Officer*, FORWARD (Apr. 3, 2017), <http://forward.com/news/israel/367907/meet-shachar-erez-israels-first-transgender-idf-officer/>.

131. Shachar Erez, *I'm the First Transgender Army Officer in Israeli History*, FORWARD (July 6, 2017), <http://forward.com/opinion/israel/376368/im-the-first-transgender-army-officer-in-israeli-history-this-is-my-story/>.

132. Carol Hills, *The Israeli Defense Forces Paid for This Soldier's Sex Reassignment*, PUB. RADIO INT'L (Mar. 30, 2017, 6:30 PM), <https://www.pri.org/stories/2017-03-30/israeli-defense-forces-paid-soldiers-sex-reassignment>.

133. See Alan Okros & Denise Scott, *Gender Identity in the Canadian Forces*, 41 ARMED FORCES & SOC'Y 243, 243 (2014).

134. Canadian Forces (@CanadianForces), TWITTER (July 26, 2017, 12:09 PM), <https://twitter.com/CanadianForces/status/890288099573600256>.

135. Jennifer Bendery, *Transgender Troops in Other Nations are Proof That Inclusive Militaries Work*, HUFFINGTON POST (Oct. 21, 2014, 4:28 PM), https://www.huffingtonpost.com/2014/10/21/transgender-military-ban_n_6017564.html.

136. Lee Berthiaume, Can. Press, *Canadian Military Seeks to Improve its Transgender Policy*, STAR (July 30, 2016), <https://www.thestar.com/news/canada/2016/07/30/canadian-military-seeks-to-improve-its-transgender-policy.html>.

137. *Id.*

consisted of an extensive literature review and interviews, concluded that, “[d]espite ongoing prejudice and weaknesses in the crafting and execution of policy, [the study] did not identify any evidence indicating that allowing transgender individuals to serve openly has harmed the operational effectiveness of the CF.”¹³⁸ The authors of the study advised that nations transitioning their policies to allow for openly transgender soldiers should place emphasis on leadership to minimize difficulties.¹³⁹

Military leaders must be clear that service members are to put their personal feelings aside and work together in pursuit of a common mission. Lieutenant Commander Nicole Lassaline of the Canadian Armed Forces emphasizes that the privacy of the soldier should be respected and the goal for incorporating transgender soldiers should be to preserve people’s dignity.¹⁴⁰ Lassaline suggested that accommodations for transgender service members is minimal, stating “really, how much does it cost to put a curtain in a shower cubicle?”¹⁴¹

Further, Canada’s open acceptance of transgender soldiers has made a negligible impact on its military health costs. Canada reported that only nineteen of its soldiers underwent gender reassignment surgery from 2008 to 2015, for a total cost of \$319,000—about twenty-five percent less than a helmet for a single F-35 pilot costs the U.S. military.¹⁴² This reaffirms the idea that even if the U.S. funds sex-reassignment surgery for active military servicemembers, only a small proportion of personnel are likely to elect surgery.

C. Australia

Australia lifted its prohibition on transgender service members in 2010. Over a four and a half-year period, between November 2012 and March 2017, twenty-seven members of the Australian Defense Force (ADF) were treated

138. Okros & Scott, *supra* note 133.

139. *Id.*

140. Bendery, *supra* note 135.

141. *Id.*

142. Kathleen Harris, *Canada Promotes Recruitment of Transgender Troops as Donald Trump Imposes Military Ban*, CBC NEWS (July 26, 2017, 5:05 PM), <https://www.cbc.ca/news/politics/canada-transgender-military-trump-ban-1.4222787>; Phillip Swarts, *F-35 Helmet Costs \$400,000: Four Times That of Predecessor*, AIR FORCE TIMES (Oct. 26, 2015), <https://www.airforcetimes.com/news/your-air-force/2015/10/26/f-35-helmet-costs-400000-4-times-that-of-predecessor/>; Adam Weinstein, *Here are All the Nations in the World That Let Transgender Troops Serve*, TASK & PURPOSE (July 27, 2017), <https://taskandpurpose.com/here-are-all-the-nations-in-the-world-that-let-transgender-troops-serve/>.

for gender dysphoria.¹⁴³ Seventeen of the twenty-seven service members underwent transitional surgery.¹⁴⁴

From 2015 to 2016, the number of military personnel in Australia was estimated to be 77,399.¹⁴⁵ The total cost over the four and one half-year period to treat personnel for gender dysphoria was \$1 million, not including pharmaceuticals.¹⁴⁶ Comparatively, the ADF spent a total of \$430 million on military health care members in the 2015-2016 financial years.¹⁴⁷ Meaning, over the span of four and a half years, the ADF spent only 0.2% for those with gender dysphoria compared to what the ADF spends in an entire year for health care expenditures.¹⁴⁸

Australian support groups, such as the Defense Force Lesbian Gay Bisexual Transgender and Intersex Information Service (DEFGLIS), work with the ADF to provide support for LGBTI service members.¹⁴⁹ The non-partisan volunteer charity trains, educates and advises the ADF about diverse sexuality and gender issues.¹⁵⁰ Such independent support groups could also prove effective in the United States.

In 2015, the Royal Australian Air Force published a diversity handbook to specifically support transgender troops. The handbook states:

We must rise to [the spectrum of conflict] with new ways of thinking, including new perspectives that a diverse workforce and equal opportunity brings. As an Air Force, we must continually challenge ourselves to provide opportunities for the best people. The best talents are from a broad cross-

143. Shalailah Medhora, *Where Does Australia Stand on Transgender People Serving in the ADF?*, TRIPLE J HACK (Aug. 11, 2017, 3:20 PM), <http://www.abc.net.au/triplej/programs/hack/whats-aust-policy-on-transgender-military-service/8798664>. See generally *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (defining gender dysphoria as a clinical term that involves a conflict between a person's sex at birth and the gender with which that person actually identifies) (last updated Feb. 2016).

144. Medhora, *supra* note 143.

145. MEG TRUCANO ET AL., FOREIGN MILITARY STRATEGIES TO RECRUIT AND RETAIN WOMEN 8 (2017), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/March2017/Insight%20RFI%203.pdf?ver=2017-03-17-113845-857>.

146. Paul Karp & Joshua Robertson, *Marise Payne Defends ADF Provision of Gender Reassignment Surgery*, GUARDIAN (Oct. 16, 2017, 2:05 AM), <https://www.theguardian.com/australia-news/2017/oct/16/marise-payne-defends-adf-provision-of-gender-reassignment-surgery>.

147. Medhora, *supra* note 143.

148. *Id.*

149. See *Our Purpose: To Support and Represent Australian Defense Force LGBTI People and Their Families*, DEFGLIS, <https://www.defglis.com.au/index.php/about> (last visited Oct. 20, 2018).

150. *Id.*

section of all Australians, and our future capability will depend on recruiting the best and brightest, regardless of gender dysphoria.¹⁵¹

Similarly, the U.S. Department of Defense published handbooks and educational materials in response to lifting the ban in 2016.¹⁵² The Implementation Handbook to guide transgender service in the military includes a statement by then Secretary of Defense Ashton Carter that,

Our mission is to defend this country, and we don't want barriers unrelated to a person's qualifications to serve preventing us from recruiting or retaining the Soldier, Sailor, Airman, or Marine who can best accomplish the mission. We have to have access to 100 percent of America's population . . . to be able to recruit from among them the most highly qualified—and to retain them[.]”¹⁵³

Thus, the United States was already on the right educational path just prior to President Trump's ban.

D. *United Kingdom*

The United Kingdom allowed openly LGBTI personnel to serve in the military starting in 2000.¹⁵⁴ The British Army's website states: “The Army welcomes transgender personnel and all who apply to join the Army must meet the same mental and physical entry standard as any other candidate. If you have completed transition you will be treated as an individual of your affirmed gender.”¹⁵⁵ In response to President Trump's tweet, commander of the U.K. Maritime Forces Alex Burton tweeted “[a]s a Royal Navy LGBT champion and senior warfighter I am so glad we are not going this way.”¹⁵⁶

The Ministry of Defense has a flexible five stage gender transition plan for individuals that wish to transition during service: (1) gender realization

151. ROYAL AUSTRALIAN AIR FORCE, AIR FORCE DIVERSITY HANDBOOK 5 (2015), <https://www.airforce.gov.au/docs/Transitioning-Gender-In-Air-Force.pdf>.

152. See generally U.S. DEP'T OF DEF., TRANSGENDER SERVICE IN THE U.S. MILITARY (2016), https://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf?ver=2016-09-30-160933-837. See also U.S. DEP'T OF DEF., IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS (2016), https://dod.defense.gov/Portals/1/features/2016/0616_policy/DoD-Instruction-1300.28.pdf.

153. TRANSGENDER SERVICE IN THE U.S. MILITARY, *supra* note 152, at 7.

154. *Countries that Allow Transgender Members in the Military*, CBC NEWS (July 26, 2017, 3:17 PM), <http://www.cbc.ca/news/world/countries-that-allow-transgender-members-in-the-military-1.4222205>; SCHAEFER ET AL., *supra* note 3, at 57.

155. *LGBT+ Soldiers and Officers in the Army*, BRITISH ARMY, <https://apply.army.mod.uk/what-we-offer/what-we-stand-for/lgbt> (last visited Oct. 20, 2018).

156. *UK Military Chiefs Praise Transgender Troops*, BBC NEWS (July 26, 2017), <https://www.bbc.com/news/uk-40733701>.

and diagnosis; (2) social transition (requiring the individual to live and work in their new gender role for a period of one year prior to irreversible surgery); (3) medical treatment/hormone therapy; (4) surgical reassignment; and (5) postoperative transition.¹⁵⁷ The plans are modifiable on a case-by-case basis, but it is estimated that the five-step process could take up to three years.¹⁵⁸ Soldiers' required duties may be reduced during transition.¹⁵⁹ The costs of hormone treatments and surgery are covered by the health care plans.¹⁶⁰

In 1999, Caroline Paige became the first openly transgender officer in the U.K. military.¹⁶¹ Although Paige initially received negative reactions from revealing her transgender status, her commitment to the military won over her critics. Paige completed ten operational tours as a helicopter pilot in Bosnia, Iraq, and Afghanistan. She retired from the Royal Air Force in 2014, after a thirty-five-year flying career.¹⁶² In 2011, the United Kingdom's Military of Defense awarded her the Peoples Award for her leadership in diversity in the U.K. Armed Forces.¹⁶³

CONCLUSION

International human rights principles and case law reflects the need to end blanket bans on transgender military personnel. History suggests that the successful inclusion of openly gay and lesbian military personnel will provide for a similar, if not easier, transition for an open transgender military policy.

As the research shows from studies and examples from other countries that have already included transgender service personnel, it is unlikely that an inclusive policy will have a detrimental effect on the U.S. military's effectiveness or available funds. Transgender soldiers in other countries have significantly contributed to their respective countries' military forces. To ban capable and committed soldiers from the U.S. military solely because of their transgender status would have a detrimental effect on military morale.

157. MINISTRY OF DEF., POLICY FOR THE RECRUITMENT AND MANAGEMENT OF TRANSEXUAL PERSONNEL IN THE ARMED FORCES ¶ 57 (2009).

158. *Id.* ¶¶ 57, 58.

159. *See id.* ¶ 59.

160. *Id.* ¶ 51.

161. *Caroline Paige*, MIL. SPEAKERS, <http://www.militaryspeakers.co.uk/speakers/caroline-paige/> (last visited Oct. 12, 2018).

162. *Caroline Paige*, HUFFPOST, <http://www.huffingtonpost.co.uk/author/caroline-paige/> (last visited Oct. 20, 2018); Anna Walker, *Transgender and Over 50*, READER'S DIG., <https://www.readersdigest.co.uk/inspire/life/transgender-and-over-50-carolines-story> (last visited Oct. 20, 2018).

163. MILITARY SPEAKERS, *supra* note 161.

President Trump's claims of tremendous costs to the military are unfounded. Policymakers are urged to reconsider their positions taking into account the models that have emerged abroad.

CONTROLLED CHAOS: A PROPOSAL FOR AN INTERNATIONAL CODE OF CONDUCT IN THE LIVE CONCERT CONTEXT

Joseph Mendoza*

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I. INTRODUCTION

From death and destruction¹ to the impeachment and removal of political figures,² live music events carry a potential world of hurt. For example, caught in a death trap at the Argentinian nightclub República Cromañón, 194 music fans were killed in a pyrotechnic-induced fire.³ In Ohio, a “crazed fan” rushed the stage, fatally shooting famed Pantera guitarist Darrell

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1. See, e.g., Kate Sedgwick, *Ten Deadliest Concert Disasters of the Last Fifty Years*, MATADOR NETWORK (Aug. 16, 2010), <https://matadonetwork.com/nights/10-deadliest-concert-disasters-of-the-last-50-years/>.

2. Marcela Valente, *Argentina: Buenos Aires Mayor Ousted Over Tragic Blaze*, INTER PRESS SERV. NEWS AGENCY (Mar. 7, 2006), <http://www.ipsnews.net/2006/03/argentina-buenos-aires-mayor-ousted-over-tragic-blaze/> (detailing the ousting of Buenos Aires Mayor Aníbal Ibarra by lawmakers in connection with a tragic nightclub fire that occurred in 2004).

3. *Id.*

“Dimebag” Abbott.⁴ And a stampede at the German techno festival “Love Parade” claimed twenty-one lives—its victims were crushed and suffocated at the over-crowded venue.⁵ Be it an intimate venue or a packed arena, there is always an inherent risk of violence or worse when a crowd is assembled into a small space. These and future tragedies are preventable, however, and, given the frequent and severe disasters within the music community, a uniform code of conduct for both artists and event organizers would complement existing law, as well as the interests of the live concert culture and society at large.

Of course, countless shows, concerts and music festivals capture a unique positivity and unity in performers and attendees.⁶ A prime example is Bob Marley’s 1978 One Love Peace Concert held in Kingston, Jamaica, in the midst of an ongoing political civil war.⁷ At the concert’s peak, and to the amazement of attendees, the reggae legend successfully convinced the two opposing political leaders—Michael Manley of the People’s National Party and Edward Seaga of the Jamaica Labour Party—to join hands on stage.⁸ In the context of live music, sources of danger range from simple human

4. Brian Williams & Corky Siemaszko, *Band Split Sets off Slayer*, DAILY NEWS (New York), Dec. 10, 2004, at 8, reprinted in *Dimebag Darrell is Killed by Pantera Fan in 2004*, N.Y. DAILY NEWS (Dec. 8, 2015, 12:25 PM), <http://www.nydailynews.com/news/crime/darrell-dimebag-abbott-killed-pantera-fan-2004-article-1.572821>.

5. *July 24, 2010: The Day the Music Stopped*, LOCAL (July 23, 2015, 4:42 PM), <https://www.thelocal.de/20150723/the-duisburg-love-parade-disaster-five-years-on>.

6. See, e.g., Robin Denselow, *Bob Marley Presides Over the Peace Concert*, GUARDIAN (June 15, 2011, 7:15 PM), <https://www.theguardian.com/music/2011/jun/16/bob-marley-peace-concert>; Erik Kirschbaum, *Love Parade Created in Berlin in '89 as Peace Rally*, REUTERS (July 24, 2010, 1:09 PM), <https://www.reuters.com/article/us-germany-love-history/love-parade-created-in-berlin-in-89-as-peace-rally-idUSTRE66N21820100724> (explaining what came to be known as one of the world’s largest techno dance parties originally began as “a demonstration for peace, tolerance and understanding through love and music”).

7. Tim Ott, *Bob Marley and the One Love Peace Concert*, BIOGRAPHY (May 11, 2017), <https://www.biography.com/news/bob-marley-one-love-peace-concert>.

8. *Id.*; Denselow, *supra* note 6.

aggression⁹ to the structural environment of a venue.¹⁰ The spectrum of potential severe and deadly consequences can occur through random event, but stem mostly from substandard planning and execution of live music events. Musicians and event organizers should meet the dedication of their concertgoers with a calculated and agreed-upon ethos grounded in respect, safety and accountability. Such policies in the context of live music events have proven successful in the United States, at least on a grass-roots level. Small, community-run art and music venues upholding a “do it yourself” approach rely on self-pronounced codes of conduct to sustain environments that promote and preserve safety and bodily integrity.¹¹ For example, a renowned Los Angeles neighborhood music venue, “Bridgetown D.I.Y.,”¹² maintains policies against bigoted language or actions, distribution or use of drugs or alcohol at the venue, and violence, harassment, or fighting of any kind.¹³

As another example, the “Ché Café Collective,” a volunteer co-operative live music venue on the University of California, San Diego campus prescribes similar tenets, expressly prohibiting drugs, alcohol, graffiti, weapons, and fighting.¹⁴ Interestingly, the co-operative even provides its visitors with instructions on proper “pit etiquette”—referring to a specific type of punk rock or heavy metal music dancing known as “mosh pitting” or

9. See generally STEVEN BLUSH, *AMERICAN HARDCORE* 24 (George Petros ed., 2d ed. 2010) (documenting the birth of “slam dancing” in southern California); see also Thomas Charles Surmanski, *Mosh Pits or Liability Pits: Criminal and Tortious Liability at Concerts*, 1 CAMBRIDGE L. REV. 115, 116-17 (2016) (describing “slam dancing” or “moshing” as a traditional practice at concerts derived from the punk rock community where the crowd—usually near the front of the stage or “the pit”—engages in a collective and therapeutic form of frenzied dancing that is aggressive, yet good humored, and where—although no one is fighting—a certain level of violence is socially accepted; although minor injuries may occur, participants exercise varying codes of conduct or “pit etiquette” to forbid behavior such as sexual harassment or trampling on fallen members).

