

**ATLANTIC LAW JOURNAL  
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**- ARTICLES -**



**ADDRESSING THE ISSUES IN INVESTOR-  
STATE ARBITRATION: IS IT TIME FOR A  
NEW DIRECTION?**

JAMES S. WELCH, JR.\*

**I. INTRODUCTION**

Throughout the over fifty-year history of the International Centre for Settlement of Investment Disputes (ICSID), there have been mixed reviews regarding the efficacy, efficiency, impartiality and transparency of the arbitration-based system for investor-state dispute settlements (ISDS). In 1966 the ICSID was established using voluntary arbitration as a mechanism for settling investment disputes between investors and host nations. It has grown tremendously since that time, both in terms of the numbers of ISDS cases and the financial amounts involved in the cases. Since its establishment, over 600 cases have been arbitrated by an independent conciliation commission or arbitral tribunal and the initial 20 signatories has grown to over 150

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contracting member states.<sup>1</sup> Despite this growth in ICSID's reach and influence in the international investment sphere, a number of arbitral decisions over the five decades have been criticized for a host of reasons ranging from perceived bias or political influence to more extensive complaints regarding decisions applying expansive and/or inconsistent interpretation of applicable law as compared to previous ICSID arbitration cases.<sup>2</sup>

While the system was initially established as an attempt to aid in removing political uncertainty from investor-state disputes and ensure arbitration before an independent tribunal, in practice the system has also often been criticized as being politically influenced, a claim that challenges the independence and impartiality of the arbitrators.<sup>3</sup> In recent years, ICSID has borne the brunt of growing criticism, most particularly coming from developing nations, that the system favors the developed world investors to the detriment of host nations. This criticism resulted in specific action in 2009, which was an especially bad

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<sup>1</sup> World Bank. 2018. *The ICSID caseload: statistics (English)*. The ICSID caseload statistics; no. 2018-1. Washington, D.C.: World Bank Group, <http://documents.worldbank.org/curated/en/372121468186843932/The-ICSID-caseload-statistics>

<sup>2</sup> Julie Maupin. *Transparency in International Investment Law: The Good, the bad and the murky* In *Transparency in INTERNATIONAL LAW*, Andrea Bianchi and Anne Peters, eds. (Cambridge University Press 2013), [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5840&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5840&context=faculty_scholarship)

<sup>3</sup> UNCTAD Secretariat, *Reform of Investor-State Dispute Settlement: in search of a roadmap*, 23 TRANSNATIONAL CORPORATIONS 1 (2015).

year for ICSID. During that year, Ecuador, complaining that the system favors transnational corporations and challenges the country's sovereignty, withdrew as a contracting member nation; Brazil excluded the ICSID arbitration rules; and, both Ecuador and Bolivia suggested that the institution be disbanded.<sup>4</sup> Perhaps the major underlying criticism does have some merit given that the majority of disputes center on capital investors pursuing claims against host nations and that most regulatory defenses arise from legal foundations established in the developed world.<sup>5</sup> Therefore, many developing nations see the ICSID arbitration system as doing “more to protect capital exporter states and the ‘equitable’ interests of their investors than address the economic and social interests of capital importing states in Africa, Asia, and Latin America that historically were economically exploited by colonial powers and their investors.”<sup>6</sup>

Notwithstanding the complaints addressing a perceived bias for investors, complaints that understandably most often arise from developing economies, there are a number of other reasons why the current ISDS system has been under fire in recent years. The arbitration-based system has also been criticized due to its expensive process and non-

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<sup>4</sup> Leon Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L LAW J. 603 (2012). See also Julius Cosmas *Legitimacy Crisis in Investor – State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward*. 4 INT'L J. OF SCIENTIFIC AND RESEARCH PUBLICATIONS 11 (November 2014).

<sup>5</sup> *Id.* at 607

<sup>6</sup> *Id.* at 606

transparent nature. In addition, though the idea of a final decision at the tribunal level, with very limited opportunity for re-examination, has had some key support, and was a major consideration when the arbitration system was being designed, the lack of a formal appeal process has been another complaint that has gained traction over the years.<sup>7</sup> Further, the inconsistencies inherent in reaching decisions in an arbitration-based system has led to a diversity of results, even results that arise out of very similar situations. These decision inconsistencies along with the fact that there is no mandate to use precedent as a part of decision-making criteria make present and future decisions rather unpredictable. This article addresses the weakness and challenges of the current investor-state dispute system and defends an international investment court system as a better approach to the problem.

The article is organized as follows: Section I provides an introduction to the issue. Section II provides some historical background of the current arbitration-based system for investor-state dispute settlement. Section III provides a critique and analysis concerning the weaknesses inherent in the current system. Section IV concludes with a discussion of some key reasons supporting a permanent investment court system including dealing with the perceived bias issue along with more manageable cost control and increased transparency,

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<sup>7</sup> Elsa Sardinha. *The Impetus for the Creation of an Appellate Mechanism*. ICSID REV. FOREIGN INVESTMENT LAW J. 3, 503–527 (1 October 2017).

an opportunity for appeal, and greater consistency in decision making.

## **II. BACKGROUND AND BRIEF HISTORY OF THE CURRENT INVESTOR-STATE DISPUTE ARBITRATION SYSTEM**

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) came out of a series of discussions at the World Bank addressing issues involving the investor-state relationship and followed a nearly decade long discussion at the United Nations as to the best method of dealing with disputes within that investor-state relationship.<sup>8</sup> These discussions grew out of a period when the only legal recourse options for investors against host nations involved legal action in the host nation's courts. In practice however, the option of using the host nation court system exclusively does not necessarily encourage international investment. Whether accurate in all situations or not, it is a widely held perception that international investment dispute actions undertaken in host nation courts have greatly reduced opportunities for full or partial recovery of damages for non-domestic capital investors and that lack of assurance does not necessarily encourage greater cross border investment.<sup>9</sup> Therefore, another legal option was

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<sup>8</sup> Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. LAW 47 (2009).

<sup>9</sup> Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*. CONTEMPORARY

needed in order to encourage greater participation in international investment and to provide a more broadly popular and supported system to deal with disputes.

Outside of the possibility to pursue legal actions in host nation courts, international investment proponents, primarily proponents coming from more developed economies, brought forth a number of different possibilities with each idea garnering mixed levels of support. Prior to the establishment of ICSID, there were at least three potentially viable options under consideration, some of which have re-emerged in the modern context.<sup>10</sup> During the early 1960s these three significant proposals were being debated to address the investor-state dispute problem, although each proposal had its advantages and disadvantages and faced a difficult journey toward acceptance.<sup>11</sup>

The first idea was a proposed Organization for Economic Cooperation and Development Convention on the Protection of Foreign Property designed to set forth substantive rules for the protection of foreign owned property and to provide a mechanism so that investors could proceed in legal actions against host states.<sup>12</sup> This option was centered on the establishment of uniform rules to provide for a more consistent, stable and transparent

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ISSUES IN INT'L ARBITRATION AND MEDIATION: THE  
FORDHAM PAPERS 71-94 (2011).

<sup>10</sup> Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. LAW 47 (2009).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

enforcement of investment dispute decisions, decisions which should be founded upon the same basic protections provided to the investment property of nationals.<sup>13</sup> These three fundamental protections include: fair and equitable treatment, most constant protection and security and the free exercise of rights relating to the investment property.<sup>14</sup>

This idea was re-examined again in the 1990s as the rebranded Multilateral Agreement on Investment, but the new draft of the proposal also failed.<sup>15</sup> The primary barrier for this proposal, a stumbling block that continues today, is the concern that the substantive rules would be more advantageous for the developed world investor class and that developing nations would have little means to regulate wealthy investors, sacrificing some of their sovereignty in the process.<sup>16</sup> This is a fairly common concern regardless of the particular investor dispute mechanism under consideration and thus is also a concern under the ICSID arbitration system.

The second proposal was a type of multilateral investment insurance and credit

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<sup>13</sup>*Id.*

<sup>14</sup> Organization for Economic Cooperation and Development [OECD], *Draft Convention on the Protection of Foreign Property*, 2 I.L.M. 241 (1963), available at <http://www.oecd.org/dataoecd/35/4/39286571.pdf>.

<sup>15</sup> Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public*. UN VISION PROJECT ON GLOBAL PUBLIC POLICY NETWORKS (2000), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf>

<sup>16</sup> *Id.*

guarantee system, which was promoted as a method of providing some measure of investor protection against the political risk always inherent in international investment situations and to encourage greater cross border investment.<sup>17</sup> This second idea was revisited twenty years later and eventually became the Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group that provides political risk insurance and credit guarantees to private sector investors and lenders.<sup>18</sup> The MIGA was established in 1988 and has evolved over its lifetime toward its aim of encouraging greater levels of investment in more risky national economic situations.<sup>19</sup> Still, while a variation of the 1960s proposal continues to exist in a new form today, by itself, the MIGA does not necessarily go far enough to provide an opportunity for legal recourse in the face of investor-state disputes, especially given the complexities of multilateral treaties.<sup>20</sup>

The third proposal was a voluntary based system, an arbitration convention, a system through which parties would have a vehicle to participate in

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<sup>17</sup> Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. LAW 47 (2009).

<sup>18</sup> Multilateral Investment Guarantee Agency. *History*. World Bank Group. (2018), <https://www.miga.org/who-we-are/history/>

<sup>19</sup> Malcolm D. Rowat. *Multilateral approaches to improving the investment climate of developing countries: the cases of ICSID and MIGA*. HARVARD INT'L LAW J. 103-144 (Winter 1992).

<sup>20</sup> STEPHEN SCHILL. *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

conciliation or arbitration. It was this third system that was able to gain traction and ultimately, to find approval, even if the initial approval was quite limited in terms of the supporting nations. The proposal took shape over a two year period from 1963 to 1965 and had the major economic powers in the developed world as the parties most interested in moving the idea forward during that time.<sup>21</sup> As a result, this arbitration convention has had divided levels of support from the beginning, and, while the numbers of countries signing on has grown tremendously, the early growth was fairly slow.

Even though this third idea was able to gain enough support to eventually find approval, developing nations were suspicious of the ICSID arbitration system from its inception with 21 developing nations, 19 Latin American countries together with the Philippines and Iraq, voting against the proposal at the World Bank annual meeting in Tokyo in 1964.<sup>22</sup> Despite the lack of consensus, the resolution moved forward and was passed in 1966 with only a small percentage of nations, primarily from the developed economies, actually signing on. This lack of initial support system is a major reason why the system was also very slow in being implemented. The first case was not brought until 1972 and only eleven disputes were brought through ICSID in its first fifteen years, with only six of those eleven resulting in a final award.<sup>23</sup> As it turned out,

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<sup>21</sup> Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. LAW 47 (2009).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

the demand for ICSID arbitration for investor-state disputes remained at very low levels for the first thirty or so years.<sup>24</sup>

Following the initial slow growth period, ICSID began to add more participating nations as international investment expanded in the 1980s and into the 1990s, and, as result, the number of registered cases began to grow. By the turn of the millennium, the ICSID system was solidified as the major option for investor-state disputes which is further evidenced through the significant ramp up in arbitration activity under the system. For example, the number of cases grew tremendously during the period 1999 through 2005, with 141 cases brought over that six year period.<sup>25</sup> This level of activity has continued with 53 cases registered under the ICSID Convention and Additional Facility Rules in 2016.<sup>26</sup> The cumulative data reveals that as of December 31, 2016, ICSID had registered a total of 650 cases under the ICSID Convention and Additional Facility Rules, with over 90% of those cases coming over the last 18 years.<sup>27</sup>

The data is clearly reflective of the tremendous need for a process by which investors and states can deal with conflict. Without a process or mechanism to deal with such conflict, cross border

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<sup>24</sup> ANTONIO PARRA. *THE HISTORY OF ICSID* (2012).

<sup>25</sup> *Id.*

<sup>26</sup> World Bank. 2018. *The ICSID caseload: statistics (English)*. The ICSID caseload statistics; no. 2018-1. Washington, D.C.: World Bank Group.

<http://documents.worldbank.org/curated/en/372121468186843932/The-ICSID-caseload-statistics>

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

investment would pose greater financial risks for all parties involved and limit opportunities for international investment. Considering that arbitration has emerged as the favored alternative among the three previously mentioned, it continues to have the strongest base of support currently while also attracting growing numbers of outspoken critics.<sup>28</sup> Therefore, even with a relatively strong base of support, the debate remains whether the ICSID arbitration system is the best mechanism to deal with such conflict.

As a practical matter, it is understandable that in order to encourage greater global investment, cross border investors require the same treatment as domestic investors, including protections as previously mentioned such as fair and equitable treatment, protection and security and the ability to freely exercise rights relating to their investment property. However, the track record of the ICSID arbitration system has been uneven at best. Essentially, the major question is simply this: does ICSID represent the most efficient and effective system to encourage greater levels of international investment going forward, especially in light of many developing nations either withdrawing or considering withdrawal from the system? The next section of the article addresses some of the major concerns regarding the ICSID arbitration system as it is currently structured and administered.

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<sup>28</sup> Leon Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L LAW J. 603 (2012).

### III. ANALYSIS AND CRITIQUE OF THE CURRENT INVESTOR-STATE DISPUTE ARBITRATION SYSTEM

From both the theoretical and practical perspective, implementation of an arbitration system for international investment disputes can lead to a variety of significant challenges related to impartiality, transparency, recourse and consistency. As the number of ICSID arbitration cases have grown over the past few decades so has the global criticism of the ICSID arbitration system. These criticisms include perceived bias (including concerns over the time and expense involved), transparency of the decision-making process, the lack of opportunity for legal recourse and the inconsistencies in both the initial arbitration and annulment decisions.

While the growth in the number of countries signed on to ICSID and the increase in the number of ICSID cases brought over the past 18 years seem to indicate that the arbitration-system is well supported today within international investment, there is a story behind the numbers. With only 4% of ICSID cases involving North America and 23% involving South American countries and 26% involving nations from Eastern Europe and East Asia, there remains a significant discrepancy in the case balance geographically.<sup>29</sup> This imbalance contributes to the perception that the system is geared more toward

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<sup>29</sup> World Bank. 2018. *The ICSID caseload: statistics (English)*. The ICSID caseload statistics; no. 2018-1. Washington, D.C.: World Bank Group.  
<http://documents.worldbank.org/curated/en/372121468186843932/The-ICSID-caseload-statistics>

protecting wealthy investors from the developed world rather than providing much legal protection for countries with developing economies not to mention the related public policy concerns within those economies.

Furthermore, given the fact that over 60% of ICSID cases arise from Bilateral Investment Treaties,<sup>30</sup> the arbitration-based model can bring a perception among developing countries that there is little choice but to sign on to the process. This process can, through the use of commercial law attorneys primarily from the developed world, focus more on the benefit of the capital exporter than any public policy consequence in the host nation. The resulting view from a number of public policy analysts is that “ICSID is a vehicle by which wealthy developed states have manicured investment law, and through it investor-state arbitration, into a self-serving *ius cogens* to suit themselves and their investors abroad.”<sup>31</sup> These perceptions have largely contributed to the pushback, especially in South America, against participation in the system.

Perhaps even more significantly, a further perception of bias is apparent in the practical application of the arbitration-based system. Results of many arbitration proceedings have largely revealed that, in interpreting investment treaties literally, ICSID arbitrators have continued to benefit developed states more substantially by applying the regulatory defenses that these developed states have

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

<sup>31</sup> Leon Trakman, *The ICSID Under Siege*, 45 CORNELL INT’L LAW J. 603 (2012).

crafted for their own particular interests.<sup>32</sup> Essentially, since the legal expertise governing and regulating international investment comes from the developed world it is no surprise that most regulatory defenses favor the more advanced economies, economies that also continue to become more and more protectionist.<sup>33</sup> For example, often cited as a major reason that the United States revised its Model Bilateral Investment Treaty (BIT) was to offset potentially more expansive legal interpretations by the ISDS tribunals.<sup>34</sup>

When the US Model BIT was revised in 2012, it added some new features to provide greater protection for investors against those more expansive legal interpretations.<sup>35</sup> The revision included modifications that impose additional burdens and restrictions on host states in order to facilitate and protect foreign investment as well as provisions that add slight protections for government authority in the area of financial services regulation.<sup>36</sup> A further revision was added with new language on environmental and labor issues designed to help

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

<sup>33</sup> Julius Cosmas. *Legitimacy Crisis in Investor – State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward*. 4 INT’L J. OF SCIENTIFIC AND RESEARCH PUBLICATIONS 11 (November 2014).

<sup>34</sup> *Id.*

<sup>35</sup> US Office of the Trade Representative. 2012 U.S. Model Bilateral Investment Treaty, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACI%20EP%20Meeting.pdf> (2012).

<sup>36</sup> *Id.*

avoid some of the possible negative effects that are often associated with foreign investment.<sup>37</sup> This revision of the US Model BIT was a clear reflection of the Obama administration priorities and also demonstrated the political pushback following certain arbitration decisions that had favored foreign governments over US investors. While the Trump administration has yet to revise the US Model BIT further, there is no doubt that as protectionism has gained momentum worldwide, it is clearly being projected onto the bilateral and multilateral treaty platform.

In recent decades, these protectionist leanings have also moved from the traditional players and expanded to other rising global economies. While North American and Western European countries were historically the major players in the protectionist movement, China and, to some extent, India, are now emerging as significant protectionist nations in their own right.<sup>38</sup> The emergence of China and India as major players in the international investment sphere creates even greater numbers of potential investors from comparatively wealthy nations who may seek to protect their own nation's interests and these nations clearly have the power to do so within bilateral or multilateral treaties. Once again leading to a perception that international investment is geared toward benefiting the developed world to the detriment and sacrifice of the developing world.

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<sup>37</sup> *Id.*

<sup>38</sup> Leon Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L LAW J. 603 (2012).

Related to this perceived bias reflected in the system itself and in the formation of many contemporary BITs, are some practical concerns about the process, specifically concerns dealing with the time and expense involved. To be sure, the time involved in the arbitration process from beginning to conclusion and the resulting expense of the process, can be more problematic for a developing nation than a very large multinational corporation. Adam Raviv, international law attorney with Wilmer, Cutler, Pickering, Hale and Darr in Washington, DC, wrote a pragmatic article examining the time factor related to ICSID cases. In his article, he examined the 19 ICSID awards in 2012 in which the average length of time was just under five years from beginning to conclusion.<sup>39</sup> It is also important to note that this nearly five year average does not include any annulment proceedings.<sup>40</sup> Granted that annulment proceedings do not happen in every instance, the mere possibility of extended proceedings represents an expensive proposition in terms of time and money over and above the five year average.

Considering that approximately 80% of the costs in an ICSID arbitration proceeding relate to the

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<sup>39</sup> Adam Raviv. *A Few Steps to a Faster ICSID*. TDM 1 (2014), [www.transnational-dispute-management.com/article.asp?key=2066](http://www.transnational-dispute-management.com/article.asp?key=2066) See Also Jeffery Commission. *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years*. KLUER ARBITRATION BLOG (2016), <http://arbitrationblog.kluwarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/>

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

costs of the external legal counsel, and given that a typical arbitration attorney can cost upwards of \$1,000 an hour or more, time is money in a very real sense.<sup>41</sup> In addition to the attorney costs to represent each party, there are also a number of direct ICSID charges including fees and expenses of conciliators, arbitrators, commissioners and ad hoc committee members, costs for lodging the complaint, as well as several additional administrative charges and fees.<sup>42</sup> While these costs are manageable for many multinational corporations, for smaller countries with limited GDPs, the overall cost can add up significantly in a short amount of time.

Even when a party is successful in the arbitration process the financial expense can still be disadvantageous depending on the comparative financial position of the parties involved. This is seen in the *Philip Morris v. Uruguay* case which began in 2010 and was eventually concluded six years later. In this case, Philip Morris International brought an action, under a bilateral treaty between Switzerland and Uruguay, against Uruguay alleging that the nation's anti-smoking regulation, including the regulation of tobacco packaging, unfairly devalued its trademarks and product investments in

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<sup>41</sup> *Id.* See also ICSID, <https://icsid.worldbank.org/en/Pages/services/Cost-of-Proceedings.aspx>; and ICSID Cost Calculator, <https://www.international-arbitration-attorney.com/icsid-arbitration-cost-calculator-2/>

<sup>42</sup> *Id.* See also Nida Mahmood, *Arbitration at ICSID: The Costs Involved*, AILIA Blog (2013), <http://blogaila.com/2013/04/21/arbitration-at-icsid-the-costs-involved-by-nida-mahmood/>

the country.<sup>43</sup> Philip Morris lost the case and was ordered to pay \$7 million to the small South American country, however Uruguay also incurred over \$2.5 million in direct expenses (not to mention other indirect costs) defending themselves in the action.<sup>44</sup>

While the victory was an important one in the global challenge to regulate tobacco advertising, and was especially beneficial for other nations contemplating such actions against multinational tobacco companies, the victory was not without expense for the winner. For a country like Uruguay with its respectable 2016 (\$52.42 billion) GDP,<sup>45</sup> perhaps those costs are manageable, however, for smaller economies, the decision to try and stand up against large multinational companies could prove to be too costly to risk.<sup>46</sup> With Philip Morris International and its 2016 \$152 billion dollar market cap,<sup>47</sup> the \$7 million award against the company was

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<sup>43</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (2010).

<sup>44</sup> Cecilia Olivet. *Who Really Won the Legal Battle between Philip Morris and Uruguay*. THE GUARDIAN, <https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts> (2016),

<sup>45</sup> Uruguay GDP 1960-2018, <https://tradingeconomics.com/uruguay/gdp>

<sup>46</sup> *Id.*

<sup>47</sup> PWC. *The risers – The 20 Global Top 100 companies with the largest absolute increase in market cap.* (2016), <https://www.pwc.com/gx/en/audit-services/publications/assets/global-top-100-companies-2016.pdf>

relatively inconsequential. As a result of the financial resource discrepancy, the significant expense of ICSID arbitration certainly favors the more deep-pocketed participant.

In addition to concerns over perceived bias and escalating expense, the arbitration-based system has also had some problems with transparency. Some international investment law analysts have gone on record to state that, in spite of a general move towards greater transparency in the international investment sphere, especially within the development of multinational treaties such as NAFTA, “ICSID has so far taken a more reserved approach to transparency.”<sup>48</sup> In this regard, while the ICSID website publishes some key information including the basic procedural details concerning registered disputes, ICSID Arbitration Rules, including the revised 2006 version, prohibits publishing the entirety of a tribunal’s award without the consent of both disputing parties.<sup>49</sup>

Therefore, as a practical matter, locating arbitral awards and decisions is often problematic, as many awards are not published due to confidentiality agreements between the parties even though parties can grant the consent for awards to be published in full.<sup>50</sup> Most certainly, the fact that such transparency

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<sup>48</sup> Julie Maupin. *Transparency in International Investment Law: The Good, the bad and the murky* In *Transparency in INTERNATIONAL LAW*, Andrea Bianchi and Anne Peters, eds (Cambridge University Press 2013), [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5840&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5840&context=faculty_scholarship)

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

is optional contributes to the murkiness of the process. If such consent is not given, ICSID is still required to publish excerpts of the tribunal's legal reasoning, but, as international law attorney and law Professor Julie Maupin notes in her 2013 article, "the oral and written submissions of the disputing parties and their experts and witnesses almost always remain confidential."<sup>51</sup> Therefore, despite ongoing calls to the contrary, for ICSID any change or evolution regarding visibility in investor-state arbitration remains significantly lagging the general global movement toward greater levels of transparency in international investment.<sup>52</sup>

Perceived bias, growing costs, and continued limitations on transparency are some key concerns with the current arbitration-based system, however the lack of an opportunity for appeal as well as the inconsistencies in both arbitral and annulment proceedings are perhaps the most significant problems facing the ISDS today. Most assuredly, these problems can harm the overall reputation of the system and lead to a weakening of support for arbitration-based models for dealing with investor-state conflict.<sup>53</sup> Much has been written about these issues and there is a tremendous amount of disagreement regarding the best means of dealing

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<sup>51</sup> *Id.* at 10

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

<sup>53</sup> Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPPERDINE LAW REV. 4 (2007).

with these concerns. In many ways, these two problems remain intertwined.

The lack of an opportunity for appeal is one major concern which strikes at the very nature of an arbitration. Even though arbitration-based systems are often valued for the finite nature of the proceedings, increasingly there are movements seeking greater possibilities for review following arbitration decisions.<sup>54</sup> The ICSID arbitration convention was certainly never designed to include a full appeal process, though it does include the opportunity for review through an annulment process as laid out in Article 52 of the ICSID Convention, Regulations and Rules.<sup>55</sup> While an annulment is not an appeal, as it, by design, only looks at jurisdictional, legal process or award questions, it does provide some level of recourse for the losing or otherwise disappointed parties.<sup>56</sup>

Nonetheless, while the opportunity to seek an annulment has been around since the foundation of ICSID, the possibility was largely ignored for many years with very limited activity. However, as the number of ICSID registrations have grown, so has the interest in annulment proceedings. In examining the data, the numbers of parties seeking annulment following arbitration has increased at a slightly faster

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<sup>54</sup> Elsa Sardinha. *The Impetus for the Creation of an Appellate Mechanism*. ICSID REV. – FOREIGN INVESTMENT LAW J. 3, 503–527 (Oct. 1, 2017).

<sup>55</sup>Article 52. ICSID REV. – FOREIGN INVESTMENT LAW J. 2, 507–717 (Oct. 1, 1998)

<sup>56</sup>Gabriel Bottini. *Present and Future of ICSID Annulment: The Path to an Appellate Body?* ICSID REV. – FOREIGN INVESTMENT LAW J. 3, 712–727 (2016)

rate than the ongoing increase in ICSID registrations and, over the past seven years, there has especially been consistent growth in the number of annulment proceedings.<sup>57</sup> Even with this increase in annulment proceedings, the track record for successful reduction or reversal of an award in these annulment proceedings is relatively limited, although, as will be discussed, there have been times of more expansive and liberal interpretations of the guiding principles in Article 52 which did result in several controversial award reductions or reversals.<sup>58</sup>

Notwithstanding these select controversial reductions or reversals, and looking at the issue from the overall statistical standpoint, obtaining a full or partial award reduction in an ICSID annulment proceeding remains quite rare. An examination of the numbers involved reveals the real challenge in pursuing annulment. In the first 40+ years, there were only 32 cases in which annulment was sought with only 12 resulting in full or partial annulment of the award.<sup>59</sup> However, since 2011, the number of annulments sought has increased to 50 with only 5 resulting in full or partial annulment of the award.<sup>60</sup> This data indicates that while there is an option for a variation on the appeal process, the practicality of the matter reveals that any recourse option to be

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<sup>57</sup> World Bank. 2018. *The ICSID caseload: statistics (English)*. The ICSID caseload statistics; no. 2018-1. Washington, D.C.: World Bank Group.  
<http://documents.worldbank.org/curated/en/372121468186843932/The-ICSID-caseload-statistics>

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

significantly limited. The fact that only 10% of annulments sought within ICSID find any measure of success demonstrates the very real resistance toward any form of recourse within the system.

From the initial complaint registration through any potential annulment review, the ICSID system remains a self-contained and self-governed system and is not really comparable to a full judicial process and review. As mentioned earlier, the parameters for the annulment process are guided by Article 52 of the ICSID Convention, parameters which are purposefully limited in scope.<sup>61</sup> These limitations are to ensure that the most common path upon initiation of a registered action represents a one-stage process. The prospect and opportunity for the annulment process was established to be the exception rather than the rule. Article 52 is restrictive by design providing that annulment will be available only for “egregious injustices of a procedural nature and not in situations where the ad hoc committee disagrees with the substantive decision rendered by the tribunal.”<sup>62</sup> Unfortunately, however, this language has been inconsistently interpreted and has created times of significant controversy for ICSID.

For the very large part of ICSID’s annulment history, annulment reviews have seen a more restrictive interpretation adhering to the specific language found in Article 52 however, this has also

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<sup>61</sup> Paul Friedland and Paul Brumpton. *Rabid Redux: The Second Wave of Abusive ICSID Annulments*. 27 AMERICAN UNIV. INT’L LAW REV. 4, 727-760 (2012)

<sup>62</sup> *Id.*

been hit and miss over the past forty years. As annulment proceedings have grown in popularity, there have been times of great inconsistencies in interpretation resulting in some periods of more expansive interpretations and other periods of more restrictive interpretations. In the mid-1980s, the possibility of annulment became a more real possibility with a significantly expansive interpretation found in two key cases, *Klöckner v. Republic of Cameroon* in 1983 and the *Amco Asia Corp. v. Republic of Indonesia I* annulment in 1985.<sup>63</sup> These two cases brought a great deal of criticism and discussion when first arbitrated in the 1980s and the debate continues today.

The first and foundational of the two cases came out of the *Klöckner v. Republic of Cameroon* annulment decision in 1983 with a more liberal and expansive interpretation of Article 52.<sup>64</sup> In this case, Klöckner, a German steel and metal manufacturer/distributor, initiated arbitration against Cameroon to seek full payment for the construction of a fertilizer plant. The initial arbitration decision went against Klöckner so the company sought an annulment alleging a violation of its due process rights and “challenged the award on three of the five

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<sup>63</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 and *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1

<sup>64</sup> Matthias Scherer. *ICSID Annulment Proceedings Based on Serious Departure from a Fundamental Rule of Procedure*. Czech (& Central European) Yearbook of Arbitration, 211-226 (2011).

Article 52(1) grounds, namely, the manifestly excessive use of power, the serious departure from a fundamental rule of procedure and the failure to state reasons.”<sup>65</sup> While the ad hoc committee spent a significant amount of time explaining why they dismissed the allegation of serious departure from a fundamental rule of procedure, it nevertheless annulled the award on the grounds of excessive use of power and failure to state reasons.<sup>66</sup>

This more expansive view continued with the *Amco Asia Corp. v. Republic of Indonesia I* annulment in 1986 when again the ad hoc committee annulled the award on the grounds of excessive use of power and failure to state reasons.<sup>67</sup> The *Amco Asia Corp.* and *Klöckner* decisions are reflective of a brief but controversial period in annulment proceedings with these broader interpretations of annulment criteria as set forth in Articles 42 and 52. As Gabrielle Kaufmann-Kohler, former Professor at the University of Geneva and now partner with Levy Kaufmann-Kohler and consistently ranked among the top arbitrators worldwide, shared in a paper written for the American Society for International Law Conference: “In both cases, the parties had not chosen the applicable law, which was determined in

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<sup>65</sup> *Id.* at 215

<sup>66</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 and *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

<sup>67</sup> Paul Friedland and Paul Brumpton. *Rabid Redux: The Second Wave of Abusive ICSID Annulments*. 27 AMERICAN UNIV. INT’L LAW REV. 4, 727-760 (2012).

accordance with the second part of Article 42(1). It was accepted that a violation of Article 42(1) found its sanction in Article 52. The ground was *construed broadly* and the awards annulled.”<sup>68</sup>

These *Amco Asia Corp.* and *Klöckner* annulments were ultimately based on the original tribunal’s failure to use applicable law. Essentially this means that, using the criteria from Article 42, a tribunal may manifestly exceed its powers when it exercises jurisdiction which it does not have, fails to exercise jurisdiction which it does have, or fails to apply the proper law to the merits of the dispute. The annulment panels in these two cases found that the original panels had not chosen to apply the national law in the host country but relied instead on the rules of international law. The annulment panel instead found that Article 42 “authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.”<sup>69</sup> This broader construing of

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<sup>68</sup> Gabrielle Kaufmann-Kohler. *Annulment of ICSID Awards in contract and Treaty Arbitrations: Are There Differences?* IAI – ASIL Conference, <https://lk-k.com/wp-content/uploads/annulment-icsid-awards-contract-and-treaty-arbitrations-are-there-differences-annulment.pdf> (2004).

<sup>69</sup> *Amco Asia Corp. v. Republic of Indonesia*, ad hoc committee decision of May 16, 1986, 1 ICSID Rep. 509, 515 (1993). See also *Kloeckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ad hoc committee decision of May 3, 1985, 2 ICSID Rep. 95, 122 (1994); *Amco Asia Corp. v. Republic of Indonesia*, award of May 31, 1990, 1 ICSID Rep. 569, 580 (1993); *Liberian Eastern Timber Corp. v.*

Articles 42 and 52 led to a great deal of criticism for the ICSID annulment process and contributed to the systems growing reputation for inconsistency.

Following the oft-debated *Klöckner* and *Amco Asia Corp* decisions, the pendulum swung back again and the ICSID annulment process returned to a more restrictive interpretive period for the next twenty years. During this period, the annulment decisions focused on the more restrictive guiding principle or the “serious departure from a fundamental rule of procedure” approach.<sup>70</sup> Still, not to disappear completely, the expansive view emerged again with two cases in the late 2000s and 2010s, with *Sempra Energy International v. Argentine Republic* and *Enron Creditors Recovery Corp. v. Argentina*.<sup>71</sup> Both *Sempra* and *Enron* had the awards partially annulled by the ad hoc committees with respect to Argentina’s claim of necessity.<sup>72</sup> This back and forth nature regarding the interpretation of Article 52 demonstrates a major

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Republic of Liberia, award of Mar. 31, 1986, 2 ICSID Rep. 343, 358-59 (1994).

<sup>70</sup> Cristoph Schreuer. *From ICSID Annulment to Appeal Half Way Down the Slippery Slope*. UNIVERSITAT WIEN RESEARCH PAPER, [http://www.univie.ac.at/intlaw/wordpress/pdf/icsid\\_annulment\\_appeal.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/icsid_annulment_appeal.pdf) (2011).

<sup>71</sup> *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 and *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3

<sup>72</sup> Elizabeth Martinez. *Understanding the Debate Over Necessity: Unanswered Questions and Future Implications of Annulments in Argentine Cases*. 23 DUKE J. OF COMPARATIVE & INT’L LAW 1 (2012).

problem with the ad hoc committee review and is a further reflection of the politically influenced nature of the entire arbitration process and the inconsistency in decision making.