10. See, e.g., Colin Stutz, *Three Dead in Stampede Following Steve Aoki Concert in Spain*, HOLLYWOOD REP. (Nov. 1, 2012, 2:45 PM), <https://www.hollywoodreporter.com/news/three-dead-stampede-steve-aoki-385438>.

11. See, e.g., *Safer & Sober Space Policies*, BRIDGETOWN D.I.Y., <http://www.bridgetowndiy.org/policies> (last visited Aug. 31, 2018) (exemplifying a working code of conduct upheld by the creators of a neighborhood music venue in Los Angeles); CHÉ CAFÉ COLLECTIVE, <http://thechecafe.blogspot.com/p/about.html> (last visited Aug. 31, 2018); SEVENTH CIRCLE MUSIC COLLECTIVE, <http://7thcirclemusiccollective.org/> (last visited Aug. 31, 2018) (expounding a successful Denver, Colorado art and music venue’s organizational aim of creating a space where its visitors feel respected, accepted, safe, welcome, and comfortable).

12. Sam Ribakoff, *Best All-ages Music Venue: Bridgetown DIY*, LA WEEKLY, <http://www.laweekly.com/best-of/2017/music-and-nightlife/best-all-ages-music-venue-8694966> (last visited Aug. 31, 2018).

13. BRIDGETOWN D.I.Y., *supra* note 11.

14. CHÉ CAFÉ COLLECTIVE, *supra* note 11.

“slam dancing.”¹⁵ To instill in its attendees the primary goal of safety at its entertainment events, the Café’s “pit etiquette” includes phrases like “Be aware of your surroundings,” “Do not ruin it for people just wanting to have a good time,” “If someone falls down, pause and pick them up,” and “Stay out of the rafters.”¹⁶

At first glance, it is a wonder how a small record store, for example, could ever carry out a punk rock or heavy metal show¹⁷ without severe misfortune or catastrophe. Such live events are commonly associated with violent crowds. Ironically, what often makes the systematic harmony captured at these events possible is the organizers’ working code of conduct, as well as the performers’ and fans’ concurrent respect for such policies. To illustrate, musician Matthew Barney commented regarding the 1980s American “hardcore” punk music scene, stating:

There was something that attracted me to the pit, this kind of controlled violent system where there are codes, and where people, in spite of the fact that their taking off each other’s heads, they [are] also looking out for one another, which is true of the football field as well.¹⁸

Of course, despite the success stories, small-scale establishments are not immune to tragedies stemming from the inherent dangers of a live music event. The deadliest fire in contemporary California history occurred at an Oakland warehouse-turned-artist collective known as “Ghost Ship” during a dance party in 2016.¹⁹ The warehouse, home to many artists and musicians,²⁰ was filled with people attending an electronic dance party on the second-floor before a fire ignited, killing thirty-six people.²¹ According to a fifty-page report compiled by the Oakland Fire Department, the exact

15. *Id.* See generally BLUSH, *supra* note 9 (explaining what is meant by terms such as “slamdancing” and “pits” at certain types of music events).

16. CHÉ CAFÉ COLLECTIVE, *supra* note 11.

17. See, e.g., PROGRAMME SKATE & SOUND, <http://programmehq.com/about/> (last visited Nov. 13, 2018) (exemplifying a record store which also operates as a music venue in Fullerton, California).

18. BLUSH, *supra* note 9.

19. Thomas Peele & David Debolt, *Ghost Ship Fire: Oakland Releases Long-Awaited Report on Deadly Inferno*, MERCURY NEWS (June 19, 2017, 4:17 PM), <http://www.mercurynews.com/2017/06/19/ghost-ship-fire-oakland-releases-50-page-report-cause-of-deadly-inferno/>; *Report Details Death, Panic in Ghost Ship Warehouse Fire*, L.A. TIMES (June 20, 2017, 4:25 PM), <http://www.latimes.com/local/lanow/la-me-ghost-ship-report-20170620-story.html>.

20. See *Inside the Oakland Ghost Ship Warehouse Before Deadly Fire*, N.Y. DAILY NEWS, <http://www.nydailynews.com/news/oakland-ghost-ship-warehouse-deadly-fire-gallery-1.2901036?pmSlide=1.2901028> (last visited Sept. 7, 2018).

21. Peele & Debolt, *supra* note 19.

cause of the fire is still unknown.²² However, the state of the warehouse's interior made it clear that those who were inside were caught in a fire trap.

The report described the interior as a “maze-like labyrinth with makeshift hallways and cubicle-like live-work spaces constructed not of walls” but of musical instruments, wooden furniture and “other scavenged items that blocked possible exits and fueled the blaze.”²³ In addition, the warehouse lacked a sprinkler system, the building was powered by an illegal ad hoc electrical system, and—perhaps most dreadful given the circumstances—the main access to the bottom floor was a makeshift staircase composed of planks and wooden pallets.²⁴ In June 2017, prosecutors charged both Ghost Ship's creative director and master tenant with thirty-six counts of involuntary manslaughter for knowingly creating the fire trap in a warehouse that was not licensed for either housing or entertainment, and inviting the public inside.²⁵ The event organizers lack of conscientious planning led to deadly consequences for their dancing victims.

In light of a broad array of similarly unfortunate yet avoidable tragedies occurring at music events across the globe, the concert industry must develop an international code of conduct that provides basic rules on fire safety, overcrowding, and protection from violence. This paper will first demonstrate that for want of a collective adherence to standards, the music community has suffered preventable harm. By way of a case study, it will then illustrate how a lack of clear standards has placed both performers and audience members at risk. Finally, this paper will propose a solution to the problem: The creation of an international code of conduct in the live music event context. Adherence to such a code would help preserve the integrity of the worldwide concert culture by achieving an increase in accountability among musicians and promoters for the health and safety of concertgoers and performers alike.

22. OAKLAND FIRE DEP'T, ORIGIN & CAUSE REPORT 50 (2017) [hereinafter ORIGIN & CAUSE REPORT],

<http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak064503.pdf>; *Panic in Ghost Ship Warehouse Fire*, *supra* note 19 (citing ORIGIN & CAUSE REPORT, *supra*).

23. *Panic in Ghost Ship Warehouse Fire*, *supra* note 19; see ORIGIN & CAUSE REPORT, *supra* note 22, at 13-14.

24. ORIGIN & CAUSE REPORT, *supra* note 22, at 4, 15, 17; *Panic in Ghost Ship Warehouse Fire*, *supra* note 19 (“Aaron Marin, a house guest staying in a studio, was upstairs when he saw flames coming from under the floor near the DJ's booth. People started down the staircase but returned because the ramshackle stairwell of planks and wooden pallets was not safe.”)

25. Peele & Debolt, *supra* note 19; *Panic in Ghost Ship Warehouse Fire*, *supra* note 19.

II. DISTORTION AND DISHARMONY: THE NEED FOR A SYNCHRONIZED ADAPTATION TO PROTECT THE PUBLIC

Lack of adherence to standards has led to easily avoidable catastrophes. Promotional goals often lead artists and promoters to compromise the safety of the audience in order to make sales. While most jurisdictions impose rules governing safety concerns and negligence standards, not all can be relied upon to adequately regulate common risks. One tragic 1979 incident occurred at a “The Who” concert in Ohio, where eleven would-be attendees died of “suffocation by asphyxiation due to compression.”²⁶ The cause was a combination of what arena employees dubbed an unreserved “animal seating” policy, inadequate staffing and deficient crowd control procedures.²⁷

More recently, an explosion caused by colored powder catching fire at a 2015 techno concert in Taiwan resulted in 508 injuries and fifteen deaths.²⁸ The event organizer was found guilty of professional negligence for the fatal incident, that could have been prevented “if there had been someone with a basic understanding of science at the scene.”²⁹ Other catastrophic moments of “rock and roll hell”³⁰ occurred at the 1969 Altamont Speedway Free Festival in northern California (850 injuries and four deaths),³¹ the 2000 Roskilde Festival near Copenhagen, Denmark (nine deaths),³² and a 2009

26. Chet Flippo, *Rock & Roll Tragedy: Why Eleven Died in Cincinnati*, ROLLING STONE, Jan. 24, 1980, at 10-24, *microformed on* UMI No. 11330 (Nat’l Archive Publ’g Co.).

27. *Id.*

28. Jason Pan, ‘Color Play Asia’ Organizer Found Guilty, TAIPEI TIMES (Apr. 27, 2016), <http://www.taipeitimes.com/News/front/archives/2016/04/27/2003644910>.

29. Jake Chung, *Water Park Inferno: Details of Pre-Blaze Conditions Emerge*, TAIPEI TIMES (June 30, 2015), <http://www.taipeitimes.com/News/front/archives/2015/06/30/2003621906>.

30. David Fricke, *Nine Dead at Pearl Jam Concert*, ROLLING STONE, Aug. 17, 2000, at 27, 32.

31. John Walsh, *Altamont Free Concert (Alameda County, CA) (December 6, 1969)*, in 3 CRIMES OF THE CENTURIES 16, 16-17 (Steven Chermak & Frankie Y. Bailey eds., 2016) (recounting the violent, substance-fueled, and poorly planned large-scale event known by many as the “end of the 1960’s counterculture,” where organizers hired notorious motorcycle bike gang Hells Angels to provide security).

32. Fricke, *supra* note 30 (detailing the tragic asphyxiation of rock band Pearl Jam fans near the front stage barricade, drowned in the “tidal crush” of the 50,000-person crowd); see Chris Barker, *Ten Rock Concerts Which Resulted in Bloodshed*, SOC. SCI. CAREERS (Oct. 19, 2012), <http://www.socialsciencecareers.org/10-rock-concerts-which-resulted-in-bloodshed/> (indicating the true cause of the tragedy is heavily debated); *Danish Police Blame Pearl Jam for Roskilde*, ABC NEWS (July 20, 2000), <http://abcnews.go.com/Entertainment/story?id=116387&page=1> (reporting Danish police found the band “morally responsible” for the disaster, rather than the event organizers).

concert at Club Santika in Bangkok, Thailand (66 deaths).³³ Regrettably, this list is far from complete.

Even without a single note being played, the anticipation of being in the presence of a beloved musician has the power to ignite a near-riot from passionate fans. Such a phenomenon occurred in 1990 at a now-closed Los Angeles record store, Warehouse Records.³⁴ Nearly 20,000 devout music fans arrived at the intersection of La Cienega Boulevard and 3rd Street, hoping to meet the acclaimed British synth-pop group Depeche Mode, which was holding an in-store autograph session to promote its new album “Violator.”³⁵ Just two years prior, Depeche Mode had sold out the famous Rose Bowl arena in Pasadena, California, filling the venue with more than 70,000 fans.³⁶ The band’s record label, alongside local rock radio station KROQ-FM, promoted the in-store signing event, which was originally scheduled to last three hours.³⁷ The event was ultimately shut down early due to the overwhelming turnout.³⁸

When the crowd overpowered the store’s private security force, Los Angeles Police Department riot control officers were summoned to maintain peace and order as thousands of fans grew restless and unruly, pounding on the large glass windows in front of the building.³⁹ The danger of the crowd against the glass could have resulted in fatalities.⁴⁰ Fortunately, none occurred. However, a handful of people were sent to the hospital—including a twelve-year old girl—for injuries sustained during the frightening occasion.⁴¹ Describing the scene outside the store when the group first

33. Jonathan Head, *Disturbing Details in Thai Blaze Inquiry*, BBC NEWS (Apr. 4, 2009, 12:43 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/7981841.stm> (reporting the popular but illegally-operating club, in which stage fireworks set off a deadly fire, lacked sprinklers, fire exits, and emergency lights).

34. *That (In)famous In-Store Album Signing Event for Violator*, HALO (Mar. 20, 2015), <http://halotheviolatorbook.com/infamous-store-album-signing-event-violator/>; *Warehouse Music*, YELP, <https://www.yelp.com/biz/warehouse-music-beverly-hills-2> (last visited Mar. 19, 2018) (indicating the record store location is permanently closed).

35. *The Warehouse In-Store*, DEPECHE MODE ARCHIVES (March 20, 1990), http://archives.depechemode.com/specials/march_20_1990.html; *That (In)famous In-Store Album Signing Event for Violator*, *supra* note 34.

36. John H. Lee, *Depeche Mode Fans Become Unruly at Store*, L.A. TIMES, Mar. 21, 1990, at VYB7.

37. *See The Warehouse In-Store*, *supra* note 35; Lee, *supra* note 36.

38. *The Warehouse In-Store*, *supra* note 35.

39. *Archives Special—The Warehouse In-Store*, DEPECHE MODE (Mar. 20th, 1990), VIMEO (Mar. 20, 2014), <https://vimeo.com/89630464>.

40. *See id.*

41. *Id.*

arrived for the signing event, long-time KROQ morning radio host Kevin Ryder stated, “We thought we were going to die.”⁴²

The Depeche Mode event’s primary relevance to this paper lies in both its planning and aftermath. Promoters placed the safety of the group’s fans on the backburner in the name of making front page news.⁴³ The promoters wanted to make a statement. Knowingly forgoing logistical and safety concerns – learned from similar past experiences – they implemented the in-store signing event in the hope that the press would arrive and cover it.⁴⁴ They got more than they bargained for but should not have been surprised. In the days leading up to the event, one of the founding members of the group, Martin Gore, excitedly voiced that “hopefully there will be a bit of mayhem, maybe,” before stating that “everybody is predicting 10,000 [people] for the event. I think we should wait for the event before we start getting into figures.”⁴⁵

After the frenzy, Depeche Mode apologized and, like the owners of Wherehouse Records, claimed they never expected such a large crowd.⁴⁶ KROQ promoter Richard Blade shifted the responsibility when questioned about the panic in and around the store: “That [is] not our business, to provide security Ours is just to basically get the word across that Depeche Mode [would] be there for an appearance.”⁴⁷ Councilman Zev Yaroslavsky, who represented the West Los Angeles area at the time, blamed the promoters and the store, characterizing the event as “one of the most incredible poor judgment calls that [he] had ever seen.”⁴⁸ In the end, Wherehouse Entertainment, Inc. paid the city about \$18,000 for costs in neutralizing the disturbance.⁴⁹ Yaroslavsky then praised Wherehouse for “exhibiting an admirable degree of corporate responsibility,” and hoped the negotiated amount would incentivize other companies to “think a little more responsibly before they leap into ill-advised promotional events.”⁵⁰

42. *Id.*

43. See KROQ, *Richard Blade Talks About His New Book, Starting a Riot, and More on Kevin & Bean*, YOUTUBE (Nov. 2, 2017), <https://www.youtube.com/watch?v=psvAKChmNss&feature=youtu.be>.

44. *See id.*

45. *Archives Special—The Wherehouse In-Store*, *supra* note 39.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Firm Pays for Unruly Fans*, L.A. TIMES (Aug. 2, 1990), http://articles.latimes.com/1990-08-02/news/we-1654_1_los-angeles.

50. *Id.*

The 1990 Depeche Mode event is not an anomaly. In 2013, another music-related event drew a large and unmanageable crowd, this time for a show by the famed rapper “Tyler, the Creator” at 140-person-capacity club, The Airliner, located in the East Los Angeles neighborhood of Lincoln Heights.⁵¹ The concert was booked as a promotion for the rapper’s upcoming Camp Flog Gnaw Carnival held in Downtown, Los Angeles, and was announced online one week beforehand.⁵² Not surprisingly, the buzz spread quickly. On the day of the event, many fans arrived at the venue as early as 11:00 am to ensure admission into the club that night.⁵³ Like the Depeche Mode in-store, this event was inevitably shut-down by Los Angeles Police Department riot police due to safety concerns.⁵⁴

Disgruntled fans were turned away at the door once the small venue quickly reached capacity, leaving the increasingly rowdy crowd outside, gradually pouring into the street.⁵⁵ At one point, artist “Tyler, the Creator” stepped outside, stood on top of a car and instructed his excited and adoring fans to remain calm and peaceful, to avoid a total shut-down of the show.⁵⁶ His efforts were in vain, however, and he ultimately did not perform. Fortunately, no one was injured or arrested during this close-call.

Because of The Airliner’s limited capacity, promoters typically do not announce big name acts until the day of the show.⁵⁷ However, this promotional policy aids in understanding the reason the planned performance was a failure. After the fiasco, the production company’s organizer, Daddy Kev, lamented over their approach, expressing their determination to prepare for future high-profile shows in a more conscientious manner: “Hindsight being twenty/twenty, we [are] never announcing an artist of that stature ahead of time ever again.”⁵⁸

As well-documented tragedies and near misses continually add to the global backlog of music events gone wrong, event organizers, promoters and musicians have good reason to focus their attention on health and safety concerns during the planning and execution of shows and festivals wherever those events are located. There is no need to turn a blind eye to such issues

51. Chris Martins, *Tyler, the Creator Show Stopped by Riot Police*, SPIN (Oct. 2, 2013), <https://www.spin.com/2013/10/tyler-the-creator-odd-future-show-canceled-los-angeles-police/>.

52. Mannie Holmes, *Tyler, the Creator’s Camp Flog Gnaw Remains a Family Affair*, VARIETY (Oct. 30, 2017, 11:34 AM), <https://variety.com/2017/scene/vpage/tyler-the-creator-camp-flog-gnaw-carnival-2017-1202602279/>; Martins, *supra* note 51.

53. Martins, *supra* note 51.

54. *See id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

in the name of profit, business and publicity. The music and art worlds demand more respect. In an age where large concerts are steadily becoming a common target for seemingly irrepressible acts of inhumanity, it has become even more important to prevent governable harm.⁵⁹

III. CRESCENDO OF DEMISE: SINGER DAVID RANDALL BLYTHE'S ACQUITTAL IN THE CZECH REPUBLIC DEMONSTRATES THE CURRENT RISKS TO INTERNATIONAL ARTISTS AND CONCERTGOERS

A lack of clear standards places performers as well as audience members in jeopardy. Just as a code of conduct is needed to protect the public, one is also needed to protect musicians. For example, front-man David "Randy" Blythe of the American heavy metal band Lamb of God endured a painful legal battle before being acquitted of manslaughter in the Municipal Court in Prague in 2013.⁶⁰ The charge was in connection to a 2010 incident that occurred at one of the band's shows at the former nightclub Abaton in Prague, Czech Republic, during the band's two-year "Wrath Tour."⁶¹ Blythe allegedly threw nineteen-year-old fan Daniel Nosek off the small and crowded stage that night, causing Nosek several injuries that led to his coma and eventual death.⁶² Despite the Czech police's failed attempts to obtain

59. See Lynh Bui et al., *At Least Fifty-Nine Killed in Las Vegas Shooting Rampage, More Than 500 Others Injured*, WASH. POST (Oct. 2, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/02/police-shut-down-part-of-las-vegas-strip-due-to-shooting/?utm_term=.340f69d541e1; Eoghan Macguire et al., *Manchester Arena Suicide Bombing: Twenty-Two Die at Ariana Grande Concert*, NBC NEWS (May 23, 2017, 9:45 AM), <https://www.nbcnews.com/news/world/deaths-injuries-confirmed-after-explosions-heard-u-k-concert-featuring-n763286>; *Orlando Nightclub Shooting: How the Attack Unfolded*, BBC NEWS (June 15, 2016), <https://www.bbc.com/news/world-us-canada-36511778>; *Terrorists Kill 89 at Eagles of Death Metal Concert in Paris*, CONSEQUENCE SOUND (Nov. 13, 2015, 1:52 PM), <https://consequenceofsound.net/2015/11/report-terrorists-take-hostages-at-eagles-of-death-metal-concert-in-paris/>.

60. Lars Brandle, *Czech Court Clears Lamb of God's Randy Blythe for Fan's Death*, BILLBOARD (June 7, 2013), <https://www.billboard.com/articles/news/1566155/czech-court-clears-lamb-of-gods-randy-blythe-for-fans-death>.

61. Jonathan Crane, *U.S. Singer to Face Trial Over Fan Death*, PRAGUE POST (Dec. 13, 2012), <https://web.archive.org/web/20121221014609/http://www.praguepost.com/print.php?url=15052-u-s-singer-to-face-trial-over-fan-death.html>; *Lamb of God Setlist: May 24, 2010*, SETLIST.FM (May 24, 2010), <https://www.setlist.fm/setlist/lamb-of-god/2010/abaton-prague-czech-republic-33d4c825.html> (last updated July 25, 2017, 5:58 PM).

62. John Hall, *Shocking Moment Heavy Metal Fan was Left with Fatal Injuries After Being Thrown Off Stage*, DAILY MAIL (Sept. 24, 2015, 9:11 AM), <http://www.dailymail.co.uk/news/article-3247261/Shocking-moment-heavy-metal-fan-left-fatal-injuries-thrown-stage-singer-pushed-suing-400-000-Czech-police-arrested-him.html>.

the U.S. Department of Justice's cooperation in the subsequent investigation, the band did not learn of the fan's death until it returned to the capital city for another concert in 2012.⁶³

Upon arrival at the airport, a group of heavily armed Czech police officers immediately arrested Blythe.⁶⁴ At his bail hearing, he convinced the judge he was not a flight risk and was granted bail at the equivalent of \$200,000.⁶⁵ Blythe was eventually released after spending five weeks in Prague's Pankrác Prison and returned to America.⁶⁶ Choosing to defy the advice gathered from legal experts who urged him to refrain from ever setting foot in the Czech Republic again, Blythe returned to Prague to face trial.⁶⁷ He did so in an effort to own up to the allegations, clear his good name and provide Nosek's family with a proper chance at finding the truth behind what transpired on that fatal night.⁶⁸ At the trial's end, the court held that Blythe was "morally responsible"⁶⁹ but not criminally liable for Nosek's death. Instead, the court held that most of the blame fell on the "inadequate security measures provided by promoters and security."⁷⁰

Blythe's memoir, retelling his experience in the foreign country's prison, provides an insider's perspective of club Abaton's condition on the night in question. Upon arrival at the venue earlier in the day, Blythe refrained from entering at a crewmember's warning that the club was "a [expletive] dump."⁷¹ Blythe recalls that the amount of space inside the club was clearly insufficient, and the unhappy crew struggled to set up the band's equipment

63. Jan Richter, *US Metal Singer Arrested in Prague on Manslaughter Charges "Awaiting Release" on Bail*, RADIO PRAGUE (July 19, 2012), <https://www.radio.cz/en/section/curraffrs/us-metal-singer-arrested-in-prague-on-manslaughter-charges-awaiting-release-on-bail>.

64. D. RANDALL BLYTHE, *DARK DAYS* 8 (2015).

65. *Id.* at 136-37.

66. *Lamb of God Singer Reveals What He Remembers of Deadly 2010 Czech Show*, ROLLING STONE (July 8, 2015, 3:28 PM), <https://www.rollingstone.com/music/music-news/lamb-of-god-singer-reveals-what-he-remembers-of-deadly-2010-czech-show-62305/>.

67. *Id.*

68. Marc Schneider, *Lamb of God's Randy Blythe Acquitted on Fan Death: 'I am a Free Man'*, BILLBOARD (Mar. 5, 2013), <https://www.billboard.com/articles/news/1550615/lamb-of-gods-randy-blythe-acquitted-in-fan-death-i-am-a-free-man>.

69. See BLYTHE, *supra* note 64, at 464-66 (recounting Blythe's "total exoneration," free from any duty to pay any fines or restitution, and the decedent's family's decision not to pursue the singer after all of the evidence); see also Jan Kudrna, *Responsibility for Acts of the President of the Czech Republic*, 56 ACTA JURIDICA HUNGARICA 39, 40-42 (2015) (describing the concept of "moral responsibility" as a non-legal type of responsibility that may occur "in the event of a breach of required rules of society").

70. Jon Wiederhorn, *Five Years Ago: Lamb of God Vocalist Randy Blythe Arrested in Prague and Accused of Manslaughter*, LOUDWIRE (June 27, 2017), <http://loudwire.com/lamb-of-god-randy-blythe-arrested-prague-manslaughter-anniversary/>.

71. BLYTHE, *supra* note 64, at 88-89.

on the designated three-foot-high stage.⁷² The end result was an extremely cramped mess on a tiny platform.⁷³ Behind the stage, Blythe recalls needing to carefully walk through an obstructed path of amplifiers, guitar cabinets, piles of cables, guitars and pieces of drum hardware, even having to crawl over the band’s drum set to get to his station on the side before the concert.⁷⁴ A short hall leading to a small dressing room was similarly crammed with equipment.⁷⁵

Club Abaton’s structural and operational issues did not end there. It was a single-entrance club; that is, there was only one way in and out of the building.⁷⁶ Moreover, there was a total lack of security presence and effective barricades between the crowd and stage.⁷⁷ Those two circumstances combined with a packed venue of rowdy, “stage diving”⁷⁸ audience members, was a recipe for disaster. Importantly, those troubling conditions also violated Lamb of God’s signed contract with the concert promoter.⁷⁹ In its typical event stipulations, the band as an organization always required trained security and a reliable barricade properly placed in front of the stage—“both measures meant to ensure that audience members do not jump on stage and that both the band and audience are safe.”⁸⁰ Club Abaton’s failure to provide unobstructed space for the band members to operate, emergency exits, an adequate barrier between the band and the audience, or a security force created an unsafe environment for a concert of any type, let alone a heavy metal show.

Lamb of God’s security and safety concerns, as well as those of other bands in their music community, admittedly intensified in the wake of friend and fellow musician “Dimebag” Darrel’s murder in 2004 committed by a “crazed fan.”⁸¹ Before this incident, it was not unusual for a fan to rush onto the stage during a performance. But in Darrel’s case, the heavy metal guitarist was attacked on stage by a gunman and shot to death. Since the killing, the only people who are now welcome on Lamb of God’s stage are

72. *Id.* at 87, 89.

73. *Id.* at 89, 93.

74. *Id.* at 93.

75. *Id.*

76. *Id.*

77. *Id.* at 94.

78. *Id.* at 105 (common occurrence at metal concerts in which individuals engage in the “seemingly senseless act of flinging one’s body [from the stage] through the air in the hope that a bunch of sweaty strangers will be kind enough to break your fall”).

79. *See id.* at 94.

80. *Id.* at 94.

81. *Id.* at 408-09, 438; *see also* Williams & Corky, *supra* note 4.

the band, its guests, and crewmembers.⁸² As Blythe, an experienced, professional international touring musician,⁸³ explained: “A crowded stage is a dangerous stage.”⁸⁴ At his manslaughter trial, Blythe recited the reasoning behind Lamb of God’s policy (expressly stated in the band’s promotional contracts) of requiring adequate security and a barricade at its shows.⁸⁵ He emphasized the goal was to ensure safety, protection and fairness for the band, crew and attendees, as well as to minimize the band’s liability for an attendee’s lapse in judgment.⁸⁶

Although Blythe and the band recognized that a heavy metal show can be a chaotic event,⁸⁷ their genuine concerns for tighter security are inherently juxtaposed with their affection for live performances, their global “music family” (i.e., their fans), and music itself.⁸⁸ Music has helped many musicians and fans through tough times.⁸⁹ Indeed, songs from Blythe’s punk rock roots helped him maintain a positive mindset while serving time in Prague’s Pankrác Prison.⁹⁰ Blythe poetically describes the concert phenomenon as “a massive energy exchange, an amazing, sublime, and holy experience of pure communication.”⁹¹ The apparent sanctity of the celebratory rituals of live music events is worth preserving. Understandably, uninformed critics tend to overlook or deny the adherence to an unspoken code of conduct in some non-mainstream or underground music scenes.⁹² Blythe likens the mosh pit experience at his concerts to a game of amateur

82. BLYTHE, *supra* note 64, at 408-09, 438 (reasoning the potential threat of harm resulting from allowing excited fans access to the stage firmly outweighs the generally harmless nature of the band’s shows).

83. *See id.* at 15, 18 (explaining Lamb of God’s eighteen-month average touring cycles have taken the singer around the world multiple times, performing for crowds numbering from 1,500 to over 100,000).

84. *Id.* at 95.

85. *Id.* at 436-38.

86. *See id.*

87. *See id.* at 468 (describing heavy metal concerts as “loud, raucous, and at times confusing affairs”).

88. *See id.* at 28, 133, 251.

89. *See id.* at 133, 337.

90. *Id.* at 337 (recounting the singer’s frequent recitation of Washington D.C. hardcore punk band Bad Brains’ philosophy of always maintaining a positive mental attitude, or P.M.A., as proclaimed in their 1980s song Attitude).

91. *Id.* at 28.

92. *See, e.g.,* Chris Grosso, *The Ian MacKaye DIY Community Interview*, INDIE SPIRITUALIST (May 8, 2012), <http://theindiespiritualist.com/2012/05/08/mackaye/> (detailing hardcore punk pioneer Ian MacKaye’s successful defense of a misunderstood subset of the Washington D.C. Go-Go dance music community that the city council tried to use as a scapegoat for the shooting death of a teenage girl).

football, where people generally do not wish to harm one another.⁹³ Contrary to what an outsider might deduce from the intensity of its concerts, the band does not wish to be “the soundtrack to injury.”⁹⁴

Ultimately, performers wield immense power to control a crowd of impassioned fans, for better or for worse.⁹⁵ To an extent, performers are the ringleaders and shepherds of the potential mob or herd mentality at live music events.⁹⁶ Reflecting on the tragedy at the 2010 concert in Prague – where nineteen-year-old fan, Daniel Nosek, lost his life – Blythe acknowledges that he should have stopped the show, and that he is truly morally responsible for the young man’s death.⁹⁷ In hindsight, Blythe explains that he wishes he had observed the club’s poor condition before the show and refused to play.⁹⁸ Instead, Blythe now lives with the grief of failing to exercise his power as a front-man that night—as “the last link in a disastrous chain of events”—to put a stop to an obviously out-of-control situation, which he had done before.⁹⁹ At the trial’s end, Nosek’s mourning mother and uncle privately met with Blythe. They each addressed his position of power at Lamb of God’s international concerts and urged him to be “a spokesperson for safer shows.”¹⁰⁰ He vowed to do so.

93. BLYTHE, *supra* note 64, at 38 (providing a similar description of the controlled system of a mosh pit as the American “hardcore” punk musician Matthew Barney in this paper’s introduction). *But see* Mark Binelli, *Punk Rock Fight Club*, ROLLING STONE (Aug. 23, 2007, 4:00 AM), <http://www.rollingstone.com/culture/news/punk-rock-fight-club-20070823> (describing the infamously violent hardcore punk gang FSU who take over mosh pits, “police” concerts, and have been accused of intimidating fans, engaging in random beatings, and causing multiple deaths).

94. BLYTHE, *supra* note 64, at 38.

95. *See, e.g.*, John Burks, *Jim Morrison’s Indecency Arrest: Rolling Stone’s Original Coverage*, ROLLING STONE (Dec. 10, 2010, 7:25 PM), <http://www.rollingstone.com/music/news/jim-morrison-s-indecency-arrest-rolling-stone-s-original-coverage-20101210> (providing several witness accounts of rock star Jim Morrison’s actions at a concert where he arguably attempted to start a riot, calling for a revolution and beckoning nearly sixty emotionally-revved attendees onto the stage); *Travis Scott Arrested and Charged for Inciting a Riot at Concert in Ark., Police Say*, CBS NEWS (May 14, 2017, 7:47 PM), <https://www.cbsnews.com/news/travis-scott-arrested-charged-arkansas-concert-inciting-riot/> (reporting rapper and producer Travis Scott encouraged fans to rush the stage and bypass security protocols at his concert); *see also* Fricke, *supra* note 30 (detailing Pearl Jam singer Eddie Vedder’s success in commanding a crowd of about 50,000 fans to collectively step back several feet to free up space near the stage).

96. *See* Michael Schreiner, *Mob Mentality*, EVOLUTION COUNSELING (May 20, 2013), <https://evolutioncounseling.com/mob-mentality/>.

97. BLYTHE, *supra* note 64, at 471-72.

98. *Id.* at 482.

99. *Id.* at 38, 471-72.

100. *Id.* at 473.

David Randall Blythe's acquittal of manslaughter in the Czech Republic sheds light on the aforementioned cultural and logistical concerns, as well as on the commitment of at least one international touring artist to abide by an ethical code of respect, honor, and accountability for incidents that occur at concerts overseas. His case serves as an exemplar for the requisite mentality that must underlie an effective international code of conduct in the live music industry. Such an ethos can provide the driving force behind a much-needed movement against a passive acceptance of repeated yet avoidable threats to performers' and concertgoers' lives. To quote the soul music legend, Sam Cooke, from a popular Civil Rights Movement anthem, "It's been a long time coming. But I know a change is gonna come."¹⁰¹

IV. FINE TUNING: DERIVING GUIDANCE FROM EXISTING CODES OF CONDUCT

Recurring international concert disasters—many resulting from organizers' perception of the need to take risks—signal a need to construct and implement a set of principles to guide players in the live music business in a unified commitment to the safest event practices possible. A voluntary approach would work. Such an approach would avoid jurisdictional and constitutional impediments, which is especially helpful in a transnational endeavor.¹⁰² In addition, a voluntary code of conduct may prove most conducive to the needs and interests of the concert culture and the public in general.¹⁰³ Finally, the code would still operate within a "legal environment" that includes legislation, regulations, as well as contract and tort law.¹⁰⁴ In

101. SAM COOKE, *A Change is Gonna Come*, on AIN'T THAT GOOD NEWS (RCA Victor 1964); see David Cantwell, *The Unlikely Story of "A Change is Gonna Come,"* NEW YORKER (Mar. 17, 2015), <https://www.newyorker.com/culture/culture-desk/the-unlikely-story-of-a-change-is-gonna-come>.