Therefore, as currently implemented, the annulment process reveals similar issues with decision inconsistency as does the initial arbitration process. This is in large part due to the fact that the ad hoc annulment committees are, in theory and in practice, not too unlike the initial arbitration panels.<sup>73</sup> In the big picture, considering the way in which the ICSID arbitration process is administered, any political influence, whether the influence is more direct or of an indirect nature, is hard to be avoided at any stage of the process. The secretary-general of ICSID carries a great deal of influence in setting policy and has a major role in establishing the panels/committees in the first place.<sup>74</sup> Therefore, it should be no surprise that when a current secretary-general is replaced with a new secretary-general, both initial arbitration and annulment proceedings can take on different interpretations of applicable law resulting in far different decisions than similar decisions arbitrated under previous regimes. In addition, given the “screening power” of the secretary-general to grant or refuse a request for

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<sup>73</sup> J. Christopher Thomas and Harpreet Kaur Dhillon. *The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards* 32 ICSID REV. – FOREIGN INVESTMENT LAW J. 3, 459–502 (Oct. 1, 2017).

<sup>74</sup> David Collins. *ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?* 30 J. OF INT’L ARBITRATION 4, 333-344 (2013).

arbitration, the potential of political influence from the top cannot be avoided.<sup>75</sup>

A significant consideration regarding the return to a more restrictive interpretation of Article 52 from the mid-1980s through the mid-2000s is based upon the simple fact that the secretary-generals of ICSID during that period also served as General Counsel of the World Bank and were not necessarily supportive of more expansive interpretations, possibly due to the strong political influence of developed nations such as the United States. As Hamid Gharavi writes in his article, *ICSID annulment committees: the elephant in the room*: “Some perceived, rightly or wrongly, that the World Bank hierarchy also disapproved of those annulment decisions because of the impact on US shareholders’ and creditors’ interests and because of the fear of a revival of the controversy that followed the *Klöckner* annulment, with all the adverse consequences it may have had on ICSID’s reputation.”<sup>76</sup>

Additionally, perhaps another reason that in the modern context there are only a small percentage of reversals or adjustments in annulment proceedings, is because the members selected to serve on ad hoc annulment committees essentially

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<sup>75</sup> Sergio Puig and Chester Brown. *The Secretary-General’s Power to Refuse to Register a Request for Arbitration under the ICSID Convention*. 27 ICSID REV. – FOREIGN INVESTMENT LAW J. 1, 172–191 (Sept. 1, 2012)

<sup>76</sup> Hamid Gharavi . *ICSID Annulment Committees: The Elephant in the Room*. GLOBAL ARBITRATION REV., <https://globalarbitrationreview.com/article/1033891/icsid-annulment-committees-the-elephant-in-the-room> (2014).

come from the same pool of resources.<sup>77</sup> As further evidence of the political influence on the system, since the members for the ad hoc annulment committee are selected by one person, the secretary-general, the prospect that very many decisions will be annulled in some form could remain dependent upon the preferences of the secretary-general. Some attorneys have gone so far as to even invoke the risk of displeasing the secretary-general to the ad hoc committee when they consider whether or not overturning an award during annulment proceedings.

With a request for annulment in 2010, the small African country of Togo attempted to have an award against them set aside or reduced. During the annulment proceedings, the corporate attorney for the prevailing party, Togo Electric, suggested: “I think that by [not annulling], you would be making ICSID arbitration improve, and I am sure that you will not be displeasing [the secretary general] of ICSID who has again recently declared that ‘the Klöckner era is behind us, it is over.’”<sup>78</sup> By 2010, the secretary-general was perhaps a little wary of the annulment process as the Togo annulment proceedings had been preceded by some very unpopular annulment decisions in the “Argentine Gas Sector Cases.”<sup>79</sup> In these cases, which included *Enron v Argentina* and *Sempra v Argentina*, the

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

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

<sup>79</sup> Elizabeth Martinez, *Understanding the Debate Over Necessity: Unanswered Questions and Future Implications of Annulments in Argentine Cases*, 23 DUKE J. OF COMPARATIVE & INT’L LAW 1 (2012).

situations were very similar while the outcomes were quite divergent.

As Irene M. Ten Cate, Associate-in-Law at Columbia Law School, explains in her article entitled *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, some of the major cases leading to the critical view regarding consistency in ICSID arbitration were these very high-profile cases coming out of Argentina and the nation's austerity measures implemented during the country's economic crisis in 2001-2002.<sup>80</sup> To address the severe economic downturn and to push the public policy agenda, Argentina made a series of tough decisions (from the view of the cross border investor) including stabilization of the tariff structure due to the fluctuation of the peso.<sup>81</sup> These decisions impacted a number of significant cross border investments and resulted in four very similar ICSID arbitration cases. In defending itself in these resulting ICSID arbitration cases, Argentina relied on the necessity defense.<sup>82</sup> The arbitration decisions in these cases did not help ICSID's track record for consistency in that "each of the four tribunals issued a significantly divergent interpretation of the necessity defense claimed by Argentina."<sup>83</sup>

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<sup>80</sup> Irene M. Ten Cate. *The Costs of Consistency: Precedent in Investment Treaty Arbitration*. 51 COLUMBIA J. OF TRANSNAT'L LAW 418 (2013).

<sup>81</sup> *Id.*

<sup>82</sup> Elizabeth Martinez. *Understanding the Debate Over Necessity: Unanswered Questions and Future Implications of Annulments in Argentine Cases*. 23 DUKE J. OF COMPARATIVE & INT'L LAW 1. (2012).

<sup>83</sup> *Id.*

Perhaps of all the major critiques about the ICSID arbitration system, it is this notion of inconsistency that causes the most consternation. The fact that some of this is due to personalities and viewpoints of the arbitrators themselves can certainly add salt to the wound for the unsuccessful party. As Professor Ten Cate writes: “Yet inconsistency that stares us in the face, as it does in the Argentina cases, reveals that we may not be quite so comfortable with the role of luck in adjudication. And even though practitioners openly acknowledge that the selection of a tribunal is the most important factor in any arbitration, the reality that the identity of the arbitrators may have affected the outcome is a hard one to stomach for parties on the losing end.”<sup>84</sup> The inconsistencies in decision making at both the initial arbitration and annulment levels, which can lead to “unpredictability and incoherence in investor-state dispute settlement,” challenge the legitimacy of the ICSID arbitration system.<sup>85</sup> Since the very beginning of the arbitration-based system, this ongoing complaint has seemed to weaken support.

Therefore, inconsistent decision making within the ICSID process does not come without significant damage to the overall reputation of the system and creates an overall murkiness to the process. Whether the decisions are inconsistent ad

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<sup>84</sup> Irene M. Ten Cate. *The Costs of Consistency: Precedent in Investment Treaty Arbitration*. 51 COLUMBIA J. OF TRANSNAT’L LAW 418 (2013).

<sup>85</sup> Charles N. Brower and Stephan W. Schill. *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*. 9 CHICAGO J. OF INT’L LAW 2 (2007).

hoc committee interpretations of Article 52 during annulment or inconsistent interpretations of specific clauses within BITs by panels during initial arbitration, these discrepancies can damage the global reputation for the system itself. As Gabriela Egli, writing about inconsistent interpretations of most favored nation clauses in his 2002 article, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, describes the ongoing problem and proclaims that “inconsistent ICSID tribunal decisions foster a loss of certainty.”<sup>86</sup> This loss of certainty disrupts the legal process and weakens the investor-state dispute system. A solution to these reliability concerns has been sought for a number of years and some believe that a solution will be found in due course,<sup>87</sup> and that the continual evolution of investment law “may help create a better understanding of the content and scope of the central principles of investment protection and result in the creation of a *jurisprudence constante*.”<sup>88</sup> For some international investment law scholars and even some EU trade commissioners, this may involve an entirely new system.<sup>89</sup>

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<sup>86</sup> Gabriel Egli.. *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*. 34 PEPPERDINE LAW REV. 4 (2007).

<sup>87</sup> Charles N. Brower and Stephan W. Schill. *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*. 9 CHICAGO J. OF INT'L LAW 2 (2007).

<sup>88</sup> *Id.* at 474.

<sup>89</sup> *EU's Malmström Makes Global Investment Court Pitch to Stakeholders*. 21 BRIDGES 7, <https://www.icsid.org/bridges->

#### IV. MOVING TOWARD A SOLUTION?

Given the aforementioned concerns with the ICSID arbitration system, the idea of a permanent international investment court to handle investor-state, or state-state disputes involving cross border investment, has been gathering steam.<sup>90</sup> It stands to reason that if so much critique has been written and debated regarding the efficacy, efficiency and transparency of the current arbitration-based system for investor-state dispute settlements (ISDS) then there must be something inherently wrong with the system, or at least as the system is currently implemented. When considering the major factors addressed in this article, namely cost control, increased impartiality and transparency, consistency and the opportunity for appeal, then perhaps a permanent investment court system would be a better solution moving forward. While this idea could occur through the extensive reform of existing multilateral structures, such as the International Centre for the Settlement of Investment Disputes (ICSID) system, a potentially more plausible alternative would be to create permanent investment courts through important multi-lateral treaties, such as Transatlantic Trade and Investment Partnership

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news/bridges/news/eus-malmstr%c3%b6m-makes-global-investment-court-pitch-to-stakeholders (2 March 2017).

<sup>90</sup> Stephen Schill. *The European Commission's Proposal of an Investment Court System for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?* 20 ASIL INSIGHTS 9, (April 22, 2016).

(TTIP), which could eventually be expanded with additional states simply using the specifics within the treaty as a model for investment court structure.

In 2015 the European Commission offered a proposal for the establishment of an investment court as part of the TTIP.<sup>91</sup> This proposal includes a two tier system with a Tribunal of First Instance and an Appeal Tribunal with both tribunals consisting of members appointed (in appropriate proportion) by the contracting parties of the TTIP, the European Union and the United States.<sup>92</sup> This would signify a significant departure from the ISDS ad hoc panels, with the permanent tribunals being designed to achieve greater levels of independence and impartiality.<sup>93</sup> In addition to the independent and impartial tribunals, the proposal also includes substantive rules which would provide greater capacity for states to “regulate in the public interest.”<sup>94</sup> As EU Trade Commissioner, Cecilia Malmstrom writes: “The proposed multilateral investment court would represent a permanent body open to all interested countries to join. Officials say

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<sup>91</sup> Barnali Choudhury. *2015: The Year of Reorienting International Investment Law*, ASIL INSIGHTS (Feb. 5, 2016)

<sup>92</sup> Stephen Schill. *The European Commission’s Proposal of an Investment Court System for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?* 20 ASIL INSIGHTS 9, (April 22, 2016).

<sup>93</sup> *Id.* See also Barnali Choudhury. *2015: The Year of Reorienting International Investment Law*, ASIL INSIGHTS (Feb. 5, 2016)

<sup>94</sup> Robert W. Schwieder. *TTIP and the investment court system: a new (and improved?) paradigm for investor-state adjudication.* 55 COLUMBIA J. OF TRANSNAT’L LAW 1, 178-227 (2016).

that it would safeguard the right to regulate in the public interest and health, safety, and environmental concerns, responding to popular concerns that the ISDS system did not provide sufficient protections for these.”<sup>95</sup>

The EU proposal could provide a major first step towards a more centralized and multilateral investment court system with greater consistency and transparency as well as a system that may reduce the time and expense involved in the dispute process (in part due to the dismissal of unfounded claims and the possibility that the loser would pay litigation costs).<sup>96</sup> Given the criticisms concerning impartiality and inconsistency with the current arbitration-based system, the creation of an investment court system with a true opportunity for appeal could represent a remedy to these issues. Furthermore, an additional hope for the investment court alternative represents a change which would bring “[a] single, unified, permanent body charged with developing international law and creating consistent jurisprudence will promote legitimacy more than disaggregated arbitrations that come to different conclusions on the same issue.”<sup>97</sup>

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<sup>95</sup> *EU's Malmström Makes Global Investment Court Pitch to Stakeholders*. 21 BRIDGES 7, <https://www.ictsd.org/bridges-news/bridges/news/eus-malmstr%c3%b6m-makes-global-investment-court-pitch-to-stakeholders> (2 March 2017).

<sup>96</sup> *Id.* See also: *European Commission Reading Guide – Draft Text on Investment Protection and Investment Court system in the Transatlantic Trade and Investment Partnership (TTIP)*. EUROPEAN UNION PRESS RELEASE DATABASE (Sep. 16, 2015).

<sup>97</sup> Gabriel Egli.. *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to*

Therefore, replacing the current arbitration-based system with an investment court made up of an initial tribunal as well as an appeal tribunal offers some significant advantages in terms of consistency and impartiality. For one, the court system would have a better means for ensuring that the decision-making authorities have the requisite experience desired and for ensuring that the judgments of the proposed investment court system would be made by publicly appointed judges with significantly higher qualifications than currently found with members of the arbitration-based panels. The proposal envisions the initial tribunal to be comprised of 15 judges, five from the US, five from the EU and five from outside the EU and US, with each judge required to have demonstrated expertise in public international law and, either, appropriate qualifications that would make them eligible for appointment to judicial office in their respective countries or an international reputation as a “jurist of recognized competence.”<sup>98</sup> The appeal tribunal would consist of six judges, within the same proportion and with the same qualification standards. Thus, the qualifications of investment court judges would be comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body. This

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*Dispute Resolution Provisions.* 34 PEPPERDINE LAW REV. 4 (2007).

<sup>98</sup> Stephen Schill. *The European Commission’s Proposal of an Investment Court System for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?* 20 ASIL INSIGHTS ( 9, (April 22, 2016).

standardization regarding the decision-making authorities would go a long way to improving the consistency and impartiality of international investment dispute decisions.

Additionally, the two-tiered system could drastically improve the efficiency of the current annulment process by offering greater options for appellate decisions. In contrast to the current all-or-nothing approach under the ISDS, the EU investment court proposal would allow for greater flexibility for appellate decisions including modifications or reversals that would become binding upon the initial tribunal.<sup>99</sup> Essentially, the investment court proposal would require the initial tribunal, after a modification or reversal through the appeal process, to revise its decision to reflect the findings and conclusions of the appeal tribunal.<sup>100</sup> The streamlined appeal process could also reduce the costs involved through the greater efficiency and speed of the proceedings. According to the TTIP proposal, the first instance decision must be issued within 18 months from submission of a claim and the appellate process must not take longer than six months. While the treaty would allow for extended time under certain conditions, this more limited time frame would provide a means for lowering overall costs over the protracted dispute resolution and annulment

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<sup>99</sup> Catharine Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead* (April 9, 2016). TRANSNATIONAL DISPUTE MANAGEMENT 1, 2017 (advance publication 25 May 2016).<https://ssrn.com/abstract=2711943> or <http://dx.doi.org/10.2139/ssrn.2711943>

<sup>100</sup> *Id.*

proceedings as they are currently implemented within the arbitration-based system.

While the possibilities of increased consistencies, efficiencies and cost controls under TTIP are significant reasons in themselves, the proposed investment court system could also build on the evolving interest to provide greater transparency throughout the investment dispute process. In 2014, the United Nations Commission on International Trade Law passed new Rules on Transparency in Treaty-based Investor-State Arbitration in order to address the lack of transparency since most arbitration between investors and states is conducted outside the public spotlight. However, a lack of transparency becomes a problem with cases that are related to the public interest involving taxpayers' money and/or dealing with, natural resources or environmental issues. The 2014 rules allow for more information to be made public and the implementation of an international investment court system could take this emphasis to a new level. The TTIP investment court could help ensure that proceedings would be transparent, with open hearings, and a right to intervene for parties with an interest in the dispute will be provided as well. As court decisions generally provide greater levels of transparency than arbitration decisions, an international investment court could potentially address one of the main criticisms of the current arbitration system giving consistent and clear transparency regarding proceedings and decisions.

Finally, the proposed investment court would also address the problem of forum-shopping by

providing for a clear distinction between international law and domestic law and ensuring that multiple and parallel proceedings would be avoided. Within the current arbitration based system, there exists no dominant view concerning legal rules governing parallel proceedings and no relevant rules are provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).<sup>101</sup> The investment court proposal would also allow for a quicker dismissal of frivolous claims, which is often a major problem under the current arbitration-based system.<sup>102</sup>

Despite the potential advantages of a permanent investment court system, there remain some significant stumbling blocks to passage and implementation. For one, the United States has thus far been a significant opposition to the idea of an Investment Court system. Many current US trade policy makers are not sure about the EU's idea for a new court system with an appeal tribunal, due to the greater risk presented to international investors, most of whom come from the developed nations like the United States. The inclusion of the investment court system was proposed after concerns that U.S. multinationals could use private arbitration rules in

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<sup>101</sup> Tatsuya Nakamura, *International Investment Arbitration and Parallel Proceedings: Focusing on regulation and coordination under national law*. RESEARCH INSTITUTE FOR ECONOMY, TRADE, AND INDUSTRY RESEARCH PAPER (June 2008).

<sup>102</sup> Tsai-fang Chen, *Deterring Frivolous Challenges in Investor-State Dispute Settlement*. 8 CONTEMPORARY ASIA ARBITRATION JOURNAL 61, 61-80 (May 2015).

the Transatlantic Trade and Investment Partnership (TTIP) to challenge European food and environmental laws. Former U.S. Trade Representative Michael Froman expressed his concern over the investment court system emphasizing: “It’s not obvious to me why you would want to give companies a second bite of the apple.”<sup>103</sup> As Froman stated further, “Because of the high standards and safeguards in our agreements, there have been very few cases against the U.S., and to date, the government has never lost.”<sup>104</sup>

An additional difficulty regards the relationship of a multilateral investment court system with domestic courts. This represents an important concern as the ISDS arbitration-based system already deals with criticism that foreign investors have greater opportunities for recourse than national investors. The arbitration system is often criticized for giving foreign investors a second opportunity even after having lost in domestic courts and for the prospect that foreign investors can circumvent domestic courts completely as the exhaustion of local remedies is often not a condition required for accessing the arbitration system. Further, even if foreign investors do not choose to circumvent local remedies completely, the arbitration-based system is also criticized for allowing foreign investors to pursue parallel claims at the domestic and

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<sup>103</sup> Philip Blenkinsop & Krista Hughes, *U.S. wary of EU proposal for investment court in trade pact*. REUTERS. (Oct. 29, 2015), <https://www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029>

<sup>104</sup> *Id.*

international levels. These are criticisms that current investment court proposals have failed to address.

Thus far, the major discussions regarding the establishment of an investment court system emerge from the EU's TTIP however this is not the only multilateral treaty to include an investment court proposal. In the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (as it was revised in 2016), an investment court consisting of 15 members each from the European Union and Canada is proposed.<sup>105</sup> While slightly more limited than the proposal in the TTIP, as CETA does not include the more substantial code of conduct requirements for judges and transparency requirements for funding disclosures, CETA also represent many of the same significant provisions as the TTIP.<sup>106</sup> Both the TTIP and the CETA investment court proposals represent significant moves towards a permanent multilateral investment court system with “full transparency of proceedings and clear and unambiguous investment protection standards.”<sup>107</sup>

Whether or not this move toward the permanent multilateral investment court system continues into the future and completely alleviates

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<sup>105</sup> Trishna Menon & Gladwin Issac *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative? CETA, Fair and Equitable Treatment, Investment Arbitration, ISDS*. Gujarat National Law University, India (March 6, 2018).

<sup>106</sup> *CETA: EU and Canada agree on new approach on investment in trade agreement*. EUROPEAN UNION PRESS RELEASE DATABASE (Feb. 29, 2016).

<sup>107</sup> *Id.*

the negative issues with the current ISDS system remains to be seen. However, in theory, it represents a very real opportunity to deal with the issues mentioned in this article. While it is unlikely that wealthy global investors and developing nation-states will ever be completely enthralled with one multilateral solution, ISDS as it is or an investment court system, any solutions which seek to manage time and costs, increase transparency and improve impartiality and consistency, would well to be considered as a longer-term solution to the investor-state dispute problem.

*ADDRESSING THE ISSUES IN INVESTOR-STATE ARBITRATION: IS IT  
TIME FOR A NEW DIRECTION?*

## LEGAL STRATEGIES FOR COMBATING ONLINE TERRORIST PROPAGANDA

T. NOBLE FOSTER\*  
DAVID W. ARNESEN\*\*

*“World War III is a guerrilla information war with  
no division  
between military and civilian participation.”<sup>1</sup>*

Although the term “Fake News” became a recurring headline during the 2016 U.S. presidential campaign, the underlying concept has been around for a very long time.<sup>2</sup> Pope Francis has observed that the serpent in the Garden of Eden<sup>3</sup> was the first to spread fake news; and he noted that the current producers of fake news are modern day followers who are practicing the divisive work of the devil.

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<sup>1</sup> MARSHALL MCLUHAN, *CULTURE IS OUR BUSINESS* 66 (Wipf & Stock 2014) (1970).

<sup>2</sup> Joanna M. Burkhardt, *Combating Fake News in the Digital Age*, *LIBR. TECH. REPS.* 5–6 (2017), <https://www.journals.ala.org/index.php/ltr/issue/viewFile/662/423>.

<sup>3</sup> *Genesis* 3:1 (King James).

The Pope has described fake news as “disinformation online or in the traditional media.”<sup>4</sup> Under this broad definition, fake news can take the form of any attempt to use false information in order to deceive. The motives behind such deception may be varied, but the common element is always found in the intent to spread falsehoods.

As many have observed, a fundamental trait of fake news is the speed with which it travels. Jonathan Swift noted in 1710 that, “False-hood flies, and truth comes limping after it, so that when men come to be undeceived, it is too late; the jest is over, and the tale hath had its effect.”<sup>5</sup> This observation is as true now as it was then. Computer networks are the supply chain of many forms of fakery, and when fake news is distributed via online social media, it spreads very quickly indeed. One recent study of Twitter messages revealed that falsehoods were 70 percent more likely to be retweeted than true stories, especially when false political stories were involved.<sup>6</sup>

This article focuses on a specific subset of “fake news” – online terrorist propaganda. Terrorist

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<sup>4</sup> Francis X. Rocca, *Pope Says Fake News Is Devil’s Work*, WALL STREET J. (Jan. 24, 2018, 7:36 a.m. ET), <https://www.wsj.com/articles/pope-says-fake-news-is-devils-work-1516797410>.

<sup>5</sup> Jonathan Swift, *On Political Lying*, LONDON EXAMINER (Nov. 9, 1710), reprinted in LITERARY CAVALCADE Jan. 2003 at 6.

<sup>6</sup> Sinan Aral, *How Lies Spread Online*, N.Y. TIMES (March 8, 2018), <https://www.nytimes.com/2018/03/08/opinion/sunday/truth-lies-spread-online.html>.

propaganda is a type of fake news because it uses deception and false promises to advance an extremist world-view and promote violence in support of its quest to impose authoritarian rule over vast territories and populations.<sup>7</sup> Terrorist groups use social media for many purposes such as recruiting new members,<sup>8</sup> conducting fundraising campaigns, glorifying “martyrs” who are killed while conducting violent attacks on civilians, and posting graphic images of their atrocities to create the impression that they have global reach and invincible power.<sup>9</sup> Terrorist groups also use social media to train their members and would-be members in the use of weapons and tactics, and to urge them to conduct violent attacks against unsuspecting civilians. Well-known terrorist organizations such as ISIS, Hezbollah, and Hamas are prolific and proficient users of social media.<sup>10</sup> All of these groups have

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<sup>7</sup> Jethro Mullen, *What is ISIS' appeal for young people?*, CNN, (Feb. 25, 2015, 2:33 PM ET), <https://www.cnn.com/2015/02/25/middleeast/isis-kids-propaganda/index.html>.

<sup>8</sup> J.M. Berger, *Tailored Online Interventions: The Islamic State's Recruitment Strategy*, CTCSENTINEL, Oct. 2015, at 19, <https://ctc.usma.edu/app/uploads/2015/10/CTCSentinel-Vol8Iss1036.pdf>.

<sup>9</sup> Complaint at 5–6, *Fields v. Twitter*, No. 4:16-cv-00213 (N.D. Cal. Jan. 13, 2016).

<sup>10</sup> COUNTER EXTREMISM PROJECT, CEP GUIDE TO ONLINE PROPAGANDISTS 1, [https://www.counterextremism.com/sites/default/themes/brick-theme/pdfs/CEP\\_Guide\\_to\\_Online\\_Propagandists\\_091818.pdf](https://www.counterextremism.com/sites/default/themes/brick-theme/pdfs/CEP_Guide_to_Online_Propagandists_091818.pdf) (last visited October 5, 2018).

been designated Foreign Terrorist Organizations (FTOs) by the U.S. State Department.<sup>11</sup>

A troubling part of this picture is the fact that paid advertising appears alongside terrorist content on computer users' screens. Terrorist groups are able to utilize social media platforms (SMPs) such as Facebook, Twitter, and YouTube/Google to disseminate their hateful content at no cost.

Advertising drives social media platforms and the purchasers of ads provide a lucrative source of revenue to SMPs. It is the income from advertising that allows SMPs to offer the use of their services "free of charge" to millions of users. And the advertisers are happy to pay for the ads because they know they are effective at producing leads and sales. For example, just one major company, Proctor & Gamble, spends approximately \$2.3 billion on online ads each year.<sup>12</sup>

Ads are the lifeblood of the internet, the source of funding for just about everything you read, watch and hear online. The digital ad business is in many

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<sup>11</sup> U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM AND COUNTERING VIOLENT EXTREMISM, FOREIGN TERRORIST ORGANIZATIONS, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited July 21, 2018).

<sup>12</sup> Barrett J. Brunsman, *P&G to YouTube: Don't Pair Our Ads With Terrorist Propaganda – Or Cat Videos*, CINCINNATI BUS. COURIER, (Sept. 25, 2017, 5:55 AM EDT, Updated Sep. 26, 2017, 7:09 AM), <https://www.bizjournals.com/cincinnati/news/2017/09/25/p-g-to-youtube-don-t-pair-our-ads-with-terrorist.html>.

ways a miracle machine — it corrals and transforms latent attention into real money that pays for many truly useful inventions, from search to instant translation to video hosting to global mapping.

But the online ad machine is also a vast, opaque and dizzyingly complex contraption with underappreciated capacity for misuse — one that collects and constantly profiles data about our behavior, creates incentives to monetize our most private desires and frequently unleashes loopholes that the shadiest of people are only too happy to exploit.<sup>13</sup>

Not only does the online advertising pay for the free services of the SMPs, there is a perverse set of incentives at work in the online ad marketplace: false stories are more popular than true ones. Ads that appear on web pages displaying falsehoods attract more viewers, and are therefore more lucrative for the SMPs:

The social media advertising market creates incentives for the spread of false stories because their wider diffusion

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<sup>13</sup> Farhad Manjoo, *Villain of Online Disrepute? The Ad Business*, SEATTLE TIMES, (Feb. 4, 2018 at 5:00 pm, Updated Feb. 5, 2018 at 9:31 AM), <https://www.seattletimes.com/business/villain-of-online-disrepute-the-ad-business/>.

makes them profitable. If platforms were to demote accounts or posts that disseminated false stories, using algorithms to weed out falsehoods, the financial incentives would presumably be reduced.<sup>14</sup>

To make matters worse, the digital ad revenues do not enrich only the SMPs. Those revenues are shared with the content provider, even when the content is posted by a self-declared media branch of a terrorist organization. These media production teams do not attempt to conceal their affiliation with ISIS and other terrorist organizations. On the contrary, they proclaim their allegiance and affiliation in an attempt to bolster their terrorist *bona fides*.<sup>15</sup> Beginning in

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<sup>14</sup> Aral, *supra* note 6.

<sup>15</sup> Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 15 (2017) (citing *Radicalization: Social Media and the Rise of Terrorism: Hearing Before the Subcomm. on National Security of the H. Comm. on Oversight and Gov't Reform*, 114th Cong. 1 (2015) (statement of Rep. Ron DeSantis, Chairman, Subcomm. on Nat'l Sec.)) ("In late 2015, a Congressman opened a hearing titled "Radicalization: Social Media and the Rise of Terrorism" by stating: [T]here are 90,000 pro-ISIS tweets on a daily basis. While others suggest that there may be as many as 200,000 such tweets. Accounts belonging to other foreign terrorist organizations, such as Jabhat al-Nusra, Al Qaeda's branch in Syria, have a total of over 200,000 followers and are thriving. Official Twitter accounts belonging to Jabhat al-Nusra operate much like those belonging to ISIS, tweeting similar extremist content. ISIS' use of platforms like Twitter is highly effective. YouTube videos depicting violent acts against Westerners are used to incite others to take up arms

2006, ISIS established a total of four media production centers. The first, Al-Furqan, is “an official media wing responsible for producing ISIS’s multimedia propaganda, [it] maintained a dedicated Twitter page where it posted messages from ISIS leadership as well as videos and images of beheadings and other brutal forms of executions to 19,000 followers.”<sup>16</sup> Three other media outlets were launched in 2013 and 2014.<sup>17</sup> The “Al-Hayat Media Center, ISIS’s official public relations group, maintained at least a half dozen accounts, emphasizing the recruitment of Westerners. As of June 2014, Al-Hayat had nearly 20,000 followers.”<sup>18</sup> “Another Twitter account, @ISIS\_Media\_Hub, had 8,954 followers as of September 2014.”<sup>19</sup> The concerted online effort mounted by ISIS is substantial and far-reaching. “As of December 2014, ISIS had an estimated 70,000 Twitter accounts, at least 79 of which were “official,” and it posted at least 90 tweets every minute.”<sup>20</sup>

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and wage jihad.”)

<sup>16</sup> Complaint at 3, *Crosby v. Twitter*, 303 F. Supp. 3d 564 (E.D. Mich. 2018) (No. 16-14406).

<sup>17</sup> Complaint at 13-7, *Cain v. Twitter*, No. 1:17-cv-00122, 2017 U.S. Dist. LEXIS 62724 (S.D.N.Y. April 25, 2017).

<sup>18</sup> Complaint at 4, *Crosby v. Twitter*, 303 F.Supp.3d 564 (E.D. Mich. 2018) (No. 16-14406). The number of followers at the Al-Hayat Media Center website has declined, with a total of 3,535 followers listed as of January 2019.

<https://jihadology.net/2019/01/03/new-video-message-from-the-islamic-state-harvest-of-the-soldiers-23/> (last visited February 7, 2019).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

YouTube reportedly pays video content providers at a rate of about \$4 for every 1,000 views. While this is a seemingly small amount, it can grow quickly. For example, a YouTube channel that posts extremist content, although banned in the UK, nevertheless has 207,000 followers and its videos have been viewed 31 million times.<sup>21</sup>

From the foregoing description, it is apparent that social media platforms provide a means for terrorists to connect with large audiences at no charge. In addition, plaintiffs allege the advertising revenues generated by posting terrorist content is shared with the terrorist-affiliated media production teams when followers view their hate-filled messages.<sup>22</sup> Some of the consumers of these

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<sup>21</sup> Rupert Neate, *Extremists Made £250,000 From Ads for UK Brands on Google, Say experts*, THE GUARDIAN, (Mar. 17, 2017, 1:30 EDT),

<https://www.theguardian.com/technology/2017/mar/17/extremists-ads-uk-brands-google-wagdi-ghoneim>.

<sup>22</sup> *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1155 (N.C. Cal. 2017) "Plaintiffs further allege that Google derives revenue from ads on YouTube. According to Plaintiffs, Google targets ads to the viewer "based upon algorithms that analyze and use data about the ads, the user, and the video posted. Google "agrees to share a percentage of the revenue it generates from ads placed before YouTube videos with the user who posts the video." Plaintiffs allege upon information and belief that "Google has reviewed and approved ISIS videos, including videos posted by ISIS-affiliated users, for 'monetization' through" its placement of ads with these videos. By approving such videos, "Google has agreed to share with ISIS and ISIS-affiliated users a percentage of revenues generated by these ads." The SAC includes a screen shot of an example of Google-placed targeted ads alongside what Plaintiffs describe as "an ISIS video" on YouTube.

messages become inspired to carry out terrorist attacks, and actually proceed to conduct such attacks, just as the videos urge them to do.

Providing “material support” to terrorists is a criminal and civil violation under the federal Anti-Terrorism Act (ATA).<sup>23</sup> While it is true that “to date no social media platform has faced criminal prosecution in the United States for hosting third-party terrorism-related content on their platforms or for allowing particular groups to maintain accounts,”<sup>24</sup> there have been several *civil* cases filed in federal court. This article examines these cases, analyzes the outcomes, and proposes revisions to the statutory framework that could remove obstacles for victims of terrorist attacks and their families in their pursuit of legal remedies.

There are some common elements among several civil cases<sup>25</sup> that have been filed against social media platform companies in federal courts. The plaintiffs are families of deceased victims of terrorist attacks. The defendants are the well-known social media platforms (SMPs) Facebook, Twitter, YouTube, and Google (in its capacity as the owner of YouTube). The claims are based on the theory that, by allowing terrorist groups to disseminate their

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<sup>23</sup> Anti-Terrorism Act, 18 U.S.C. § 2339A (2009).

<sup>24</sup> VanLandingham, *supra* note 15, at 6.

<sup>25</sup> Force v. Facebook, 304 F. Supp. 3d 315 (E.D.N.Y. 2018); Cohen v. Facebook, 252 F. Supp. 3d 140 (E.D.N.Y. 2017); Gonzalez v. Google, 282 F. Supp. 3d 1150 (N.D. Cal. 2017); Cain v. Twitter, No. 1:17-cv-00122-PAC, 2017 U.S. Dist. LEXIS 62724 (S.D.N.Y. April 25, 2017); Fields v. Twitter, 217 F. Supp. 3d 1116, 2016 U.S. Dist. LEXIS 161233 (N.D. Cal. Nov. 18, 2016).

propaganda via social media, the platforms are violating federal law by providing material support for terrorist organizations. The ATA provides for a private right of action.<sup>26</sup> Further, the plaintiffs assert that the social media platforms have continued to allow terrorist groups to use their platforms even after they had knowledge that the content was posted by government-designated terrorist organizations and/or affiliated individuals.<sup>27</sup> The U.S. Department of State Bureau of Counterterrorism designated ISIS as a Foreign Terrorist Organization in 2004.<sup>28</sup> In the years that followed, Twitter executives repeatedly dismissed calls for it to block the ongoing posting of terrorist material on its platform. By responding publicly to news accounts, congressional committee testimony, and televised media reports criticizing the company for allowing ISIS to use Twitter for spreading propaganda, arguably Twitter had knowledge that it was allowing repeated posting of terrorist content on its platform.<sup>29</sup>

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<sup>26</sup> Anti-Terrorism Act, 18 U.S.C. § 2339A (2009).

<sup>27</sup> Complaint at 72–80, *Cain v. Twitter*, No. 1:17-cv-00122, 2017 U.S. Dist. LEXIS 62724 (S.D.N.Y. April 25, 2017).

<sup>28</sup> Foreign Terrorist Organizations (FTOs) are foreign organizations that are designated by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act (INA), as amended. U.S. DEPARTMENT OF STATE, Foreign Terrorist Organizations, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Oct. 20, 2018).

<sup>29</sup> Complaint at 72–80, *Cain v. Twitter*, No. 1:17-cv-00122, 2017 U.S. Dist. LEXIS 62724 (S.D.N.Y. April 25, 2017) (citing CNN Transcripts, *Erin Burnett Outfront: ISIS Urges English Speakers to Join Cause*, CNN (June 20, 2014), <http://transcripts.cnn.com/TRANSCRIPTS/1406/20/ebo.01.ht>

Part I of this article explains the operations of social media platforms and the role of digital advertising and of bots. Part II provides an overview of the online efforts of terrorist groups to spread their deadly messages, incite violence, and glorify their causes. Part III provides a summary of selected cases and court decisions. Part IV sets forth proposals for combating online support for terrorism.

## I. SOCIAL MEDIA PLATFORMS AND DIGITAL ADVERTISING

### A. *The Role of Social Media*

It is difficult to overstate the multidimensional impact on our world that has been brought on by the rise in the use of social media. One major shift has particular significance in the context of this examination of online deception. A majority of the population in the U.S. now looks to social media as their primary source of news,<sup>30</sup> leaving

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ml; Tom Risen, *Twitter, Facebook, YouTube Grapple with Islamic State Censorship*, U.S. NEWS & WORLD REP. (Sept. 5, 2014),

<http://www.usnews.com/news/articles/2014/09/05/twitter-facebook-youtube-navigate-islamic-state-censorship>; Alex Altman, *Why Terrorists Love Twitter*, TIME (Sept. 11, 2014), <http://time.com/3319278/isis-isis-twitter/>; *Tweets Still Must Flow*, TWITTER (Jan. 26, 2012),

<https://blog.twitter.com/2012/tweets-still-must-flow>; Biz Stone & Alex Macgillivray, *The Tweets Must Flow*, TWITTER (Jan. 28, 2011), <https://blog.twitter.com/2011/the-tweets-must-flow>.

<sup>30</sup> Craig McClain, *Practices and Promises of Facebook for Science Outreach: Becoming a “Nerd of Trust,”* PLOS

traditional print and broadcast news organizations behind.

One of the effects of consuming news via social media is the tendency for the newsfeed to be increasingly tailored by the SMPs in such a way as to deliver only those stories that fit the perceived preferences of the user. Over time, this iterative process creates a so-called “filter bubble,”<sup>31</sup> or “echo chamber”<sup>32</sup> which effectively insulates one’s

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BIOLOGY, June 2017, at 1-9 (64%). Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/> (62% of U.S. adults gets news on social media).

<sup>31</sup> Eli Pariser, *Beware Online “Filter Bubbles,”* TED.COM (March 2011), [https://www.ted.com/talks/eli\\_pariser\\_beware\\_online\\_filter\\_bubbles](https://www.ted.com/talks/eli_pariser_beware_online_filter_bubbles).

<sup>32</sup> Jasper Jackson, *Eli Pariser: Activist Whose Filter Bubble Warnings Presaged Trump and Brexit*, THE GUARDIAN (Jan. 8, 2017 8:00 am EST), <https://www.theguardian.com/media/2017/jan/08/eli-pariser-activist-whose-filter-bubble-warnings-presaged-trump-and-brexit> (“Fake news has exposed a deeper problem – what Pariser calls a “crisis of authority. . . . For better and for worse, authority and the ability to publish or broadcast went hand in hand. Now we are moving into this world where in a way every Facebook link looks like every other Facebook link and every Twitter link looks like every other Twitter link and the new platforms have not figured out what their theory of authority is. . . . As a result we live in this information environment that is both on the one hand more filter-bubbly, but also the bounds of what is considered acceptable to talk about, acceptable to think, and the norms, seem to be shifting. It is changing the bounds of what the conversation can be in a way that I think is pretty corrosive.”).

newsfeed from any alternative opinions, arguments, or points of view.

This tailoring is made possible by the data collection capabilities of the SMPs themselves. Each login, mouse movement, click, and search term entered is automatically recorded, later to be sorted and saved. Aggregated data is then packaged into demographic categories and offered for sale to online advertisers for targeted ad campaigns. Advertisers pay more for the most detailed of the curated lists.<sup>33</sup>

### *B. The Role of Bots*

Bots (short for robots) are automated computer programs that can, among other things, simulate the online actions of real people, such as browsing, hovering, and clicking.<sup>34</sup> Over half of the online activity at any given time is generated by bots.<sup>35</sup> When bots are deployed on social media platforms, they can be programmed to use algorithms that post or tweet (or re-post and re-tweet) malicious messages while masquerading as real human users.<sup>36</sup>

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<sup>33</sup> Maciej Zawadziński, *The Truth About Online Privacy: How Your Data is Collected, Shared, and Sold*, CLEARCODE, <https://clearcode.cc/blog/online-privacy-user-data/> (last visited October 5, 2018).

<sup>34</sup> @ATLANTIC COUNCIL'S DIGITAL FORENSIC RESEARCH LAB, *#BotSpot: Twelve Ways to Spot a Bot* (Aug. 28, 2017), <https://medium.com/dfrlab/botspot-twelve-ways-to-spot-a-bot-aedc7d9c110c>.

<sup>35</sup> Igal Zelfman, *Bot Traffic Report 2016*, IMPERVA INCAPSULA (Jan. 24, 2017), <https://www.incapsula.com/blog/bot-traffic-report-2016.html>.

<sup>36</sup> TIM CHAMBERS, *A PRIMER ON SOCIAL MEDIA BOTS AND THEIR MALICIOUS USE IN U.S. POLITICS* 6 (2017),

Bots are often connected into vast networks (botnets) comprised of hundreds of thousands of accounts. This coordination of computing power enables the rapid and broad spreading of online content.<sup>37</sup> For example, in an analysis of the spread of alternative news conspiracy theories via Twitter, bots were found to be behind the two most active domains studied by researchers.<sup>38</sup>

Bots do not necessarily only appear as simulations of real humans. They might also present themselves to online users in their actual form as an

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[https://www.ndn.org/sites/default/files/blog\\_files/NDN-BOTPAPER.pdf](https://www.ndn.org/sites/default/files/blog_files/NDN-BOTPAPER.pdf).

<sup>37</sup> *Id.*

<sup>38</sup> Kate Starbird, *Examining the Alternative Media Ecosystem through the Production of Alternative Narratives of Mass Shooting Events on Twitter*, in PROCEEDINGS OF THE ELEVENTH INTERNATIONAL AAAI CONFERENCE ON WEB AND SOCIAL MEDIA (Association for the Advancement of Artificial Intelligence 2017), <https://www.aaai.org/ocs/index.php/ICWSM/ICWSM17/paper/view/15603/14812> (“Interesting, the two most highly tweeted domains were both associated with significant automated account or “bot” activity. The Real Strategy, an alternative news site with a conspiracy theory orientation, is the most tweeted domain in our dataset (by far). The temporal signature of tweets citing this domain reveals a consistent pattern of coordinated bursts of activity at regular intervals generated by 200 accounts that appear to be connected to each other (via following relationships) and coordinated through an external tool. They were occasionally retweeted from outside their group, resulting in many weak connections to other alternative media domains. Though we consider this domain in our research, we removed its node from our network because its bot-driven activity distorts the graph.”).

automated interface. The former have been called “social bots” and the latter “machinic bots.”<sup>39</sup>

There is a sizeable market for buying and selling bots.<sup>40</sup> The purpose of buying bots is often based in a desire to deceive, in one form or another.

Entire shadow industries focus on spam and mass manipulation of social media via bots to achieve purely commercial goals, including click fraud, artificially driving views, and driving sales and marketing of online products and services. Twitter bots promise new followers, likes and shares – for a price – on this “dark net.”<sup>41</sup> When real human

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<sup>39</sup> Miles C. Coleman, *Bots, Social Capital, and the Need for Civility*, 3 J. OF MEDIA ETHICS 120, at 121 (2018) (providing deep insights into the creation and operation of various types of bots).

<sup>40</sup> Nicholas Confessore & Gabriel J.X. Dance, *Battling Fake Accounts, Twitter to Slash Millions of Followers*, N.Y. TIMES (July 11, 2018),

<https://www.nytimes.com/2018/07/11/technology/twitter-fake-followers.html> (“Many users have inflated their followers on Twitter or other services with automated or fake accounts, buying the appearance of social influence to bolster their political activism, business endeavors or entertainment careers.”).

<sup>41</sup> CHAMBERS, *supra* note 36, at 10 (“*Marketers, spammers and commercial botnets for hire*. Entire shadow industries focus on spam and mass manipulation of social media via bots to achieve purely commercial goals, including click fraud, artificially driving views, and driving sales and marketing of online products and services. Twitter bots promise new followers, likes and shares – for a price – on this “dark net.” These commercial botnets are organized by various shades of

users retweet content that was originally generated by a bot, the power of the bot's effort is multiplied. This is a common sequence of events and it accelerates the distribution process.

The information networks we've built are almost perfectly designed to exploit psychological vulnerabilities to rumor. 'Your brain tells you 'Hey, I got this from three different sources,' she says. 'But you don't realize it all traces back to the same place, and might have even reached you via bots posing as real people. If we think of this as a virus, I wouldn't know how to vaccinate for it.'<sup>42</sup>

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cybercriminals. And it is worth noting that in 2011 Russia was one of the larger centers of cybercrime, accounting for 36% of all cybercrime profits that year. Some of these commercial botnets make use of inflammatory political content on thousands of social accounts – not to sway public opinion, but to attract eyeballs for profit. Once the content lures viewers, the bots point users to their own websites, where each click pays off in ad revenue, malware downloads or other scams. Of course, it's not hard to imagine that these negative user experiences might dampen future political participation via social networks.”).

<sup>42</sup> Danny Westneat, *UW Professor: The Information War is Real, and We're Losing It*, SEATTLE TIMES (Mar. 29, 2017, 5:30 AM, Updated Oct. 31, 2017, 9:34 AM), <https://www.seattletimes.com/seattle-news/politics/uw-professor-the-information-war-is-real-and-were-losing-it/>.

One way that social media collects and uses data on consumer behavior is by counting clicks. Bots can be programmed to rank the relative popularity of content based on the number of clicks it receives, or the number of times content is shared. Higher-ranking content gets more prominent placement in a “trending” category, regardless of the truth or accuracy of the material.<sup>43</sup>

The role of bots was a special focus of the intensive media attention around the still-unfolding series of revelations about Russia’s cyber operations during the 2016 U.S. presidential election campaign.

Russia’s 2016 stealthy social media campaign was part of a broad cyber offensive that U.S. intelligence agencies say was aimed at helping Donald Trump win the White House. It originated at a so-called “troll farm” in St. Petersburg, where Russian operatives, a number of

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<sup>43</sup> Burkhardt, *supra* note 2, at 15 (“Counting clicks is a relatively easy way to assess how many people have visited a website. However, counting clicks has become one of the features of social media that determines how popular or important a topic is. Featuring and repeating those topics based solely on click counts is one reason that bots are able to manipulate what is perceived as popular or important. Bots can disseminate information to large numbers of people. Human interaction with any piece of information is usually very brief before a person passes that information along to others. The number of shares results in large numbers of clicks, which pushes the bot-supplied information into the “trending” category even if the information is untrue or inaccurate. Information that is trending is considered important.”).

whom now face U.S. criminal charges, allegedly placed Facebook and Twitter ads carrying fake or harshly critical news about Democratic presidential candidate Hillary Clinton or aimed at sowing divisions among voters on issues such as race, gun rights and immigration. The impact of some of those ads was amplified via automated messages, known as “bots,” that reached millions of Americans.<sup>44</sup>

### C. *The Role of Advertising*

Social media platforms provide their formidable array of services to the public for “free.” Advertisers who purchase space on digital webpages are the primary source of revenue for social media providers.<sup>45</sup>

Social media platforms do not need to charge each user a subscription in order to cover their costs, presumably because they are so lucrative already that it is not worth the effort to collect fees from users.

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<sup>44</sup> Greg Gordon, *Fake Social Media Posts Exploding Globally, Oxford Study Finds*, MCCLATCHY WASH. BUREAU (July 20, 2018, 6:00 AM, Updated July 19, 2018, 5:34 PM), <https://www.mcclatchydc.com/news/nation-world/national-security/article215188910.html>.

<sup>45</sup> Patrick Armitage, *Can An Ad-Free, Subscription-Based Social Network Exist?*, MARKETING LAND (Sept. 20, 2016, 1:21 PM), <https://marketingland.com/can-ad-free-subscription-based-social-network-exist-189614> (“Consider that 88 percent of Twitter’s revenue and 96 percent of Facebook’s revenue comes from advertising.”).

Besides, the decision was made long ago, at the inception of the online industry, that the technology would be made available to users free of charge, and advertising would pay for it.<sup>46</sup> The amount of digital ad spending is staggering. Spending for online ads in 2017 reached \$88 billion, surpassing the spending on television ads (\$70 billion) for the first time.<sup>47</sup>

The largest social media platforms are hugely profitable. Until recently, Facebook founder Mark Zuckerberg was ranked as the third richest person on the planet in 2018, after Jeff Bezos and Bill Gates.<sup>48</sup>

What are the big social media platforms, actually? We believe them to be mere neutral platforms for social interaction — an identity they cling to with all their outsize might. But they are not. They

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<sup>46</sup> Manjoo, *supra* note 13.

<sup>47</sup> Anthony Ha, *IAB Says Online Advertising Grew To \$88B Last Year – More Spending Than TV*, TECHCRUNCH, <https://techcrunch.com/2018/05/10/iab-2017-report/> (last visited Oct. 11, 2018)

(“Online advertising reached \$88 billion last year, a 21 percent increase from 2016 and a new high, according to the latest IAB Internet Advertising Revenue Report.”).

<sup>48</sup> Jesse Byrnes, *Zuckerberg Jumps Ahead of Buffett to Become Third-Richest Person Alive*, THE HILL (July 7, 2018 10:47 AM EDT), <http://thehill.com/homenews/news/395931-zuckerberg-jumps-ahead-of-buffett-to-become-third-richest-person-alive>. (“Facebook co-founder Mark Zuckerberg has surpassed Warren Buffett to become the third-richest person in the world, according to an index of billionaires updated Friday. Zuckerberg, with \$81.6 billion, jumped ahead of Buffett, \$81.2 billion, on Friday as Facebook shares rose by 2.4 percent, according to the Bloomberg Billionaires Index.”).

are businesses designed to make money, and the way they make money is by targeting advertisements to us and keeping us on their platforms for as long as possible by feeding us with content their algorithms calculate we will like.<sup>49</sup>

Advertisers pay more for online sites that provide wide exposure. The more visitors to the site, the more the potential impact for the ads that appear there. Websites that feature sensational content tend to attract more visitors, and that fact of human nature creates an incentive for advertisers to support those sites with their ad buys:

Some advertisers will capitalize on this human propensity for sensation by paying writers of popular content without regard for the actual content at the site. The website can report anything it likes, as long as it attracts a large number of people. This is how fake news is monetized, providing incentives for writers to concentrate on the sensational rather than the truthful. The problem with most sensational information is that it is not always based on fact, or those facts are twisted in some way to make the story seem like

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<sup>49</sup> David Patrikarakos, *Social Media Networks Are the Handmaiden to Dangerous Propaganda*, TIME (NOV. 2, 2017), <http://time.com/5008076/nyc-terror-attack-isis-facebook-russia/>.

something it is not. It is sometimes based on no information at all.<sup>50</sup>

Platforms such as Google, YouTube, and Facebook also collect information about those who visit their websites by cataloging the content that users post, and by tracking the online behavior of users. These data are collected and sorted over time, then organized into categories based on users' browsing interests, age, location, or other demographic designation. This is exactly the kind of market segmentation that advertisers seek in order to target ads at receptive audiences.<sup>51</sup>

Twenty-first-century economic incentives have increased the motivation to supply the public with fake news. The internet is now funded by advertisers rather than by the government. Advertisers are in business to get information about their products to as many people as possible. Advertisers will pay a website owner to allow their advertising to be shown, just as they might pay a newspaper publisher to print advertisements in the paper. How do

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<sup>50</sup> Burkhardt, *supra* note 2, at 8.

<sup>51</sup> DIPAYAN GOSH & BEN SCOTT, #DIGITALDECEIT: THE TECHNOLOGIES BEHIND PRECISION PROPAGANDA ON THE INTERNET 15 (New America, Jan. 2018), <https://www.newamerica.org/public-interest-technology/policy-papers/digitaldeceit/> (Creative Commons Attribution 4.0 International License, <https://creativecommons.org/licenses/by/4.0/legalcode>).

advertisers decide in which websites to place their ads? Using computing power to collect the data, it is possible to count the number of visits and visitors to individual sites. Popular websites attract large numbers of people who visit those sites, making them attractive to advertisers. The more people who are exposed to the products advertisers want to sell, the more sales are possible. The fee paid to the website owners by the advertisers rewards website owners for publishing popular information and provides an incentive to create more content that will attract more people to the site.<sup>52</sup>

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<sup>52</sup> Burkhardt, *supra* note 2, at 7–8. (“People are attracted to gossip, rumor, scandal, innuendo, and the unlikely. *Access Hollywood* on TV and the *National Enquirer* at the newsstand have used human nature to make their products popular. That popularity attracts advertisers. In a *Los Angeles Times* op-ed, Matthew A. Baum and David Lazer report ‘Another thing we know is that shocking claims stick in your memory. A long-standing body of research shows that people are more likely to attend to and later recall a sensational or negative headline, even if a fact checker flags it as suspect. In the past several years, people have created websites that capitalize on those nonintellectual aspects of human nature. Advertisers are interested in how many people will potentially be exposed to their products, rather than the truth or falsity of the content of the page on which the advertising appears. Unfortunately, sites with sensational headlines or suggestive content tend to be very popular, generating large numbers of visits to those sites and creating an advertising opportunity. Some advertisers will capitalize on this human propensity for sensation by paying writers of popular content without regard for the actual content

The structure of the digital ad market is such that more always equates with better. The goal is always to get users online and keep them there. Unfortunately, that online “time” occurs even when the content that draws users to a site is hate speech and terrorist propaganda . . . resulting in still more ad revenue.<sup>53</sup>

The SMPs place ads on web pages through a process of digital bidding for space on a website’s “real estate.” It is an automated process with little or no human input and it operates at a very high speed. Advertisers pay the SMPs based on a “cost per click” or a “cost per engagement” formula. Tracking pixels<sup>54</sup> allow advertisers to see who viewed the ad, how long they paused over it, and how many clicks were generated. This so-called “programmatic

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at the site. The website can report anything it likes, as long as it attracts a large number of people. This is how fake news is monetized, providing incentives for writers to concentrate on the sensational rather than the truthful.’ Citations omitted).

<sup>53</sup> Patrikarakos, *supra* note 49 (“This is a business model that does not naturally turn away advertisers and, more relevantly to the case of ISIS, close down large swaths of user accounts, not to mention police them. The more people that use a platform designed to connect as many as users as possible — even if they spread propaganda or hate speech — the more successful it is. Tech companies also have a libertarian free speech model that decries censorship and, rightly, believes in freedom of speech. They have slowly hedged this idealism and in recent years have taken down of thousands of Twitter and Facebook jihadist accounts.”).

<sup>54</sup> See, e.g., The Facebook Pixel, FACEBOOK.COM, <https://www.facebook.com/business/help/651294705016616> (last visited Aug. 7, 2018).

advertising” sometimes results in situations in which ads appear alongside terrorist content with which no reputable company would knowingly want to associate. Although this practice has apparently been going on for some time, only recently have advertisers become aware of it, and started to raise concerns.

Many of the companies said that they were unaware of and “deeply concerned” by their presence on the sites. They blamed programmatic advertising, a system using complex computer technology to buy digital adverts in the milliseconds that a webpage takes to load. Many agencies have their own programmatic divisions, which often apply mark-ups to digital commercials without the brands’ knowledge.<sup>55</sup>

For example, Proctor & Gamble, which reportedly spends over \$2 billion per year on digital advertising, discovered that it was paying for ads that were never viewed by humans, but by bots instead. Even worse was the fact that their ads were paired with terrorist videos. The company reacted by cutting \$100 million in ad spending “because we

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<sup>55</sup> Alexi Mostrous, *Head of Investigations, Big Brands Fund Terror Through Online Adverts*, THE TIMES (Feb. 9, 2017, 12:01am), <https://www.thetimes.co.uk/article/big-brands-fund-terror-knnxfgb98>.

couldn't be assured that our ads would not appear next to bad content like a terrorist video."<sup>56</sup>

A Hyundai ad that appeared following the 2017 Super Bowl later showed up on YouTube next to a Hezbollah video, along with "[a]ds from AB-InBev's Budweiser and Bud Light, T-Mobile and, at least according to screenshots provided by third-party monitoring firm Gipec, Airbnb and Procter & Gamble Co."<sup>57</sup> Clearly, none of these companies would want

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<sup>56</sup> Brunzman, *supra* note 12.

<sup>57</sup> Jack Neff, *Super Bowl Ads Show Up with Youtube Videos Promoting Terror Groups, Sparking Backlash*, AD AGE (February 12, 2017), <http://adage.com/article/digital/super-bowl-ads-show-youtube-videos-promoting-terror/307956/> ("On Thursday, in response to a separate story by the Times of London about similar YouTube placements as well as programmatic ad buys on what appear to be sites promoting jihad or Nazism, the World Federation of Advertisers cited such placements as part of larger problems in the digital supply chain. The WFA specifically called out programmatic ad placement, which its research shows now makes up 16% of large multinational global advertisers' budgets, up from 10% two years ago. The Association of National Advertisers is also concerned. Preventing ad placements on objectionable content are part of the mission of the ANA-backed Trustworthy Accountability Group. Google was one of the initial recipients of TAG's 'Certified Against Fraud' seal in December. 'Certain types of content, such as terrorist activity and IP infringement and pornography, they're all prohibited from having ads served against them' by TAG standards, said ANA CEO Bob Liodice in an interview. Reports of ads placed alongside content supporting terrorist organizations are among examples, he said, of why 'marketers have to take their industry back.' But he said, 'We need to recognize that we're still not winning enough,' adding that 'we need to keep advocating, pushing and investing behind protocols that will allow us to do that.' Gipec CEO Eric Feinberg said in an email

to intentionally associate with a terrorist organization.

The World Federation of Advertisers and the Association of National Advertisers have expressed great concern, and have called upon the SMPs to take responsibility for their actions:

“Both we and our members are increasingly concerned about the lack of transparency in this ecosystem,” said WFA CEO Stephan Loerke in a statement. “This takes many forms; including brand misplacement (as highlighted in recent media reports) but also the endemic levels of ad fraud.”

While brand owners may be taking steps to protect themselves, Mr. Loerke said, “*it is ultimately incumbent on the platforms ... to do more to restrict this sort of inappropriate content from appearing in the first place.*”

The Association of National Advertisers is also concerned. Preventing ad placements on objectionable content are part of the mission of the ANA-backed Trustworthy Accountability Group. Google was one of the initial recipients of TAG ‘Certified Against Fraud’ seal in December.

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that ad placements on YouTube, such as the Super Bowl ads, may help fund terrorist groups such as ISIS, a contention also made in the Times of London piece and a separate story Thursday from Fox News.”).

‘Certain types of content, such as terrorist activity and IP infringement and pornography, they’re all prohibited from having ads served against them’ by TAG standards, said ANA CEO Bob Liodice in an interview.<sup>58</sup>

Advertising revenues are split between the SMP and the content provider, including media production groups affiliated with ISIS. The content providers receive a share of ad revenues from ads placed “against” YouTube pages even when those videos glorify terrorist organizations, showcase gruesome executions, and spread hate messages.<sup>59</sup>

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<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> Neate, *supra* note 21 (“Extremists and hate preachers are estimated by marketing experts to have made at least \$318,000 (£250,000) from adverts for household brands and government departments placed alongside their YouTube videos. Google, which owns YouTube, is estimated by internet analysts to have taken a cut of \$149,000 from advertisers for its role placing the ads against the content, even though brands did not want their names associated with the hate speech. Wagdi Ghoneim, an Egyptian-Qatari Salafi Muslim preacher who has been banned from entering the UK due to concerns he is seeking to ‘provoke others to commit terrorist acts’, is estimated to have made \$78,000 from adverts placed in anti-western propaganda videos. Adverts placed against Ghoneim’s videos include campaigns by the BBC, Boots and Channel 4. Ghoneim’s YouTube channel, Wagdy0000, is the most popular of the online extremists found by the Times to be benefiting from Google’s programmatic advertising system, which uses algorithms to place brand adverts against any videos. Ghoneim, who has been banned from entering the UK since 2009 because the government is concerned he is ‘seeking to foment, justify or glory terrorist violence’, has

In a case discussed in more detail below, plaintiffs alleged that the SMPs are much more than a mere online version of a bulletin board. Instead, they are described as a complex process that is far from being a passive platform for messages:

The SAC also contains allegations about the operation of the YouTube platform. Registered users may establish a YouTube ‘channel,’ post videos on the platform, and post comments on the pages of YouTube channels and videos. When a YouTube user posts a video, ‘Google’s computer servers receive the information and distribute it to the YouTube user’s network of YouTube channel ‘subscribers.’ Google employs algorithms to help users locate other videos and accounts with similarities, ‘introducing users to other users and videos that they will be interested in based on the video and account information and characteristics.’ ‘[I]n this way, users are able to locate other videos and accounts related to ISIS even if they do not know the correct identifier

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207,000 subscribers to his YouTube channel. His videos have been watched a total of 31m times. YouTube video creators such as Ghoneim collect approximately \$4.18 for every 1,000 times a video is viewed. Ghoniem’s channel is estimated, via a calculator provided by Influencer MarketingHub, to have made a total of \$78,683.”).

or if the original YouTube account has been replaced by a new identifier.’

Plaintiffs further allege that Google derives revenue from ads on YouTube. According to Plaintiffs, Google targets ads to the viewer ‘based upon algorithms that analyze and use data about the ads, the user, and the video posted.’ Google ‘agrees to share a percentage of the revenue it generates from ads placed before YouTube videos with the user who posts the video.’ Plaintiffs allege upon information and belief that “Google has reviewed and approved ISIS videos, including videos posted by ISIS-affiliated users, for ‘monetization’ through’ its placement of ads with these videos. By approving such videos, ‘Google has agreed to share with ISIS and ISIS-affiliated users a percentage of revenues generated by these ads.’ The SAC includes a screen shot of an example of Google-placed targeted ads alongside what Plaintiffs describe as ‘an ISIS video’ on YouTube.<sup>60</sup>

When Facebook CEO Mark Zuckerberg and other company officials testified in Congressional hearings in April 2018, some new information about the scope of digital advertising was revealed. They

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<sup>60</sup> *Gonzalez v. Google*, 282 F. Supp. 3d 1150, 1155 (N. Dist. Cal. 2017).

admitted that it was not possible for Facebook to be aware of how many advertisers were using their platform:

In recent Congressional hearings — dubbed the ‘Tech Hearings’ — the U.S. government interrogated Facebook, Twitter and Google about the extent to which ‘fake news’ influenced the nation’s 2016 presidential elections. On Facebook alone, Russian-influenced content reached 126 million Americans between June 2015 and August 2017; the operatives published about 80,000 posts. In the hearings, Facebook’s legal representative acknowledged that the company could not track all of its *advertisers* — let alone its *users*. But not enough is being done, if it even can be in this current model. Saipovs are still being produced — and with increasing regularity. *The social media networks have become a handmaiden of propaganda.*<sup>61</sup>

## II. THE SCOPE AND IMPACT OF TERRORIST PROPAGANDA

Advertising works. Online advertising works faster, cheaper, and more effectively. At least that is what advertisers must think, based on the annual “spend” on advertising. If it did not work, and work

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<sup>61</sup> Patrikarakos, *supra* note 49 (emphasis added).

well, why would anyone pay to produce it, and pay again to place it in front of potential consumers?

Terrorist propaganda works too. After committing horrific bombings, shootings, beheadings, and other forms of mayhem, the perpetrators often credit terrorist messages that they watched on Facebook, Twitter, or YouTube as the source of inspiration for their violent acts.<sup>62</sup> In case there is any doubt about the power of terrorist propaganda, consider the following:

The world was shocked when the Islamic State in Iraq and Syria (ISIS) used YouTube to reveal its brutal beheading of reporter James Foley in 2014; that year a noted terrorism expert found that “Al-Qaeda, its affiliates and other terrorist organizations have moved their online presence to YouTube, Twitter, Facebook, Instagram, and other social

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<sup>62</sup> COUNTER EXTREMISM PROJECT, *supra* note 10 (“There is no shortage of extremist actors and ideologues online. Qatar-based Muslim Brotherhood ideologue Yusuf al-Qaradawi is banned from entering the United States, United Kingdom, and France because of his declared support for suicide bombings and incitement of Islamist violence. Khuram Butt, one of the June 2017 London Bridge attackers, was reportedly influenced by American propagandist Ahmad Musa Jibril. Shoe bomber Richard Reid was partially radicalized by Jamaican radical Abdullah Faisal. Content featuring Qaradawi, Jibril, Faisal, and other propagandists is just as dangerous as content from Awlaki, and yet remains widely available on YouTube and other social media platforms. At a minimum, content from individuals with links to violent extremist actors should be removed from online platforms.”).

media outlets.” In early 2015, the Brookings Institution concluded that “[t]he Islamic State, known as ISIS or ISIL, has exploited social media, most notoriously Twitter, to send its propaganda and messaging out to the world and to draw in people vulnerable to radicalization.” *Because of social media platforms’ noted attributes such as reach and rapid diffusion rate, experts believe they provide terrorist organizations inexpensive and arguably effective ways to recruit, propagandize, and radicalize.*<sup>63</sup>

One specific example of ISIS’ use of Twitter to disseminate very targeted messaging to urge terrorist attacks far from the battlefields of Syria is found in the indictment against Sayfullo Saipov. On October 31, 2017, Saipov conducted a terrorist attack, by driving a truck through a pedestrian walkway in New York City, resulting in the deaths of eight and serious injury to twelve civilians.

In the complaint filed against Sayfullo, the allegations included a summary of the evidence found during the investigation after his arrest. While recovering from his wounds in the hospital, Sayfullo stated that he had been inspired to attack, using a truck, from ISIS videos he had watched on his cell phone. He planned the attack for about one year. FBI investigators who examined Sayfullo’s cell phone

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<sup>63</sup> VanLandingham, *supra* note 15, at 6 (emphasis added) (internal citations omitted).

found 90 videos of ISIS propaganda, including graphic recordings of killings by means of running over victims with a tank, shooting a victim in the face, and a beheading. There were also videos with instructions on making explosive devices, and 3,800 images of ISIS symbols and images of ISIS leaders.<sup>64</sup>

ISIS has recruited thousands of foreign fighters from across the globe to assist with its efforts to expand its so-called caliphate in Iraq, Syria, and other locations in Africa and the Middle East, and has leveraged technology to spread its violent extremist ideology and for incitement to commit terrorist acts.

ISIS members and associates make and disseminate recruiting materials and propaganda encouraging others to join ISIS and personally participate in acts of violence, including in suicide attacks, materials which are distributed over the Internet to increase and further the public perception of ISIS as a terrorist organization. These materials include propaganda designed to encourage ISIS followers to commit acts of violence using vehicles as weapons.<sup>65</sup>

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<sup>64</sup> Complaint at 8–9, *U.S. v. Saipov*, No. 1:17cr722 (S.D.N.Y. filed Nov. 1, 2017).

<sup>65</sup> Indictment at 5–6, *U.S. v. Saipov*, No. 1:17cr722 (S.D.N.Y. filed Nov. 21, 2017) (“ISIS members and associates make and disseminate recruiting materials and propaganda encouraging

In another case, the U.S. government was extremely concerned about the power of online terrorist lectures recorded by a single individual, Anwar Al-Awlaki. President Obama authorized orders to execute him by means of a drone strike in Yemen in 2011. The fact that this operation against Al-Awlaki, a U.S. citizen of Yemeni descent, was authorized, in part, on the basis of arguments presented in a 41 page legal memorandum prepared by an assistant attorney general indicates just how seriously the government assessed the threat of the ongoing Al-Alwaki lecture series to be.<sup>66</sup> Although the successful drone strike prevented any new Al-Alwaki recordings, nevertheless, as of August 30, 2017, an online search for his name produced over 70,000 results, including links to many of his earlier

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others who are unable to travel to the Middle East to instead conduct attacks in other countries. For example, on or about March 31, 2015, the user of Twitter account @AbuHu55ain, believed to be used at the time by an ISIS member located in Syria, tweeted: "Lone Wolfs Rise Up"; "If you can't make the hijrah [i.e. , travel to the Middle East] , dont sit at home & gie up . . . ignite a bomb, stab a kaffir [i.e. , the disbelievers or non-Muslims], or shoot a politican!"; "if you came here, you'd be on the frontline fighting, right ? But u couldn't come here, so why not fight the kuffar over there?" ; and " i always see in the media brothers getting caught making hijrah, brothers know that your jihad is not over just because you got stopped."").