102. See *id.* Voluntarily adopted codes of conduct may bypass national laws and avoid jurisdictional concerns. *Id.* at 38-39. As a result, voluntary regulatory approaches come with greater flexibility than government-prescribed regulatory schemes. *Id.* On the other hand, "fixed rules, created centrally by governments and backed by inflexible sanctions, are ineffective, expensive and counter-productive." *Id.* at 14 (first citing CHRISTOPHER D. STONE, *WHERE THE LAW ENDS* (1975); then citing EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK* (1982); then citing Robert Baldwin, *Why Rules Don't Work*, 53 MOD. L. REV. 312 (1990); then citing FIONA HAINES, *CORPORATE REGULATION* (1997); and then citing Jill Murray, *Corporate Social Responsibility: An Overview of Principles and Practices* (Int'l Labour Org., Working Paper No. 34, 2004), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079107.pdf).

103. See *id.* at 17.

104. See *id.* at 10-12 (explaining that current voluntary codes of conduct are influenced in part by governments' legislation, regulation, and trade agreements).

practice, failure to comply would inevitably modify liability standards and provide performers with clear standards of negligence to point to when they encounter dangerous venues or unethical promoters.

Furthermore, codes of conduct work. The drafters of an international code of conduct in the live concert tour and music festival sector need not start from nothing or invent an innovative solution to the problem. The creators of the code may model their principles after those utilized by corporations in various industries around the world.¹⁰⁵ Juggernauts like Amazon, Apple, and Google,¹⁰⁶ as well as companies in the world's largest retailing industries, like the garment industry,¹⁰⁷ use codes of conduct as vehicles to drive home their respective fundamental philosophies. Here, the drafters will benefit from the ability to learn from the successes and drawbacks of these precedents.

Multinational voluntary codes of conduct and initiatives aimed at promoting socially responsible practices have existed since 1948.¹⁰⁸ Today, Corporate Social Responsibility is a widely recognized management approach whereby companies incorporate social and environmental concerns into their business models.¹⁰⁹ Companies with a Corporate Social Responsibility agenda follow a "Triple-Bottom-Line" approach which focuses on achieving a balance of economic, environmental, and social needs, while simultaneously addressing both their shareholders and

105. See, e.g., *Industry Codes*, AUSTRALIAN COMPETITION & CONSUMER COMMISSION, <https://www.accc.gov.au/business/industry-codes> (last visited Mar. 19, 2018).

106. See *Top Ten Companies' Codes of Ethics and Conduct*, DR. DIANE HAMILTON (Sept. 13, 2011), <http://drdianehamilton.com/top-10-companies-code-of-ethics-and-conduct-2011/>.

107. See HU XIAOYONG, JAPANESE INST. FOR LAB. POL'Y & TRAINING, CORPORATE CODES OF CONDUCT AND LABOUR-RELATED CORPORATE SOCIAL RESPONSIBILITY 17 (2006), <http://www.jil.go.jp/profile/documents/Hu.pdf> (explaining that large multinational enterprises, especially in the textile, clothing, and footwear industries—including Nike, Reebok, and Gap—have "led the trend toward" voluntary company codes).

108. Phillip H. Rudolph, *The History, Variations, Impact and Future of Self-Regulation*, in CORPORATE SOCIAL RESPONSIBILITY 421, 422 (Ramon Mullerat ed., 2d ed. 2011) (citing G.A. Res. 217 (III), A, Universal Declaration of Human Rights (Dec. 10, 1948)) (documenting the United Nations' adoption of the Universal Declaration of Human Rights—an outline of human rights standards meant as a response to the atrocities surrounding World War Two).

109. *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, at 4, COM (2001) 366 final (July 18, 2001) ("Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment."); see RADU MARES, THE DYNAMICS OF CORPORATE SOCIAL RESPONSIBILITIES 1-3 (2008) (explaining that one definition of CAR encompasses a voluntary "managerial strategy"); *What is CSR?*, UNITED NATIONS INDUS. DEV. ORG., <https://www.unido.org/csr/o72054.html> (last visited Mar. 19, 2018) (similarly defining CSR as "a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders") [hereinafter UNIDO].

stakeholders' expectations.¹¹⁰ The idea is essentially a business strategy that establishes long-lasting shareholder value by welcoming opportunities and managing risks stemming from economic, environmental and social developments.¹¹¹

The Corporate Social Responsibility approach increased over the last few decades, beginning in the 1990s, in response to various human rights abuses in labor-intensive industries.¹¹² Increased attention to corporate abuses led to a proliferation of codes of conduct. Many codes focus on promoting socially responsible practices in corporations' international business operations. To minimize corruption, harm and abuse, many codes aim to protect human rights and the health and safety of individuals. The Organisation for Economic Co-operation and Development (OECD)¹¹³ has defined corporate codes of conduct as "commitments voluntarily made by companies, associations or other entities, which put forward standards and principles for the conduct of business activities in the marketplace."¹¹⁴ Unlike laws that are designed to be binding, such as the Duty of Care Principle,¹¹⁵ voluntary codes of conduct mostly rely on self-regulation and entail no direct legal commitment.¹¹⁶ Thus, voluntary codes of conduct are sometimes characterized as "soft law" – a term used to describe non-binding recommendations (as opposed to "hard law") that eventually may establish custom or serve as the basis for the drafting of treaties.¹¹⁷ In the corporate arena, the underlying force behind such codes of conduct was a "do it yourself" philosophy not unlike that upheld by the small-scale music venues discussed earlier in this paper.¹¹⁸

The OECD Guidelines for Multinational Enterprises (1976), the International Labour Organization's Tripartite Declaration (1977), and most prominently, the UN Global Compact (2000), are some of the world's most

110. UNIDO, *supra* note 109.

111. *Corporate Sustainability*, ROBECOSAM, <http://www.sustainability-indices.com/sustainability-assessment/corporate-sustainability.jsp> (last visited Mar. 19, 2018).

112. MARES, *supra* note 109, at 1.

113. *About the OECD*, ORG. FOR ECON. CO-OPERATION & DEV., <https://www.oecd.org/about/> (last visited Mar. 19, 2018).

114. ORG. FOR ECON. CO-OPERATION & DEV., *CORPORATE RESPONSIBILITY* 48 (2001).

115. SURYA DEVA, *REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS* 65 (2012).

116. *See* SIMON BAUGHEN, *HUMAN RIGHTS AND CORPORATE WRONGS* 212 (2015).

117. *Id.* at 248; *see also* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 *AM. J. INT'L L.* 901, 914-15 (2003) (defining the concept of "soft law" in the context of analyzing the international "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," or "UN Norms"—a "non-voluntary" intergovernmental code that has yet to realize any binding effect).

118. BAUGHEN, *supra* note 116, at 212.

significant voluntary initiatives.¹¹⁹ With over 12,000 corporate participants and stakeholders from over 145 countries, the UN Global Compact is the largest existing voluntary corporate responsibility initiative.¹²⁰ Today, the UN Global Compact lays out ten principles, or core values, concerning internationally proclaimed human rights, labor standards, and environmental practices.¹²¹ Although adherence to these principles is strictly voluntary, companies must disclose their compliance and progress in annual corporate reports to their stakeholders and to the UN Global Compact website.¹²² If a participant repeatedly fails to comply with this mandatory disclosure, it will eventually be expelled and its name will be published.¹²³ Rather than policing or enforcing behavior, the UN Global Compact utilizes public accountability, transparency and companies own self-interests to proactively pursue practices that correspond with its core values.¹²⁴

The OECD, headquartered in Paris, France, provides an outlet where governments can cooperate and exchange experiences and develop solutions to common economic, social and environmental issues.¹²⁵ Like the UN Global Compact, it is a government-driven instrument that outlines core principles and human rights that entities are expected to protect.¹²⁶ As part of its operations, the organization draws on facts and experience to promote and recommend policies aimed at improving the economic and social well-being of citizens around the world.¹²⁷ The OECD's work is driven by an interdependent network of the OECD Council which is charged with oversight, strategic direction and ultimate decision-making; around 250 committees, working groups, and expert groups to act as representatives of

119. ORG. FOR ECON. CO-OPERATION & DEV., *THE UN GLOBAL COMPACT AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES COMPLEMENTARITIES AND DISTINCTIVE CONTRIBUTIONS 2* (2005) [hereinafter *GLOBAL COMPACT PRINCIPLES AND OECD GUIDELINES*], <https://www.oecd.org/corporate/mne/34873731.pdf>; DEVA, *supra* note 115, at 7-8.

120. BAUGHEN, *supra* note 116, at 212-13.

121. *Id.*; *GLOBAL COMPACT PRINCIPLES AND OECD GUIDELINES*, *supra* note 119, at 5 (providing the ten principles, e.g., Principle 1: "Businesses should support and respect the protection of internationally proclaimed human rights"; and Principle 2: "Make sure they are not complicit in human rights abuses").

122. *Communication on Progress, UN Global Compact Policy on Communicating Process*, at 2, https://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf (last updated Mar. 1, 2013); see *About the UN Global Compact*, UN GLOBAL COMPACT, <https://www.unglobalcompact.org/about/faq> (last visited Mar. 19, 2018).

123. *Communication on Progress*, *supra* note 122, at 3.

124. Rudolph, *The History, Variations, Impact and Future of Self-Regulation*, *supra* note 108, at 369; *About the UN Global Compact*, *supra* note 122.

125. *About the OECD*, *supra* note 113.

126. MARES, *supra* note 109, at 169.

127. *About the OECD*, *supra* note 113.

each member country at OECD committee meetings that concern discussion and implementation; and the Secretariat, charged with analysis and proposals.¹²⁸ There are currently thirty-six contributing members.¹²⁹

Apart from codes coming from international organizations formed by governments, there are codes established by particular industries. For example, fair trade coffee, as part of a voluntary movement in which products are certified by third party organizations as being produced under “fair” conditions, has benefitted certain areas in which coffee is farmed.¹³⁰ The fair trade model, under which products must meet a series of criteria in order to be certified – e.g., guaranteed minimum prices to producers, fair wages to laborers, environmentally sustainable production practices, public accountability, and safe, non-exploitative working conditions – originated in Mexico.¹³¹ The movement began with coffee, which remains the world’s largest fair-traded commodity.¹³² International entities such as Starbucks and McDonald’s carry fair trade coffee.¹³³ Mexico is the world’s largest producer of coffee and is the location of the most producers of fair trade coffee.¹³⁴

Fair trade coffee has led to social, economic, and environmental benefits to participants in the villages of Yagavila and Teotlasco in Oaxaca, Mexico.¹³⁵ In those small villages, fair trade products’ higher prices increase household income and decrease household debt.¹³⁶ In addition, fair trade partially protects coffee farmers from commodity crises.¹³⁷ Moreover, higher product prices associated with fair trade may help to generate favorable economic effects within the communities.¹³⁸ Although fair trade

128. *Who Does What*, OECD, <https://www.oecd.org/about/whodoeswhat/> (last visited Mar. 19, 2018).

129. *Members and Partners*, OECD, <https://www.oecd.org/about/membersandpartners/#d.en.194378> (last visited Mar. 19, 2018) (including the United States, the United Kingdom, Czech Republic, Germany, Denmark, Japan, and Australia).

130. DANIEL JAFFEE, *BREWING JUSTICE* 1-3, 8, 28 (updated ed., 2014).

131. *Id.* at 1-4.

132. *Id.* at 2; Eric Goldschein, *Eleven Incredible Facts About the Global Coffee Industry*, *BUS. INSIDER* (Nov. 14, 2011, 10:20 AM), <http://www.businessinsider.com/facts-about-the-coffee-industry-2011-11>.

133. Goldschein, *supra* note 132.

134. JAFFEE, *supra* note 130, at 4; *History of Coffee in Mexico*, EQUAL EXCHANGE, <http://equalexchange.coop/history-of-coffee-in-mexico> (last visited Mar. 19, 2018).

135. JAFFEE, *supra* note 130, at 4, 7-8.

136. *Id.* at 6-8.

137. *Id.* at 6.

138. *Id.* at 8.

is not a cure-all to the problems the movement aims to combat, similar positive results have been found in other coffee-producing regions.¹³⁹

Voluntary codes and initiatives have had great success over the years. In some circumstances, these soft laws have “hard” indirect effects. One example comes from the apparel industry in the 1990s.¹⁴⁰ The multinational corporation Nike was exposed for its poor working conditions and abusive labor practices in south Asian production factories and sweatshops.¹⁴¹ Similar reports in the media led to a national controversy surrounding inhumane business practices utilized by clothing and other textile corporations.¹⁴² As a response to an international backlash and outcry from consumers, critics and protesters, Nike began to implement voluntary codes of conduct in its overseas affairs.¹⁴³

Over the next decade, the transnational apparel corporation raised the minimum wage at its Asian factories, adopted Occupational Health and Safety Administration (OSHA) clean air standards, conducted hundreds of factory audits and published a report recognizing its past violations.¹⁴⁴ To ensure adherence to adequate standards, Nike created the Fair Labor Association, an independent and nongovernmental organization which monitors and enforces the corporation’s practices abroad.¹⁴⁵

Pressure deriving from company’s own self-proclaimed voluntary code of conduct can lead to improved circumstances in the areas in which such company operates. For example, in *Laderer v. Dole Food Co.*, Dole was sued by a California consumer for allegedly misrepresenting its company policies in its Guatemalan banana plantations.¹⁴⁶ At the time, Dole’s production in the country contaminated local water supplies, destroyed wetlands, caused flooding, destroyed local communities’ crops and caused illnesses in

139. *See id.*; *The Difference that Fairtrade Makes*, FAIRTRADE FOUND., <https://www.fairtrade.org.uk/What-is-Fairtrade/The-impact-of-our-work/The-difference-that-Fairtrade-makes> (last visited Mar. 19, 2018).

140. Caroline Thompson, *Ethical Consumerism as a Human Rights Enforcement Mechanism: The Coffee Cultivation Model*, 24 *TRANSNAT’L L. & CONTEMP. PROBS.* 161, 189-90 (2014).

141. *Id.*

142. *See id.*

143. *See id.* at 190; JAFFEE, *supra* note 130, at 214.

144. *See* Thompson, *supra* note 140 (citing Max Nisen, *How Nike Solved Its Sweatshop Problem*, *BUS. INSIDER* (May 9, 2013, 10:00 PM), <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>).

145. *See id.*; *but see* JAFFEE, *supra* note 130, at 214 (stating many of the companies in the apparel industry which reacted to the global consumer outrage of the 1990s have since failed to fulfill their promises or provide meaningful protection to their workers).

146. Complaint, *Laderer v. Dole Food Co.*, No. CV12-09715 CAS (AGR), 2012 WL 5815734 (C.D. Cal. Nov. 13, 2012).

children.¹⁴⁷ The claimant asserted that he would not have bought Dole's products if he had known that the company's practices had such harmful effects.¹⁴⁸ Citing Dole's own company materials, which proclaimed an "unwavering commitment" to "environmental responsibility and social accountability," the plaintiff alleged that Dole had violated California consumer fraud laws, and that Dole had committed common law fraud by concealment and unjust enrichment.¹⁴⁹ When confronted with its own self-imposed tenets of humane business practices, Dole settled the lawsuit in 2013 and agreed to aid in delivering a water filter project in the pertinent local Guatemalan communities.¹⁵⁰ Although Dole did not concede liability,¹⁵¹ the pressures of complying with its code of conduct led to a positive change in its operations.

Undoubtedly, the effectiveness of voluntary codes and initiatives within the global Corporate Social Responsibility movement is not immune from criticism. The codes have been critiqued as mere corporate facades, "window-dressing," lip service, and essentially phony attempts to put a human face atop business-oriented and sometimes inhumane agendas.¹⁵² Voluntary codes of corporate conduct are further criticized for giving corporations too much discretion resulting in overly-selective codes, lacking external independent assessment, and for being too vague to effectuate actual change.¹⁵³

At the same time, some argue that voluntary codes threaten the free market and global economy. Prominent scholars like Milton Friedman, for example, argue that the sole responsibility of a business is to maximize shareholder profits, rather than to concern itself with issues of respect and human rights. According to Friedman:

In such [a free] market economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, [i.e.], engages in open and free competition, without deception or fraud.¹⁵⁴

Although the area of corporate voluntarism and regulation from an international governance perspective is fairly new and not yet fully

147. *Id.* at 14, 21.

148. *Id.* at 4, 21-23.

149. *Id.* at 3-5, 13-14, 17-22.

150. BAUGHEN, *supra* note 116, at 250.

151. *Id.*

152. *See* MARES, *supra* note 109, at 274, 305.

153. *See id.* at 190; DEVA *supra* note 115, at 77.

154. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (40th anniversary ed., 2002).

developed,¹⁵⁵ this rapidly evolving shift in business approach is capable of generating a positive global impact. One prime illustration of this potential is the “B Corp Movement.”¹⁵⁶ The “B Corp Movement” is a group of nearly 2,000 certified “B Corporations” in fifty countries and 130 industries that are raising the standard for corporate social and environmental performance, legal accountability and public transparency.¹⁵⁷ The corporations in this community have met such standards as verified by the independent nonprofit “B Lab” to create prosperity for both shareholders and society at large.¹⁵⁸ Upwards of 40,000 additional companies and millions of others (e.g., entrepreneurs and investors) have publicly demonstrated a desire to use business as a force for good through the B Corp Movement.¹⁵⁹ In addition, current international codes like the OECD Guidelines can influence changes because they lay out basic health and safety principles.¹⁶⁰ Moreover, a growing increase in independent monitoring practices, such as auditing, within corporations serves to further legitimize the Corporate Social Responsibility approach.¹⁶¹ In order to compel companies around the world to exhibit increased levels of due care,¹⁶² and to deal with the various perceived shortcomings of Corporate Social Responsibility, the corporate scheme must be updated to a collaborative approach (as opposed to a “go-it-alone” or “do-it-yourself” strategy) with cooperating stakeholders.¹⁶³

Businesses create and adopt voluntary codes and initiatives to set forth and preserve a credible image with their stakeholders, adding pressure on other companies to do the same. Some codes are now further strengthened

155. See 2 BINDA PREET SAHNI, *TRANSNATIONAL CORPORATE LIABILITY* 47 (2006); MARES, *supra* note 109, at 274.

156. See Bart Houlahan et al., *Impact Governance and Management: Fulfilling the Promise of Capitalism to Achieve a Shared and Durable Prosperity*, BROOKINGS 3 (July 1, 2016), <https://www.brookings.edu/research/impact-governance-and-management-fulfilling-the-promise-of-capitalism-to-achieve-a-shared-and-durable-prosperity/>.

157. *Id.*

158. *Id.*

159. *Id.*

160. SAHNI, *supra* note 155.

161. See, e.g., XIAOYONG, *supra* note 107, at 28 (reporting many stakeholders believe independent monitoring is more credible than other types of monitoring, and Nike has relied on it to provide an “objective snapshot” of the working conditions in its supply chain); CORPORATE RESPONSIBILITY, *supra* note 114, at 80-81 (explaining although there is a general lack of extensive standardization of accounting in most areas of corporate responsibility, some noteworthy initiatives have developed in certain areas by governments, firms, and non-governmental organizations – e.g., Global Reporting Initiative, the ISO 140000 series of environmental standards, SA 8000, and ECS 2000).

162. See MARES, *supra* note 109, at 274.

163. See *id.*

with mandatory corporate report disclosures like that of the aforementioned UN Global Compact.¹⁶⁴ This process creates incremental social pressures for other companies to comply.¹⁶⁵ The hope is that this new level of transparency, dialogue, and advocacy will gradually drive out companies that evade accountability for harmful practices,¹⁶⁶ since a growing number of individuals desire to support companies acting as positive influences on social and environmental progress, but doubt companies' self-proclamations.¹⁶⁷

The initiatives may help to promote responsible practices before governments eventually require them.¹⁶⁸ Despite the skepticism surrounding Corporate Social Responsibility schemes,¹⁶⁹ there currently exists common ground, at least, in the idea that corporations should be socially responsible.¹⁷⁰ For example, this culture shift is seen in the United States where, at least partially in response to market trends, over 200,000 businesses and 325,000 business executives promulgate a mission to use their business as a force for creating a more sustainable society.¹⁷¹ Thus, Friedman's maxim that "the social responsibility of business is to increase profits"¹⁷² is outdated, and regulation of socially irresponsible behavior does not extinguish free markets.¹⁷³

In the live music realm, a mixed approach that accounts for both profit-maximization theory and a desire for liability expansion can be effective. One view is that legal systems should strive to create efficient and effective liability regimes and combine them with voluntary soft law initiatives.¹⁷⁴ Rather than using voluntary initiatives alone, this approach would also increase international enterprises' accountability.¹⁷⁵ Within the current

164. *See id.*

165. *See id.*

166. John G. Ruggie, *The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact*, 5 J. CORP. CITIZENSHIP 27, 32 (2002).

167. Houlahan et al., *supra* note 156, at 8.

168. *See* MUZZAFFER EROGLU, MULTINATIONAL ENTERPRISES AND TORT LIABILITIES 227 (2008).

169. *See, e.g.*, Houlahan et al., *supra* note 156, at 7 (quoting Delaware Supreme Court Chief Justice Leo Strine on advocates for Corporate Social Responsibility: "[L]ecturing others to do the right thing without acknowledging the actual rules that apply to their behavior, and the actual power dynamics to which they are subject, is not a responsible path to social progress.>").

170. EROGLU, *supra* note 168, at 228.

171. Houlahan et al., *supra* note 156 (citing *Overview*, AM. SUSTAINABLE BUS. COUNCIL, <http://asbcouncil.org/about-us>).

172. *Id.* at 1.

173. *See* DEVA, *supra* note 115, at 10, 123.

174. EROGLU, *supra* note 168, at 234.

175. *Id.*

context of international concerts and music festivals, a focus on a voluntary code, rather than binding regulation, would be a positive step in the right direction to achieve a progressive movement toward change. Corporate Social Responsibility's vagueness is better suited to the international live music realm – an industry that consists of a multi-faceted network of enterprises that lack a clear definition as an organized undertaking as an organization but that involve a multitude of contractual relationships between independent entities.¹⁷⁶ Corporate Social Responsibility's wide scope may prove to be conducive to achieving international regulation of live concerts.¹⁷⁷

Although most problems arising from unsafe practices in the international live music sector are dealt with in existing negligence law,¹⁷⁸ the broader network of the industry, as opposed its varying actors, needs a widespread Corporate Social Responsibility initiative to help formulate a more cohesive response to common life-threatening issues. Fans and audience members are stakeholders in the vast web that is the live music industry, which includes (among many others) promoters, booking agents, venue managers, band managers, various crewmembers and, of course, the talent.¹⁷⁹ Promoters know what works best in their particular venue and market,¹⁸⁰ and there is a general lack of a collective sense of responsibility for problems in overcrowding, fire safety and violence at concerts among musicians. A voluntary code of conduct would help to bridge the gap among bands and artists as organizations in the industry and provide them with rigorous universal minimum standards that everyone in the industry is aware of without the need to obtain legal advice.

Like the OECD's collaborative process mentioned earlier in this paper, monitoring of such a code can be accomplished internationally with administrative and policy-making bodies.¹⁸¹ Representative committees from each nation can cooperate with an intergovernmental voluntary initiative like the OECD to increase the goal of increased safety and accountability at concert tours, festivals, and live events at smaller

176. *Id.* at 234-35.

177. *See id.* at 235.

178. Tracy H. Pearl, *Crowd Crush: How the Law Leaves American Crowds Unprotected*, 104 KY. L.J. 1, 1 (2015).

179. *See* RAY D. WADDELL ET AL., THIS BUSINESS OF CONCERT PROMOTION AND TOURING 236-47 (2007).

180. *Id.* at 201.

181. *See* SAHNI, *supra* note 155, at 39 (citing A.A. Fatouros, *On the Implementation of International Codes of Conduct: An Analysis of Future Experience*, 30 AM. U.L. REV. 941, 961 (1981)).

establishments. Existing entities such as the “Purple Guide” in the United Kingdom and “Live Performance Australia” in Australia have demonstrated a desire and purpose to promote safer concert practices.¹⁸² Such proponents only need an effective outlet to help spark the global conversation—to respond to the “why,” “what,” and ultimately “how” challenges inherent in a push for increased social responsibility in the international live concert context.¹⁸³ It should be noted that codes of conduct are a means to an end,¹⁸⁴ but they are a necessary step to gradually achieving transnational social and ethical goals and objectives.¹⁸⁵ A voluntary code in this context would be an essential component in this movement.

A model of a voluntary code in the concert context already exists through Australia’s “Your Choice” movement as a great example of widespread collective acceptance of responsibility and accountability for safety at concerts and festivals.¹⁸⁶ Operating under a credo of shared responsibility, Your Choice is a campaign within Australia’s music industry that proactively engages in counteracting behavioral issues and lack of personal accountability at the country’s live music venues and event spaces.¹⁸⁷ Hundreds of musicians, promoters, festivals, live concert venues, and other industry companies publicly support the movement’s primary goal of creating a positive cultural change in the music community.¹⁸⁸ Supporters work with an eye toward preventing unsafe and harmful behaviors, like

182. See, e.g., CROWD SAFETY, <http://www.crowdsafety.org/about-us/> (last visited Mar. 19, 2018); CROWD SAFETY TRAINING, <http://www.crowdsafetytraining.com/> (last visited Mar. 19, 2018); ERESPONSE CROWD SAFETY, <https://www.linkedin.com/company/eresponse-crowd-safety/> (last visited Mar. 19, 2018); LIVE PERFORMANCE AUSTRALIA, http://www.liveperformance.com.au/about_lpa (last visited Mar. 19, 2018); THE PURPLE GUIDE TO HEALTH, SAFETY AND WELFARE AT MUSIC AND OTHER EVENTS, <https://www.thepurpleguide.co.uk/> (last visited Mar. 19, 2018); VENUES TODAY, <http://www.venuestoday.com/events/detail/international-crowd-management-conference-icmc> (last visited Mar. 19, 2018); WORKING WITH CROWDS, <http://www.workingwithcrowds.com/about-us/> (last visited Mar. 19, 2018).

183. See DEVA, *supra* note 115, at 1.

184. Rudolph, *The History, Variations, Impact and Future of Self-Regulation*, *supra* note 108, at 383-84.

185. *Id.* at 384.

186. *Music Lovers, Help Us Create a Culture of Positive Change*, YOUR CHOICE, <https://your-choice.net.au> (last visited Mar. 19, 2018).

187. *It’s Your Choice*, YOUR CHOICE, <https://your-choice.net.au/about/> (last visited Mar. 19, 2018).

188. Josh Butler, *The Campaign to Stop Sexual Assault and Violence at Concerts and Festivals*, HUFFINGTON POST (Australia) (July 14, 2017, 2:00 PM), http://www.huffingtonpost.com.au/2017/07/13/the-campaign-to-stop-sexual-assault-and-violence-at-concerts-and_a_23029217/; *Music Lovers, Help Us Create a Culture of Positive Change*, *supra* note 186.

sexual assault and violence, rather than merely reacting to such threats to the overall concert experience.¹⁸⁹ The movement clearly sets out its beliefs and currently provides a set of thirteen “House Rules,” including “Throw a party, not a projectile” and “Be a do-er, not a me too-er[.] [I]f someone [is] doing something dodge, call them out, [and] report it.”¹⁹⁰ Rather than seeking restrictive legislative solutions, the industry representatives “continue to work with the public, emergency services, community groups and government agencies to develop informed and preventative strategies.”¹⁹¹ Proponents of the Your Choice movement have the right idea. The live music and touring sectors around the world need clear standards to “let the good [and safe] times roll.”¹⁹²

V. CONCLUSION

Concerts and music festivals around the world continue to draw massive crowds of fans with no signs of slowing down.¹⁹³ Because the health and safety of global music-lovers are at risk, as well as the integrity of the industry, it is time to formulate an international code of conduct in the live concert tour and music festival realm. Despite well-documented limitations, a voluntary code rather than binding regulation would prove to fit the context of the worldwide music community. Such a code would ultimately aid in bringing an increased sense of control in a seemingly chaotic international community. To borrow a line from the late-great John Lennon of the prolific Beatles (tragically murdered by an obsessed and resentful fan): “You may say I’m a dreamer. But I’m not the only one.”¹⁹⁴

189. Butler, *supra* note 188; *Music Lovers, Help Us Create a Culture of Positive Change*, *supra* note 186.

190. *Music Lovers, Help Us Create a Culture of Positive Change*, *supra* note 186.

191. *Id.*

192. THE CARS, *Good Times Roll*, on THE CARS (Elektra 46014 1979).

193. See, e.g., August Brown, *Electric Daisy Carnival Celebrates 20th Anniversary in Las Vegas with 400,000 Revelers: ‘The Stakes Have Never Been So High,’* L.A. TIMES (June 17, 2016, 3:00 AM), <http://beta.latimes.com/entertainment/music/la-et-ms-edc-edm-20160613-snap-story.html>; Bruno Boelpaep, *Belgium’s Tomorrowland Music Festival Makes Global Impact*, BBC NEWS (July 28, 2014), <http://www.bbc.com/news/world-europe-28525703>; Hugh McIntyre, *Coachella Just Became the First Annual Music Festival to Hit \$100 Million in Grosses*, FORBES (Oct. 18, 2017, 4:39 PM), <https://www.forbes.com/sites/hughmcintyre/2017/10/18/coachella-just-became-the-first-annual-music-festival-to-hit-100-million-in-grosses/#180120224d7c>.

194. JOHN LENNON, *Imagine*, on IMAGINE (Apple 1971); see Danielle Sloane, *Inside the Mind of John Lennon’s Killer*, CNN (Dec. 8, 2015, 11:39 AM), <http://www.cnn.com/2015/12/08/us/mark-david-chapman-lennon-interviews/index.html>.

INTERNATIONAL TRANSFER PRICING AND THE ELUSIVE ARM’S LENGTH STANDARD: A PROPOSAL FOR DISCLOSURE OF ADVANCE PRICING AGREEMENTS AS A TOOL FOR TAXPAYER EQUITY

Chi Tran *

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I. INTRODUCTION

Transfer pricing disputes involve jarring amounts of money. In 2014, the Internal Revenue Service (“IRS”) squandered \$2.2 million in an unsuccessful investigation into Microsoft’s tax practices.¹ Again, in 2017, the billion-dollar multinational corporation, Amazon, prevailed in a transfer

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1. David Forst & Larissa Neumann, *US Transfer Pricing Litigation Update*, INT’L TAX REV. (Mar. 26, 2015), <http://www.internationaltaxreview.com/Article/3440036/US-transfer-pricing-litigation-update.html>.

pricing dispute with the IRS that otherwise could have cost the company more than \$3 billion in taxable income.² The IRS's 2013 Apple investigation provides yet another instance of high-stakes transfer pricing disputes. In that case, the Senate Permanent Investigations Subcommittee ultimately discovered that Apple had reduced its U.S. corporate income tax by an estimated \$1 million on its overall \$22 billion in earnings.³ Why does the IRS continually fail to convince the United States Tax Court that mammoth multinational corporations such as these evade their respective tax obligations? Put simply: transfer pricing.

Transfer pricing occurs when related multinational entities engage in mutual trade.⁴ Companies allocate taxable income to low-tax jurisdictions and tax-deductible costs to high-tax jurisdictions. In addition, multinational entities shift profits by selling component parts and final goods between subsidiaries at inflated or deflated prices.⁵ While the term "transfer pricing" itself is tax neutral, it is essentially equated with tax avoidance or profit shifting from a high-tax jurisdiction to a lower tax jurisdiction.⁶ For example, in 2016, the IRS slapped Facebook with a tax deficiency notice of \$3 to \$5 billion after the multinational corporation transferred its global operations, an intangible asset, to an Irish subsidiary.⁷ The IRS claimed that Facebook

2. Julie Martin, *Amazon Wins \$1.5 Billion Transfer Pricing Dispute in US Tax Court*, MNE TAX (Mar. 24, 2017), <https://mnetax.com/amazon-wins-transfer-pricing-case-tax-court-20243-20243>.

3. *Offshore Profit Shifting and the U.S. Tax Code, Part 2 (Apple Inc.): Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec.*, 113th Cong. 10 (2013) (statement of Sen. John McCain, Member, Subcomm. on Investigations) [hereinafter *Permanent Subcomm. Report*], <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf> (explaining that, from 2009 to 2012, one Apple entity (ASI) "contributed a little more than half of the cost-sharing payments to Apple Incorporated but pocketed twice the earnings of Apple Incorporated, \$74 billion compared to \$39 billion. Apple Operations International received \$30 billion in dividends from 2009 to 2012 and paid zero taxes; \$102 billion of Apple's \$145 billion in cash on hand is overseas"); Howard Gleckman, *The Real Story on Apple's Tax Avoidance: How Ordinary It Is*, FORBES (May 21, 2013, 4:58 PM), <https://www.forbes.com/sites/beltway/2013/05/21/the-real-story-about-apples-tax-avoidance-how-ordinary-it-is/#152548336523>.

4. *Transfer Pricing*, TAX JUST. NETWORK, <http://www.taxjustice.net/topics/corporate-tax/transfer-pricing/> (last visited Sept. 4, 2018).

5. ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS 320 (2017) [hereinafter OECD TRANSFER PRICING GUIDELINES], https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page1.