<sup>66</sup> Memorandum for the Attorney General by David J. Barron, Acting Assistant Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations against Shaykh Anwar al-Aulaqui, U.S. Department of Justice Office of Legal Counsel (July 16, 2010) (on file with author).

recorded lectures.<sup>67</sup> By November of 2017, YouTube had reduced this number to 18,600, and access to most of his videos is now more restricted due to scanning conducted by human reviewers at YouTube.<sup>68</sup> And yet, his recorded speeches continue to this day to be accessible online for anyone who looks for them.<sup>69</sup>

Al-Awlaki has been implicated as the provider of inspiration for several high-profile terrorist attacks. For example, in the case of Mohammad Youssuf Abdulazeed, who attacked two military installations in Chattanooga, Tenn., killing four Marines and a sailor. “F.B.I. investigators who examined his computer discovered that he had been watching Awlaki videos in the weeks before the shootings.”<sup>70</sup> In addition, Cherif Kouachi, who carried out the Charlie Hebdo attacks; Omar Mateen, who killed forty-nine people at the Pulse nightclub in

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<sup>67</sup> *Anwar al-Awlaki Online, Case study: Anwar Awlaki on YouTube*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/anwar-al-awlaki-youtube> (last visited July 1, 2018).

<sup>68</sup> Scott Shane, *In ‘Watershed Moment,’ YouTube Blocks Extremist Cleric’s Message*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/us/politics/youtube-terrorism-anwar-al-awlaki.html>

<sup>69</sup> *Anwar Al-Awlaki’s Sermons, Lectures Still Accessible On Youtube*, HOMELAND SECURITY NEWS WIRE (Sept. 26, 2017), <http://www.homelandsecuritynewswire.com/dr20170926-anwar-alawlaki-s-sermons-lectures-still-accessible-on-youtube>.

<sup>70</sup> Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html>.

Orlando; Ohio State University car attacker Abdul Razak Ali Artan; and Boston Marathon bombers Dzhokhar and Tamerlan Tsarnaev; all credited the YouTube lectures of Anwar Al-Awlaki as a source of their inspiration.<sup>71</sup>

Al-Awlaki may be gone, but there are many others who have taken his place as online promoters of terror.<sup>72</sup> As of 2015, reports delivered in Congressional hearings told of 90,000 to 200,000 “pro-ISIS tweets” on a daily basis. Some members of Congress urged more direct action by social media platforms in taking down terrorist content while others suggested that social media companies were violating federal law against providing material support to terrorists.<sup>73</sup>

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<sup>71</sup> *Anwar Al-Awlaki’s Sermons, Lectures Still Accessible On Youtube*, *supra* note 69.

<sup>72</sup> COUNTER EXTREMISM PROJECT, *supra* note 10 (“There is no shortage of extremist actors and ideologues online. Qatar-based Muslim Brotherhood ideologue Yusuf al-Qaradawi is banned from entering the United States, United Kingdom, and France because of his declared support for suicide bombings and incitement of Islamist violence. Khuram Butt, one of the June 2017 London Bridge attackers, was reportedly influenced by American propagandist Ahmad Musa Jibril. Shoe bomber Richard Reid was partially radicalized by Jamaican radical Abdullah Faisal. Content featuring Qaradawi, Jibril, Faisal, and other propagandists is just as dangerous as content from Awlaki, and yet remains widely available on YouTube and other social media platforms. At a minimum, content from individuals with links to violent extremist actors should be removed from online platforms.”).

<sup>73</sup> VanLandingham, *supra* note 15, at 15.

### III. SELECTED CASES CLAIMING CIVIL LIABILITY

The Anti-Terrorism Act (ATA)<sup>74</sup> establishes criminal liability for providing “material support” to terrorists.<sup>75</sup> The statute defines the term “material support” broadly, as including “any property, tangible or intangible, or service . . . .”<sup>76</sup> Another section, § 2333(a), provides for *civil remedies* via a

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<sup>74</sup> 18 U.S.C. § 2339A(a) (2009).

<sup>75</sup> Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 514 (2017) (“*b. Material Support of an FTO*: It is a federal crime to provide ‘material support’ to an FTO. Although a person must know that the organization is a designated FTO, one need not intend to further terrorism through his or her support of the FTO. Indeed, a person may engage in material support even if she subjectively intends, and reasonably acts, to steer the group away from terrorism or to further humanitarian ends through her support. ‘Material support’ means ‘any property . . . or service,’ including ‘expert advice or assistance’ or ‘personnel.’ The only exceptions are for ‘medicine or religious materials.’ ‘Training’ is defined as ‘instruction or teaching designed to impart a specific skill, as opposed to general knowledge,’ and ‘expert advice or assistance’ is defined to mean ‘advice or assistance derived from scientific, technical or other specialized knowledge.’ To be prosecuted for providing personnel, one must have ‘knowingly provided, attempted to provide, or conspired to provide [an FTO] with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control.’ If one works ‘entirely independently of the [FTO] to advance its goals or objectives,’ that person ‘shall not be considered to be working under the foreign terrorist organization’s direction and control.’”).

<sup>76</sup> 18 U.S.C. § 2339A(b) (2009).

private right of action for victims of terrorist attacks.<sup>77</sup>

The Justice Against Sponsors of Terrorism Act<sup>78</sup> (JASTA) was unanimously passed by both houses of Congress and became law in 2016, overriding a veto by then President Obama. JASTA provides that U.S. courts have jurisdiction and U.S. citizens may sue foreign governments via civil claims for damages incurred in terrorist attacks sponsored by foreign governments. The law had the effect of advancing claims against Saudi Arabia arising out of the 9/11 attacks, although that purpose is not explicitly stated in the legislation. Viewed broadly, the passage of JASTA is an indication of the will of Congress, and of the people of the United States, to provide a means for victims of foreign terrorists to have their day in court.

In the ATA, the language of the Findings and Purpose of the Act, clearly articulates this intention:

SEC. 2. 18 USC §2333 FINDINGS  
AND PURPOSE.

(a) Findings.--Congress finds the following:

...

(6) Persons, entities, or countries that *knowingly or recklessly contribute material support or resources, directly or indirectly*, to persons or organizations that pose a significant risk of committing

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<sup>77</sup> 18 U.S.C. § 2333 note (2016) (Findings and Purpose).

<sup>78</sup> Pub.L.114–222.

acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.

(7) The United States has *a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.*

(b) Purpose.--

The purpose of this Act is to *provide civil litigants with the broadest possible basis*, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or

persons that engage in terrorist activities  
against the United States.<sup>79</sup>

This section provides a summary of five cases recently filed under one or more provisions of the civil claims provisions of ATA and/or JASTA. These cases were selected because they share common characteristics.

In *Force v. Facebook*,<sup>80</sup> the family of Taylor Force, deceased, and others, brought this case against Facebook. Taylor Force was a 29-year old MBA student at Vanderbilt University. The complaint alleges that on March 8, 2016, Force was with a group of fellow students on a study trip to Israel, walking along the Jaffa boardwalk on their way to a restaurant for dinner. Two operatives and agents of Hamas, Muhammed Massalha and Muhammad Aweida, launched a knife attack on pedestrians, killing Force and injuring ten others. Police shot and killed one of the attackers near the scene. After the attack, Hamas praised it as a “heroic operation” and posted a photo of Massahla on its Facebook page honoring him with the caption “General of the Knives[.]”

Among the many examples of Hamas’ terrorist history detailed in the complaint, a specific period of time has been identified as the onset of a new form of violence. From October 2015 through March 2016 more than 30 Israelis were killed and over 400 injured in knife attacks. The complaint

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<sup>79</sup> 18 USC § 2333.

<sup>80</sup> Complaint at 43, *Force v. Facebook*, 304 F. Supp. 315 (E.D.N.Y filed July 10, 2016) (No. 1:16-cv-05490).

alleges that Hamas used Facebook to “incite, enlist, organize and dispatch would-be killers to “stab” and “slaughter Jews.”<sup>81</sup> The wave of violence has been “variously labeled as a new “al Aqsa Intifada”, as the “Knife Intifada”, and as the “Facebook Intifada.”<sup>82</sup>

The U.S. State Department has designated Hamas a Foreign Terrorist Organization (FTO), and the complaint alleges further that Facebook knew that Hamas is and was a FTO but nevertheless continued to provide its social network platform and communication services to Hamas, its leaders, and supporters.<sup>83</sup>

*Cohen v. Facebook*<sup>84</sup> is a companion case to *Force* filed on behalf of 20,000 individuals residing in Israel who claimed to have been targeted by ongoing attacks by Palestinian terrorist groups. When defendant Facebook filed a motion to dismiss, the *Cohen* case was joined with *Force* because the court found substantial similarity in the facts and the legal issues of both. Subsequently, a motion to dismiss was granted in both actions.

*Cain v. Twitter*<sup>85</sup> is a case that arose out of the November 13, 2015 ISIS terrorist attacks in Paris at La Belle Equipe restaurant, the Bataclan Café, and at a soccer stadium in Saint Denis.<sup>86</sup> In addition, the

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<sup>81</sup> *Id.* at 32.

<sup>82</sup> *Id.* at 32.

<sup>83</sup> *Id.* at 34.

<sup>84</sup> *Cohen v. Facebook*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017).

<sup>85</sup> *Cain v. Twitter*, No. 1:17-cv-00122-PAC, 2017 U.S. Dist. LEXIS 62724, at 2-3 (S.D.N.Y. April 25, 2017).

<sup>86</sup> *Gonzalez v. Google*, 282 F. Supp. 3d 1150 (N.D. Cal. 2017) (“In the fall of 2015, Nohemi Gonzalez was a 26-year old California State University student studying abroad in Paris,

case included families of the victims, siblings Alexander Pinczowski and Sascha Pinczowski, who died in the Brussels airport bombing by ISIS terrorists on March 22, 2016.

*Gonzalez v. Google*<sup>87</sup> is a case brought by the family of Nohemi Gonzalez, who also was killed during the Paris attacks. She was a student at California State University, studying abroad in the fall of 2015. Nohemi and a group of friends met for dinner at a bistro called La Belle Equipe on November 13, 2015. Shortly after sitting down at their table, three ISIS terrorists attacked the bistro with gunfire, shooting repeatedly at the diners. Nohemi and eighteen other victims were killed. ISIS posted messages on YouTube claiming responsibility for the attacks at the restaurant, as well as the Bataclan Theatre and the Stade de France that same night. By the end of the coordinated attacks

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France. [Docket No. 95.] On November 13, 2015, Gonzalez was dining with a group of friends at La Belle Équipe, a Paris bistro. A few minutes into their meal, three ISIS terrorists, Abdelhamid Abaaoud, Brahim Abdeslam, and Chakib Akrouh, approached the restaurant and began spraying the patrons with bullets, killing Gonzalez and 18 others. Two other groups of ISIS terrorists mounted coordinated attacks that night at other locations in Paris, including the Stade de France and the Bataclan Theatre concert hall. They eventually killed 130 individuals and wounded nearly 400. *Id.* ISIS issued statements claiming responsibility for the attacks, including audio and video messages posted on YouTube, a free online video platform owned and operated by Google. Plaintiffs allege that twelve individual ISIS terrorists were directly involved in the Paris attacks, including the three La Belle Équipe shooters.

<sup>87</sup> *Id.*

that night, a total of twelve terrorists had killed 130 civilians.<sup>88</sup> In the second amended complaint in this case, plaintiffs alleged that

YouTube ‘has played an essential role in the rise of ISIS to become the most feared terrorist organization in the world.’ YouTube provides ISIS with a "unique and powerful tool of communication" that enables it to achieve its program of terrorism and motivate others to carry out more terrorist attacks. Plaintiffs contend that ISIS uses YouTube as a means to accomplish many of its goals:

ISIS not only uses YouTube for recruiting, planning, inciting, and giving instructions for terror attacks, ISIS also uses YouTube to issue terroristic threats, attract attention to its terror attacks and atrocities, instill and intensify fear from terror attacks, intimidate and coerce civilian populations, take credit for terror attacks, communicate its desired messages about the terror attacks, reach its desired audiences, demand and attempt to obtain results from the terror attacks, and influence and affect government policies and conduct.

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<sup>88</sup> *Id.*

Plaintiffs describe a number of videos that allegedly were posted on YouTube at the direction of individuals affiliated with ISIS, including gruesome depictions of executions of ISIS prisoners. According to Plaintiffs, ISIS has recruited more than 30,000 foreign volunteers since 2014 through its use of YouTube and other social media platforms.<sup>89</sup>

In *Fields v. Twitter*,<sup>90</sup> the plaintiff in the case was the widow of Lloyd “Carl” Fields, Jr., a U.S. citizen killed while working as a trainer at a police academy in Amman, Jordan. On November 9, 2015, Anwar Abu Zaid, a captain in the local police force, attacked Fields in the cafeteria of the training center. Zaid drove into the academy grounds armed with an automatic rifle and two handguns. Because he was an officer, he was not subjected to search upon entering. Once inside the compound, Zaid first shot an American truck driver who was traveling through the complex, then he entered the cafeteria where he shot and killed Fields and four others. Zaid did not know any of his victims, he had killed them all because he believed that they were Americans. ISIS claimed responsibility for the attack.<sup>91</sup>

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<sup>89</sup> Order on Defendant's Motion to Dismiss at *Gonzalez v. Google*, 282 F. Supp. 3d 1150 (N.D. Cal. 2017) (No. 6-cv-03282-DMR).

<sup>90</sup> *Fields v. Twitter*, 217 F. Supp. 3d 1116, 2016 U.S. Dist. LEXIS 161233 (N.D. Cal. Nov. 18, 2016).

<sup>91</sup> Complaint, *Fields v. Twitter*, *supra* note 9. (‘The following statement was issued by ISIS via its al-Battar Media

A. *Defenses to Plaintiffs' Claims*

None of these victims has been successful in court. Instead, plaintiffs in these cases have encountered a withering barrage of arguments from the defendants, including the following:

1) Section 230 of the Communications Decency Act provides that “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.”<sup>92</sup> This argument has been raised by defendants in all of the recent cases discussed above. It has proven to be a successful argument, as illustrated by the federal

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Foundation: ‘Yes... we kill the Americans in Amman, ‘the terror group said, using the words lone wolf to describe the attack. ‘Do not provoke the Muslims more than this, especially recruited and supporters of the Islamic State. The more your aggression against the Muslims, the more our determination and revenge... time will turn thousands of supporters of the caliphate on Twitter and others to wolves.’).

<sup>92</sup> 47 U.S.C. § 230. See also *CDA 230: The Most Important Law Protecting Internet Speech*, EFF, <https://www.eff.org/issues/cda230> (last visited Oct. 19, 2018) (‘In other words, online intermediaries that host or republish speech are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say and do. The protected intermediaries include not only regular Internet Service Providers (ISPs), but also a range of ‘interactive computer service providers,’ including basically any online service that publishes third-party content. Though there are important exceptions for certain criminal and intellectual property-based claims, CDA 230 creates a broad protection that has allowed innovation and free speech online to flourish.’).

district court judge's decision granting defendant's motion to dismiss in the *Fields* case:

I dismissed plaintiffs' First Amended Complaint because their claims were barred by the Communications Decency Act ('CDA'), 47 U.S.C. § 230(c). In the Second Amended Complaint, plaintiffs attempt to plead around the CDA by asserting that Twitter provided ISIS with material support by allowing ISIS members to sign up for accounts, not by allowing them to publish content. But no amount of careful pleading can change the fact that, in substance, plaintiffs aim to hold Twitter liable as a publisher or speaker of ISIS's hateful rhetoric, and that such liability is barred by the CDA. Twitter's motion to dismiss is GRANTED without leave to amend.<sup>93</sup>

2) Proximate cause cannot be established between the online terrorist messaging and the resulting injury to plaintiffs under the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § (2016) and/or the Anti-Terrorist Act (ATA) § 2333 due to judicial interpretation of the standard created in the "*by reason of*" language. The court of appeals decision in *Fields* turned on the statutory interpretation of this phrase. Ruling

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<sup>93</sup> Order Granting Motion to Dismiss, *Fields v. Twitter, Inc.*, No. 3:16-cv-00213 (N.D. Cal. Nov. 18, 2016).

in favor of defendant, Twitter, the court summarized the issue:

The gravamen of the parties' disagreement is the scope of the ATA's 'by reason of' requirement. Appropriately, the parties do not dispute that the ATA's 'by reason of' language requires a showing of proximate causation. Rather, they disagree concerning what such a showing entails. Plaintiffs–Appellants contend that proximate causation is established under the ATA when a defendant's 'acts were a substantial factor in the sequence of responsible causation,' and the injury at issue 'was reasonably foreseeable or anticipated as a natural consequence.' Twitter argues that the standard is higher, requiring Plaintiffs–Appellants to show that Twitter's conduct 'led directly' to their injuries. The district court declined to decide the question because it concluded that Plaintiffs–Appellants' pleading was insufficient under either standard. We conclude that Twitter has the better of the argument, and hold that to satisfy the ATA's 'by reason of' requirement, a plaintiff must show at least some direct relationship

between the injuries that he or she suffered and the defendant's acts.<sup>94</sup>

3) The volume of online messaging is so large, it is not possible for any social media provider to completely eradicate all terrorist content from its platform. In an example of this defense, Twitter previously had taken the position that it is simply not possible to monitor all of the volume of traffic that it facilitates. For example, this statement was issued in 2014:<sup>95</sup>

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<sup>94</sup> Fields v. Twitter, No. 16-17165, 2018 U.S. App. LEXIS 2445 (9th Cir. Jan. 31, 2018).

<sup>95</sup> Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ('Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.'). See also Rhett Jones, *Facebook Gives Us the First Real Look at Its Cesspool of Terrorist Propaganda and Hate Speech*, GIZMODO (May 5, 2018, 1:45 PM), <https://gizmodo.com/facebook-gives-us-the-first-real-look-at-its-cesspool-o-1826042898> ('Today, as we sit here, 99 percent of the ISIS and al-Qaeda content that we take down on Facebook, our AI systems flag before any human sees it,' Zuckerberg boasted at his Senate hearing in April. According to today's report, that number is actually 99.5 percent, up from 96.9 percent the previous quarter. But the number of pieces of terrorist propaganda that were taken down jumped a whopping

On August 20, 2014, following harsh criticism for permitting ISIS to use Twitter to distribute gruesome video and images of the beheading of James Foley, Twitter's then-CEO Dick Costolo tweeted: "We have been and are actively suspending accounts as we discover them related to this graphic imagery;" however, after ISIS next used Twitter to broadcast video and images of Steven Sotloff's beheading on September 2, 2014, Twitter spokesperson Nu Wexler told U.S. News & World Report: "Twitter users around the world send *approximately 500 million tweets each*

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73 percent in just a few months. While it couldn't accurately estimate how prevalent terrorist violations on the network were, it did conclude 'that the number of views of terrorist propaganda content related to ISIS, al-Qaeda and their affiliates on Facebook is extremely low' in comparison with other content that violates its policies. . . . It was able to estimate that fake accounts represent around 3-4 percent of its monthly active user base. The company most recently claimed to have 2.2 billion users. But the veracity of that number is always under threat with floods of fake accounts being opened on the site at all times. In the first quarter this year, it removed an astounding 583 million fake accounts. This is actually 111 million fewer account removals than in the previous quarter. Again, it's difficult to say if that means that Facebook is getting better or worse in its detection system. The percentage of fake accounts it removed before a user reported them declined less than 1 percent.')

*day, and we do not monitor them proactively.”<sup>96</sup>*

By 2018, in contrast, Twitter seemed to have come up with the means, and a recently acquired zeal, for purging accounts in very large numbers, as shown in these headlines:

Twitter is sweeping out fake accounts like never before, putting user growth at risk.<sup>97</sup> Battling Fake Accounts, Twitter to Slash Millions of Followers.<sup>98</sup> Twitter reportedly suspended 70 million accounts in past two months in

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<sup>96</sup> Complaint at 75, *Cain v. Twitter*, No. 3:17--cv-02506-JD (N.D. Cal. Jan. 8, 2017) (citing Tom Risen, *Twitter, Facebook, YouTube Grapple With Islamic State Censorship*, U.S. NEWS & WORLD REP. (Sept. 5, 2014), <http://www.usnews.com/news/articles/2014/09/05/twitter-facebook-youtube-navigate-islamic-state-censorship>) (emphasis added).

<sup>97</sup> Craig Timberg & Elizabeth Dwoskin, *Twitter Is Sweeping Out Fake Accounts Like Never Before, Putting User Growth At Risk*, THE WASH. POST (July 6, 2018), [https://www.washingtonpost.com/technology/2018/07/06/twitter-is-sweeping-out-fake-accounts-like-never-before-putting-user-growth-risk/?noredirect=on&utm\\_term=.b5218e8bf0e7](https://www.washingtonpost.com/technology/2018/07/06/twitter-is-sweeping-out-fake-accounts-like-never-before-putting-user-growth-risk/?noredirect=on&utm_term=.b5218e8bf0e7).

<sup>98</sup> Nicholas Confessore & Gabriel J.X. Dance, *Battling Fake Accounts, Twitter to Slash Millions of Followers*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/technology/twitter-fake-followers.html>.

crackdown.<sup>99</sup> Twitter followers vanish amid inquiries into fake accounts.<sup>100</sup>

4) The terms of service (TOS) contract terms between the SMPs and content providers are adequate for responding to complaints. Social media platforms have taken down content that violates their terms of service agreements. However, they have been very slow to take action, and have repeatedly resisted doing so. A recent example is the case of Alex Jones and his website InfoWars. Jones is not a terrorist, however, his online rants have violated TOS agreements. After first having content removed by Facebook and YouTube, in August, 2018 Twitter CEO Jack Dorsey steadfastly allowed Jones to maintain his Twitter account.<sup>101</sup> Dorsey tweeted his position:

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<sup>99</sup> Colin Lecher, *Twitter Reportedly Suspended 70 Million Accounts In Past Two Months In Crackdown*, THE VERGE (July 6, 2018, 4:46pm), <https://www.theverge.com/2018/7/6/17542480/twitter-account-suspensions-crackdown>.

<sup>100</sup> Nicholas Confessore, Gabriel J.X. Dance & Rich Harris, *Twitter Followers Vanish Amid Inquiries Into Fake Accounts*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/interactive/2018/01/31/technology/social-media-bots-investigations.html?mtrref=www.google.com&gwh=F8A0C312434A569B27596B7EF4A8AF47&gwt=pay>.

<sup>101</sup> Issie Lapowsky, *Twitter Finally Axes Alex Jones – Over A Publicity Stunt*, WIRED (Sept. 6, 2018, 6:43 PM), <https://www.wired.com/story/twitter-bans-alex-jones-infowars/>.

If we succumb and simply react to outside pressure, rather than straightforward principles we enforce (and evolve) impartially regardless of political viewpoints, we become a service that's constructed by our personal views that can swing in any direction. That's not us.<sup>102</sup>

One month later, however, Twitter reversed its position and permanently banned Jones and InfoWars, citing violations of its TOS provisions on abusive behavior.<sup>103</sup>

5) The well-known language of the First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

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<sup>102</sup> Toulia Drimonis, *Social Media Is A Toxic Mess. It Should Be On The Companies To Fix It.*, HUFFINGTON POST (Aug. 11, 2018, 7:01 AM), [https://www.huffingtonpost.com/entry/opinion-twitter-facebook-harrasment\\_us\\_5b6df892e4b0530743c9dfcf](https://www.huffingtonpost.com/entry/opinion-twitter-facebook-harrasment_us_5b6df892e4b0530743c9dfcf) (quoting Jack Dorsey (@jack), Twitter (Aug. 7, 2018, 5:11 PM)).

<sup>103</sup> Sara Salinas, *Twitter Permanently Bans Alex Jones and Infowars Accounts*, CNBC (Sept. 6, 2018, 4:45 PM), <https://www.cnbc.com/2018/09/06/twitter-permanently-bans-alex-jones-and-infowars-accounts.html>.

the government for a redress of grievances.<sup>104</sup>

But is terrorist propaganda protected by the First Amendment, or is it “material support” that is constitutionally punishable under federal law? By its terms, the First Amendment limits government attempts to censor free speech or the free press. However, it does not apply to private entities that take steps to limit speech:

The First Amendment does not—in all but the most limited of circumstances—preclude private parties from restricting speech. Thus, private companies—including social media companies, online service providers, and others—are legally permitted to act on their own initiative to “censor” or otherwise restrict speech by those who use their services or platforms. For the Facebooks, Twitters, and Googles of the world, the organizations’ commercial relationships with its users, as well as its Codes of Conduct for how it will self-regulate as an organization, constitute the framework for its ability or responsibility to impede speech.<sup>105</sup>

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<sup>104</sup> U.S. CONST. amend. I.

<sup>105</sup> PEN AMERICA, FAKING NEWS: FRAUDULENT NEWS AND THE FIGHT FOR TRUTH 25 (2017), [https://pen.org/wp-content/uploads/2017/10/PEN-America\\_Faking-News-Report\\_10.12.pdf](https://pen.org/wp-content/uploads/2017/10/PEN-America_Faking-News-Report_10.12.pdf) (“The First Amendment serves to restrict

The U.S. Supreme Court has ruled that there are some exceptions to the First Amendment protection in cases where the speech at issue is determined to be so-called fighting words, obscene, intended to incite imminent violence, or conveys a true threat:

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government interference with our rights. Any government attempt to compel private technology companies to restrict or censor the speech hosted on their platforms would be subject to First Amendment scrutiny to determine its constitutionality. Any regulation to preclude “fake news,” were it not to qualify as one of the categories of speech receiving diminished protection, would most likely be interpreted as an attempt to regulate speech based on its content, for which courts would apply “strict scrutiny.” Under such a test, the law must be justified by a “compelling government interest”; the law must be “narrowly tailored” to achieve such an interest; and the law must be the “least restrictive means” for achieving such interest. In practice, the attempted government regulation of speech based on its content is almost never accepted as constitutional. The First Amendment does not—in all but the most limited of circumstances—preclude private parties from restricting speech. Thus, private companies—including social media companies, online service providers, and others—are legally permitted to act on their own initiative to “censor” or otherwise restrict speech by those who use their services or platforms. For the Facebooks, Twitters, and Googles of the world, the organizations’ commercial relationships with its users, as well as its Codes of Conduct for how it will self-regulate as an organization, constitute the framework for its ability or responsibility to impede speech. Thus, when users argue that a company has “censored” them, they are using the term more generally than as a legal concept. However, just because these private restrictions are not legally prohibited, certainly does not mean they are free from danger from a free speech standpoint, as this report will further discuss.”).

Simply verbally supporting a group or even nominally being a member to make a statement without doing anything to support its organization, is protected by the First Amendment. However, where a member begins to advance a terrorist cause, directly or indirectly (either by direct incitement or true threats on social media, training terrorists in the use of that media, or uploading such material on those websites), the actions give rise to probable cause of material support.<sup>106</sup>

So far, courts have ruled in favor of the defendants in all of the cases summarized above. Given the success of the arguments advanced by the defendants, these plaintiffs have been left without a remedy.

### *B. The Response of Social Media Platforms*

The initial response of the social media platforms in connection with these cases, beyond their successful arguments in the courts generally has been to take a step back from assuming any responsibility for the content posted on their sites:

As terrorist networks increasingly embrace new media, internet information companies often remain reluctant or ambivalent about removing

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<sup>106</sup> Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 702 (2018).

even explicit and graphic calls for ideologically motivated carnage, disruption, destruction, and terrorist indoctrination. While those companies are not purveyors of threats or incitement, their responsibility nevertheless arises when they cooperate with terrorist organizations by providing a platform for their indoctrination, threats, and instructive contents. With an increasingly proliferating number of terrorist webpages, self-policing has proven ineffective.<sup>107</sup>

Interestingly, social media platforms apparently have no difficulty in identifying hate groups. According to a report, Facebook, Amazon, Google and Twitter all work with the Southern Poverty Law Center to identify hate groups and instances of hate speech.<sup>108</sup> At the same time, plaintiffs in *Fields* alleged that Twitter, for example, did not remove ISIS accounts from its platform even when presented with formal government requests to strike them.<sup>109</sup>

In 2016, some significant actions by social media resulted in self-imposed “enhanced content restrictions.” Twitter reported that it had in the

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<sup>107</sup> Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 *FORDHAM L. REV.* 605, 610 (2017).

<sup>108</sup> Peter Hasson, *Facebook, Amazon, Google and Twitter All Work with Left-Wing SPLC*, *THE DAILY CALLER* (June 7, 2017, 9:37 PM), <https://dailycaller.com/2018/06/06/splc-partner-google-facebook-amazon/>.

<sup>109</sup> Complaint at 5-6, *Fields v. Twitter*, *supra* note 9, at 9.

previous year suspended 125,000 terrorist-related accounts, and energized its “internal review teams”. In 2015, Facebook changed its “community standards” in its terms of service (TOS) agreements to ban “dangerous organizations” from using its platform.<sup>110</sup> More recently, Twitter removed accounts of Hamas and Hezbollah leaders in response to a request from the government of Israel.<sup>111</sup>

Even more recently, during the summer of 2018, Twitter suspended over 1 million accounts per day, in “a major shift to lessen the flow of disinformation on the platform.”<sup>112</sup> Facebook, meanwhile, is implementing new measures to take down online misinformation that “could lead to violence.”<sup>113</sup> YouTube has taken down videos in the U.K. in response to requests by police to halt knife attacks.<sup>114</sup> This late-arriving effort by the SMPs has gained momentum, perhaps as a response to 2018 Congressional hearings involving Facebook.

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<sup>110</sup> VanLandingham, *supra* note 15, at 18.

<sup>111</sup> Adam Kredo, *Twitter Purges Top Hamas, Hezbollah Accounts*, THE WASH. FREE BEACON (July 2, 2018, 2:28 pm), <http://freebeacon.com/national-security/twitter-purges-top-hamas-hezbollah-accounts/>.

<sup>112</sup> Timberg & Dwoskin, *supra* note 97.

<sup>113</sup> Sheera Frenkel, *Facebook to Remove Misinformation That Leads to Violence*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/technology/facebook-to-remove-misinformation-that-leads-to-violence.html>.

<sup>114</sup> Megan C. Hills, *YouTube Has Removed Half Of 'Violent' Drill Music Videos At The British Police's Request*, FORBES (May 29, 2018, 11:02 PM), <https://www.forbes.com/sites/meganhills1/2018/05/29/youtub-e-drill-music/#4a4e84e569d5>.

C. *Responses of Other Countries to Online  
Terrorist Propaganda and Hate Speech*

Many governments around the world have responded to the threats posed by online terrorist propaganda and hate speech. Some EU countries that generally recognize and support the concept of legal protections for free speech have nevertheless implemented new measures that restrict speech in the interest of security. Countries in other regions that do not have a free speech tradition have not hesitated to impose restrictions when deemed necessary. This section contains a summary of government actions from selected countries to illustrate the range of responses.

1. Germany

In 2017, the German government passed new laws relating to social media that would impose fines of 50 million Euros for failing to promptly take down hate speech or defamatory fake news.<sup>115</sup> The law requires that the SMP remove the offending material within 24 hours of being notified that the posting contains a violation of the ‘Netzwerkdurchsetzungsgesetz’ (NetzDG) law. According to Germany’s Justice Minister, Heiko Maas:

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<sup>115</sup> Kirsten Grieshaber, *Germany Approves Bill Curbing Hate Crime, Fake News*, ASSOCIATED PRESS (April 5, 2017), <https://finance.yahoo.com/news/germany-approves-bill-curbing-online-093208900.html>.

“Just like on the streets, there is also no room for criminal incitement on social networks.” Maas said.

”The internet affects the culture of debate and the atmosphere in our society. Verbal radicalization is often a preliminary stage to physical violence,” he added.

The minister pointed out that social networks don’t delete enough punishable content, citing research that he said showed Twitter deletes just 1 percent of illegal content flagged by users, while Facebook deletes 39 percent.<sup>116</sup>

## 2. France

Similar to the United States 2016 presidential election, the French have had concerns over Russian interference in their last election. The French government is considering a new law specifically targeting online ‘manipulation of information’ in connection with elections.

Under the law, French authorities would be able to immediately halt the publication of information deemed to be false ahead of elections. Social networks would have to introduce measures allowing users to flag up false reports,

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<sup>116</sup> *Id.*

pass their data on such articles to authorities, and make public their efforts against fake news. And the law would authorise the state to take foreign broadcasters off the air if they were attempting to destabilise France -- a measure seemingly aimed at Russian state-backed outlet RT in particular.<sup>117</sup>

There is a continuing debate in France that this law may not only stifle free speech, but also journalistic freedom to report alternative points of view. While French President Emmanuel Macron supports the law, other members of the French Parliament have argued that it should not be the government determining what is fake news.

### 3. United Kingdom

The UK is taking the approach of directly monitoring social media and controlling fake news via regulation. For example, the United Kingdom recently announced the creation of a new 'dedicated national security unit to tackle fake news and disinformation.' The new force will be a national security measure under the control of the office of the defence secretary.<sup>118</sup> Known as the National

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<sup>117</sup> Jacques Klopp, *France's fake news law leaves media experts uneasy*, AF (June 4, 2018), <https://www.yahoo.com/news/frances-fake-news-law-leaves-media-experts-uneasy-145712000.html>.