6. *Id.*

7. Kartikay Mehrotra, *Facebook Tax Bill Over Ireland Move Could Cost \$5 Billion*, BLOOMBERG (July 28, 2016, 4:08 PM), <https://www.bloomberg.com/news/articles/2016-07-28/facebook-gets-3-5-billion-irs-tax-notice-over-ireland-move>.

deliberately shifted its profits to a lower tax jurisdiction and thereby seriously devalued its assets by billions of dollars.⁸

While transfer pricing permeates the international commercial community, its impact reaches much further than international trade. Returning to the Apple case, when the company created two entities in Ireland, it allocated \$22 billion of its \$34 billion pre-tax income.⁹ Apple had a strong motivation to disproportionately allocate this income because, in 2011, Ireland maintained a 12.5% corporate tax rate while the U.S. maintained a 35% tax rate, one of the highest tax rates among developed countries at the time.¹⁰ Though the Tax Court found for Apple, the Permanent Subcommittee's report reached a more disturbing conclusion: In the realm of tax avoidance, Apple's practices were not only typical of other multinational corporation, but the company was far from the worst multinational corporation in terms of intentional transfer pricing.¹¹

A 2009 Christian Aid report substantiated the Subcommittee's finding, estimating that less developed countries lose approximately \$160 billion in tax revenue each year due to profit shifting and multinational corporation tax avoidance schemes.¹² Developing countries, such as India, Namibia, and Vietnam, particularly need these tax revenues to improve infrastructure, healthcare, and education.¹³ Specifically, if spent on healthcare, the additional tax revenues would save 350 thousand children every year.¹⁴ However, because half of world trade occurs through tax havens, and because

8. *Id.*

9. Gleckman, *supra* note 3.

10. Danielle Kurtzleben, *FACT CHECK: Does the U.S. Have the Highest Corporate Tax Rate in the World?*, NRP (Aug. 7, 2017, 10:09 AM), <https://www.npr.org/2017/08/07/541797699/fact-check-does-the-u-s-have-the-highest-corporate-tax-rate-in-the-world>; *Permanent Subcomm. Report*, *supra* note 3, at 2 (statements of Senator Carl Levin, Chairman, Subcomm. on Investigations); Gleckman, *supra* note 3.

11. *See Permanent Subcomm. Report*, *supra* note 3, at 14 (statement of Richard Harvey, Professor, Villanova University School of Law) ("Now, the scary thing is Apple allocated 64 percent of its global income into that shell corporation. There are other multinationals that probably would have allocated even more. So, to some extent, Apple is not as aggressive as others[.]"); Gleckman, *supra* note 3.

12. CHRISTIAN AID, FALSE PROFITS 3 (2009), <https://www.christianaid.org.uk/sites/default/files/2017-08/false-profits-robbing-the-poor-to-keep-rich-tax-free-march-2009.pdf>.

13. *Id.* at 6, 12-13, 23.

14. CHRISTIAN AID, DEATH AND TAXES 2, 51 (2008), <https://www.christianaid.org.uk/sites/default/files/2017-08/death-and-taxes-true-toll-tax-dodging-may-2008.pdf>.

businesses intend to avoid taxes, these developing countries likely will not receive the additional revenues any time soon.¹⁵

This Comment argues that Advance Pricing Agreements (“APA”), also known as agreements with taxing authorities that identify which transfer pricing methodology a company should use,¹⁶ must be published and available to the public so that taxpayers understand how to comply with the required “arm’s length standard.” Section I, above, introduced the concept of transfer pricing. Section II addresses how the current lack of comparables in the transfer pricing community prevents multinational corporations from complying with the arm’s length standard. Section III then discusses how implementing a system of disclosure through use of APAs can combat companies’ inadvertent and perhaps even inevitable non-compliance with this standard. Finally, section IV responds to the argument that proprietary information and trade secrets need protection.

II. THE CURRENT PROBLEM WITHIN THE TRANSFER PRICING COMMUNITY: A LACK OF COMPARABLES

Profit shifting has serious national and international consequences. As such, to combat profit shifting, both the IRS and the Organisation for Economic Co-Operation and Development (“OECD”) have implemented the arm’s length standard and require companies to charge a price as if the transaction were at arm’s length.¹⁷ In essence, this arm’s length standard requires related companies to establish a transfer price comparable to transfer prices between unrelated companies¹⁸ – that is, a fair price that is neither inflated nor deflated. The OECD implements this arm’s length standard through various methodologies, each of which apply appropriately to different situations.¹⁹ As this section will illustrate, comparability lies at the heart of the transfer pricing methodologies.²⁰

Yet, as it stands currently, there is a lack of public information for companies to compare.²¹ In the U.S., the IRS operates under Internal Revenue Code (“IRC”) § 482, which establishes an arm’s length standard to

15. *Id.* at 2, 52-55.

16. OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 214.

17. See CHRISTIAN AID, FALSE PROFITS, *supra* note 12, at 52; John Neighbour, *Transfer Pricing: Keeping it at Arm’s Length*, OECD OBSERVER, http://oecdobserver.org/news/archivestory.php/aid/670/Transfer_pricing:_Keeping_it_at_arms_length.html (last updated July 3, 2008).

18. See OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 33-36.

19. *Id.* at 35, 43-45.

20. *Id.* at 16.

21. *Id.* at 13.

govern income and deduction allocations for transactions between related parties.²² In the international context, the OECD implements transfer pricing guidelines that lay out the arm's length standard and its methodologies.²³ Under the IRS regulations and the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("Guidelines"), transactions must satisfy two requirements: (1) the transaction price must be calculated using the best method under the circumstances, and (2) the price must meet the arm's length standard.²⁴ However, data is key to comparability.

Despite an available standard and established methods to implementing this standard, multinationals still experience audits and penalties for tax deficiencies.²⁵ The problem lies in the elusive arm's length standard. One solution by which multinationals can avoid audits and penalties is the use of APAs. Some multinationals opt for the APA alternative because it offers peace of mind and a no-audit guarantee.²⁶ In the U.S., the IRS does not publish APAs. As a result, multinationals and the public remain in the dark as to what the IRS finds acceptable and what it considers common practice. Without published APAs, watchdog groups expect the worst and multinationals wonder whether their competitors are getting a better deal. Although the IRS and OECD have both established an arm's length standard

22. I.R.C. § 482 (1954) (stating, in part, that "[i]n any case of two or more organizations, trades, or businesses . . . owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property . . . , the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible").

23. See generally OECD TRANSFER PRICING GUIDELINES, *supra* note 5.

24. See 26 C.F.R. § 1.482-1(b) (2017).

In determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer. A controlled transaction meets the arm's length standard if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances (arm's length result).

Id. Phrased in slightly different terms, the OECD Guidelines state that the arm's length principle "is based on a comparison of the conditions in a controlled transaction with the conditions that would have been made had the parties been independent and undertaking a comparable transaction under comparable circumstances." OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 43. The analysis first requires evaluating "the commercial or financial relations between the associated enterprises and the conditions and economically relevant circumstances attaching to those relations." *Id.* The second aspect of considers whether "the pricing of that controlled transaction under the arm's length principle." *Id.* at 44.

25. See, e.g., Martin, *supra* note 2.

26. *Id.* at 476-80.

to govern transfer pricing, these standards experience limited success due to a lack of comparables.²⁷

A. Best Method Rule

The OECD's arm's length standard requires a fact specific inquiry into whether the method employed was the best method under the circumstances.²⁸ This is known as the Best Method Rule. The chosen method must provide the most reliable measure of an arm's length result²⁹ considering, primarily, the degree of comparability between the controlled transaction and any uncontrolled comparable, and the quality of the data and assumptions used in the analyses.³⁰ Degree of comparability, in turn, depends on the following factors: (1) functions, (2) contractual terms, (3) risks, (4) economic conditions, and (5) property or services.³¹

The first factor, functions, compares the functions performed and the resources utilized, considering: (1) research and development, (2) product design and engineering, (3) manufacturing production, and process engineering, (4) product fabrication, extraction, and assembly, (5) purchasing and materials management, (6) marketing and distribution functions, and (7)

27. INT'L MONEY FUND ET AL., A PLATFORM FOR COLLABORATION ON TAX 145 (2017), <http://www.oecd.org/tax/toolkit-on-comparability-and-mineral-pricing.pdf>.

28. OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 8.

29. 26 C.F.R. § 1.482-1(c)(1) (2017) ("The arm's length result of a controlled transaction must be determined under the method that, under the facts and circumstances, provides the most reliable measure of an arm's length result.").

30. *Id.* § 1.482-1(c)(2).

In determining which of two or more available methods (or applications of a single method) provides the most reliable measure of an arm's length result, the two primary factors to take into account are the degree of comparability between the controlled transaction (or taxpayer) and any uncontrolled comparables, and the quality of the data and assumptions used in the analysis. In addition, in certain circumstances, it also may be relevant to consider whether the results of an analysis are consistent with the results of an analysis under another method.

Id.

31. *Id.* § 1.482-1(d)(1)(i-v).

Whether a controlled transaction produces an arm's length result is generally evaluated by comparing the results of that transaction to results realized by uncontrolled taxpayers engaged in comparable transactions under comparable circumstances. For this purpose, the comparability of transactions and circumstances must be evaluated considering all factors that could affect prices or profits in arm's length dealings (comparability factors). While a specific comparability factor may be of particular importance in applying a method, each method requires analysis of all of the factors that affect comparability under that method. Such factors include the following:

- (i) Functions;
- (ii) Contractual terms;
- (iii) Risks;
- (iv) Economic conditions; and
- (v) Property or services.

Id.

managerial services.³² For example, an inappropriate comparison exists between one widget made entirely of gold, which took decades of research and development, and which is designed for a narrow industry, to another widget made of plastic, which took only one year to develop, and which is designed for fun because of the radically different functions and resources between the two widgets.

The second factor, contract terms, include: (1) form of the consideration, (2) volume, (3) scope and terms of the warranties, (4) rights to updates, revisions, and modifications, (5) duration, (6) collateral transactions between the buyer and the seller, and (7) extensions of credit and payment terms.³³ To illustrate, a contract that pays in cash, provides no warranties, and that lasts for the life of the entities is too dissimilar from a contract that pays in debt, provides a warranty for a certain number of years, and that only lasts for five years.

32. *Id.* § 1.482-1(d)(3)(i)(A-H).

Determining the degree of comparability between controlled and uncontrolled transactions requires a comparison of the functions performed, and associated resources employed, by the taxpayers in each transaction Functions that may need to be accounted for in determining the comparability of two transactions include[:]

- (A) Research and development;
- (B) Product design and engineering;
- (C) Manufacturing, production and process engineering;
- (D) Product fabrication, extraction, and assembly;
- (E) Purchasing and materials management;
- (F) Marketing and distribution functions, including inventory management, warranty administration, and advertising activities;
- (G) Transportation and warehousing; and
- (H) Managerial, legal, accounting and finance, credit and collection, training, and personnel management services.

Id.

33. *Id.* § 1.482-1(d)(3)(ii)(A)(1-7).

Determining the degree of comparability between the controlled and uncontrolled transactions requires a comparison of the significant contractual terms that could affect the results of the two transactions. These terms include:

- (1) The form of consideration charged or paid;
- (2) Sales or purchase volume;
- (3) The scope and terms of warranties provided;
- (4) Rights to updates, revisions or modifications;
- (5) The duration of relevant license, contract or other agreements, and termination or renegotiation rights;
- (6) Collateral transactions or ongoing business relationships between the buyer and the seller, including arrangements for the provision of ancillary or subsidiary services; and
- (7) Extension of credit and payment terms. Thus, for example, if the time for payment of the amount charged in a controlled transaction differs from the time for payment of the amount charged in an uncontrolled transaction, an adjustment to reflect the difference in payment terms should be made if such difference would have a material effect on price. Such comparability adjustment is required even if no interest would be allocated or imputed under § 1.482-2(a) or other applicable provisions of the Internal Revenue Code or regulations.

Id.

The third factor, relevant comparability risks factors, include: (1) market risks, (2) risks associated with the success or failure of research and development activities, (3) financial risks, (4) credit and collection risks, (5) products liability risks, and (6) general business risks.³⁴

The fourth factor, economic conditions, compares conditions that might affect the price charged, including: (1) the similarity of geographic markets, (2) the size and extent of the overall economic development in each market, (3) the market level, (4) the relevant market shares, (5) the cost of production and distribution, (6) the extent of competition in each market, (7) the economic condition of the particular industry, and (8) the alternatives realistically available to the buyer and seller.³⁵ For instance, it is useless to compare the crude oil market in Saudi Arabia, a country that limits crude oil exports, with the crude oil market in a country that does not place a cap on crude oil because of the dissimilar economic conditions.

34. *Id.* § 1.482-1(d)(3)(iii)(A)(1-6).

Determining the degree of comparability between controlled and uncontrolled transactions requires a comparison of the significant risks that could affect the prices that would be charged or paid, or the profit that would be earned, in the two transactions. Relevant risks to consider include[.]:

- (1) Market risks, including fluctuations in cost, demand, pricing, and inventory levels;
- (2) Risks associated with the success or failure of research and development activities;
- (3) Financial risks, including fluctuations in foreign currency rates of exchange and interest rates;
- (4) Credit and collection risks;
- (5) Product liability risks; and
- (6) General business risks related to the ownership of property, plant, and equipment.

Id.

35. *Id.* § 1.482-1(d)(3)(iv)(A-H).

Determining the degree of comparability between controlled and uncontrolled transactions requires a comparison of the significant economic conditions that could affect the prices that would be charged or paid, or the profit that would be earned in each of the transactions. These factors include[.]:

- (A) The similarity of geographic markets;
- (B) The relative size of each market, and the extent of the overall economic development in each market;
- (C) The level of the market (e.g., wholesale, retail, etc.);
- (D) The relevant market shares for the products, properties, or services transferred or provided;
- (E) The location-specific costs of the factors of production and distribution;
- (F) The extent of competition in each market with regard to the property or services under review;
- (G) The economic condition of the particular industry, including whether the market is in contraction or expansion; and
- (H) The alternatives realistically available to the buyer and seller.”).

Id.

Finally, the fifth factor, property and services, compares intangible property or services being transferred.³⁶ According to the Code of Federal Regulations, “[t]his comparison may include any intangible property that is embedded in tangible property or services being transferred (embedded intangibles).”³⁷

B. Price at an Arm's Length

To determine the second requirement, whether the price meets the arm's length standard, taxing authorities examine the method used. Both the IRS and the OECD employ five methodologies to determine if a multinational's transfer price for tangible assets satisfies the arm's length standard.³⁸ These methodologies include: (1) the comparable uncontrolled price (“CUP”) method, (2) the resale price method, (3) the cost plus method, (4) the transactional net margin method, and (5) the transactional profit split method.³⁹ While no single method is preferred or superior to the others, each applies most appropriately to particular situations. For example, “traditional transaction methods,” which include CUP, resale price, and cost plus methods, most directly establish whether a transaction was at arm's length.⁴⁰ This is because these methods easily trace prices back and can identify any

36. *Id.* § 1.482-1(d)(3)(v) (“Evaluating the degree of comparability between controlled and uncontrolled transactions requires a comparison of the property or services transferred in the transactions.”).

37. *Id.*; see 26 C.F.R. § 1482-4(c)(2)(iii)(B)(1).

In order for the intangible property involved in an uncontrolled transaction to be considered comparable to the intangible property involved in the controlled transaction, both intangibles must (i) Be used in connection with similar products or processes within the same general industry or market; and (ii) Have similar profit potential.

26 C.F.R. § 1482-4(c)(2)(iii)(B)(1).

38. *Id.* § 1.482-1(a)(2).

In determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer. A controlled transaction meets the arm's length standard if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances (arm's length result).

Id.; OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 97.

39. OECD TRANSFER PRICING GUIDELINES, *supra* note 5 (“Traditional transaction methods are the comparable uncontrolled price method or CUP method, the resale price method, and the cost plus method. Transactional profit methods are the transactional net margin method and the transactional profit split method.”).

40. *Id.* at 98 (“Traditional transaction methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are arm's length.”).

difference between the uncontrolled versus the controlled transaction.⁴¹ On the other hand, situations exist where the “transactional profit methods,” which include the transactional net margin method and the transactional profit split method, are the more appropriate methods.⁴² This is particularly true where the transaction involves unique and valuable contributions or where the activities are integrated.⁴³

These methods and their application are complex and warrant further explanation. First, the CUP method compares the price charged in the controlled transaction to the price charged in an uncontrolled transaction.⁴⁴ The degree of comparability is assessed under the same factors enumerated above.⁴⁵ The CUP method is particularly useful where the transactions are highly similar. According to the OECD, this method is the most direct, reliable, and preferred method where comparable uncontrolled transactions exist.⁴⁶ The CUP method is often rejected in practice, however, because the comparability criteria cannot match up, and, in certain industries, even a small comparability difference affects the price.⁴⁷ A different price results for the same tangible if, for example, that tangible is sold in two different markets, and a monopoly power exists in one market but not in the other. Consequently, the CUP method works best in “commodity-type markets” because the “homogenous nature” of the product and the equilibrium between supply and demand facilitate highly comparable circumstances.⁴⁸

The resale price method focuses on the realized gross profit margin—that is, the difference between purchase price and selling price.⁴⁹ Under this

41. *Id.* (“This is because any difference in the price of a controlled transaction from the price in a comparable uncontrolled transaction can normally be traced directly to the commercial and financial relations made or imposed between the enterprises, and the arm’s length conditions can be established by directly substituting the price in the comparable uncontrolled transaction for the price of the controlled transaction.”).