<sup>118</sup>Peter Walker, *New national security unit set up to tackle fake news in UK*, THE GUARDIAN,

Security Communications Unit, it will seek to prevent foreign interference in elections. There is concern in Great Britain that fake news, initiated by foreign elements, influenced the Brexit vote to leave the EU.

#### 4. Italy

The government of Italy has adopted a somewhat different approach to combat fake news. In 2017 it mandated a new media literacy course to be part of the curriculum in high schools across the country. The course is designed to teach students how to identify likely sources of misinformation and how to use self-help to seek independent verification of facts.<sup>119</sup> Also, an independent fact checking organization, Pagella Politca, which is being funded by Facebook, has been established to place a ‘fact checking’ notice next to stories which it believes are false. Italy also enforces its privacy laws with regard to online posting which violate personal privacy. In 2010, three executives of Google Video were convicted of invasion of privacy for allowing a video showing a boy with autism being bullied. Google argued that they removed the video immediately after being notified by Italian police. However, the

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<https://www.theguardian.com/politics/2018/jan/23/new-national-security-unit-will-tackle-spread-of-fake-news-in-uk> (last retrieved Sept. 6, 2018).

<sup>119</sup> Yasmeen Serhan, *Italy Scrambles to Fight Misinformation Ahead of Its Elections*, THE ATLANTIC (Feb. 24, 2018), <https://www.theatlantic.com/international/archive/2018/02/eur-ope-fake-news/551972/>.

prosecution said that Google knew of the ‘controversial’ video months before and that it was negligent to leave it posted.<sup>120</sup>

## 5. Czech Republic

The Czech Republic, also concerned about Russian interference, in 2017 set up the Centre Against Terrorism and Hybrid Threats to identify ‘disinformation campaigns’ during the Czech elections. The government unit has tried to counter the fake news with its own Twitter account postings; however, this has been largely unsuccessful.<sup>121</sup>

## 6. Malaysia

In 2018, the government of Malaysia enacted a very strict new law against fake news, including penalties in the form of fines and imprisonment. The Anti-Fake News Act allows for a fine up to 500,000 ringgits (\$128,000) and six years in jail. “The proposed Act seeks to safeguard the public against the proliferation of fake news whilst ensuring the right to freedom of speech and expression under the

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<sup>120</sup> *Google executives convicted in Italy over abuse video*, THE GUARDIAN (Feb. 24, 2010), <https://www.theguardian.com/technology/2010/feb/24/google-video-italy-privacy-convictions>.

<sup>121</sup> *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/>.

Federal Constitution is respected,” the government said in the bill.<sup>122</sup>

The first conviction under the Anti-Fake News Act was in April 2018. The accused pleaded guilty to posting incorrect criticism of police in responding to an incident and was sentenced to a week in jail and a \$2500 fine.<sup>123</sup>

## 7. Brazil

The government of Brazil is considering new laws relating to fake news and elections. More than a dozen draft bills have been introduced. One of them provides for jail terms of up to three years for spreading false information “relating to health, security, the national economy, the electoral process or all other subjects of public interest.”<sup>124</sup> Brazil has also followed a similar approach to Italy in requiring school children to take compulsory media studies, to identify fake stories, and to learn that everything they see on social media is not true.

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<sup>122</sup> *Malaysia proposes jail for up to 10 years, fines for 'fake news,'* REUTERS (Mar. 25, 2018, 10:18 PM), <https://www.reuters.com/article/us-malaysia-politics/malaysia-proposes-jail-for-up-to-10-years-fines-for-fake-news-idUSKBN1H20FM>.

<sup>123</sup> *Foreign Visitor Sentenced to Jail in Malaysia's First 'Fake News' Conviction,* BENARNEWS <https://www.benarnews.org/english/news/malaysian/fake-sentence-04302018162630.html>

<sup>124</sup> AFP, *Fighting 'fake news' with the law* (Jul. 12, 2018), <https://www.yahoo.com/news/fighting-fake-news-law-042157977.html>.

## 8. Kenya

A new bill in Kenya “contains a sweeping cyber-crimes act that criminalises online bullying but also aims to stop the spread of “fake news.” It provides for a \$50,000 fine and up to two years in jail for anyone who intentionally publishes false information.<sup>125</sup> The Bloggers Association of Kenya has challenged in court portions of the bill claiming suppression of free speech.

## 9. European Union

The European Commission has proposed a new law that will require social media platforms to take down terrorist content *within one hour* after being notified by government. In addition, SMPs will be required to develop and implement proactive procedures for spotting extremist content and to document their efforts in an annual report. Fines up to 4 percent of global revenues could be assessed for noncompliance. The new law still needs the approval of the EU member countries and the European Parliament.<sup>126</sup>

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<sup>125</sup> Reuters, *Kenya's president signs cybercrimes law opposed by media rights groups*, (May 16, 2018) <https://www.reuters.com/article/us-kenya-lawmaking/kenyas-president-signs-cybercrimes-law-opposed-by-media-rights-groups-idUSKCN1IH1KX> Last retrieved 6/14/19.

<sup>126</sup> REUTERS, *EU Pushes Internet Firms to Remove Extremist Content in One Hour* (Sept. 11, 2018, 9:00 PM), <https://www.reuters.com/article/eu-internet-content/eu-pushes->

#### IV. PROPOSALS FOR COMBATING ONLINE SUPPORT FOR TERRORISM

This section proposes a number of possible changes to the current legal landscape, all of which are intended to make SMPs more responsible for the foreseeable consequences of allowing terrorist propaganda to be published on their platforms. These measures include legislation, changes in judicial interpretation, new regulatory efforts, and public awareness campaigns aimed at stimulating consumer boycotts. While any one of these measures, by itself, may not be sufficient, a combination of approaches might have a realistic chance of success. In addition to changes in the law, other strategies for combating fake news are outlined.

Briefly stated, we offer the following list of possible reforms, along with commentary on the prospects for each.

1. *Amend Section 230 of the CDA* so that social media platforms are deemed to be publishers, and therefore no longer given immunity from liability for the content made available via their sites. This seems unlikely, for a number of reasons. As professor Jeffrey Kosseff, an expert on Section 230, has explained,

I'm writing a book about Section 230 for  
Cornell University Press, titled *The*

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internet-firms-to-remove-extremist-content-in-one-hour-  
idUSL5N1VX5JR.

*Twenty-Six Words that Created the Internet.* The title is not an overstatement. Without Section 230, it is difficult to conceive of social media, consumer review sites, and other user-focused online platforms existing in their current forms. If companies are exposed to costly lawsuits for their failure to block harmful online content, they will have two choices. First, they could hire enough moderators to screen every tweet, post, and user picture, but that would be extremely expensive and impractical. Second, and more likely, they could reduce or entirely stop the ability of users to contribute their ideas and thoughts. The Internet would change from the public square that it is today to an electronic version of a traditional newspaper or magazine, a one-way interaction. It's not a coincidence that the most successful Internet companies are based in the United States.<sup>127</sup>

However, Kosseff does recognize the injustice that can result from such extensive immunity.

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<sup>127</sup> Jeffrey Kosseff, *How do you change the most important law in Internet history? Carefully*, ARS TECHNICA (Dec. 23, 2017, 6:36 AM), <https://arstechnica.com/tech-policy/2017/12/how-do-you-change-the-most-important-law-in-internet-history-carefully/>.

But there are some legitimate criticisms of such broad immunity. Some victims of defamation and other harms cannot identify the person who created the content and are left unable to recover for their harms. In the past two decades, Section 230 has prevented some truly sympathetic victims from suing websites for the harms that they suffered.<sup>128</sup>

2. *Carve out another exception to Section 230 of CDA that parallels the current exception for victims of online sex trafficking in the FOSTA-SESTA bill, signed into law by President Trump in April 2018.*<sup>129</sup> (The House bill, FOSTA, the Fight Online Sex Trafficking Act, and the Senate bill, SESTA, the Stop Enabling Sex Traffickers Act were combined to form FOSTA-SESTA.) This approach has a greater likelihood of success simply because it has already been implemented in the area of online sex trafficking. Another exception to the immunity provided by Section 230 does not seem difficult to achieve given that victims of terrorist propaganda and the victims of sex trafficking have similarly situated claims in that their harm was fostered by online material. Some observers have already stated that FOSTA-SESTA is just the beginning of the end for Section 230 immunity.<sup>130</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

<sup>130</sup> Aja Romano, *A new law intended to curb sex trafficking threatens the future of the internet as we know it*, VOX (Apr.

3. *Amend the ATA* to explicitly provide victims a private right of action against social media platforms for knowingly providing their services to terrorists. The effects of this amendment would provide justice to victims, pressure social media to become more vigilant, and degrade the effectiveness of terrorist organizations to a significant degree.

Not only would amending the ATA provide relief for victims of ISIS related terrorism, but it would provide guidance for courts which are likely to see more lawsuits against social media companies. More importantly, it would significantly hinder ISIS's recruitment activities, as the group heavily relies on social media for recruitment and promoting its propaganda. If social media companies can be held civilly liable for allowing ISIS members to use their platforms to recruit and organize terrorist acts, it follows that social media companies will take greater steps to terminate or disable ISIS accounts on platforms such as Facebook, Twitter, and YouTube. Disabling ISIS accounts would weaken ISIS by hindering recruitment and

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18, 2018, 5:40 PM),  
<https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

organizational abilities both abroad and in the United States.<sup>131</sup>

4. *Implement a statutory framework patterned after Article 2 of the Uniform Commercial Code<sup>132</sup> and create statutory warranties that are automatically inserted into Terms of Service (TOS) contracts between ad buyers and social media platforms.* This contractual approach imposes new rights for advertisers and new duties on the SMPs. Non-compliance in the form of breach of warranties by the SMPs would threaten their number one revenue stream: advertising purchasing. By targeting the revenue stream from paid ads, increased pressure would be placed on the SMPs to police their platforms for extremist content.<sup>133</sup> The statutory

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<sup>131</sup> Zoey Kotzambasis, *Lawfare: A New Tool For Fighting Terrorism?*, 35 ARIZ. J. INT'L & COMP. L. 1, 206 (2018).

<sup>132</sup> U.C.C. § 2-312 (2018); U.C.C. 2-318 (2018).

<sup>133</sup> PEN AMERICA, *supra* note 105, at 31–32 (“Removing financial incentives for creating fraudulent news is an important part of curbing its spread, but technology and social media platforms must take a narrowly tailored approach that maximizes the public’s right to access information and protects robust political discourse online. Platforms should strictly limit their efforts to cutting off ad revenue to the purveyors of demonstrably false information that is being presented as fact in an effort to deceive the public. They must work to ensure that their actions do not result in “false positive” identifications of websites whose content may be considered hyper-partisan or hyperbolic but is not demonstrably false or intended to deceive. Their advertising policies should make their requirements clear, and they should establish an appeals mechanism for websites that feel they have unfairly been classified as a purveyor of fraudulent news,

warranties could provide terms that guarantee that no ads will appear on pages containing terrorist propaganda or other forms of terrorist content. Statutory damages for each instance of a breach of such warranty would be provided. In the event of a breach of warranty, all revenues paid by the advertiser would be refunded. While the UCC is a uniform state law, Congress could devise a similar federal law under its constitutional authority to regulate interstate commerce. There are, of course, any number of other instances of federally mandated contract clauses,<sup>134</sup> so the overall concept is certainly within the realm of possibility. There does not appear to be any published commentary on this approach, and for that reason it is difficult to forecast its prospects for success.

5. *Adopt a new law patterned after the Telephone Consumer Protection Act (1991).* Congress enacted the TCPA in response to extremely negative public opinion of unsolicited phone calls containing recorded commercial advertising. Forty state laws were already in place when Congress took action. The aim of the TCPA was to restrict the then growing practice of telemarketing via so-called “robo-calls.” At the same time, the statute was not intended to eliminate telemarketing entirely. Instead,

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which would trigger a review process of the initial determination by the platform.”).

<sup>134</sup> See, e.g., Contract Clauses: Frequently Asked Questions, FEDERAL TRANSIT ADMINISTRATION, <https://www.transit.dot.gov/funding/procurement/third-party-procurement/contract-clauses> (last visited Sept. 11, 2018).

the drafters intended to balance the right to privacy of individuals, public safety interests, and commercial freedoms of speech and trade.”<sup>135</sup> This balanced approach seems to have worked, since the telemarketing industry did not oppose the bill and was involved in its preparation. The features of the TCPA provide a framework that could serve as a model for a new federal statute that aims to remove terrorist propaganda from social media platforms. The TCPA includes the following elements, some of which could be included in a new statute aimed at SMPs that allow terrorist content and messaging on their platforms:

- *A balanced interests approach:* personal privacy, public safety on the one hand, and commercial freedom of speech and trade on the other.
- *An express prior consent* requirement, with signature of the customer, indicating a willingness to receive telemarketing calls.
- *A private right of action for users.*
- *Statutory damages with no cap on total aggregated damages:* \$500 statutory damages, up to \$1,500 per violation.
- *No safe harbor for mixed-message calls,* which are partly informational and partly telemarketing.

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<sup>135</sup> Stuart L. Pardau, Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare (Fall 2018) (under review) *Journal of Law, Technology & Policy*, Vol., Vol. 2018, Issue 2 (Fall).

- *Statutory vicarious liability* of advertiser when calls are made on its behalf by third party independent contractors.
- *A strict liability standard.*

Among the options for changing current law listed here, the most promising would seem to be new legislation modeled after the major provisions of the TCPA. From the plaintiffs' point of view, it contains many helpful elements: a private right of action, a strict liability standard, statutory vicarious liability, no safe harbor for mixed-message situations, statutory damages, no cap on damages, and no limit on class actions.<sup>136</sup>

Under such a statutory framework, the need for a government-funded oversight program would not be necessary. Instead, oversight and policing of social media would be placed in the hands of ordinary citizen-users of social media; many millions of consumers who are constantly monitoring online content, just doing what they already do every day.

The combination of these changes would unleash the power of the plaintiff's bar to bring class action lawsuits against SMPs that allow terrorist organizations access to their platforms. If this set of changes produces results on a par with the lawsuits filed under the TCPA, it could trigger a '*litigation fiesta*' as legal expert (and strong supporter of Section 230) Prof. Eric Goldman has so aptly called it.<sup>137</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> Eric Goldman, *Another Court Rejects 'Material Support To Terrorists' Claims Against Social Media Sites – Gonzalez v.*

The TCPA opened the door of the courthouse for the plaintiffs' bar, representing "victims" of robo-calls. The result of this combination of statutory features has been a tidal wave of class action cases, most of which have been settled, with an average settlement of \$4.12 million and some ranging as high as \$76 million. The volume of such cases filed grew from 14 cases in 2007 to 3,710 in 2015.<sup>138</sup>

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*Google*, TECHNOLOGY AND MARKETING LAW BLOG (Oct. 25, 2017), <https://blog.ericgoldman.org/archives/2017/10/gonzalezvgoogle.htm> ("Although this is a nice Section 230 ruling, I have a pit in my stomach about how good rulings like this could turn into a long-term strategic loss. To me, the support-to-terrorist laws closely parallel the support-to-sex-traffickers laws. Both statutory schemes have broad criminal provisions, expansive secondary liability doctrines, supporting federal civil claims, tragic and sympathetic victims, and political toxicity for any opposition. (Though I'll note one key difference: much content published by terrorists qualifies for the First Amendment, while *Backpage v. Lynch* suggested that sex trafficking ads never qualify for the First Amendment). Thus, if Congress passes SESTA/the Wagner bill, it will provide a template for similar reform to exclude terrorist victim claims from Section 230. In other words, when courts resoundingly embrace Section 230 as an immunity to wipe away terrorist victim claims, it could have an unfortunate side effect of providing more fuel for statutory reform advocates. Meanwhile, the *Fields v. Twitter* case is on appeal to the Ninth Circuit, which will hear oral arguments in early December. If the Ninth Circuit affirms, I'm hoping that ruling will quell the existing lawsuits against social media sites and discourage new ones. Any other result will produce a litigation fiesta.").

<sup>138</sup> Stuart L. Pardau, *supra* note 135.

## 6. *Other Strategies*

*Urge advertisers to pull digital ads* when their goods and services appear on web pages alongside terrorist content. Many have already done so, but the problem persists.<sup>139</sup>

*Use social media to organize consumer boycotts* of products and services of companies who continue to buy online ads that are used in support of terrorist propaganda.

*Impose a system of tiered labeling* of news stories, to inform consumers that what they are about to read is verified and factually accurate, unverified, a mixture of fact and speculation, or completely untrue. Websites like Hamilton 68 attempt to identify sources of news so that readers can evaluate its credibility for themselves.

Hamilton 68 tracks a network of Russian-linked accounts related to influence operations in the United States. The dashboard does not “track bots,” but rather it tracks and monitors the output of Kremlin-oriented influence operations, whether orchestrated by humans or automation. The objective of the dashboard is to increase understanding of the focus, spread, and effectiveness of these influence operations by dissecting and assessing

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<sup>139</sup> Jack Neff, *supra* note 57.

the message, messengers, and methods the Kremlin and its proxies employ on social media.<sup>140</sup>

*Launch a multi-pronged effort to reclaim the legitimacy and credibility of news*, using the following approaches: intensify efforts to advance public awareness and education in news literacy, strengthen the role of journalists, expand the role of fact-checking and increase transparency relating to its methods. Some organizations, such as Pen America, have put forward detailed analyses of the origins, manifestations, and consequences of fake news in the broader context of civil society.<sup>141</sup> They have also urged recognition of the rights and responsibilities of news consumers, social media platforms, news outlets, educators, and research institutes.<sup>142</sup> The proposed strategies call for active participation and vigilance on the part of all sectors of civil society. Failure to apply corrective measures could have severe consequences:

If left unchecked, the continued spread of fraudulent news and the erosion of public trust in the news media pose a significant and multidimensional risk to American civic discourse and

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<sup>140</sup> GMF ALLIANCE FOR SECURING DEMOCRACY, Tracking Russian Influence Operations On Twitter, <https://dashboard.securingsdemocracy.org/> (last visited Sept. 18, 2018).

<sup>141</sup> PEN AMERICA, *supra* note 105.

<sup>142</sup> *Id.* at 18.

democracy, building gradually over time. These developments have already conspired to create a trust deficit in which many Americans credit few, if any, sources of news. This diminished trust could have far-reaching implications for American governance and society, undermining the news media's role as the fourth estate and an important check against infringements of civil liberties. The experience of societies around the world that have grappled with these challenges in varying contexts suggests that even those implications that now seem farfetched should not be excluded from consideration.<sup>143</sup>

Similar proactive measures have been proposed in a special report by the American Library Association, with an emphasis on defensive tactics at the individual level that can help users to detect and disregard fake news. Recognizing the limitations of technological tools to defeat fake news, the report is focused on the importance of educating teachers, students, and librarians to better understand how to recognize fake news. The key learning objectives, broadly stated, include: understanding how fake news spreads, how search engines work, acquiring media literacy, recognizing psychological forces that influence perception, and developing tools to evaluate credibility.

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<sup>143</sup> *Id.* at 4.

## V. CONCLUSION, IMPLICATIONS, AND POLICY RECOMMENDATIONS

Modern terrorist organizations have established a pattern of using our way of life against us. Before 9/11, few predicted that terrorists could weaponize civilian airplanes. When that particular threat was effectively blocked by enhanced airport screening and other measures, terrorists turned to using firearms to attack civilians, or rental cars and trucks to mow down unsuspecting pedestrians, or to deliver car bombs. When firearms and explosives are not available, terrorists resort to knife attacks. The terrorists' pattern of behavior has revealed itself, and it should not come as a surprise that online social media platforms have been weaponized too. In the ongoing battle for online control, we should not allow terrorists to use our respect for the right of free speech against us. Instead, we should learn from the tactics used in the recent past to guide our efforts in maintaining security. In addition, we should proactively seek out and disable terrorist online activity, wherever and whenever it can be targeted.

Families of the victims of past attacks deserve justice. Age-old jurisprudence holds that, "It is an elementary maxim of equity jurisprudence that there is no wrong without a remedy."<sup>144</sup> If those words have any meaning, they must certainly apply here.

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<sup>144</sup> *Leo Feist, Inc., v. Young*, 138 F.2d 972, 974 (7th Cir. 1943).

Beyond the scope of this article, there are many related developments and areas for future research. For example, questions may remain in the area of attaching strict liability to the SMPs, even though Congress has shown its willingness to sweep aside such concerns when regulating relatively harmless forms of communication, such as annoying telemarketing calls. As this article goes to press, new challenges to the immunity of SMPs are emerging from many different points along the political spectrum. Whether based on legal or ethical principles, these efforts reflect genuine concerns about the power of SMPs to collect data from their users and to control the flow of information to hundreds of millions of people each day.

It remains to be seen how these developments will play out—and whether any of the proposed changes will benefit the victims who suffered from the attacks generated, in part, by online terrorist propaganda. But it seems certain that, at the very least, the SMPs will soon no longer be able to claim that they are merely neutral, passive, and open “bulletin boards.”

The record of the recent hearings of the U.S. Senate Select Committee on Intelligence reflects a growing awareness on the part of government, and by the social media industry generally, that data security is a *national security issue*. To some observers, this development seems to open the door for serious consideration of direct government

intervention via regulation of the entire digital world as we know it.<sup>145</sup>

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<sup>145</sup> Jason Abbruzzese, *Sen. Wyden Gets A 'Yes' On Personal Privacy As A Matter Of National Security*, NBC NEWS (Sept. 5, 2018, 10:36 AM), <https://www.nbcnews.com/card/sen-wyden-gets-yes-personal-privacy-matter-national-security-n906596>.

*LEGAL STRATEGIES FOR COMBATING ONLINE TERRORIST  
PROPAGANDA*

**ADDRESSING LEGAL-MANAGERIAL  
RELATIONSHIP MANAGEMENT  
CHALLENGES THROUGH EMOTIONAL  
INTELLIGENCE**

EVAN A. PETERSON\*

**I. INTRODUCTION**

Interdisciplinary scholarship on the importance of legal strategy to business strategy represents a critical advancement to traditional scholarship in the fields of law and management. Just as management scholars failed traditionally to fuse legal analysis with business strategy discussions, legal scholars neglected customarily to consider the connection between business and law alongside discussions of risk management and litigation strategy.<sup>1</sup> Such joint disregard in scholarly consideration largely inhibited researchers' abilities to consider innovative methods through which in-

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<sup>1</sup> Robert C. Bird, *The Many Futures of Legal Strategy*, 47 AM. BUS. L. J. 575, 581 (2010); George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, AM. BUS. L. J. 641, 641 (2010).

house legal departments could support the overall competitive strategies of their companies.<sup>2</sup> Modern business challenges derived from globalization, technology, entrepreneurship and other forces, however, have pushed the need for scholars to reexamine perspectives on the role of legal strategy within the larger context of organizational strategy efforts.<sup>3</sup> Organizations that understand the flexibilities intrinsic to every legal system, and integrate legal strategy with overall competitive strategy to better respond to those flexibilities, will stand in a better position to cultivate competitive advantage.<sup>4</sup> Organizations that lack integration between legal strategy and competitive strategy, by contrast, will be severely limited in their ability to derive strategic value from the law.<sup>5</sup>

Managing the relationships between members of the in-house legal department and other departments within the organization represents a key foundation to integrating legal strategy with overall competitive strategy. Proactive law, a growing area

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<sup>2</sup> Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81, 81 (2014); David Orozco, *Legal Knowledge as an Intellectual Property Management Resource*, 47 AM. BUS. L. J. 687, 688 (2010).

<sup>3</sup> See generally David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & BUS. 137 (2016).

<sup>4</sup> Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N. C. J. INT'L L. & COMM. REG. 334, 335 (2014).

<sup>5</sup> Yi-Min Chen et al., *Information-and Rivalry-Based Perspectives on Reactive Patent Litigation Strategy*, 68 J. BUS. RESEARCH, 788, 788 (2015).

of scholarship focused on changing traditional perspectives toward law and legal strategy, has paved new ground in connecting legal strategy and business strategy in new ways. Scholars have integrated proactive law principles into a variety of frameworks designed to facilitate increased integration of legal strategy across the organization, such as the Manager's Legal Plan (MLP), the Five Pathways of Legal Strategy, Legal Astuteness, and the Systems Approach to Law, Business, and Society. Despite the increased scholarship on integrating legal strategy across the organization, however, scholars have focused their research primarily on issues related to adjusting non-lawyer perspectives toward law in the organization. Efforts to manage relationships between managers and in-house counsel must also account for the perspectives, goals, and positions of in-house counsel. Just as organizations may need to promote the embrace of legal strategy by different managers in different ways, organizations may also need to promote the embrace of business strategy by different lawyers in different ways. In-house counsel may resist efforts to take a greater role participating in business issues.

The results of a study by Peterson (2017) highlighted two key obstacles that may prevent in-house counsel, when placed on interdisciplinary teams, from supporting the views, perspectives, and interests of others: (1) beliefs that it is the job of in-house counsel only to provide legal guidance, not to support the views, perspectives, and interests of others; and (2) beliefs that supporting the views, perspectives, and interests of others may lead in-

house counsel to suppress their own independent judgment. These two obstacles may pose significant challenges to the relationship between in-house counsel and managers when in-house counsel serve on interdisciplinary teams. Emotional intelligence provides in-house counsel with a means to develop the skills and knowledge necessary to address these obstacles. Many of the tasks performed by in-house counsel require an aptitude for emotional intelligence (EQ).<sup>6</sup> The components of EQ encompass self-awareness, self-regulation, internal motivation, empathy, and social skills.<sup>7</sup> Emotional intelligence represents a critical core competency for in-house counsel who serve on interdisciplinary teams.<sup>8</sup> The purpose of this article is to outline how emotional intelligence training may promote greater receptivity to supporting the views, perspectives, and interests of others among in-house counsel who are assigned to interdisciplinary teams.

## II. MANAGING THE RELATIONSHIP

### A. *Importance of Legal Strategy to Competitive Strategy*

The importance of legal strategy to the organization's overall competitive strategy

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<sup>6</sup> References to 'emotional intelligence' and 'EQ' will appear interchangeable in this article.

<sup>7</sup> DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (2006).

<sup>8</sup> Bjarne P. Tellmann & Susan R. Sneider, *The Relationship Between the Legal Department and the Corporation, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* (2018).

represents a growing subject area within the respective fields of legal and management scholarship. Six forces in the business environment have propelled legal concerns to the frontline of strategic considerations: litigation, entrepreneurship, regulation, globalization, technology, and compliance.<sup>9</sup> Due to changing conditions in the business environment as a result of these six forces, legal strategy now inhabits a much larger role in organizational efforts to cultivate competitive advantage.<sup>10</sup> An organization that recognizes and responds to the substantive, systemic, and enforcement flexibilities intrinsic to every legal system will stand in a better position to cultivate competitive advantage in a rapidly changing business environment.<sup>11</sup> Law affects countless activities in the value chain (manufacturing, warranties, sales, design, distribution) as well as each of the forces shaping enterprise attractiveness (buyer power, supplier power, substitute availability, threat of new entrants, and threat of rivals).<sup>12</sup>

Proactive law, a growing area of scholarship focused on changing traditional perspectives toward law and legal strategy, has paved new ground in connecting legal strategy with overall competitive strategy. Proactive law centers on the use of law as an empowering mechanism to manage future risk,

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<sup>9</sup> George J. Siedel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law among Business School Core Courses*, 37 AM. BUS. L. J. 717, 732-733 (2000).

<sup>10</sup> Orozco, *supra* note 3.

<sup>11</sup> Evans & Gabel, *supra* note 4.

<sup>12</sup> CONSTANCE E. BAGLEY, *MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY* (2015).

cultivate value, and nurture relationships.<sup>13</sup> Proactive law encompasses practices, skills, and knowledge that support identifying future legal problems in time to take preventive action, as well as the detection of business opportunities in time to take advantage of conceivable benefits.<sup>14</sup> A core tenet of proactive law focuses on the encouragement of inter-professional collaboration between lawyers, managers, and other subject matter experts.<sup>15</sup> Legal researchers have used proactive law principles to support in-house legal departments in transitioning away from reactive postures.<sup>16</sup> Reactive-posture legal departments operate comfortably in firefighter mode, reacting to incidents as they happen, effectively decreasing their capacity to establish priorities and identify future business risks.<sup>17</sup> Proactive-posture legal departments, in contrast, focus on encouraging the behaviors and procedures necessary for faster responses to emerging

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<sup>13</sup> Gerlinde Berger-Walliser, *The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement*, (University of Connecticut, School of Business Research Paper), [https://www.researchgate.net/profile/Gerlinde\\_Berger-Walliser/publication/273440662\\_The\\_Past\\_and\\_Future\\_of\\_Proactive\\_Law\\_An\\_Overview\\_of\\_the\\_Proactive\\_Law\\_Movement/](https://www.researchgate.net/profile/Gerlinde_Berger-Walliser/publication/273440662_The_Past_and_Future_of_Proactive_Law_An_Overview_of_the_Proactive_Law_Movement/)

<sup>14</sup> *Id.*

<sup>15</sup> Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT'L. L. 417, 438 (2015).

<sup>16</sup> Susie Lees et al., *Stop Putting out Fires and Start Working Proactively with your Client*, 31 ACC DOCKET 73, 77 (2013).

<sup>17</sup> *Id.*

incidents.<sup>18</sup> The proactive approach, in reducing the emphasis on firefighter mode, provides the in-house legal department with added time to achieve strategic objectives using law-based solutions.<sup>19</sup>

The scholarship on law and legal strategy encompasses a growing array of frameworks designed to facilitate the increased acceptance of legal strategy across the organization.

- The Manager's Legal Plan (MLP) encompasses four steps geared toward supporting proactive managerial perceptions toward law and legal strategy: (1) understanding the legal dimensions of business and learning how to work alongside legal professionals; (2) recognizing ways to deal with legal problems by handling their costs and learning from the challenges they create; (3) developing business solutions to prevent legal problems from occurring again in the future; and (4) reframing legal problems as business opportunities to develop new options for value creation.<sup>20</sup>

- The Five Pathways of Legal Strategy outlines a continuum of strategic affect that organizations can employ to identify value-creating opportunities from the law: (a) avoidance; (b) compliance; (c) prevention; (d) value, and (e) transformation.<sup>21</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> GEORGE J. SIEDEL & HELENA HAAPIO, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2016).

<sup>21</sup> Bird & Orozco, *supra* note 2.

- The Systems Approach to Law, Business, and Society supports connecting legal issues with mental models that drive the pursuit of competitive advantage, enabling researchers to evaluate the degree of fit between a company's legal, corporate social responsibility, and political routines against its value chain, resources, and competitive environment.<sup>22</sup>

- The Legal Astuteness framework places a heavy focus on proactive attitudes toward legal regulation by emphasizing: (a) value-laden attitudes toward the value of law to business success; (b) proactive attitudes toward legal regulation; (c) informed judgment in managing legal issues that affect the business, and (d) the use of suitable legal tools in conjunction with context-specific legal knowledge.<sup>23</sup>

- Concept-Sensitive Managerial Analysis depends on managerial prudence to recognize circumstances where law and other factors may hinder managerial flexibility in decision-making.<sup>24</sup> The framework enables managers to grasp the effect of legal regulations on business decisions through: (a) applying business concepts to legal regulations to detect conditions that will promote business

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<sup>22</sup> Constance E. Bagley, *What's Law Got to Do With It? Integrating Law and Strategy*, 47 AM. BUS. L. J. 587, 592 (2010).

<sup>23</sup> Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 379 (2008).

<sup>24</sup> James E. Holloway, *Concept-Sensitive Managerial Analysis with Law: Applying a Business Concept to a Legal Rule to Identify the Domain of Business Situations*, 6 WM. & MARY BUS. L. REV. 137, 140 (2015).

opportunities; (b) identifying environmental conditions that will not afford flexibility to exploit business opportunities; and (c) applying a legal-analytical methodology in the decision-making process to ensure compliance with legal requirements.<sup>25</sup>

### *B. Promoting the Acceptance of Legal Strategy*

Promoting the importance of legal strategy to competitive strategy requires an understanding of managerial viewpoints toward lawyers and the law. Managerial perceptions of in-house counsel include notions that lawyers are not team players, are a necessary evil, and are not capable of creatively solving multifaceted problems.<sup>26</sup> Managerial perspectives of in-house counsel further encompass beliefs that company lawyers have excessive and unnecessary decision-making authority over the employer-employee relationship.<sup>27</sup> Unrealistic perceptions of attorneys in practice may originate from a cultural lack of esteem for lawyers due to fictional depictions of aggressive *fighter* attorneys in

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<sup>25</sup> *Id.*

<sup>26</sup> Chuck Barry & Kristin Kunz, *In-House Counsel should Implement Servant Leadership to Help Clients make Values-Based Decisions*, 37 *HAMLIN L. REV.* 501, 519 (2014); Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *L. & SOC. REV.* 457, 468 (2000).

<sup>27</sup> Steven L. Lovett, *The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of In-House Counsel*, 34 *J. L. & COMM.* 113, 131 (2015).

movies and television shows.<sup>28</sup> With respect to managerial perceptions of the law, managers often view law as an impairment to organizational growth.<sup>29</sup> Managers often treat the legal consequences of corporate misconduct as an inevitable cost of doing business.<sup>30</sup> Others believe that involvement in addressing corporate legal concerns is the sole responsibility of in-house attorneys or outside counsel.<sup>31</sup>

The variety of managerial perspectives toward law complicate efforts to encourage the managerial embrace of proactive law. The existing frameworks for integrating law and business strategy proposed by Siedel and Haapio, Bird and Orozco, Bagley, Holloway and other scholars differ significantly regarding the specific tactics used to promote legal strategy, the degree of response regarding managerial attitudes toward the law, and the identification of tangible, concrete action steps for implementing the proposed tactics.<sup>32</sup> Peterson (2017) conducted a Delphi study to build consensus among a panel of in-house general counsel with

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<sup>28</sup> Mitchell Travis & Kieran Tranter, *Interrogating Absence: The Lawyer in Science Fiction*, 1 INT'L J. L. PROF. 23, 27 (2014).

<sup>29</sup> Siedel & Haapio, *supra* note 1.

<sup>30</sup> Richard S. Gruner, *Lean Law Compliance: Confronting and Overcoming Legal Uncertainty in Business Enterprises and Other Complex Organizations*, 11 N.Y. J. L. & BUS. 247, 252 (2014).

<sup>31</sup> Bird, *supra* note 1.

<sup>32</sup> Evan A. Peterson, *Building Consensus Among General Counsel to Address Managerial Legal Strategy Perspectives* (Dec. 2017) (unpublished Ph.D. dissertation, Walden University) (on file with ProQuest).

regard to techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.<sup>33</sup> The results of Peterson's study included an assortment of techniques for altering unreceptive managerial viewpoints toward the strategic value of law, such as rapport building, legal risk management training, open communication, and mutual recognition of each other's contributions to the company.<sup>34</sup>

Despite the growth of scholarship on frameworks for integrating law and business strategy, the majority of such scholarship focuses on adjusting managerial perspectives toward law. Efforts to manage relationships between managers and in-house counsel must account for the perspectives, goals, and positions of in-house counsel as well as managers. Just as managers may oppose greater involvement in legal matters, in-house counsel may oppose greater involvement in business matters. Few scholars have conducted thorough examinations of obstacles to the integration of law and business strategy that may stem from in-house legal departments.

Specific results from Peterson's study allude to potential obstacles. Collective ratings supplied by panelists in the study reflected substantial doubts as to the feasibility (workability) of in-house counsel displaying value as participants on interdisciplinary teams by supporting the views, perspectives, and interests of others. These results were surprising given nearly 100% agreement among the panelists as

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

to the high desirability of in-house counsel displaying value as participants on interdisciplinary teams by supporting the views, perspectives, and interests of others. The comments supplied by the panelists in support of the low feasibility ratings highlighted two potential challenges to relationship management between lawyers and managers when members from both groups are present on interdisciplinary teams: (1) believes that it is the job of in-house counsel only to provide legal guidance, not to support the views, perspectives, and interests of others; and (2) believes that supporting the views, perspectives, and interests of others may lead in-house counsel to suppress their own independent judgment.

### III. CHALLENGES TO RELATIONSHIP MANAGEMENT

#### *A. Not Job of In-House Counsel to Support Others*

The suggestion that it is not the job of in-house counsel to support the views, perspectives, and interests of others reflects a lack of understanding of the responsibilities facing modern in-house counsel. The roles and responsibilities of in-house counsel continue to expand as a result of the growing recognition of law as a source of organizational value creation.<sup>35</sup> In-house counsel, in addition to managing litigation, ensuring responsibility in corporate practices, assessing the effects of

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<sup>35</sup> Orozco, *supra* note 3.

regulatory changes on firm operations, and responding to governmental requests, also serve as strategic planners and crisis managers.<sup>36</sup> In light of these diverse responsibilities, in-house counsel must possess a wide array of skills alongside legal knowledge and legal acumen, including developed understandings of budgeting, human resources, project management, business management, financial management, procurement, information technology, and marketing.<sup>37</sup> Alongside business fluency, driving legal strategy in an interdisciplinary context requires strategy execution capabilities, effective communication skills, and creative problem-solving capabilities.<sup>38</sup> In-house counsel, through increased participation in business strategy

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<sup>36</sup> Charles Ham & Kevin Koharki, *The Association between Corporate General Counsel and Firm Credit Risk*, 61 J. ACCT. & ECON. 274, 274 (2016); *See generally* Alan D. Jagolinzer et al., *Corporate Governance and the Information Content of Insider Trades*, 49 J. ACCT. RESEARCH, 1249 (2011); Justin J. Hopkins et al., *Corporate General Counsel and Financial Reporting Quality*, 61 MGMT. SCIENCE 129 (2014); Constance E. Bagley & Mark Roellig, *The Transformation of General Counsel: Setting the Strategic Legal Agenda*,

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2201246](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201246)

<sup>37</sup> ASSOCIATION OF CORPORATE COUNSEL (December 9, 2013), *Skills for the 21<sup>st</sup> Century General Counsel*, <http://www.acc.com/legalresources/resource.cfm?show=13560> 49; ASSOCIATION OF CORPORATE COUNSEL (January 29, 2014), *ACC Chief Legal Officers 2014 Survey*, <http://www.acc.com/legalresources/resource.cfm?show=1358895>; ASSOCIATION OF CORPORATE COUNSEL (January 29, 2015), *ACC Chief Legal Officer (CLO) 2015 Survey*, <http://www.acc.com/legalresources/resource.cfm?show=13894>

<sup>38</sup> Bird & Orozco, *supra* note 2.

discussions, are now positioned to champion high-level legal strategies and encourage non-legal employees to adopt more participatory, hands-on approaches regarding legal strategy.<sup>39</sup>

The diverse business competencies of in-house counsel have important implications for relationship management between in-house counsel and company managers. It is necessary for counsel to recognize how their interactions with members of other organizational departments play a major role in supporting the strategic vision of the organization.<sup>40</sup> In-house counsel, as boundary spanners that bridge the gap between legal perspectives and business perspectives, stand in a strong position to positively alter managerial views of the legal department's value to promoting organizational strategy.<sup>41</sup> As managerial attitudes toward lawyers and the law affect organizational openness toward legal strategy, in-house counsel must work to dispel managerial perceptions that lawyers are incapable of creative problem solving and teamwork, as well as necessary evils and impairments to organizational growth.<sup>42</sup> Addressing managerial biases toward lawyers, the law, and legal strategy will help organizations

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<sup>39</sup> Bagley & Roellig, *supra* note 36; Lovett, *supra* note 27.

<sup>40</sup> INSIDE COUNSEL, *Findings from the 7th Annual Law Department Operations Survey*, [http://www.insidecounseldigital.com/insidecounsel/january\\_2015?pg=15#pg15](http://www.insidecounseldigital.com/insidecounsel/january_2015?pg=15#pg15).

<sup>41</sup> Lovett, *supra* note 27.

<sup>42</sup> Barry & Kunz, *supra* note 26; Nelson & Nielsen, *supra* note 26; Siedel & Haapio, *supra* note 1.

modify policies and approaches to legal strategy to facilitate the improved delivery of legal services.<sup>43</sup>

### *B. Fears of Forsaking Legal Objectivity*

The notion that supporting the views, perspectives, and interests of others may lead in-house counsel to suppress their own independent judgment reflects the assumption that supporting others' views equates to blind acceptance of those views. In-house counsel often encounter conflicts stemming from obligations toward the organization on the one hand and obligations to the legal profession on the other.<sup>44</sup> In light of these competing obligations, situations may arise where counsel will face an impasse in their decision-making: breach attorney-client privilege to perform their duties as compliance officers, or breach their fiduciary duties to their organizations but perform their roles of chief legal strategists to the best of their abilities.<sup>45</sup> Kim described the diverse psychological pressures in-house counsel may experience as a result of such competing obligations, including obedience pressures, conformity pressures, and alignment

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<sup>43</sup> Nancy B. Rapoport, *'Nudging' Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 ST. MARY'S J. L. ETH. & MALPRACTICE 42, 42 (2014).

<sup>44</sup> Ronit Dinovitzer et al., *Corporate Lawyers and their Clients: Walking the Line between Law and Business*, 21 INT'L J. L. PROF. 3, 7 (2014).

<sup>45</sup> Lawrence A. Hamermesh, *Who Let You into the House?* 2012 WIS. L. REV. 360, 365 (2012).

pressures.<sup>46</sup> Internal pressures may lead in-house counsel to overlook critical facts that may affect key operational or strategic decisions. To foster perceptions that they are team players, company lawyers may face pressures to champion the decisions or activities of non-lawyer colleagues.<sup>47</sup> Hamermesh expressed concern that such pressures could restrict in-house counsels' ability to act in organizational best interests in circumstances where senior managers' actions are averse to such interests.<sup>48</sup>

Managerial perceptions of lawyers affect the decisions and behaviors of in-house counsel. Behaviors portraying the relationships of in-house counsel with non-lawyers in the organizations reside along two axes: (a) the degree to which in-house counsel relies on prior experience or legal knowledge to support decisions and actions, and (b) the degree to which in-house counsel frames their role in terms of collective group action or in individual action.<sup>49</sup> Dinovitzer et al. identified profiles for 4 types of in-house lawyers.<sup>50</sup> The *team lawyer* places priority on legal considerations over business considerations, but gives greater deference to personal experience in

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<sup>46</sup> Sung H. Kim, *Inside Lawyers: Friends or Gatekeepers?* 84 FORDHAM L. REV. 1867, 1871 (2016).

<sup>47</sup> Eli Wald, *In-House Risk* (U Denver Legal Studies Research Paper No. 15-51), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2667157##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2667157##); Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L. J. 1243, 1275 (2013).

<sup>48</sup> Hamermesh, *supra* note 45.

<sup>49</sup> Dinovitzer et al., *supra* note 44.

<sup>50</sup> *Id.*

decision-making. The *team player* places greater emphasis on experience rather than legal knowledge while demonstrating an appreciation of firm collectivity. The *lawyers' lawyer* places primary emphasis on legal knowledge in decision-making, giving precedence to legal considerations over business considerations. The *lone ranger* references law in decision-making but places primary emphasis on personal experience.

#### IV. ADDRESSING RELATIONSHIP MANAGEMENT CHALLENGES THROUGH EMOTIONAL INTELLIGENCE

##### A. *The Need for Emotional Intelligence in Legal Practice*

Recognition of the connection between emotional intelligence and performance is critical to successful legal practice. Emotional Intelligence is a growing element of scholarship. As noted by Goleman, EQ consists of five components: (a) self-awareness – recognizing feelings as they occur; (b) self-regulation – handling feelings appropriately; (c) internal motivation – gathering emotions together in service of a goal; (d) empathy – responding to social signals that indicate what others need or want; and (e) social skills – managing emotions in others.<sup>51</sup> Individuals with a high EQ express themselves, understand others, and relate with others better than

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<sup>51</sup> GOLEMAN, *supra* note 7.

individuals with a low EQ.<sup>52</sup> Emotional intelligence is also a major factor in performance.<sup>53</sup> Although high performance encompasses intelligence and technical skills alongside emotional intelligence, evidence suggests that emotional intelligence is the most important element in determining high overall performance.<sup>54</sup> Alongside individual performance, emotional intelligence is also critical to group effectiveness.<sup>55</sup> Teams, like individuals, have the capacity to engender greater emotional intelligence and boost overall performance as a result.<sup>56</sup> In recognition of the group element of emotional intelligence, Lynn reorganized the concept of group EQ to reflect the following elements: (a) self-awareness and self-control – fully understanding oneself and using that information to manage emotions productively; (b) empathy – understanding others’ perspectives; (c) social expertness – building genuine relationships and expressing caring, concern, and conflict in healthy ways; (d) personal influence – positively leading and inspiring others;

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<sup>52</sup> Debra Austin & Rob Durr, *Emotion Regulation for Lawyers: A Mind Is a Challenging Thing to Tame*, 16 WYO. L. REV. 387, 388 (2016).

<sup>53</sup> María J. Gutiérrez-Cobo et al., *The Relationship between Emotional Intelligence and Cool and Hot Cognitive Processes: A Systematic Review*, 10 FRONTIERS IN BEHAVIORAL NEUROSCIENCE 101, 101 (2016) (individuals with better EQ scores perform better in cognitive tasks).

<sup>54</sup> Richard E. Boyatzis, *Competencies in the 21<sup>st</sup> Century*, 27 J. MGMT. DEVELOPMENT 5, 7 (2008).

<sup>55</sup> See generally Vanessa U. Druskat & Steven B. Wolff, *Building the Emotional Intelligence of Groups*, HARV. BUS. REV. 80 (2001).

<sup>56</sup> *Id.*

and (e) mastery of purpose/vision – bringing authenticity to one’s life and living out one’s intentions and values.<sup>57</sup>

Elements of emotional intelligence dwell within many of the tasks performed by lawyers, including client consultations, mediation, deal negotiations, factual research and due diligence investigations, and oral/written advocacy.<sup>58</sup> An ability to work with people, alongside legal knowledge and acumen, is critical for lawyers aiming to accomplish such tasks effectively.<sup>59</sup> As noted by Kiser, the element of emotional maturity within each of the fundamental lawyering skills identified in the MacCrate Report, such as problem solving, negotiation, and the ability to resolve ethical dilemmas, highlights the importance of integrating substantive legal knowledge with emotional intelligence.<sup>60</sup> Injecting emotions into the legal process helps attorneys recognize social cues, embrace change, and make better decisions.<sup>61</sup>

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<sup>57</sup> ADELE B. LYNN, *THE EQ DIFFERENCE: A POWERFUL PLAN FOR PUTTING EMOTIONAL INTELLIGENCE TO WORK* (2004).

<sup>58</sup> Jean R. Sternlight, *Psychology and Lawyering: Coalescing the Field*, 15 NEV. L. J. 431, 431 (2015).

<sup>59</sup> *Id.*

<sup>60</sup> Randall Kiser, *The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior*, 15 NEV. L. J. 442, 445 (2014).

<sup>61</sup> See Dana L. Joseph et al., *Why Does Self-Reported Emotional Intelligence Predict Job Performance? A Meta-Analytic Investigation of Mixed EI*, 100 J. APPLIED PSYCHOL. 309 (2015); Kihwan Kim et al., *Emotional Intelligence and Negotiation Outcomes: Mediating Effects of Rapport, Negotiation Strategy, and Judgment Accuracy*, 24 GROUP DECISION & NEGOTIATION 487 (2015).

In addition to the general practice of law, emotional intelligence also has important implications for in-house legal practice. According to Mottershead and Magliozzi, emotional intelligence represents a core competency necessary for success in contemporary in-house legal practice.<sup>62</sup> Tellmann and Sneider, in questioning the relevance of emotional intelligence to the legal department's relationship with the rest of the organization, noted that it is critical for in-house counsel to demonstrate emotional intelligence when serving on interdisciplinary teams.<sup>63</sup> In-house counsel, as members of interdisciplinary teams, can better express and demonstrate the value the legal department brings to the organization by respecting, valuing, and supporting the perspectives and contributions of other team members.<sup>64</sup> As noted in the results of Peterson's study, in-house counsel must remain open to different perspectives, maintain a sense of humility, and appreciate the incredible pressures facing management.<sup>65</sup> In-house counsel, by expressing a willingness to work cooperatively on generating acceptable solutions to business problems, will develop camaraderie with senior managers that will enable all to work together toward

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<sup>62</sup> Terri Mottershead & Sandee Magliozzi, *Can Competencies Drive Change in the Legal Profession?* 11 UNIV. ST. THOMAS L. J. 51, 61 (2013).

<sup>63</sup> Bjarne P. Tellmann & Susan R. Sneider, *The Relationship Between the Legal Department and the Corporation*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2018).

<sup>64</sup> *Id.*

<sup>65</sup> Peterson, *supra* note 32.

satisfying common organizational goals.<sup>66</sup> As one panelist in the study noted:

Often lawyers see their value add as how much they can move a business project towards the theoretical “best” term or deal point. That approach loses the focus that the real goal is to mutually assist the manger and thereby the organization to achieve its goal (usually new business, more ROI, reduction in cost etc.) Flexibility and humility are both key components to connect to and thus impact your organization.

Another study panelist commented that in-house counsel must:

Respect the difficulty of other people’s jobs and the pressure they are under. It is really easy to sit on the outside and find fault in other people’s actions and decisions. It is harder, and infinitely more valuable, to be on their team and help solve the problem. That’s the difference between a management team member who is a lawyer, and a lawyer who will never be in management.

In-house counsel who understand the importance of emotional intelligence to relationship building stand in a better position to promote the

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<sup>66</sup> *Id.*

increased acceptance of legal strategy across the organization. Certain members of the in-house legal department, referred to as *generalists* by Tellmann and Sneider, reflect such an understanding. Generalists are members of the in-house legal team who manage relationships with other organizational departments by relying on superior skills connected to emotional intelligence alongside strong analytical skills and a broad range of legal knowledge.<sup>67</sup> The generalist serves as a key point of contact for other departments within the organization, building and ensuring strong relationships across the organization by attending strategy meetings, contributing an in-depth understanding of organizational operations and industry to problem resolution, and communicating departmental needs and concerns to the organization's general counsel.<sup>68</sup> As noted by Tellmann and Sneider, however, it is essential for all lawyers within the in-house legal department to possess EQ skills.<sup>69</sup>

### *B. The Treatment of Emotional Intelligence in Legal Education*

Emotional intelligence is a learned skill. As noted by Austin and Durr, training programs provide a platform for lawyers to develop emotional

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<sup>67</sup> *Id.* (Specialists, in contrast to generalists, are company lawyers with primary expertise in specific areas of law who devote most of their time to issues related to their respective areas of expertise).

<sup>68</sup> *Id.*

<sup>69</sup> Tellmann & Sneider, *supra* note 63.

intelligence skills.<sup>70</sup> Doleve and Leshem, in summarizing existing research, noted that emotional intelligence training can lead to improved professional effectiveness.<sup>71</sup> An effective emotional intelligence training program centers on efforts to develop EQ competencies, change attitudes, and develop skills through diverse practice exercises and feedback sessions.<sup>72</sup> Successful EQ development calls for using diverse active learning and experiential learning strategies to facilitate exploration, development, practice and repetition.<sup>73</sup> A diverse range of activities support EQ training, including short lectures with examples/stories, small group and large group discussions, reflections of prior experiences, role-playing, case studies, self-observations, journaling (on insights gained), small group exercises, and the drafting of personal goal

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<sup>70</sup> *Id.*

<sup>71</sup> Niva Dolev & Shosh Leshem, *What Makes up an Effective Emotional Intelligence Training Design for Teachers?* 16 INT'L J. LEARNING, TEACHING & EDUC. RSCH. 72, 75 (2017).

<sup>72</sup> Cary Cherniss & Daniel Goleman, *Training for Emotional Intelligence: A Model*, in THE EMOTIONALLY INTELLIGENT WORKPLACE: HOW TO SELECT FOR, MEASURE, AND IMPROVE EMOTIONAL INTELLIGENCE IN INDIVIDUALS, GROUPS AND ORGANIZATIONS 209 (Cary Cherniss & Daniel Goleman eds., 2001); STEPHEN NEALE ET AL., EMOTIONAL INTELLIGENCE COACHING: IMPROVING PERFORMANCE FOR LEADERS, COACHES AND THE INDIVIDUAL (2011); Cary Cherniss et al., *Bringing Emotional Intelligence into the Workplace: A Technical Report*, [http://www.eiconsortium.org/pdf/technical\\_report.pdf](http://www.eiconsortium.org/pdf/technical_report.pdf)

<sup>73</sup> Neale et al., *supra* note 72.

statements.<sup>74</sup> EQ training sessions may vary considerably in frequency and duration, ranging from numerous short sessions over a period of weeks to a single, day-long session.<sup>75</sup>

Emotional intelligence training may consist of one-on-one training, group training, or combined individual-group training. One-on-one training typically encompasses individual coaching.<sup>76</sup> Individual coaching is designed to help facilitate the development of emotional intelligence skills by enabling coaches to focus on the needs and learning styles of the individual learner in a supportive, private development setting.<sup>77</sup> Individual coaching often incorporates the use of personal EQ assessment tools to identify the specific EQ skills and competencies needing development.<sup>78</sup> Group emotional intelligence training, in contrast, provides a means to cultivate EQ skills between members of a group. Group EQ training workshops facilitate support among peers, develops collegiality and collaboration, and presents opportunities for real-

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<sup>74</sup> Mickaël Campo et al., *Emotional Intelligence Training: Implications for Performance and Health*, 101 ADV. PSYCHOL. RES. 75, 80 (2015).

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

<sup>76</sup> Margaret Chapman, *Emotional Intelligence and Coaching: An Exploratory Study*, in EVIDENCE-BASED COACHING, VOLUME 1: THEORY, RESEARCH AND PRACTICE FROM THE BEHAVIOURAL SCIENCES 183 (Michael Cavanagh et al. eds., 2005).

<sup>77</sup> *Id.* See also Geetu Bharwaney, *Coaching Executives to Enhance Emotional Intelligence and Increase Productivity*, in EDUCATING PEOPLE TO BE EMOTIONALLY INTELLIGENT 183 (Reuven Bar-On et al. eds., 2007).

<sup>78</sup> Dolev & Leshem, *supra* note 71.

world, hands-on training.<sup>79</sup> Combined individual-group training encompasses the integration of personal coaching sessions with group training sessions.<sup>80</sup> As the goal of this paper is to address select challenges to relationship management between in-house counsel and managers, the discussion in the next section will focus on a framework for developing a group EQ training program.

Despite evidence demonstrating the importance of emotional intelligence in legal practice, law schools have traditionally paid little attention to the connection between emotional intelligence and legal practice in the context of curriculum development. According to Austin and Durr, law schools are grossly behind medical schools and business schools in terms of incorporating materials related to emotional and social competencies into their curriculums.<sup>81</sup> As a result of this deficiency, many law students receive legal training that promotes apathy and opposition to the human element of legal practice.<sup>82</sup> The prospect of including training on emotional intelligence within the law school curriculum may appear in conflict with traditional legal education.<sup>83</sup> While the law school curriculum assists students in developing skills and knowledge necessary for bar passage and

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Austin & Durr, *supra* note 52.

<sup>82</sup> Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 421-422 (1996).

<sup>83</sup> Austin & Durr, *supra* note 52.

entry into legal practice, it falls short in supporting students' development of relationship building, leadership, and other skills that are critical to advancement in the legal profession.<sup>84</sup> Students gain exposure in law school to behaviors necessary for success in the adversary system, but are not prepared to consider or examine the harmful consequences that such behaviors may inflict upon relationships with clients, colleagues, or adversaries when applied outside the litigation context.<sup>85</sup> As legal study and the practice of law promote and reward aggressive and goal-oriented behaviors, concerns exist that lawyers seldom reflect on the desires and principles that motivate their decision-making.<sup>86</sup>

The growing evidence highlighting the importance of emotional intelligence to legal practice is, however, leading to curricular changes in law schools across the United States. Legal scholars and practitioners alike are expressing increased openness toward integrating examinations of how people think and act within legal practice.<sup>87</sup> Select law schools are now paving the way in integrating emotional intelligence training into their respective curriculums as a means to help law students cultivate intrapersonal and interpersonal skills, improve

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<sup>84</sup> See generally William S. Blatt, *Teaching Emotional Intelligence to Law Students: Three Keys to Mastery*, 15 NEV. L. J. 464 (2014).

<sup>85</sup> See generally Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 17 (2002).

<sup>86</sup> Nelken, *supra* note 82.

<sup>87</sup> Sternlight, *supra* note 58.

wellbeing during crisis, and manage their careers over the long-term.<sup>88</sup> These curricular advancements include mindfulness, leadership, and other courses related to emotional intelligence offered at numerous institutions, including the University of Chicago, New York University, Texas Tech, Miami University, Northwestern University, and Georgetown.<sup>89</sup>

## V. APPLYING EQ TO LEGAL-MANAGERIAL RELATIONSHIP MANAGEMENT CHALLENGES

### A. *Not Job of In-House Counsel to Support Others*

Emotional intelligence training for in-house counsel provides a means to help dispel the belief that it is not the job of in-house counsel, when placed on interdisciplinary teams, to support the views, perspectives, and interests of other team members. Any EQ training initiative designed to accomplish this task must reflect a full consideration of how the training initiative will help achieve organizational goals. Companies routinely sponsor training initiatives to facilitate the attainment of organizational goals.<sup>90</sup> As suggested by Pollock, answering the question of how a training initiative will help achieve organizational goals requires an

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<sup>88</sup> Austin & Durr, *supra* note 52.

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

<sup>90</sup> ROY V. H. POLLOCK ET AL., *THE SIX DISCIPLINES OF BREAKTHROUGH LEARNING: HOW TO TURN TRAINING AND DEVELOPMENT INTO BUSINESS RESULTS* (2015).

understanding of the relationship between business objectives and learning objectives.<sup>91</sup> The business objectives of training outline how the training will benefit the organization, whereas the learning objectives of training describe what participants will know and be able to do after completing the training program.<sup>92</sup>

The business objective of providing EQ training to in-house counsel is to promote increased collaboration between in-house counsel and other members of interdisciplinary teams. The increased collaboration will enable interdisciplinary teams to support organizational efforts to manage risk and cultivate value through: (1) identifying future legal problems in time to take preventive action; and (2) detecting business opportunities in time to take advantage of conceivable benefits. The learning objectives that will support this business objective include helping participants to know why it is their job to support the views, perspectives, and interests of others, and be more willing to provide such support. As noted above, a range of activities support achieving learning objectives in EQ training, including lectures with examples/stories, small group or large group discussions, role-playing, case studies, self-observations, and small group exercises.<sup>93</sup> Although the tools used are largely up to the discretion of the training facilitator (whether

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

<sup>92</sup> *Id.*

<sup>93</sup> Mickaël Campo et al., *Emotional Intelligence Training: Implications for Performance and Health*, 101 ADV. PSYCHOL. RES. 75, 80 (2015).

internal or external to the organization), facilitators are strongly encouraged to employ activities that illustrate how the concept of *legal guidance* expands beyond litigation to a range of decision-making activities. In the crisis management context, for example, in-house counsel often participate in determining answers to a variety of questions, including:<sup>94</sup>

- What information should be conveyed to organizational employees to address potential drops in morale that may derive from suspicions toward the investigation process?
- What level of factual investigation is most appropriate in light of possible disruptions to daily business operations?
- How to determine which information to distribute internally and which information to keep confidential?
- What strategy is best suited to communicating with government regulators and investigative agencies?
- How to determine when (and how) to self-report misconduct to regulators and investigating agencies?
- What strategy to pursue in settlement negotiations?
- What measures are necessary to prevent similar crises from occurring in the future?

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<sup>94</sup> Robert Waterman & Bruce E. Yannett, *Crisis Management, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* (2018).

The identification of a suitable business objective served by the EQ training, as well as the learning objectives that support that business objective, is only the first step. The individual(s) facilitating the EQ training must communicate the business objectives to the in-house counsel who are participating in the training. It is critical that the business objectives effectively convey the rationale for the time commitment required by the participants.<sup>95</sup> To foster voluntary and self-motivated commitment to the EQ training, in-house counsel must view the business outcomes of the training as valuable to the legal department and to the organization.<sup>96</sup>

### *B. Fears of Forsaking Legal Objectivity*

Emotional intelligence training for in-house counsel also provides a means to dispel the worry that supporting the views, perspectives, and interests of others may lead in-house counsel to suppress their own independent judgment. Although concerns about suppressing independent judgment are understandable given the pressures and obligations facing in-house counsel,<sup>97</sup> such anxieties reflect a faulty assumption that showing support for others' views, perspectives, and interests is the same as accepting those views, perspectives, and interests. Support is not the same as agreement. In-house

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<sup>95</sup> Pollock et al., *supra* note 90.

<sup>96</sup> Pollock et al., *supra* note 90; Dolev & Leshem, *supra* note 71.

<sup>97</sup> See *supra* notes 44 - 48 and accompanying text.

counsel, by participating in EQ training, will develop several skills that will allow them to demonstrate support for others' views, perspectives, and interests without agreeing with or passively accepting proposals derived from those views, perspectives, and interests. First, empathy skills developed in EQ training will allow in-house counsel to better understand (and acknowledge when appropriate) how other team members frame tasks, issues, and problems facing the team. Counsel, by conveying an understanding of others' frames of reference within the explanation of their disagreement with a proposal, conveys to others' that they are attuned to their views, perspectives, and interests. Second, self-control skills developed in EQ training will help in-house counsel calmly listen to others' points of view and better direct constructive criticism (as appropriate) toward the point of view rather than the proponent. Third, social expertness skills developed in EQ training will enable in-house counsel to cultivate better relationships with other interdisciplinary team members. Specifically, counsel will be better equipped to informally approach other team members, explain that they occupy a support-role rather than a deal killer-oversight role, and describe potential ways in which the team can best apply counsel's analytical skills.

## **VI. CONCLUSION**

Managing the relationship between members of the in-house legal department and other departments within the organization represents a key

foundation to integrating legal strategy with overall competitive strategy. A review of existing frameworks and the related literature, however, reveals that the vast majority of scholarship focuses on issues related to the adjustment of non-lawyer perspectives toward law in the organization. Efforts to manage relationships between managers and in-house counsel must also account for the perspectives, goals, and positions of in-house counsel. Two obstacles may prevent in-house counsel, when placed on interdisciplinary teams, from supporting the views, perspectives, and interests of others: (1) beliefs that it is the job of in-house counsel only to provide legal guidance, not to support the views, perspectives, and interests of others; and (2) beliefs that supporting the views, perspectives, and interests of others may lead in-house counsel to suppress their own independent judgment.

Emotional intelligence training represents one possible approach for addressing these two obstacles. First, EQ training for in-house counsel provides a means to help dispel the belief that it is not the job of in-house counsel, when placed on interdisciplinary teams, to support the views, perspectives, and interests of other team members. To foster voluntary and self-motivated commitment to the EQ training, in-house counsel must view the business outcomes of the training as valuable to the legal department and to the organization. Training facilitators, using lectures with examples/stories, small group or large group discussions, role-playing, case studies, self-observations, and small group exercises, can help to illustrate how the concept of

'legal guidance' expands beyond litigation to a range of decision-making activities. In-house counsel, armed with a greater understanding of the expanded concept of legal guidance, will stand in a greater position to cooperatively generate solutions to business problems and satisfy common organizational goals. Second, EQ training also provides a means to encourage in-house counsel to support the views, perspectives, and interests of others without fear of forsaking their own independent judgment. In-house counsel, by participating in EQ training, will gain a greater understanding of empathy, self-control, social expertness and other skills, enabling them to: (1) better understand how other team members frame tasks, issues, and problems facing the team; (2) internalize others' points of view and better direct constructive criticism (as appropriate) toward the points of view rather than the proponents; and (3) cultivate better relationships with other interdisciplinary team members.

*ADDRESSING LEGAL-MANAGERIAL RELATIONSHIP MANAGEMENT  
CHALLENGES THROUGH EMOTIONAL INTELLIGENCE*

**FOR THE PUBLIC BENEFIT:  
WHY PURPOSE-DRIVEN COMPANIES  
SHOULD ADOPT, PURSUE AND DISCLOSE  
LOCALLY SUPPORTIVE TAX STRATEGIES**

DOV FISCHER\*  
MICHAEL KRATEN\*\*  
JOHN PAUL\*\*\*

**I. INTRODUCTION**

Over the centuries, various corporations have engaged in tax mitigation schemes that have increased shareholder wealth at the cost of society.<sup>1</sup> In their defense, these corporations have argued that they owe their shareholders the duty to minimize the tax bill under all possible legal methods, even if they do not pass the smell test.<sup>2</sup> On the other hand,

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<sup>1</sup> GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS*, 102 (2016).

<sup>2</sup> Grahame R. Dowling, *The Curious Case of Corporate Tax Avoidance: Is It Socially Responsible*, 124 J. BUS. ETHICS 1,1 (2013).

purpose-driven companies ostensibly strive for a higher code of ethics and serve the interests of a broader constituency.<sup>3</sup> It is for this reason that purpose-driven companies (including benefit corporations) should be required to both eschew tax avoidance strategies and publicly disclose how corporate activities support legitimate tax policies. This should apply equally to both domestic and international purpose-driven companies alike.

The realm of tax ethics within corporate strategy is grossly underdeveloped.<sup>4</sup> This is all-the-more-true with purpose-driven companies. Terms such as “responsible tax strategy” are inherently ambiguous as to how a competitive financial strategy is compatible with the expectations of societal responsibility. Due to this continuing ambiguity, even a global leader in corporate social responsibility like Novo Nordisk openly admits that its tax strategy focuses on competing with its peers rather than assuring the payment of valid taxes in support of public interests.<sup>5</sup> Worse yet, Novo Nordisk has enjoyed certain tax advantages relative to its U.S.-

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<sup>3</sup> George Serafeim, *Facebook, BlackRock, and the Case for Purpose-Driven Companies*, HARV. BUS. REV. (2018); Bill Saporito, *Making Good, Plus A Profit*, TIME (March 23, 2015).

<sup>4</sup> Thomas Pogge, *Cosmopolitanism and Sovereignty*, ETHICS 103, no. 1 (1992): 48-75, 50; Peter Dietsch, *Asking the Fox to Guard the Henhouse: The Tax Planning Industry and Corporate Social Responsibility*, ETHICAL PERSPECTIVES 18, no. 3 (2011): 341-54.

<sup>5</sup> NOVO NORDISK 2017 ANNUAL REPORT [[http://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE\\_NVO\\_2017.pdf](http://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_NVO_2017.pdf)].

based competitors,<sup>6</sup> at least until the passage of the *Tax Cuts and Jobs Act of 2017*.<sup>7</sup> By aggressively pursuing those advantages, Novo Nordisk may have contributed to the corporate inversions of Allergan and Pfizer, the latter of which was ultimately aborted after a public outcry.<sup>8</sup>

The current article expands the tax ethics framework developed by Fischer and Kraten (2017) for benefit corporations and applies it to the broader context of both domestic and international purpose-driven corporations.<sup>9</sup> In order to do this, the article first defines the meaning of “purpose-driven company” and distinguishes it from the more narrowly defined scope of benefit corporations. Next, the article provides exemplars of purpose-driven companies and shows that many have adopted distinctive corporate structures from benefit corporations. With the broader audience of corporate entities defined, the article then concisely extends the Fischer and Kraten framework by identifying six

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<sup>6</sup> Nina Trentmann, *Lower Tax Rate, Weaker Dollar Make U.S. More Attractive, Novo Nordisk Says*, WALL ST. J. (Feb., 2, 2011), <https://blogs.wsj.com/cfo/2018/02/02/lower-tax-rate-weaker-dollar-make-u-s-more-attractive-novo-nordisk-says/>.