42. *Id.* (“There are situations where transactional profit methods are found to be more appropriate than traditional transaction methods.”).

43. *Id.* (“For example, cases where each of the parties makes unique and valuable contributions in relation to the controlled transaction, or where the parties engage in highly integrated activities, may make a transactional profit split more appropriate than a one-sided method.”).

44. 26 C.F.R. § 1.482-3(b)(1) (2017).

45. 26 C.F.R. § 1.482-3(b)(2)(i) (2017) (“Whether results derived from applications of this method are the most reliable measure of the arm’s length result must be determined using the factors described under the best method rule in § 1.482-1(c).”).

46. OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 101.

47. Elizabeth Hughes & Wendy Nicholls, *The Different Methods of TP: Pros and Cons*, TAX J. (Sept. 28, 2010), <https://www.taxjournal.com/articles/different-methods-tp-pros-and-cons>; *id.*

48. Hughes & Nicholls, *supra* note 47.

49. OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 105-06.

The resale price method begins with the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. This price (the resale price) is then reduced by an appropriate gross margin on this price (the ‘resale price margin’)

method, the arm's length price equals the resale price minus the gross profit margin, which is adjusted for the cost of acquiring the good.⁵⁰ The resale price method applies well to marketing operations, particularly between distributors and resellers.⁵¹ Resale price is easiest to determine when the reseller does not substantially change the product in any way, thereby changing the value, and when the reseller realizes the profit in a short time frame.⁵² This method allows broader product differences but still requires highly comparable functions.⁵³ For some tangibles, however, even small product differences can translate into substantial profit margin differences.⁵⁴ For example, the profit margin of a product that sells without much advertising is greater than the profit margin of a product that requires extensive marketing. The profit margin is smaller where the product requires extensive marketing to compensate for the cost of advertising.⁵⁵

Under another method, the cost plus method first looks at the costs to the supplier or vendor and then adds a "cost plus mark-up" to arrive at an appropriate profit that considers the functions of the supplier or vendor and the market conditions.⁵⁶ The mark-up price should compare to that of an unrelated company if it had performed similar functions, with similar risks, and under similar market conditions.⁵⁷ The cost plus method performs well

representing the amount out of which the reseller would seek to cover its selling and other operating expenses and, in the light of the functions performed (taking into account assets used and risks assumed), make an appropriate profit.

Id.

50. *Id.* at 106 ("What is left after subtracting the gross margin can be regarded, after adjustment for other costs associated with the purchase of the product (e.g. customs duties), as an arm's length price for the original transfer of property between the associated enterprises.").

51. See Hughes & Nicholls, *supra* note 47.

52. *Id.*

53. OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 74 (stating that "[a]rm's length prices may vary across different markets even for transactions involving the same property or services; therefore, to achieve comparability requires that the markets in which the independent and associated enterprises operate do not have differences that have a material effect on price or that appropriate adjustments can be made").

54. Hughes & Nicholls, *supra* note 47.

55. *Id.*

56. OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 111 ("The cost plus method begins with the costs incurred by the supplier of property (or services) in a controlled transaction for property transferred or services provided to an associated purchaser. An appropriate cost plus mark-up is then added to this cost, to make an appropriate profit in light of the functions performed and the market conditions. What is arrived at after adding the cost plus mark up to the above costs may be regarded as an arm's length price of the original controlled transaction.").

57. *Id.*

in sales between manufacturers and related distributors.⁵⁸ This method is easy to implement, which is an advantage for many businesses.⁵⁹ However, its easy implementation is only in theory because the mark-up cost is difficult to determine through benchmarking analysis.⁶⁰ This is because companies account for cost at different stages and include different expenses.⁶¹ For example, similar products can have different mark-ups if one company includes operating and overhead expenses in its mark-up but another company includes only overhead expenses.

The transactional net margin method, useful for services between related parties, such as back office management services and research and development, compares the net profit of a controlled transaction to the net profit of an uncontrolled transaction relative to an appropriate base.⁶² The appropriate base could consist of sales, costs, or assets.⁶³ A major advantage of this method is the availability of public data regarding net profits of similar businesses in similar markets.⁶⁴ Nevertheless, whether the companies are truly comparable is questionable because the public data is insufficient.⁶⁵ Instead, companies must rely on the publicly available information and hope that it satisfies the tax authorities' comparability factors.

Finally, under the transactional profit split method, profit allocations relative to each party's contribution in a controlled transaction is compared to the profit allocation in an uncontrolled transaction between unrelated parties.⁶⁶ Each party's activities are weighted according to importance and the profits are split accordingly.⁶⁷ For instance, if a company contributes 80% to produce a tangible but its subsidiary contributes only 20%, the profit split should correspond to this percentage so that it reflects the different contributions. Though this method is simple in theory, it is difficult to implement because there are issues regarding the amount of profits to split and the concern that profit splitting incentivizes and spreads the cost of inefficiency.⁶⁸

58. *Id.* ("This method probably is most useful where semi finished goods are sold between associated parties, where associated parties have concluded joint facility agreements or long-term buy-and-supply arrangements, or where the controlled transaction is the provision of services.").

59. *Id.* at 111-12.

60. *Id.* at 112.

61. *Id.* at 112-15.

62. *Id.* at 117.

63. *See id.*; Hughes & Nicholls, *supra* note 47.

64. Hughes & Nicholls, *supra* note 47.

65. *Id.*

66. OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 133.

67. *See* Hughes & Nicholls, *supra* note 47.

68. *Id.*

C. Lack of Data and Penalties for Non-Compliance

The common thread running through all five pricing methods is their reliance on comparability: They depend on a high degree of comparability of uncontrolled transactions to controlled transactions to determine if a price is at arm's length. This determination requires a great amount of data. Unfortunately, both developed and developing countries currently lack the required public data and comparables.⁶⁹ Theoretically, various sources, such as commodity or financial exchanges, provide access to comparable data.⁷⁰ Most countries find relevant data through commercial databases, but the results remain limited because existing data is often incomplete or difficult to interpret.⁷¹ In many circumstances, data is often difficult to access or even impossible due to privacy concerns.⁷² Thus, publicly available data is sparse.

Although the lack of publicly available data affects the entire transfer pricing community, it particularly impacts developing countries.⁷³ Many reasons exist for this disparate impact. First, developing countries host fewer competing companies than developed countries.⁷⁴ Thus, comparable data is meager, if it exists at all. Second, developing countries typically lack the resources and manpower to compile, organize and review complete sets of data capable of accurate comparisons.⁷⁵ In addition, most databases focus on data from developed countries, which is not always relevant to markets in developing country markets, and even so, access is expensive.⁷⁶ Moreover, no data necessarily results from so called "first movers" in unexplored or under-exploited areas as no prior industry exists.⁷⁷

Consequently, limited public data comparables fosters uncertainty regarding appropriate transfer pricing methods and does nothing to reduce the ever-looming threat of a tax audit. Even research into the best transfer pricing method offers multinationals little protection against audits. To illustrate, in 2013, Ernst and Young ("EY"), a global professional services firm, surveyed twenty-six countries regarding transfer pricing, including the

69. See INT'L MONEY FUND ET AL., *supra* note 27, at 12.

70. *Id.* at 30 n.39.

71. *Id.* at 36.

72. See *id.* at 36 n.46.

73. *Id.* at 12.

74. *Id.* at 36, 37.

75. *Id.* at 159.

76. *Id.*

77. See *id.* at 16.

U.S.⁷⁸ The results indicated that 15% of companies litigated a transfer pricing case in the past year and 28% reported unresolved transfer pricing examinations, which is up from 17% in 2010 and 12% in 2007.⁷⁹ Additionally, interest charges stemming from transfer pricing adjustments affected 60% of the companies surveyed, 24% of which suffered penalties from an adjustment.⁸⁰ These numbers demonstrate that even companies in developed countries remain unsure about the arm's length standard and are not immune from penalties for implementing the standard incorrectly.

Furthermore, under that same survey, 47% of parent companies experienced double taxation after a transfer pricing adjustment.⁸¹ Double taxation, a major area of concern in the transfer pricing community, occurs when different tax authorities impose liability on the same profits. While countries undoubtedly deserve their fair share of the taxes from profits in their jurisdiction, double taxation goes beyond making the deprived country whole and ultimately discourages global business activities.

In the U.S., the Internal Revenue Code assesses penalties when underpayment results from any number of reasons under the Code.⁸² In general, the penalty equals 20% of the underpaid tax when: (1) the transfer price is either 200% more, or 50% less than the arm's length price; or (2) where the adjustment exceeds gross receipts by \$5 million or 10%, whichever is lower.⁸³ For example, if the correct transfer price is \$100, then the penalty is 20% where the actual transfer price was more than \$200 or less than \$50. The penalty spikes to 40% when: (1) the transfer price is either 400% more, or 25% less than the arm's length price; or (2) where the adjustment exceeds gross receipts of \$20 million or 20%, whichever is less.⁸⁴ Thus, just like the previous example, a 40% penalty is assessed if the price is more than \$400 or less than \$25. In reality, however, the penalties are far more. In the case of Apple, for instance, 40% of \$40 billion is a hefty fine.⁸⁵ One saving-grace of the penalty section is that the penalties max out at 40%, though that might not offer entities like Apple much comfort.⁸⁶ No penalty attaches at all,

78. ERNST & YOUNG, NAVIGATING THE CHOPPY WATERS OF INTERNATIONAL TAX 3, 57 (2013), [https://www.ey.com/Publication/vwLUAssets/EY-2013_Global_Transfer_Pricing_Survey/\\$FILE/EY-2013-GTP-Survey.pdf](https://www.ey.com/Publication/vwLUAssets/EY-2013_Global_Transfer_Pricing_Survey/$FILE/EY-2013-GTP-Survey.pdf).

79. *Id.* at 24.

80. *Id.* at 4, 7, 24.

81. *Id.* at 24.

82. 26 C.F.R. § 1.6662-5(a) (2017).

83. 26 C.F.R. § 1.6662-6(b) (2017).

84. 26 C.F.R. § 1.6662-5(g) (2017); *id.* § 1.6662-6(a), (b)(2), (c) (2017).

85. Apple faced \$16 million in IRS penalties. *See* 26 C.F.R. § 1.6662-5 (2017).

86. *See generally* 26 C.F.R. § 1.6662-5 (2017); 26 C.F.R. § 1.6662-6 (2017).

however, if the taxpayer can show reasonable cause for the underpayment and that the taxpayer acted in good faith.⁸⁷

III. DISCLOSING APAS WOULD BENEFIT THE TRANSFER PRICING COMMUNITY

An alternative to the traditional transfer pricing methodologies is to execute an APA. APAs are negotiated agreements that, from the start, determine the applicable transfer pricing method for certain transactions over a fixed period of time.⁸⁸ These agreements can be unilateral, bilateral, or multilateral.⁸⁹ Unilateral agreements occur between the company and the tax authority where the company is located.⁹⁰ Bilateral and multilateral agreements are between the company and several tax authorities (because the related company could sit in different tax jurisdictions).⁹¹ In most cases, companies prefer bilateral or multilateral agreements because these offer a reduced risk of double taxation, are fair to all parties (multinational and taxing authorities in all relevant jurisdictions), and provide greater certainty to the tax-paying multinational.⁹²

To negotiate an APA in the U.S., the IRS requires specific information, such as the agreed transfer pricing method, the relationship of the companies involved, the transactions covered, and the number of years the APA is effective.⁹³ Most importantly, the IRS mandates that the APA contain “critical assumptions” regarding future events.⁹⁴ Critical assumptions are “fact[s] whose continued existence [are] identified in an APA as being material to the reliability of the APA’s covered methods.”⁹⁵ These facts can relate to the company, a third party, an industry, or business and economic regulations.⁹⁶ If the APA fails to include one or more critical assumptions,

87. 26 C.F.R. § 1.6662-5(a) (2017). The good faith exception applies to penalties only; it is not an exception to the disclosure provisions. *Id.* See 26 C.F.R. § 1.6664-4(f) (2017) for the rules relating to the good faith exception.

88. See OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 214.

89. DELOITTE, ADVANCE PRICING AGREEMENT FREQUENTLY ASKED QUESTIONS 3 (2012), <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/thoughtpapers/in-tax-deloitte-apa-faqs-noexp.pdf>.

90. *Id.*

91. *Id.*

92. See OECD TRANSFER PRICING GUIDELINES, *supra* note 5, at 216.

93. *Id.* at 216-17.

94. *Id.* at 215.

95. Rev. Proc. 2015-41, 2015-35 I.R.B. 263.

96. *Id.*

the IRS is authorized to revise or even revoke the agreement.⁹⁷ Thus, critical assumptions of future events are crucial and at the heart of an APA.⁹⁸

Currently, the Internal Revenue Code prohibits disclosure of APAs in the U.S. because APAs qualify as confidential return information under section 6103 rather than written determinations under section 6110.⁹⁹ These provisions came about following a 1996 lawsuit in which the Bureau of National Affairs attempted to force the IRS to disclose APAs under section 6110 and the Freedom of Information Act.¹⁰⁰ After a long battle, the IRS conceded that APAs were written determinations, but Congress quickly recategorized the agreements as confidential return information, thereby prohibiting disclosure.¹⁰¹

Essentially, business leaders and industry representatives lobbied Congress to ensure these documents would not become public information.¹⁰² To appease disclosure proponents, however, Congress also passed the Tax Relief Extension Act requiring that the Treasury Department publish annual APA reports.¹⁰³ The Act mandated that each report contain certain information, such as model APAs, statistics regarding requests and applications, and general information regarding transfer pricing schemes.¹⁰⁴ In other words, the annual reports contained only generalized information rather than facts and numbers that could serve as useful comparisons.

Considering the EY litigation statistics, the financial burden that audits impose on both parties, and the potentially steep readjustment penalties, the IRS should publicly disclose APAs in their entirety.¹⁰⁵ Disclosure would provide clarity and generally increase public confidence in government standards.

97. *Id.*

98. *Id.*

99. See I.R.C. §§ 6103(2)(c), 6110; Rev. Proc. 2015-41, 2015-35 I.R.B. 263.

100. Bureau of Nat. Affairs, Inc. v. IRS, 24 F. Supp. 2d 90, 94 (D.D.C. 1998).

101. See Tax Relief Extension Act of 1999, Pub. L. No. 106-170, § 521, 113 Stat. 1862, 1925-27 (2000); John L. Abramic, Note, *Advance Pricing Agreements: Confidential Return Information or Written Determinations Subject to Release*, 76 CHI.-KENT L. REV. 1823, 1824 (2001) (citing Pub. L. No. 106-170, § 521, 113 Stat. at 1925-27).

102. Tax Relief Extension Act of 1999, Pub. L. No. 106-170, § 521, 113 Stat. at 1925-27; Abramic, *supra* note 101, at 1842 (first citing Barton Massey, *Shielding APAs: Was There Fair Debate of Policy Concerns?*, 19 TAX NOTES INT'L 2389, 2389-90 (1999); and then citing Pub. L. No. 106-170, § 521, 113 Stat. 1925-27).

103. Tax Relief Extension Act of 1999, Pub. L. No. 106-170, § 521, 113 Stat. at 1925-27; Abramic, *supra* note 101, at 1842 (citing Pub. L. No. 106-170, § 521, 113 Stat. 1925-27).

104. Tax Relief Extension Act § 521, 113 Stat. at 1925-27; Abramic, *supra* note 101, at 1842-43 (citing Pub. L. No. 106-170, § 521, 113 Stat. 1925-27).

105. See *supra* section II for discussion on litigation, audits, and penalties.

First, disclosure creates transparency and uniformity regarding the arm's length standard because APAs require specificity and detail. Executed APAs provide a good starting point for comparisons to other multinationals, depending on the APA and the agreement type, the applicable industry, and the covered transactions. APA disclosure is analogous to judicial precedent, which is important in the legal context because precedents provide for consistent rulings and clear standards. Here, disclosing APAs would serve the same purpose: It would provide taxpayers with clear standards of acceptable and unacceptable conduct in certain situations from the IRS itself. This tax-precedent at least offers multinationals the opportunity to avoid adjustments and costly penalties from taxing authorities.

In addition, because the number of executed APAs is relatively small compared to the number of received APAs, these agreements will be easy to categorize. Out of the 2,245 APAs the IRS has received from 1991 through 2016, only 1,597 have been executed.¹⁰⁶ An APA database could organize the data by agreement type, industry or transaction, and then include searchable terms, or "headnotes," like those found in legal databases like LexisNexis or Westlaw. Organizing these agreements by industry would ensure that the APAs are easily accessible for companies that would like to utilize them. Like any other database, the owner may require a fee to access the database, a portion of which would cover expenses involved in maintaining and updating the records. If Westlaw can organize and update hundreds of thousands of legal documents each day, the IRS or a private company can easily organize the 1,597 APAs in existence today and incorporate the few new agreements the IRS enters into each year.