<sup>7</sup> PUBLIC LAW NO: 115-97 (12/22/2017).

<sup>8</sup> Max Nisen, *Big Pharma Murdered Tax Inversions*, BLOOMBERG (Apr. 6, 2016), <https://www.bloomberg.com/gadfly/articles/2016-04-06/big-pharma-ruined-tax-inversions-for-everybody; Tracking Tax Runaways>, BLOOMBERG, (Sept. 18, 2017, Updated Mar. 1, 2017), <https://www.bloomberg.com/graphics/tax-inversion-tracker/>.

<sup>9</sup> Dov Fischer and Michael Kraten, *Tax Ethics for Benefit Corporations*, DECISION SCIENCES CONFERENCE PROCEEDINGS, Washington, D.C. (Nov. 2017).

practices that all purpose-driven companies should avoid in order to successfully maintain their tax ethics standards.<sup>10</sup> Lastly, the article applies these additional insights to Novo Nordisk as a case study of the ethical problems encountered by otherwise well-intentioned purpose-driven companies.<sup>11</sup>

## **II. DEFINING THE PURPOSE-DRIVEN COMPANY**

At a basic level, a purpose-driven company has some purpose beyond simply benefitting shareholders.<sup>12</sup> That purpose can be to “benefit” employees, customers, and the broader universe.<sup>13</sup> This is why the term purpose-driven company is sometimes confounded with benefit company.<sup>14</sup> However, benefit companies are a more specific subclass of purpose-driven companies, and in fact there are two sub-classes of benefit companies. A “Benefit Corporation” is a legal form of business recognized by most U.S. states; on the other hand, a B-Corp is a certification provided by B Lab, a nonprofit which

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<sup>10</sup> James S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287-301 (2013).

<sup>11</sup> FORBES, <https://www.forbes.com/companies/novo-nordisk/#3058dff51960>.

<sup>12</sup> MacLeod and More, <https://www.mcleodandmore.com/purpose-driven-business/>.

<sup>13</sup> *Id.*

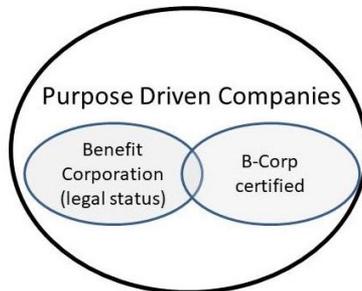
<sup>14</sup> Rachel Zurer, *The World’s Top For-Benefit Companies*, CONSCIOUS COMPANY MEDIA (Nov. 6, 2016), <https://consciouscompanymedia.com/sustainable-business/the-worlds-top-25-for-benefit-companies/>.

certifies more than two thousand for-profit companies around the world as B Corporations.<sup>15</sup> Table 1 summarizes the three terms. Figure 1 presents a Venn diagram showing that the legal status of Benefit Corporation overlaps with B-Corp certified companies, while both are part of the larger universe of purpose-driven companies.

**Table 1.** Benefit Companies and Purpose-Driven Companies

	<i>Official status</i>	<i>Authority</i>	<i>Profit orientation</i>
Benefit Corporation	Legal form of business	U.S. states	For-profit
B Corporation	Certification	B Lab	For-profit
Purpose-driven	None	None	For-profit and non-profit

**Figure 1.** Purpose-Driven Companies and Benefit Companies



Evidence of the continuing confusion between general purpose-driven companies and specific benefit corporations and/or B-Corp certified entities is provided by Conscious Company Media (CCM).

<sup>15</sup> Dana Brakman Reiser, *Benefit Corporations – A Sustainable Form of Organization*, WAKE FOREST L. REV. 2 (2011).

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In 2016, CCM claimed to have ranked the world’s top 25 “benefit companies.” In fact, CCM actually used the term “benefit company” loosely to refer to the broader world of purpose driven companies.<sup>16</sup> With that caveat in mind, the CCM effort still provides insight into how general purpose-driven companies can be evaluated. The CCM companies were rated along twelve dimensions, with “purpose” receiving half the weight. The other eleven dimensions included various policies relating to employees, customers, and the environment. However, none of the eleven policies addressed tax policy. Table 2 summarizes CCM’s ranking system of benefit companies.

**Table 2.** Conscious Company Media Rating System for Purpose Driven Companies

<i>Purpose</i>	Clearly defined mission and demonstrated commitment through strategy, measurements, incentives, and/or a legal structure.
<i>Operating Practices</i>	Eleven practices covering relations with employees, customers, and environment

CCM provides only very basic information about the companies on its list. One quantitative measure it provides is the approximate number of employees. To gain a better understanding of these highly regarded companies, look at Table 3 listing the sixteen largest companies on the list in terms of employees (400+). Table 3 presents the 16 largest companies on the CCM list. As indicated earlier, these companies are not technically benefit

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<sup>16</sup> Zurer, *supra*, note 14.

corporations. Only Patagonia is legally a benefit corporation, and only six are B-Corp certified.<sup>17</sup>

Ten of the sixteen companies were U.S. based, although none of these were in the top three in terms of employees. Four companies were publicly traded, and one (Aveda) was a subsidiary of a publicly traded company (Estee Lauder). Eight were privately-held companies with a clear for-profit orientation - including employee-owned Recology (a San Francisco-based recycler). Perhaps the company with the most interesting ownership structure was Roshan, a wireless provider in Afghanistan that is majority-owned by the Aga Khan Fund for Economic Development, which in turn is a for-profit agency of the non-profit Aga Khan Development Network, founded and chaired by Aga Khan IV (b.1936), the head of the Nizari Ismaili Shia denomination constituting 25 million members.<sup>18</sup>

Three companies did not have a clear profit motive and these included: Groupe SOS, the Paris-based conglomerate; Vancity, the Vancouver-based credit union; and Triodos, the Netherlands-based bank.<sup>19</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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**Table 3.** Distinguishing Purpose-Driven Companies Using CCM’s Rankings (This list includes sixteen companies with employees of at least 400)

<i>Name</i>	<i>Business</i>	<i>Location</i>	<i>Employees</i>	<i>Benefit Corp. / B-Corp Certified</i>	<i>Organizational Form</i>
Novo Nordisk	Largest insulin maker	Denmark	42,000		Public, foundation owns majority
Groupe SOS	Conglomerate	Paris	14,000		Non-profit
Natura	Cosmetics	Sao Paulo	7,000	B-Corp Certified	Public
Interface	Carpet tiles	Atlanta	3,500		Public
Recology	Recycling	San Francisco	3,000		Employee owned
Vancity	Credit union	Vancouver	3,000		Co-op
Aveda	Cosmetics	Minneapolis area	2,000		Owned by Estee Lauder
Patagonia	Clothing	Los Angeles area	2,000	Benefit Corp. and B-Corp Certified	Private
Eileen Fisher	Clothing	Suburban NYC	1,300	B-Corp Certified	Private
Triodos	Bank	Netherlands	1,200		Fully owned by foundation
Roshan	Wireless	Afghanistan	1,200	B-Corp Certified	Majority owned by Aga Khan Development Fund
Cliff Bar	Nutrition bar	San Francisco area	1,000		Private
Etsy	Crafts	Brooklyn	900	B-Corp Certified	Public
Honest Company	Personal and baby products	Los Angeles area	500	B-Corp Certified	Private
Toms	Clothing and accessories	Los Angeles	400		Private
D.Light	Solar lighting	San Francisco	400		Private

As laudable as CCM’s efforts are in attempting to provide a comprehensive listing of information on leading purpose-driven “benefit” corporations, the listing still suffers from one notable defect: none of CCM’s listed dimensions include any information regarding the corporation’s “beneficial” tax policy. As explained in the following section, previous work by Hiller has proposed a broader ethics framework for benefit corporations. Moreover, Fischer and Kraten extended this framework to include tax ethics for benefit corporations. In the

present article, we extend it further to include tax ethics for ALL purpose-driven entities.

### III. EXTENDING THE FISCHER/KRATEN FRAMEWORK TO PURPOSE-DRIVEN ENTITIES

According to the broader ethics framework of Hiller (2013), there are five characteristics of benefit corporations: (1) the purpose of the corporation to provide a public benefit, (2) the independent third-party standard to annually review corporate public benefit, (3) the duties of directors to consider a broader spectrum of interests beyond shareholder profit, (4) transparency, and (5) Benefit Corporation enforceability by means of a benefit enforcement proceeding. Table 4 lists the five characteristics that Hiller attributes to benefit corporations.<sup>20</sup>

**Table 4.** Hiller’s (2013) Five Characteristics of a Benefit Corporation

Benefit corporation characteristic		Tax ethics implications	
(1) Public benefit	Purpose of the corporation to provide a public benefit.	Provide public benefits in the form of tax payments to host communities	“a material positive impact on society and the environment” (Model Act, § 102)
(2) Third-party standard	Independent third-party standard to annually review corporate public benefit	Not applicable	
(3) Director duties	Duties of directors to consider a broader spectrum of interests beyond shareholder profit.	Broadens the traditional concept of directors’ legal fiduciary duties beyond shareholders of the corporation. (Hiller 2013)	
(4) Transparency	Requiring an annual benefits report	Embrace organizational simplicity and avoid complexity	
(5) Enforcement	Enforceability by means of a benefit enforcement proceeding	Not applicable	

<sup>20</sup> James S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287-301 (2013).

In 2017, Fischer and Kraten<sup>21</sup> focused on Hiller (2013) characteristics 1, 3, and 4 (public benefit, director duties, transparency) as these characteristics relate closely to the issue of tax avoidance.<sup>22</sup> Public benefit is defined as “a material positive impact on society and the environment.”<sup>23</sup> For benefit corporations, and to a lesser degree purpose-driven companies, director duties cover a broad spectrum of interests beyond shareholder profit, which according to Hiller broadens “the traditional concept of directors’ legal fiduciary duties beyond shareholders of the corporation”; furthermore, in order to monitor these duties, there must be transparency, which requires an annual benefits or sustainability report.<sup>24</sup> From our perspective, however, we are concerned with the transparency, or lack thereof, in the financial statements about tax minimization schemes.

Unlike most traditional corporations, benefit corporations are dedicated to a “triple bottom line” of “people, planet and profit” and are becoming some of the fastest growing companies in the United States.<sup>25</sup> With Maryland passing the first benefit

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<sup>21</sup> Fischer and Kraten, *supra*, note 9.

<sup>22</sup> *Id.*

<sup>23</sup> MODEL BENEFIT CORPORATION LEGISLATION §102 (2016).

<sup>24</sup> Hiller, *supra*, note 20.

<sup>25</sup> Michelle Cho, *Benefit Corporations in the United States and Community Interest Companies in the United Kingdom: Does Social Enterprise Really Work*, NW. J. INT’L. L. & BUS. 37 (2016).

corporation statute in 2010,<sup>26</sup> the legislative growth of this corporate form has been rapid. Currently, thirty-one states and the District of Columbia have passed benefit corporation statutes and another seven states have legislation pending.<sup>27</sup>

The proliferation of benefit corporations and certifications can be largely attributed to the promotional work of B Lab, a Pennsylvania nonprofit corporation organized in 2006.<sup>28</sup> B Lab works with individuals, communities and interest groups to garner attention to social enterprise and business mission alignment in two key ways. First, it centers its operations on creating a movement around firms that meet the standards of verified, overall social and environmental performance, public transparency and legal accountability.<sup>29</sup> Second, B Lab creates awareness of and provides

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<sup>26</sup> Joan Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 612 (2017); See B Lab, Maryland First State in Union to Pass Benefit Corporation Legislation, CSRWIRE, (Apr. 14, 2010), [http://www.csrwire.com/press\\_releases/29332-Maryland-First-State-inUnion-to-Pass-Benefit-Corporation-Legislation](http://www.csrwire.com/press_releases/29332-Maryland-First-State-inUnion-to-Pass-Benefit-Corporation-Legislation) [<http://perma.cc/3V8X-3MCD>]; Debra Cassens Weiss, Md. Adopts Nation's First Law Creating Do-Gooder 'Benefit Corporations', A.B.A.J. (Apr. 15, 2010), [http://www.abajournal.com/news/article/md\\_adopts\\_nations\\_first\\_law\\_creating\\_do-gooder\\_benefit\\_corporations/](http://www.abajournal.com/news/article/md_adopts_nations_first_law_creating_do-gooder_benefit_corporations/) [<http://perma.cc/68KD-TFZ7>].

<sup>27</sup> B Lab, *State by State Status of Legislation*, <http://benefitcorp.net/policymakers/state-by-state-status> [<http://perma.cc/669E-P6BX>].

<sup>28</sup> J. Haskell Murray, *The Social Enterprise Law Market*, MD. L. REV. 75 (2016).

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

support for the benefit corporation form as well as benefit corporation (B Corp) certification. B Lab also supplies model benefit corporation legislation and social enterprise standards that may meet the requirements of benefit corporation statutes in numerous states.<sup>30</sup>

Traditional for-profit corporations are intended to pursue the financial interests of their shareholders. While for-profit corporations may engage in socially beneficial activities, these activities are measured against a profit motive.<sup>31</sup> On the other hand, non-profit corporations pursue socially beneficial results without considering the profit motive for its members because there are no shareholders who receive profit distributions.<sup>32</sup>

Between the structures of the for-profit and non-profit corporations are the benefit corporations.<sup>33</sup> Benefit corporations are for-profit since they have shareholders who obtain financial benefits from dividends but they are also non-profit since they consider the social good; however, benefit corporations are different from both for-profit and non-profit corporations in that the shareholders realize that producing social good might reduce profitability.<sup>34</sup>

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

<sup>31</sup> James D. Cox and Thomas Lee Hazen, *The Evolution of Corporations in England and America: Benefit Corporations*, TREATISE ON THE LAW OF CORPORATIONS (2015).

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

<sup>33</sup> *Id.*

<sup>34</sup> Hiller, *supra*, note 20.

In order to become a benefit corporation in the United States, an entity must pursue the general public benefit, file annual benefit reports, and assess its progress against third-party standards.<sup>35</sup> A benefit corporation is a corporate structure offered by an individual state statute and is not the same as a B Corp. A B Corp. is defined as a company who has received B Corp. certification from the nonprofit corporation, B Lab, one of the most respected third-party organizations and proponents of benefit corporation legislation in the United States. A corporation can be a benefit corporation without being a B Corp.<sup>36</sup>

A key advantage of becoming a benefit corporation in the United States is branding. The benefit corporation label basically opens up partnership opportunities with other benefit corporations that favor doing business with similarly socially conscious entities. Furthermore, registered benefit corporations can use marketing strategies that advertise the company's socially conscious status to the public.<sup>37</sup> These companies can persuade consumers that by purchasing from a benefit corporation, the consumers are not just purchasing for their own benefit but contributing to the greater social good as well. Several social conscious companies have successfully capitalized on the advantage of becoming a benefit corporation

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<sup>35</sup> B Lab, *supra*, note 27.

<sup>36</sup> Murray, *supra*, note 28.

<sup>37</sup> *Id.*

including Etsy, Patagonia, Ben & Jerry's and Warby Parker.<sup>38</sup>

Critics of benefit corporations point out two flaws. First, there is a lack of accountability in existing benefit corporation legislation. Second, there is a lack of oversight by the benefit corporation directors.<sup>39</sup> Insufficient clarity with respect to the accountability and oversight of benefit corporations leads to “faux social responsibility.” The language in state-specific benefit corporation legislation remains vague and does not provide specific guidance in assessing whether benefit corporation activities are in compliance with the greater social good.<sup>40</sup> In light of these flaws, benefit corporations and purpose-driven companies should avoid activities that could potentially undermine their reputations as socially conscious entities.

#### **IV. SIX PRACTICES TO AVOID IN ALL PURPOSE-DRIVEN ENTITIES**

Having explained how the Fischer/Kraten Framework can be extended to Purpose-Driven Entities, in this section we provide specific examples of how this framework can be applied. Specifically, we describe six practices that all purpose-driven

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<sup>38</sup> *Id.*

<sup>39</sup> J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. BUS. L. REV. 1, 28 (2012).

<sup>40</sup> Thomas J. White III, *Benefit Corporations: Increased Oversight Through Creation of the Benefit Corporation Commission*, 41 J. LEGIS. 329 (2015).

companies should avoid; we then provide a general “smell test.” The first six practices arguably violate at least one of Hiller’s characteristics – and should apply to all purpose-driven entities. The smell test does not violate any specific characteristic but serves as a standard that should not be violated.

Table 5 outlines the practices to be avoided, which we describe in greater detail below.

**Table 5.** Tax Practices that Purpose Driven Companies should avoid

<i>Practices to avoid</i>	<i>Reasons</i>
Transferring intellectual property developed in the home country to other countries to avoid home country taxes	Public benefit, transparency
Borrow money in the home country while cash languishes in overseas subsidiaries	Public benefit
Corporate inversions	Public benefit, director duties, transparency
Tax position which can be reasonably challenged by the tax authority	Transparency
Classify of cash as “permanently reinvested” overseas so as to not report a deferred tax liability	Transparency
Transactions undertaken entirely for tax purposes	Public benefit, transparency
<i>The Smell Test</i> - Any transaction or practice that would draw criticism	Appearance of impropriety

*A. Refrain from transferring intellectual property from the home country to avoid taxes*

Companies such as Delta Airlines have taken up schemes to transfer their brand name to low-tax

nations such as Ireland and the Netherlands.<sup>41</sup> They would then have the U.S. business pay a hefty royalty to the overseas company that owns the brand name, thereby reducing the U.S. tax bill.<sup>42</sup> This activity does not pass the smell test. The brand name was developed in the U.S. by U.S. employees.<sup>43</sup> This activity violates the requirement that the company have a materially positive impact on its community. Furthermore, the transfer of intellectual property is shrouded in secrecy and violates the spirit of transparency.

*B. Refrain from borrowing money in the home country while cash languishes overseas*

Companies such as Apple have borrowed billions in the U.S., sometimes to pay shareholder dividends, even though billions of dollars remain in overseas bank accounts.<sup>44</sup> This activity would be absurd were it not that these companies wished to avoid paying U.S. taxes on their overseas profits. Mind you, the U.S. allows a credit for overseas taxes paid. It is just that these companies do not wish to

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<sup>41</sup> Justin Bachman, *To Avoid Taxes, Delta's Assets Could Book a One-Way Flight to Europe*, BLOOMBERG BUS. (December 15, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Mark Holtzblatt, John Geekie and Norbert Tschakert, *Should U.S. and Global Regulators Take a Bigger Tax Bite Out of Technology Companies: A Case on Apple's International Tax Minimization and Reporting Strategies*, 31 ISSUES IN ACCT. EDUC. 133 (2016).

pay their fair share of U.S. taxes on overseas profits.<sup>45</sup> It is easy for these companies to convince the public that the U.S. has no moral claim to tax overseas profits but this is not the case. The ability of companies such as Apple and Google to make profits overseas derives from the benefit of the U.S. educational system and other factors that enabled these companies to grow and thrive in the U.S. before dominating overseas markets.<sup>46</sup> Until such time that the U.S. changes its tax system to a territorial one for both individuals and corporations, companies should not undertake schemes to avoid U.S. taxation on foreign profits.

*C. Avoid corporate inversion mergers*

Besides the unsavory tax avoidance, the practice is a betrayal of the home country, which provided a home for the company to grow and thrive. Considering that it is the board of directors who makes critical decisions such as corporate inversions, directors of benefit corporations should be especially apprised that they have fiduciary duties not just to shareholders but to the local communities.<sup>47</sup> To the extent that inversions increase complexity they also impede transparency.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Hiller, *supra*, note 20.

*D. Avoid any tax position which the tax  
authority can reasonably challenge*

Companies routinely take tax positions or claims that they know the IRS will challenge.<sup>48</sup> Furthermore, they estimate the probability that these claims will be sustained in favor of the taxpayer. For financial reporting purposes, if the probability is at least 50% that a claim can be sustained, the taxpayer can take the benefit.<sup>49</sup> For a benefit corporation, there is no reason to take positions with doubtful sustainability. The practice of taking uncertain tax positions violates the spirit of the transparency characteristic. If a benefit corporation encounters an area of uncertainty in taxes, it should be forthright about the matter with the taxing authority.

*E. Full disclosure of Deferred Tax Liability for  
overseas cash*

Most large companies avoid reporting this liability by stating that they never intend to repatriate their overseas cash.<sup>50</sup> This practice is disingenuous and inconsistent with accounting concepts. If

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<sup>48</sup> Katherine Drake, Nathan Goldman and Stephen Lusch, *Do Income Tax-Related Deficiencies in Publicly Disclosed PCAOB Part II Reports Influence Audit Client Financial Reporting of Income Tax Accounts?* 91 ACCT. REV. 1411 (2016).

<sup>49</sup> *Id.*

<sup>50</sup> Alexander Edwards, Todd Kravet and Ryan Wilson, *Trapped Cash and the Profitability of Foreign Acquisitions*, 33 CONTEMP. ACCT. RES. 44 (2016).

overseas cash is included in consolidated assets then a deferred tax liability should be recorded to reflect the moral costs to repatriate that cash.

*F. Only engage in transactions that have a sound business, rather than tax, purpose*

Some transactions only make sense because of the associated tax benefits. Benefit corporations should avoid such transactions according to the ethical guideline of Avi-Yonah<sup>51</sup> (2008).

## V. THE “SMELL TEST”

The previous list of tax practices to be avoided by benefit corporations is just that, a list. As a matter of practice, lists are self-defeating. At the end of the day, benefit corporations should avoid any transaction or practice that would be criticized by the press and political leaders if it came to light. An example includes the carried interest provision under which hedge fund managers receive compensation that is taxed at much lower capital-gains rates rather than earned income rates that most people pay.<sup>52</sup> As another example, in the recent U.S. presidential election, it came to light that Donald Trump most probably did not pay taxes for the past two decades

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<sup>51</sup> Reuven Avi-Yonah, *Corporate Social Responsibility and Strategic Tax Behavior in W. Schon (ed), TAX AND CORP. GOV.* (2008).

<sup>52</sup> Matthew Goldstein and Ben Protess, *Trump Tax Plan Silent on Carried Interest, A Boon for the Very Rich*, N.Y. TIMES (Apr. 27, 2017).

due to carrying forward large losses from the mid-nineties.<sup>53</sup> While the logic of carrying forward losses seems fair to sophisticated businesspeople and accountants, it appears to be a “loophole” to non-sophisticated observers.

The legal profession has been a pioneer in recognizing that one must avoid even the appearance of improper behavior.<sup>54</sup> The U.S. Department of Justice (2018) lists fourteen General Principles of Ethical Conduct (Please see table 6).<sup>55</sup> Interestingly, the first principle views public service as a public trust, which is very similar to the public benefit characteristic of a benefit corporation. The twelfth principle specifically refers to taxes, asking employees to “in good faith” pay their “just ... taxes.” The fourteenth principle provides an overarching guidance: employees should avoid even the appearance of violating ethical standards.

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<sup>53</sup> Nicholas Confessore and Binyamin Appelbaum, *How a Simple Tax Rule Let Donald Trump Turn a \$916 Million Loss into a Plus*, N.Y. TIMES (Oct. 3, 2016).

<sup>54</sup> Lyn Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55 (2000).

<sup>55</sup> U.S. DEPT. OF JUSTICE, *14 General Principles of Ethical Conduct* (2018).

**Table 6.** U.S. Department of Justice’s (2018)  
General Principles of Ethical Conduct for  
Employees (Principles 1,12, &14)

1. Public service is a <u>public trust</u> , requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
12. Employees shall satisfy in good faith their obligations as citizens, including <u>all just financial obligations</u> , especially those—such as Federal, State, or local <u>taxes</u> —that are imposed by law.
14. Employees shall endeavor to avoid any actions creating the <u>appearance</u> that they are <u>violating the law or the ethical standards</u> set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

## **VI. APPLYING THE PROPOSED FRAMEWORK TO NOVO NORDISK**

Although we criticize certain aspects of Novo Nordisk’s tax strategy, we begin by pointing out that it does communicate a spirit of tax citizenship. It is refreshing that the company specifically identifies tax contributions as a form of “value created.” It is rare for companies to explicitly acknowledge that tax contributions are a form of created value. This is a first step in identifying tax policy as area governed by social responsibility. In describing its business approach, the company lists tax contributions as one of the forms of value created for society.

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**Figure 2.** Novo Nordisk Accomplishments and Results, 2017 Annual Report, pg.5



While it is certainly welcome that Novo Nordisk views tax contributions as value created for society, it will be apparent that it takes measures to keep these contributions within bounds. Furthermore, the lion's share of the contributions goes to one jurisdiction (Denmark) in which the company generates an insignificant percentage of its sales. Meanwhile, the U.S., where Novo Nordisk generates half its sales, receives a quarter or possibly much less than the company's tax contributions. Furthermore, the number 10.6 billion Kroner is a misleading indicator of actual taxes paid to society. Several pages later under Novo Nordisk provides two paragraphs describing its tax strategy. Figure 3 contains the first of the two paragraphs.

**Figure 3.** Novo Nordisk Accomplishments and Results, 2017 Annual Report, pg.12

RESPONSIBLE TAX APPROACH (first paragraph, emphasis added)

Novo Nordisk's tax approach is to pursue a *competitive tax level in a responsible way*. As a general rule, Novo Nordisk subsidiaries pay corporate taxes in the countries in which they operate and *where business activity generates profits*, earned in accordance with international transfer pricing rules. A competitive tax level implies achieving a tax level around the peer-group average. The company has a balanced tax risk profile and *does not engage in tax avoidance activities*.

While the above statement acknowledges that a responsible tax approach is an important area of corporate judgement, it communicates less than it appears at first glance. On the one hand, the company claims that it does not engage in tax avoidance activities and that it pays corporate taxes in countries where business activities generate profits, yet on the other hand it acknowledges that it aims to achieve a competitive tax level with its peers, some of whom undoubtedly pursue aggressive tax strategies. On its face, the two objectives are incompatible. There is another subtle phrase in this paragraph. Novo Nordisk aims to pay taxes in countries in which business activities *generate profit*. As anyone familiar with the intricacies of transfer pricing, generating profit can have very little to do with the actual sales and profits generated by a market. While the U.S. market is highly lucrative for Novo Nordisk, it uses profit shifting in such a way as to minimize the profits allocated, and taxes paid to, the U.S. From the perspective of U.S. consumers and taxpayers, they benefit little from the value generated by Novo Nordisk's tax payments.

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Before turning to how two specific tax schemes identified earlier in our study relate to Novo Nordisk, it is useful to take a deeper look into financial reporting for taxes. Corporate tax reporting is a notoriously difficult section of the financial statements to understand, not least because the amount of taxes *expensed* on the income statement is not the same as actual tax *payments* to society. The Statement of Cash Flows highlights the difference between the two numbers.

**Figure 4.** Novo Nordisk Cash Flow Statement, 2017 Annual Report, pg.59

DKK million	Note	2017
<b>CASH FLOW STATEMENT</b>		
Net profit for the year		38,130
Reversal of non-cash items:		
Income taxes in the Income statement	2.6	10,550
Depreciation, amortisation and impairment losses	3.1, 3.2	3,182
Non-recurring income from the partial divestment of NNIT A/S included in Other operating income	2.5	—
Other non-cash items	4.6	2,027
Change in working capital	4.5	(3,634)
Interest received		101
Interest paid		(87)
Income taxes paid	2.6	(9,101)
<b>Net cash generated from operating activities</b>		<b>41,168</b>

Compare to the graphic from Figure 2:



So, whereas the income tax expense on the income statement is 10.55 billion kroner, the actual

income taxes paid was only 9.1 billion kroner; from a societal perspective, this is the number that matters most.

Figure 5 shows us a footnote, which tells us more about where the taxes were paid to:

**Figure 5.** Novo Nordisk Footnote on Income Taxes, 2017 Annual Report, pg. 73

**INCOME TAXES PAID**

DKK million	2017	2016	2015
Income taxes paid in Denmark for current year	6,798	5,506	5,926
Income taxes paid outside Denmark for current year	2,639	2,645	3,040
Income taxes paid/ repayments relating to prior years	(336)	(5,252)	408
<b>Total income taxes paid</b>	<b>9,101</b>	2,899	9,374

Of the taxes paid for the current year, 72 percent were paid in Denmark and only 28 percent was paid in the rest of the world including the U.S. where the company generated half its revenue. Below we will discuss the fairness of such gross underpayment of taxes in a society that accounts for such a large portion of the company’s revenues.

*A. Intellectual Property Transfer*

No company, least of all a company that projects the socially responsible image like Novo Nordisk, seeks to advertise that it transfers intellectual property to low tax jurisdictions. However, the required disclosures in the annual

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report suggest that Novo Nordisk bases some of its intellectual property in Switzerland, which has a corporate tax rate of 8 percent (see Figures 6 and 7).

**Figure 6.** Novo Nordisk Footnote on Income Taxes, 2017 Annual Report, pg. 72

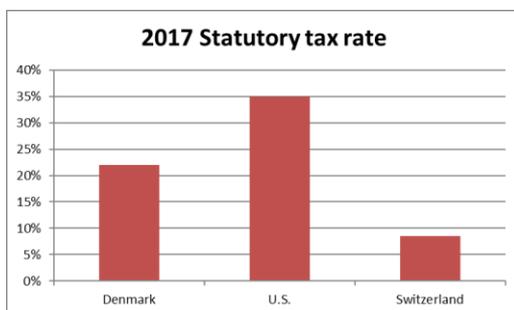
DKK million	2017	2016	2015
Computation of effective tax rate:			
Statutory corporate income tax rate in Denmark	22.0%	22.0%	23.5%
Deviation in foreign subsidiaries' tax rates compared with the Danish tax rate (net)	0.0%	0.2%	(2.9%)
Non-taxable income from the partial divestment of NNIT A/S	—	—	(1.3%)
Non-taxable income less non-tax-deductible expenses (net)	0.1%	0.1%	0.1%
Others, including adjustment of prior years	(0.4%)	(1.6%)	0.4%
<b>Effective tax rate</b>	<b>21.7%</b>	20.7%	19.8%

The impact of the deviation in foreign subsidiaries' tax rates compared with the Danish tax rate is mainly driven by Swiss and US business activities.

This footnote is a standard disclosure for companies to explain why their effective tax rate (21.7% of pre-tax income) differs from their home country's statutory tax rate (22% in Denmark). While the difference of 0.3% is admittedly small, the details suggest that the company engages in income shifting to Switzerland. The second line "deviation in foreign subsidiaries' tax rates compared with the Danish tax rate indicates no adjustment for 2017, a positive (i.e. additional tax rate) of 0.2% in 2016 and a negative (i.e. reduced tax rate) of 2.9% in 2015.

While at first glance, these numbers appear innocent, a second look raises some questions. The U.S., where Novo Nordisk obtains the majority of its revenues, the federal tax rate was 35% in addition to U.S. state tax rates (see figure 2). In the fourth quarter of 2017, the company generated approximately 50% of its revenues in the U.S. IFRS does not require the company to report profits by region, so as a conservative estimate, assume that 25% of profits are attributable to the U.S. Under such a scenario the weighted average tax rate would be 25 percent rather than the actual effective tax rate of 22 percent. However, by shifting 25 percent of the company's worldwide profits to Switzerland, it achieves a 22 percent effective tax rate.

**Figure 7.** Federal Statutory Tax Rates<sup>56</sup>



What is implied by these numbers is that the company shifted 25 percent of pretax income away from the U.S. (where it derives 50% of sales) and

<sup>56</sup> Deloitte Corporate Tax Rates 2013 – 2017, at <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-corporate-tax-rates-2013-2017.pdf>.

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Denmark (where its intellectual property should legitimately reside) to Switzerland, which generates a miniscule portion of sales. The only way that this can be accomplished is through intellectual property transfer.<sup>57</sup> Tables 7 and 8 calculate what the hypothetical tax rate would have been without income shifting to Switzerland, and the actual effective tax rate of 22 percent achieved by income shifting to Switzerland.

**Table 7.** Hypothetical Effective Tax Rate in 2017, without Income Shifting

	Statutory tax rate	Weighted average
Denmark and similar tax rate jurisdictions	22%	17%
U.S.	35%	9%
Estimated effective tax rate	25%	

**Table 8.** Actual Effective Tax Rate in 2017, with Income Shifting to Switzerland

	Statutory tax rate	Weighted average
Denmark	22%	11%
U.S.	35%	9%
Switzerland	9%	2%
Effective tax rate	22%	

*B. Uncertain Tax Positions*

Many companies take “tax positions”, which are theoretical justifications for paying less taxes than another reasonable person might judge

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<sup>57</sup> Holtzblatt et al., *supra*, note 44.

appropriate.<sup>58</sup> Eventually, the tax authority may dispute such tax position and the matter may be adjudicated in a tax court. Novo Nordisk seems to make a good effort to minimize these uncertain tax positions (see Figure 8). It negotiates Advanced Pricing Agreements in key countries such as the U.S.

**Figure 8.** Novo Nordisk 2017 Annual Report, pg. 12

To create certainty regarding tax payments, Novo Nordisk has applied for advance pricing agreements (APAs) in key countries. The ambition is to have APAs covering more than two-thirds of total sales. An APA is an up-front agreement between the tax authorities in two or more countries, covering the pricing methodologies for relevant intercompany transactions, thereby determining the level of taxable income for the countries in question. An APA typically covers a future period of five tax years. Novo Nordisk currently has APAs in place covering intercompany transactions with the US, Canada and Japan, corresponding to more than half of total sales.