Finally, disclosure would level the playing field for smaller multinationals that lack the resources to execute an APA themselves. Just as not every company can afford to conduct a costly transfer pricing study, not every multinational can afford to enter into an APA with the IRS and/or other taxing authorities. To explain, the fee to apply for an APA with the IRS is \$60,000, and the renewal fee is \$35,000 for each renewal request.¹⁰⁷ Thus, smaller multinationals that do not compete on the same economic playing-field as conglomerates like HSBC or Exxon would particularly benefit from being able to access other APAs at little or even no cost. This would allow

106. I.R.S. Announcement 2017-03, 2017-15 I.R.B. 1077, <https://www.irs.gov/pub/irs-irbs/irb17-15.pdf>.

107. See Rev. Proc. 2015-41, 2015-35 I.R.B. 263. The renewal fee is still \$35,000 even if the renewal makes no changes. In addition, each amendment to a current APA costs \$12,500 per amendment. *Id.*

them to use these executed APAs as models and then adjust their own agreement accordingly.

Second, disclosure promotes public confidence by allowing the public to act as a second “check” on government and corporate standards. It is not hard to imagine that, without public scrutiny, tax authorities could give better deals to one company but not another. Transparency through disclosure deters this behavior and incentivizes taxing authorities to act with fairness and consistency. The public could check these APAs to ensure that the deals are fair, and any discrepancy they have will have to be addressed by the IRS. In addition, public disclosure strongly encourages the IRS to look at not only the present impact of the APAs, but the long-term effects of their agreements as well. That is, the IRS would need to consider how other people and other companies will react to a particular deal, and how other companies will use the data as a comparison for their own dealings with the IRS.

In a similar fashion, disclosure gives multinationals some leverage in dealings with taxing authorities, thereby lessening the company’s tax liability in a given jurisdiction. For example, in 2006, the Securities and Exchange Commission (“SEC”) adopted a rule that required publicly held companies to disclose compensation of their chief officers and other high-ranking members.¹⁰⁸ This decision was partly due to widespread disparities between consumer and worker wages, and executive compensation. The SEC hoped the legislation would help equalize wages.¹⁰⁹ While, several surveys report that some executive compensation actually increased since the SEC rule, executive compensation is lower when taken as a whole.¹¹⁰ One possible explanation for this is that executives who were paid less in the past have now demanded more compensation after seeing what their counterparts received.¹¹¹

This unintended consequence could also arise in the APA disclosure context. If multinationals can assess other deals, for example, the increased “competition” could in turn drive tax liability down. Much like how competition drives down market prices, here, competition may allow companies to force the IRS to cut better deals by demanding the same price as a competitor. This bargaining chip is important because it would allow companies more control over how much tax they pay, even if that control is minimal. Even so, this “competition” has a bright side: While each entity

108. *Fast Answers: Executive Compensation*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/fast-answers/answers-execomphm.html> (last updated Oct. 21, 2014).

109. *Id.*

110. *See, e.g.*, Alexandre Mas, *Does Transparency Lead to Pay Compensation?*, 125 J. POL. ECON. 1683 (2017).

111. *See id.*

may owe less individually, it will be more difficult for a company to avoid paying taxes altogether.

Moreover, audits are costly both to the taxing authority and the multinational being audited.¹¹² In 2014, for example, Microsoft initiated litigation against the IRS under the Freedom of Information Act because the IRS hired an outside law firm, Quinn Emanuel Urquhart & Sullivan, to pursue Microsoft in a tax audit.¹¹³ The IRS agreed to pay the firm \$2.2 million to assist in its Microsoft investigation in connection with a cost sharing agreement¹¹⁴ between Microsoft and its overseas subsidiary.¹¹⁵ Critics perceived this tactic as the IRS's lack of confidence in its ability to carry out an audit on its own.¹¹⁶ Others saw the move as a "willingness to vigorously litigate transfer pricing, even in the face of a number of significant past losses."¹¹⁷

In a similar situation, Amazon prevailed in a \$1.5 billion transfer pricing dispute with the IRS.¹¹⁸ At issue here was Amazon's transfer of its intangible assets to its Luxembourg subsidiary at prices the IRS determined were suspiciously low.¹¹⁹ The subsidiary agreed to pay Amazon \$254.5 million worth of buy-in payments over seven years. But, according to the IRS's calculations, the payments should have totaled \$3.5 billion.¹²⁰ The IRS also estimated that Amazon maintained almost \$235 million in prior tax deficiencies.¹²¹ In the end, the U.S. Tax Court sided with Amazon, condemning the IRS's behavior as an abuse of power.¹²² In the *Amazon* case, IRS critics claimed that the litigation was simply the IRS rehashing a different transfer pricing case it lost in 2005.¹²³ In fact, despite the decade

112. Vidya Kauri, *IRS Must Rethink Transfer Pricing Cases After Amazon Loss*, LAW360 (Mar. 24, 2017, 10:20 PM).

113. *United States v. Microsoft Corp.*, 154 F. Supp. 3d 1134, 1141-42 (W.D. Wash. 2015); see Forst & Neumann, *supra* note 1.

114. According to the Code of Federal Regulations § 1.482-7A, a CSA is "an agreement under which the parties agree to share the cost of development of one or more intangibles in proportion to their shares of reasonably anticipated benefits from their individual exploitation of the interests in the intangibles assigned to them under the arrangement." 26 C.F.R. § 1.482-7A (2017).

115. See Forst & Neumann, *supra* note 1.

116. *Id.*

117. *Id.*

118. *Amazon.com, Inc. v. Comm'r*, 148 T.C. 8 (2017); Martin, *supra* note 2.

119. *Amazon.com, Inc.*, 148 T.C. at 5.; Martin, *supra* note 2.

120. *Amazon.com, Inc.*, 148 T.C. at 6.; Martin, *supra* note 2.

121. Martin, *supra* note 2.

122. *Amazon.com, Inc.*, 148 T.C. at 177.

123. In *Xilinx v. Commissioner of Internal Revenue*, the parent company had a CSA to develop intangibles with its foreign subsidiary. Each party paid a percentage of the total research and development costs based on how much they were going to receive in benefits from the intangibles.

between the *Xilinx* and *Amazon* cases, the IRS put forth very similar arguments.¹²⁴ Here, disclosing APAs would save resources on both sides by reducing the number of tax disputes and litigation between the IRS and multinationals. Not only would the IRS save taxpayers money by not relitigating the same issues, multinationals would save money by not defending against these suits.

Third, disclosure promotes international cooperation. The U.S. is one of the most influential countries in the world, with an economy to match.¹²⁵ Its economy is the largest in the world, at about \$19 trillion in gross domestic product, making up about 25% of the gross world product.¹²⁶ In 2017, the U.S. corporate tax rate dropped from 35% to 21%.¹²⁷ While the U.S. held one of the steepest corporate tax rates for many years, tax reforms brought it closer to the world average, which is approximately 23.5%.¹²⁸ The assumption is, now that the U.S. is more “tax neutral” (that is, its corporate tax rate falls close to the world average), it has no incentive to side with any particular tax jurisdiction, whether a high or low tax jurisdiction. Other tax jurisdictions will see the U.S.’s actions as unbiased because it is a middle-of-the-road jurisdiction. In turn, other U.S. actions would carry more weight since a neutral stance usually does not carry suspicious motives as well.

Similarly, if the U.S. chose to change its policies on APA disclosures, other countries may also be incentivized to follow suit. Any country that chooses not to follow the U.S.’s lead in APA disclosure risks alienating itself from the U.S. economic circle. Multinationals may also hesitate to conduct business with these outliers for fear that the outlier might be an economic outsider. To maintain a competitive edge in the transfer pricing field, then, other countries would be wise to follow the U.S.’s lead. More holistically, though, international cooperation in APA sharing would bring a more unified, consistent approach to the international transfer pricing community.

The parent then issued stock options to its employees performing research and development but did not include in research and development costs any amount related to the issuance of stock options to, or exercise of stock options by, its employees. The IRS argued that it should have been included. In the end, the tax court ruled against the IRS. *Xilinx v. Comm’r*, 125 T.C. 37 (2005); see 26 C.F.R. § 1.482-7A (2017).

124. See Kauri, *supra* note 112.

125. Devon Haynie, *These Are the Top 5 Most Influential Countries*, U.S. NEWS (Jan. 23, 2018, 12:01 AM), <https://www.usnews.com/news/best-countries/best-international-influence>.

126. Prableen Bajpai, *The World’s Top 20 Economies*, INVESTOPEDIA (Aug. 16, 2018, 11:06 AM), <https://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp>.

127. Kyle Pomerleau, *The United States’ Corporate Income Tax Rate is Now More in Line with Those Levied by Other Major Nations*, TAX FOUND. (Feb. 12, 2018), <https://taxfoundation.org/us-corporate-income-tax-more-competitive/>.

128. *Id.*

This consistency allows multinationals to better predict the range of possible outcome of their transactions, thus bringing more peace of mind.

Furthermore, a unified approach would lessen the stress multinational entities experience in attempting compliance with the arm's length standard. For example, some multinationals take a head-in-the-sand approach, whereby they do nothing at all and hope for the best.¹²⁹ The rationale is that, while they do not understand the tax rules of transfer pricing, neither does the IRS (which could explain the increase in litigation yet major IRS loses).¹³⁰ These companies hope to skate by under the radar and appease the IRS by doing the bare minimum. On the other hand, some companies fully dive into the complex world that is transfer pricing and implement a "full blown" comprehensive approach.¹³¹ These companies build transfer pricing teams that consist of accountants, attorneys, computer programmers, economists, engineers, financial analysts and many other specialists to make sure they are complying with the rules.¹³² One can imagine how costly building such a team can be. A more unified approach could alleviate some of this financial stress, or at least would allow the resources to shift and be put to a better use. Such an approach would also reward professionalism, since the accounting professionals will be able to offer more precise advice.

IV. SOLVING THE ISSUE OF PROPRIETARY INFORMATION AND TRADE SECRETS

Although opponents of disclosure argue that APAs contain confidential information such as trade secrets and proprietary information, all of this can be redacted before the APAs are published. Disclosing APAs is similar to the Private Letter Rulings that the IRS already publishes. Private letter rulings are "written statement[s] issued to a taxpayer that interpret[] and appl[y] tax laws to the taxpayer's represented set of facts."¹³³ It is written in response to a written request by the taxpayer.¹³⁴ Private Letter Rulings are important because they provide other taxpayers with information and general

129. Robert Feinschreiber, *Practical Aspects of Transfer Pricing*, 70 FLA. B.J. 41 (1996).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Tax Exempt Private Bonds Private Letter Rulings: Some Basic Concepts*, INTERNAL REVENUE SERV., <https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts> (last updated Apr. 20, 2018).

134. *Id.*; see *Understanding IRS Guidance: A Brief Primer*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> (last updated May 9, 2018).

knowledge on what the IRS is likely to do in a given situation. They provide much-needed guidance for the average citizen to comply with the complex tax codes. Here, APAs follow the same general concept of a Private Letter Ruling in that they are also requested by the taxpayer and are specific to a set of facts or circumstances. If the IRS is able to publish Private Letter Rulings where the facts have been slightly changed to protect the identity of the taxpayer, they should also publish redacted APAs.

One can understand the taxpayer's concern when it comes to proprietary information or trade secrets. For companies like Coca-Cola where the brand itself is built on a secret formula, one can understand the hesitation of entering into an APA, since it might mean exposing trade secrets.¹³⁵ Yet, for less extreme situations, such as when a company does not want to publicize its profit margins, the public good outweighs the company's desire to keep certain numbers a secret. Sometimes, certain details will have to be disclosed and cannot be redacted, whether companies like it or not.

As it currently stands, however, both sides stand to lose too much in resources when it comes to litigating transfer pricing disputes. If the IRS could spend \$2.2 million to hire Quinn Emmanuel to chase down one multinational, then this is an area that could benefit from standardization. That is only one instance. The IRS has gone after many other large multinationals, such as Amazon and Microsoft.¹³⁶ One can only imagine how much time and resources the IRS has spent in chasing down companies and auditing them in the hopes of finding some sort of tax avoidance scheme. The IRS would need to strike a balance between redacting certain information and disclosing certain information, because admittedly, if APAs are redacted too much, they would become useless.

One similar parallel that can be drawn is when parties in litigation redact sensitive documents to hand over in discovery. Under Federal Rule of Civil Procedure 26, the party "from whom discovery is sought may move for a protective order," and "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."¹³⁷ This rule also specifies that the court may require "a trade secret or other confidential research, development, or

135. Coca-Cola generally maintains that its formulas are "among the important trade secrets of [the] Company." Coca-Cola Co., Annual Report (Form 10-K) (Feb. 25, 2015). In an ongoing tax dispute with the IRS, in which Coca-Cola contested the IRS's \$3.3 billion tax assessment, the company successfully sought a protective order preventing the IRS from disclosing its trade secrets. *See Coca-Cola Co. v. Comm'r*, No. 311830-15 (T.C. Nov. 22, 2017); *Coca-Cola Co. v. Comm'r*, 149 T.C. 21 (2017).

136. *See Amazon.com, Inc. v. Comm'r*, 148 T.C. 8 (2017); *United States v. Microsoft Corp.*, 154 F. Supp. 3d 1134, 1141-42 (W.D. Wash. 2015); Forst & Neumann, *supra* note 1.

137. Fed. R. Civ. P. 26(c)(1).

commercial information not be revealed or be revealed only in a specified way.”¹³⁸

Similarly, when companies resist divulging certain information, the IRS should be allowed to exercise judgment when it comes to disclosing that information. There must be a balance between redaction and disclosure. The IRS would be in a good position to decide what is important information that should not be disclosed, and what is not important information that would be harmless if disclosed. The case could be that the parties who fear their trade secrets will be exposed are being too cynical or looking at the information too narrowly. As an outsider, the IRS will have an unbiased view of what is and is not important. It has the experience and expertise to do so, since it will have seen and executed many APAs.

Furthermore, redaction is used in many different areas of the law with high levels of success. In the era of technology and the internet, more and more paperwork is filed online and oftentimes, these filings contain confidential information. Courts and lawyers have been able to redact sensitive information from these filings without mishaps. Another example illustrating the innocuous nature of disclosure is the SEC's required disclosures for public companies.¹³⁹ For companies to qualify as public, they must be traded on a national stock market or have an investor base that is a certain size.¹⁴⁰ Under the SEC 1934 Act, public companies are required to file annual 10-K reports, quarterly 10-Q reports, form 8-K, proxy statements, and reports related to things such as mergers, acquisitions, tender offers, and securities transactions by company insiders, just to name a few requirements.¹⁴¹

Within the 10-K report is information regarding the company's operations, risks the company currently faces, its accounting policies and practices, and executive compensation.¹⁴² But that is not all. Most importantly, the 10-K contains financial statements that shows how much money the company made and how much debt it has, among other important financial information.¹⁴³ These statements include income statements and balance sheets, which allows the reader to peek into the company's

138. *Id.*

139. *Public Companies*, U.S. SEC. & EXCH. COMM'N, <https://www.investor.gov/introduction-investing/basics/how-market-works/public-companies>.

140. *Id.*

141. 15 U.S.C. § 78d (2012); *id.*

142. *How to Read a 10-K*, U.S. SEC. & EXCH. COMM'N (Sept. 7, 2011), <https://www.investor.gov/news-alerts/investor-bulletins/how-read-10-k>.

143. *Id.*

finances.¹⁴⁴ One can imagine how important financial data is, especially when it comes to how much money a company makes and its debt levels.

Considering how much information is required to be disclosed under the 1934 Act, and how all public companies have complied, the take away from this should be that there is no harm in disclosure. So much has already been disclosed, and continues to be disclosed, yet, no great harm has come to these companies like the opponents of disclosure would have one believe. Taxpayers should also look at disclosure in a positive light. These SEC disclosures arm investors with the right information to make their investment choice. Similarly, disclosure of APAs would arm taxpayers with the right information so that they are better informed when it comes time to negotiate with tax authorities.

Currently, although the IRS does publish an annual report on APAs, the information contained in that document is a general overview of the program and the different sectors or industries. This is insufficient given the nature of the complexity of transfer pricing itself, which needs specific numbers and more information. Taxpayers need to be able to look towards concrete facts and numbers to use as their base. Moreover, transfer pricing depends on comparability, which would not work well with only generalized information. Redacting proprietary information in APAs would serve better as comparables instead of generalized information.

V. CONCLUSION

In an era of globalization, where sixty percent of international trade occurs within, and not between, multinationals,¹⁴⁵ it is crucial that companies are treated fairly regarding the amount of tax they pay. This requires striking a balance between implementing fair and manageable deals, while at the same time ensuring that tax authorities receive the taxes they are owed. This delicate balance is especially difficult to realize when so much confusion exists as to what the arm's length standard entails. The IRS must look to publishing APAs to solve this issue. Doing so would facilitate the balance through heightened clarity standards for legal compliance, public and taxpayer confidence, and international cooperation. After all, according to Justice Brandeis, sunlight is the best disinfectant.

144. *Id.*

145. See OECD TRANSFER PRICING GUIDELINES, *supra* note 5.