Novo Nordisk appears to strive for some level of transparency with the relevant tax authorities, but it is not clear whether this is done as a matter of social conscience or as a matter of risk-minimization strategy. Even if it is transparent with the tax authorities, this does not mean that it negotiates a fair and equitable agreement. For all of U.S. President Donald Trump's claims about unfair trade agreements,<sup>59</sup> there may be an element of truth to his argument that U.S. negotiators have been

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<sup>58</sup> Andrew Lattimer, *Uncertain Tax Positions*, BLUMSHAPIRO, (March 24, 2017), <https://www.blumshapiro.com/insights/uncertain-tax-positions-fin-48-compliance-boston-hartford-providence/>.

<sup>59</sup> CBS/Associated Press, *President Trump Says Era of Unfair Trade Deals "Are Over,"* CBS MONEY WATCH (June 1, 2018), <https://www.cbsnews.com/news/president-trump-says-era-of-unfair-trade-deals-are-over/>.

“taken advantage of” by savvier negotiators around the world. After all, the management of Novo Nordisk is arguably savvier and more knowledgeable about the intricacies of intra-corporate pricing arrangements than U.S. civil servants.

Even to the extent that Novo Nordisk is engaging in a transparent manner with tax authorities, it fails to provide transparent information to the public about the effects of its transfer pricing arrangements. It does not disclose the percentage of its operating profit generated in the U.S., a jurisdiction that accounts for half its revenues. Based on the income taxes paid outside of Denmark, it can be reasonably estimated that transfer pricing agreements result in a very small percentage of taxable income attributable to the U.S.

### *C. Corporate Inversions*

Ironically, Novo Nordisk claims that its “responsible tax strategy” should aim for a tax burden that is comparable to its peers. As a Danish company since its founding Novo Nordisk obviously never had the need to engage in a corporate inversion, a practice that U.S. companies have engaged in to reincorporate in lower tax jurisdictions such as Denmark.<sup>60</sup>

The ironic part is that it is precisely the tax advantageous positions enjoyed by companies such

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<sup>60</sup> Jonathan Rockoff and Nina Trentmann, *New Tax Law Haunts Companies That Did Inversion Deals*, WALL ST. J. (Feb. 11, 2018).

as Novo Nordisk, who are based in low-tax countries but sell in the U.S., that have motivated its U.S.-based peers to seek “inversions.” As a result, the tax savings that Novo Nordisk enjoys from its unique corporate structure are only a small portion of the revenues lost to countries such as the U.S., where it generates revenue. The additional cost to the U.S. and similar countries arises when home-grown companies seek to emulate the advantageous corporate structure enjoyed by companies like Novo Nordisk.

#### *D. Code of Ethics*

Novo Nordisk publishes a “Business Ethics Code of Conduct.”<sup>61</sup> This 13-page document obviously cannot go into technical detail about its tax strategy, as it is meant for the rank and file rather than the specialized finance and tax staff. However, the fact that the code does not even mention the word taxes says something about the underdevelopment of tax ethics as compared to other elements of the company’s “purpose” and social responsibility. At the very least, the company could have communicated the basic tax strategy it disclosed in its annual report to investors.

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<sup>61</sup> NOVO NORDISK BUSINESS ETHICS CODE OF CONDUCT, <https://www.novonordisk.com/content/dam/Denmark/HQ/sustainablebusiness/performance-on-tbl/Responsible%20business%20practices/novo-nordisk-business-ethics-code-of-conduct.pdf>.

## **VII. SUMMARY AND CONCLUSION**

This study develops and applies a tax ethics framework for purpose-driven multinational companies, particularly those that operate in the United States. The basic characteristics for such companies include public benefit and transparency. In applying the tax ethics framework, the following practices should be avoided: tax-induced transfer of intellectual property and borrowing; corporate inversions; aggressive tax positions; permanent reinvestment of cash overseas; and transactions with an appearance of impropriety.

As is evident in our analysis of Novo Nordisk, even companies with a high level of “purpose” and sense of social responsibility address tax ethics in the most superficial manner. The criticism is less directed at Novo Nordisk than at the corporate culture of multinational entities in general. As long as the prevailing corporate culture is that tax minimization is an integral part of strategy, phrases such as “responsible” tax strategy will ultimately mean financially responsible rather than socially responsible.

Companies that hold themselves out as purpose-driven have an obligation to be ethical not just in fact but also in appearance. These companies would not engage in practices that are unsavory if they knew that those practices would come to light. These include the practice of lobbying lawmakers for advantageous tax positions. Another example of above-board tax practices to be expected from a benefit corporation relates to sales taxes. Benefit

corporations that sell to consumers over the internet should collect taxes for every state that charges sales taxes. Warren Buffett, provides the following apt ethical test:

“I want them [the CEOs] to judge every action by how it would appear on the front page of their local newspaper, written by a smart but semi-unfriendly reporter, who really understood it, to be read by their families, their neighbors, their friends. And it has to pass that test”<sup>62</sup>

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<sup>62</sup> BUSINESS QUOTES, [www.thebusinessquotes.com/warren-buffett-quotes/](http://www.thebusinessquotes.com/warren-buffett-quotes/)

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**TEACHING THE INTERSECTION OF THE  
FIRST AMENDMENT AND EMPLOYMENT  
LAW: PROFESSIONAL FOOTBALL AS A  
CLASSROOM ILLUSTRATION OF THE  
LIMITS OF POLITICAL SPEECH**

JULIE D. PFAFF \*

BRIAN J. HALSEY \*\*

**I. INTRODUCTION**

The First Amendment of the United States Constitution is only a single sentence. Explicitly, it states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>1</sup> Yet despite its relative brevity, the First Amendment at present engenders more discussion, debate and downright consternation than any other Constitutional Amendment (save perhaps the Second Amendment, but that is a subject

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<sup>1</sup> U.S. Const. amend. I.

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for another day).<sup>2</sup> A 2018 survey conducted by the Freedom Forum Institute found that while 77% of Americans are supportive of the First Amendment and the freedoms it guarantees, most Americans cannot articulate or apply those freedoms.<sup>3</sup> When Americans were asked to name the freedoms granted to them by the First Amendment, 40% of survey respondents could not name a single freedom and 36% could name only one.<sup>4</sup> Only one respondent of the 1,009 Americans surveyed was able to name all five freedoms guaranteed by the First Amendment.<sup>5</sup>

A series of very public current events have continued to conflate and confuse the boundaries of the First Amendment within the national discourse. Take for example the debate over the First Amendment that was sparked when professional football players chose to “take a knee” during the National Anthem in a manner meant to draw attention to what proponents of the movement characterized as a protest against social injustices

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<sup>2</sup> The authors anticipate teaching notes on the 2<sup>nd</sup>, 4<sup>th</sup>, 10<sup>th</sup> Amendments in the near future. All will address current events.

<sup>3</sup> First Amendment Center of the Freedom Forum Institute, *2018 State of the First Amendment Survey Report* (2018), <https://www.freedomforuminstitute.org/first-amendment-center/state-of-the-first-amendment/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Unfortunately, the report does not share with the readers the occupation of the person who could name all five freedoms, although this, in the authors’ opinion, is perhaps the most tantalizing question.

such as racial inequality.<sup>6</sup> These current events provide excellent teaching opportunities. They illustrate both the limits of the First Amendment, as well as the elements of employment law that control on the field. Moreover, a growing body of research supports the conclusion that instructional activities which promote direct cognitive engagement with course materials through class participation result in improved learning outcomes and more enjoyable classes for students.<sup>7</sup>

## II. PREPARATION

Because most students will already have a baseline familiarity with these current events, there is little need for extensive readings prior to class. Students will, however, benefit from a basic understanding of the concepts of employment-at-will and employment contracts. Therefore, this lesson is best incorporated into the employment law unit (or after a unit on employment law has been covered in class). The authors cover this material during the

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<sup>6</sup> Eli Rosenberg, *What the NFL's New Rules for Anthem Protests Really Mean for the First Amendment, According to Experts*, THE WASHINGTON POST (May 24, 2018), [https://www.washingtonpost.com/news/early-lead/wp/2018/05/24/what-the-nfls-new-rules-for-anthem-protests-really-mean-for-the-first-amendment-according-to-experts/?noredirect=on&utm\\_term=.10189e3eb0fe](https://www.washingtonpost.com/news/early-lead/wp/2018/05/24/what-the-nfls-new-rules-for-anthem-protests-really-mean-for-the-first-amendment-according-to-experts/?noredirect=on&utm_term=.10189e3eb0fe)

<sup>7</sup> Kevin J. O'Connor, *Class Participation: Promoting in Class Student Engagement*, 133(3) *EDUCATION* 340 (2013); see also, Kelly A. Rocca, *Student Participation in the College Classroom: An Extended Multidisciplinary Literature Review*, 59 *COMMUNICATION EDUCATION* 185 (2010).

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employment law unit, after a basic primer on Constitutional law has occurred earlier in the semester. In some cases, the instructor may choose to require students to read a brief newspaper article on the topic prior to class or watch a short video.<sup>8</sup> The authors have found that a short video clip viewed during class time and a few visual aids summarizing the salient/relevant points of each topic work well for their purposes and are sufficient to give students the background they need to discuss the issues.

It is especially important that the students are not tainted by the opinions of the professor in these

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<sup>8</sup> For articles that may be useful for students to read in preparation for this assignment: *See* Rosenburg, *supra* note 6; *see also*, Scott Bomboy, *The First Amendment and Restricting Professional Athlete Protests*, Constitution Daily (September 17, 2017), <https://constitutioncenter.org/blog/the-first-amendment-and-restricting-professional-athlete-protests>; O.R., *Trampling on the First Amendment, Donald Trump and the NFL*, THE ECONOMIST (May 30, 2018), <https://www.economist.com/democracy-in-america/2018/05/30/donald-trump-and-the-nfl>; Geoffrey Stone, *Roseanne Barr and the NFL, What Counts as Free Speech?*, ROLLING STONE (May 30, 2018), <https://www.rollingstone.com/culture/culture-news/roseanne-barr-and-the-nfl-what-counts-as-free-speech-629203/>. For videos that may be useful for students to view in preparation for this assignment: *See, Does the NFL's National Anthem Rule Break the First Amendment?*, MSNBC (May 26 2018), <https://www.msnbc.com/msnbc/watch/does-the-nfl-s-national-anthem-rule-break-the-1st-amendment-1242646083708>; Floyd Abrams, *First Amendment and National Anthem Protests*, C-SPAN (October 13, 2017), <https://www.c-span.org/video/?c4686236/1st-amendment-national-anthem-protests>.

discussions. The authors take pains to avoid revealing their personal or political opinions regarding the “take a knee” controversy. The students *should not* know what the instructor thinks about the issue. Instead, the authors attempt to lay out a framework that forces the students to draw their own independent legal conclusions outside of their pre-conceived political opinions.

In addition, the authors discuss in class the possibility that multiple facts may be true at once. It may be true that the players discussed herein are sainted political commentators on the “right” side of history. It also may be true that they are ill-informed publicity hounds seeking a payday as they see the end of their professional careers loom on the horizon. It also may be true that the team owners are irascible scoundrels, or patriotic businessmen, neither, or both. But none of that matters – part of the exercise is to train students to place a reasoned analysis above their personal proclivities.

### **III. THE LAW OF KNEELING DURING THE NATIONAL ANTHEM AND THE LIMITS OF A PROFESSIONAL FOOTBALL PLAYER'S WORKPLACE FREE SPEECH**

#### *A. Background on the Anthem Controversy*

While anthem protests are not entirely new,<sup>9</sup> it was during the 2016 National Football League

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<sup>9</sup> Marc Edelman, *Standing to Kneel: Analyzing NFL Players' Freedom to Protest During the Playing of the U.S. National*

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(“NFL”) preseason that Colin Kaepernick sparked the most recent round of controversy when he kneeled or “took a knee” during The National Anthem in what he characterized as a protest of police violence against Black Americans.<sup>10</sup> Throughout the season Kaepernick was joined by numerous other players, across a variety of other teams, including the Seattle Seahawks, Denver Broncos and San Francisco 49ers.<sup>11</sup>

The players’ protests sparked outrage from a wide swath of the NFL’s fanbase. The President of the United States took to Twitter to express his ire, writing: “Can you believe that the disrespect for our Country, our Flag, our Anthem continues without penalty to the players. The Commissioner has lost control of the hemorrhaging league. Players are the boss!”<sup>12</sup> The protests also began a debate about what

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*Anthem*, 86 FORDHAM L. REV. 1 (2018) (discussing a history of anthem protests).

<sup>10</sup> *Id.* (setting forth a concise summary of the history of the recent N.F.L. anthem protests).

<sup>11</sup> *Id.* (citing Mark Sandritter, *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SB NATION, (Sept. 25, 2017, 10:28 AM),

<https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protestseahawks-brandon-marshall-nfl> [<https://perma.cc/95AU-S9CQ>]).

<sup>12</sup> Cindy Boren, *Trump Tweets that NFL is ‘weak and out of control’ Because of Players’ National Anthem Demonstrations*, THE WASHINGTON POST, (November 28, 2017), [https://www.washingtonpost.com/news/early-lead/wp/2017/11/28/trump-tweets-that-nfl-is-weak-and-out-of-control-because-of-players-national-anthem-demonstrations/?utm\\_term=.bb8e40ba750f](https://www.washingtonpost.com/news/early-lead/wp/2017/11/28/trump-tweets-that-nfl-is-weak-and-out-of-control-because-of-players-national-anthem-demonstrations/?utm_term=.bb8e40ba750f).

right, if any, the players had to conduct such protests during what is essentially their “work time.”<sup>13</sup> Specifically, the discussion became whether or not the First Amendment of the United States Constitution protected a player’s right to protest during a game, or if the NFL could fire a player for engaging in such protests.

After students briefly review the facts of the NFL protests, they are often anxious to get right into a discussion of whether the player’s First Amendment rights were violated. The students’ initial reactions are wide-ranging and are almost always emotionally driven. The authors have found, however, that student discussion is more productive and leads to a better understanding of salient legal concepts if it is methodically guided.

### *B. The Analysis Process*

The authors provide an analytical framework for the legal discussion of the “take a knee” controversy. The class must determine and apply several principles through a six-part process:

1. Are the NFL players employees, and if they are, are they at-will, or union employees?
2. Is the act of “taking a knee” political speech covered by the 1<sup>st</sup> Amendment?

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<sup>13</sup> Nicole Lewis, *The NFL and the First Amendment: A Guide to the Debate*, THE WASHINGTON POST, (October 5, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/10/05/the-nfl-and-the-first-amendment-a-guide-to-the-debate/?utm\\_term=.542cf5894653](https://www.washingtonpost.com/news/fact-checker/wp/2017/10/05/the-nfl-and-the-first-amendment-a-guide-to-the-debate/?utm_term=.542cf5894653).

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3. What is a state actor in this context?
4. Is the NFL ownership/ league a state actor?
5. How do the President's actions impact the controversy, if at all?; and
6. Can the players who participate in the protests be fired without abridging their 1<sup>st</sup> Amendment rights?

*C. Principle I – Are the NFL Players Employees,  
and if They Are, Are They At-Will, or Union  
Employees?*

The authors suggest establishing the governing employment laws by asking students to consider a series of questions:

First, students are asked to discuss whether NFL players are at-will employees, or union employees, subject to a collective bargaining agreement. Most students understand that professional athletes have contracts and will quickly and accurately identify the players as unionized employees subject to the rules of the NFL players union. From there, however, it is also helpful to point out to students that in addition to being members of the NFL players union, players are also governed by the terms of their individual player's contracts.<sup>14</sup>

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<sup>14</sup> Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiation*, 16 UCLA ENT. L. REV. 179, 190-200 (2009).

Second, students are asked to identify how an NFL player, subject to the terms of employment and union contracts, might lawfully be terminated from his employment. That is, what is a permissible response if the player breaches the terms of his contract? The students are asked for examples. Students respond well because many of the students are sports fans and can provide real stories of terminated players.

Third, students are queried regarding what possible grounds for terminating a player would be unlawful. Students here, again, provide solid examples (i.e., if the team violated the player's contract or violated a federal law, etc.).

The authors have found that these questions help students to understand better that NFL players, like themselves, are operating within the context and constraints of an employee/employer relationship, and if they violate the terms of that relationship they may be terminated for any legal reason.

*D. Principle II – Is the Act of “Taking a Knee”  
Political Speech Covered by the 1<sup>st</sup> Amendment?*

Instructors who have not covered Constitutional law (or who did not cover the definition of speech within their discussion of Constitutional law) may find it advisable to engage students in a reasoned analysis of whether the NFL players' conduct is considered speech under the First Amendment.

The authors first ask students to read the precise language of the First Amendment: “Congress

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shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>15</sup> Next, the authors ask students whether “taking a knee” is considered speech under the language of the First Amendment.

A case that provides guidance on the interpretation of “speech” under the First Amendment is *Texas v. Johnson*.<sup>16</sup> Here, the Supreme Court of the United States held that flag burning was expressive conduct protected by the First Amendment, noting that: “[t]he First Amendment literally forbids the abridgment only of “speech,” but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct

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<sup>15</sup> See U.S. Const. amend. I. (*emphasis added*).

<sup>16</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1987) (stating “[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’ Hence, we have recognized the expressive nature of students’ wearing of black armbands to protest American military involvement in Vietnam, of a sit-in by blacks in a “whites only” area to protest segregation, of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam. . . .”) (internal citations omitted).

intends thereby to express an idea, we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”<sup>17</sup> Using this construction of speech, most students quickly realize that “taking a knee” or raising a fist, is indeed considered speech within the context of the First Amendment. But just because an action is “speech” doesn’t mean that you have right to express it. That fact brings the students to the second element of the analysis – the state actor requirement.

*E. Principle III - What is a State Actor in this Context?*

At this point in the conversation most students are very motivated to tell the professor what they *think* about the National Anthem protests. While this kind of engagement is exactly what professors dream about, the authors have found it best to hold this enthusiasm at bay for a few more moments to methodically ask students to contemplate one more critical element - the plain language of the First Amendment. The authors first ask students to again read relevant constitutional language.<sup>18</sup> Then, based upon the plain language of

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<sup>17</sup> *Id.* (internal citations omitted).

<sup>18</sup> U.S. Const. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

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the First Amendment, the authors ask students who it is that the Constitution of the United States prevents from abridging one's freedom of speech?<sup>19</sup>

Once students come to the conclusion that the First Amendment prohibits *Congress* from infringing upon their freedom of speech, the authors have found it useful to expand further upon the concept of a government or "state actor." First, it is useful to note to students that the Fourteenth Amendment of the United States Constitution applies the First Amendment's free speech protections to the states.<sup>20</sup> Next, the authors discuss the concept of a state actor.<sup>21</sup> In the authors' experience many college students have not yet grasped the concept that the Constitution protects citizens from *government action*, not from action by private individuals or institutions. The authors find that identifying what (or who) a state actor is helps students to better understand and discuss the nuances of this particular

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<sup>19</sup> Some instructors may wish to include a more detailed discussion of statutory constructionism at this point, although the authors have not done so personally.

<sup>20</sup> *Gitlow v. New York*, 268 U.S. 652 (1925) (concluding that freedom of speech is a fundamental personal right and is protected by the due process clause of the Fourteenth Amendment from impairment by the States.)

<sup>21</sup> *See Evans v. Newton*, 382 U.S. 296, 299 (1966) (stating "[w]hat is 'private' action and what is 'state' action is not always easy to determine. Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action) (*citing* *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

scenario. The authors teach at a state university – and thus are state actors. We contrast our obligations as state actors with an equivalent professor at a private school that receives no federal or state dollars. This example is an effective one to illustrate the point.

*F. Principle IV - Is the NFL Ownership a State Actor?*

With this foundation, students are ready to consider whether NFL ownership is a state actor. Most students are quick to say “no”. When students think of NFL ownership most conjure up images of billionaire owners, like the Dallas Cowboys owner Jerry Jones, or the Philadelphia Eagles owner Jeffrey Lurie. However, the authors point out there is in fact one team that is publicly traded – The Green Bay Packers.<sup>22</sup> Moreover, there are numerous stadiums that lease public land, get tax breaks, and receive other kinds of public support.<sup>23</sup> With this knowledge the authors again ask students whether they believe that NFL ownership is a state actor.

After students have been given adequate time to provide their opinions and analysis as to whether teams may be considered state actors, the authors discuss with students a recent decision in the

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<sup>22</sup> See the official Green Bay Packers website available at: <https://www.packers.com/community/shareholders>.

<sup>23</sup> Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS L. REV. 411, 414 (2010), <http://scholarship.law.marquette.edu/sportslaw/vol20/iss2/>.

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U.S. District Court for the Northern District of Illinois decision where the court refused to dismiss a Green Bay Packer fan's First Amendment claim against the Chicago Bears, after Bears management refused to allow the fan access to an on-field event at Soldier Field because he was wearing Green Bay Packers apparel. (Soldier Field was jointly operated by the Chicago Bears and the Chicago Parks Department).<sup>24</sup> The authors note that this is one result and it is difficult to find this decision predictive, as this is an unsettled area of the law. In fact, there are a number of cases in which courts have been reluctant to find that a team is a state actor when operating a sports facility, since this is not a traditional government facility.<sup>25</sup> Instructors may also find this to be an opportunity to review or emphasize the concept of precedent, and query students upon whom the U.S. District Court for the Northern District of Illinois decision would be binding. Finally, the authors point out to students that courts largely use three separate tests to identify whether a party is a state actor.<sup>26</sup>

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<sup>24</sup> Beckman v. Chi. Bear Football Club, Inc., No. 17-CV-4551, 2018 U.S. Dist. LEXIS 55140 (N.D. Ill. March 30, 2018).

<sup>25</sup> See, e.g., Ludwig's Drug Store Inc., No. 13-CV-6045 (MKB), 2016 WL 915102, at 9 (E.D.N.Y. Mar. 4, 2016); Bessey v. Spectrum Arena, L.P., No. 11-CV-7099, 2011 WL 6779306, at 4 (E.D. Pa. Dec. 23, 2011); Stark v. Seattle Seahawks, No. C06-1719JLR, 2007 WL 1821017, at 8 (W.D. Wash. June 22, 2007).

<sup>26</sup> See e.g. Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525 (2006) (including a discussion of the three tests courts predominantly

*G. Principle V - How Do the President's Actions Impact the Controversy, if at All?*

Finally, with all the above principles in place, the authors ask students whether they believe that *the government* infringed upon the player's First Amendment Rights. Discussion is often quite lively on its own and many students have a significant knowledge about or interest in this topic prior to class. In the event that discussion needs to be further stimulated, the authors have found it useful to ask the class to consider what impact, if any, the President's role has had in the controversy. The President was particularly vocal about this issue on social media, writing on September 24, 2017: "Sports fans should never condone players that do not stand proud for their National Anthem or their Country. NFL should change policy!"<sup>27</sup> And, "[i]f NFL fans refuse to go to games until players stop disrespecting our Flag & Country, you will see change take place fast. Fire or suspend!"<sup>28</sup>

Class discussion focuses on whether students believe that the President's tweets rise to the level of government action. A hypothetical question is posed to the class - what if the President himself used the

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use to identify state action: symbiotic relationship, entwinement, and public function.).

<sup>27</sup> Benjamin Hoffman, Victor Mather & Jacey Fortin, *After Trump Blasts N.F.L., Players Kneel and Lock Arms in Solidarity*, THE NEW YORK TIMES (September 24, 2017), <https://www.nytimes.com/2017/09/24/sports/nfl-trump-anthem-protests.html>.

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

authority of his office to conspire with private groups to sanction any NFL player who “took a knee” or remained in the locker room during the National Anthem?<sup>29</sup>

*H. Principle VI - Can the Players Who Participate in the Protests be Fired Without Abridging their 1<sup>st</sup> Amendment Rights?*

The final segment of the class discussion asks students to consider whether players who participate in the anthem protests can be fired by the NFL, or whether such firing would be in violation of their First Amendment rights. Answering this question requires students to synthesize information from the sections above, weigh it and apply it. It is important to note that at the time of publication, no player has yet been fired for participation in the anthem protests. However, Colin Kaepernick, the most public face of the protest movement, has not played a game in the NFL since the 2016 season after he was not re-signed, ostensibly because of his participation in the anthem protests.<sup>30</sup> Kaepernick filed suit,

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<sup>29</sup> Robert Post, *Do Trump’s NFL Attacks Violate the First Amendment? Probably Not—But they Still Undermine our Constitutional Values*, POLITICO MAGAZINE (September 27, 2017),

<https://www.politico.com/magazine/story/2017/09/27/do-trumps-nfl-attacks-violate-the-first-amendment-215650>.

<sup>30</sup> Amir Vera, *How National Anthem Protests Took Colin Kaepernick from A Star QB to Unemployment to a Bold Nike Ad*, CNN (September 4, 2018),

<https://www.cnn.com/2018/09/04/us/colin-kaepernick-controversy-q-and-a/index.html>.

accusing the league of conspiring to keep him off the field because of his role in the protests.<sup>31</sup> His suit was settled in early 2019, the terms of which were confidential but the total amount was reportedly under ten (10) million dollars.<sup>32</sup>

During this segment, the authors concern themselves less with students' conclusions and more with their methodology – focusing upon whether students can apply the multi-faceted steps discussed herein to support their analysis. If the discussion needs prompting or depth, the authors find it useful to provide a few hypotheticals to help students better contemplate their methodology or the limits of their conclusions. For example, what if a player who plays for a publicly traded team is fired for protesting? Is this different than if a player who plays for a privately-owned team, in a privately-owned stadium is fired?

#### IV. CONCLUSION

As the anthem controversy continues to rock the National Football League, it is important to equip our students with the tools to intelligently analyze this issue. The anthem controversy can be successfully leveraged in the classroom to guide students through an analysis of the limits of the First

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<sup>31</sup> *Id.*

<sup>32</sup> Andrew Beaton, *NFL Paid Under \$10 Million to Settle Colin Kaepernick Grievance*, THE WALL STREET JOURNAL (March 21, 2019), <https://www.wsj.com/articles/nfl-paid-under-10-million-to-settle-colin-kaepernick-grievance-11553192288>.

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Amendment and the intersection of employment law in what the authors' believe is an interesting and informative manner. Vince Lombardi, known as one of the most influential football coaches of all time, once said: "They call it coaching but it is teaching. You do not just tell them...you show them the reasons."<sup>33</sup>

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<sup>33</sup> See the official website of Vince Lobardi, available at: <http://www.vincelombardi.com/quotes.html>.

**CURRICULAR ENHANCEMENT: ADDING  
THE REAL WORLD TO A LEGAL  
ENVIRONMENT OF BUSINESS COURSE**

WILLIAM J. MCDEVITT\*

GEORGE LUTZOW\*\*

**I. INTRODUCTION**

The “new” Legal Environment of Business course is a model of pedagogical effectiveness. It is the end product of nearly a century of including business law in the business school curriculum. Joseph Wharton was the first person to introduce business law into the business school curriculum in 1881.<sup>1</sup> For decades the traditional business law course focused primarily on contract law, the Uniform Commercial Code and the law governing forms of business.<sup>2</sup> This made perfect sense at the time since business was viewed as buying and selling goods and services; each transaction was based upon an agreement, and each agreement was governed by

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<sup>1</sup> For an excellent discussion on the evolution of the traditional business law course to the legal environment course in the business curriculum, see Carol J. Miller and Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?* 28 J. LEGAL STUD. EDU. 149 (2011).

<sup>2</sup> *Id.* at 150

contract law. However, as the 20<sup>th</sup> Century unfolded and the Great Depression rocked the nation, Congress reacted by passing a multitude of laws regulating business. Knowing the basics of contract law was no longer enough to be a successful business manager. In 1990, responding to this evolving regulatory environment, legal scholars led by members of the Academy of Legal Studies in Business (ALSB) convinced the American Association of Collegial Schools of Business (now known as AACSB International) to emphasize the “legal environment of business” in the common body of knowledge that schools of business offered.<sup>3</sup>

Our modern legal environment course was designed not only to help future business leaders recognize legal problems when they face them so that they can prevent, or more easily resolve disputes, but also to operate their businesses more effectively within the world of government regulation that Joseph Wharton could not have foreseen.<sup>4</sup> This new approach transformed the discipline of law in business education from the relatively narrow topic of rules that govern agreements on the buying and selling goods and services to the much bigger picture of how laws and regulations affect virtually every

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<sup>3</sup> *Id.* at 154.

<sup>4</sup> *Id.* at 150. “[B]usiness persons need to understand the legal framework in which businesses function.” *Id.* at 154, citing John Tanner et al., *A Survey of Business Alumni: Evidence of Continuing Need For Law Courses in Business Curricula*, 21 J. LEGAL STUD. EDUC. 203 (2004).

aspect of business operations.<sup>5</sup> The traditional Business Law course largely yielded to the broader and more relevant Legal Environment of Business course.

As relevant as the “legal environment” approach is to educating today’s business students about business law, there remains room for improvement. Most young students do not understand the full impact of the law on business, not to mention the law’s impact on their personal lives. Much has been written over the years about effective learning, both generally and with regard to business law. Scholars have noted the difference between conceptual learning and experiential learning.<sup>6</sup> As one commentator noted, “Learning is not a spectator sport.”<sup>7</sup> Indeed, there is strong evidence that learning to be most effective should involve active, integrative and experiential immersion on the part of

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<sup>5</sup> For a syllabus excerpt listing the topics covered in a typical one-semester Legal Environment of Business course, see Appendix A.

<sup>6</sup> See, Anne Tucker Ness, Susan Willey & Nancy R. Mansfield, *Enhancing the Educational Value of Experiential Learning: The Business Court Project*, 27 J. LEGAL STUD. EDUC. 171, 175 (2010) (“While conceptual learning is important, the major leaps forward for students often occur when they encounter theories experientially. Students learn by doing.”).

<sup>7</sup> See, Linda A. Reid & Curt M. Weber, *Using Technology-Enabled Active Learning Tools to Introduce Business Ethics Topics in Business Law Courses: A Few Practical Examples*, 25 J. LEGAL STUD. EDUC. 283, 292 (2008) (citing Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, AM. ASSOC. HEALTH ED. BULL., Mar. 1987, at 3-7).

students that both develops and transforms them.<sup>8</sup> Students learn best when they are actively involved in their own learning.<sup>9</sup>

In response to these findings, many teachers of legal studies have embraced “active learning.”<sup>10</sup> Indeed, there is an endless variety of active learning methods.<sup>11</sup> Education journals are filled with creative and engaging exercises that stimulate students to pursue active learning that extends well beyond the assigned text book.<sup>12</sup> Approaching the

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<sup>8</sup> See Ness, Willey & Mansfield, *supra* note 6, at 173 (“Research on learning suggests that the most effective learning is active, integrative, and experiential, which both develops and transforms the student.”). See also Caryn L. Beck-Dudley, *The Future of Work, Business Education, and the Role of AACSB*, 35 J. LEGAL. STUD. EDUC. 65, 167-68 (2018) (“The traditional lecture has already been replaced...with classrooms and content that is about doing and not just about listening.”)

<sup>9</sup> See, Lucille M. Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive Skills Through an Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. EDUC. 169, 169-170 (2006) (“Pedagogical experts contend that students learn best when they are actively involved in and responsible for their own learning.”).

<sup>10</sup> See, Larry A. DiMatteo & T. Leigh Anenson, *Teaching Law and Theory Through Context: Contract Clauses in Legal Studies Education*, 24 J. LEGAL STUD. EDUC. 19, 20 (2007) (“This teaching methodology, called “active learning,” has become the new case method in college courses.”)

<sup>11</sup> *Id.* at 21.

<sup>12</sup> See, e.g., Regina Robson, *Breaking Out of the Box: An Exercise in “Extra-Cubicle” Thinking*, 11 J. ACAD. BUS. EDU. 54 (2010) (an ADR exercise that integrates legal knowledge and managerial decision making to arrive at an optimal solution to a problem); Ryan C. Grelecki and Susan L. Wiley,

challenge of how to enhance the students' understanding of the ubiquitous and challenging legal environment in which businesses operate, I developed an active learning assignment called the "Curricular Enhancement."

## II. THE CURRICULAR ENHANCEMENT

There is a distinct difference between a term paper and a curricular enhancement. A term paper is a major written assignment associated with a course "representative of a student's achievement during a term."<sup>13</sup> A term paper usually involves research on the part of the student of material associated with the course. Curricular enhancement, on the other hand, is an activity that the student pursues outside of class that is associated with the course material. The student reports on these activities either orally or in writing, to the professor or to the entire class.

Several years ago, I began to require my students to select one of several assignments, each of which was designed to expand their exposure to and

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*Applying Legal Concepts to Business in a Legal and Ethical Environment of Business Course: The Build-a-Business Project*, 34 J. LEGAL STUD. EDUC. 89 (2017) (getting students to recognize and appreciate the role of law in the real-world through a series of papers and assignments in a "chunking" format); Cristen W. Dutcher, *Engaging Legal and Ethical Environment of Business Students with Create a Law Days*, 36 J. LEGAL STUD. EDUC. 59 (2019) (in-class assignment in which students role-play contract negotiators, jurors, and ADR mediators/negotiators).

<sup>13</sup> See <http://www.m-w.com/cgi-bin/dictionary> (last accessed December 27, 2018). Merriam-Webster's definition of "term paper."

knowledge of the legal environment. As the assignment evolved over time, I retained the best alternatives based upon the students' reaction to them. Eventually, I settled on three (3) choices:

- 1) The interview (of an attorney or a judge)
- 2) The court observation (either trial or appellate)
- 3) The law review report

As the number of papers submitted mounted, I decided to collect data from the students regarding their assessment of the value of the assignment in terms of pedagogy. Using a questionnaire and a Likert scale, I was able to quantify the impact that the assignments were having on the students' deepening appreciation of the role that lawyers, judges and the courts play in the legal environment in which businesses operate. What follows is a description of the assignments, the data that was collected, and the additional use of the students' work to enhance even further their business law education.

### **III. THE ASSIGNMENT**

As stated above, the students can select from three (3) assignments: A) the interview, B) the court observation, and C) the law review report.<sup>14</sup> Each is described in more detail as follows.

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<sup>14</sup> For General Instructions, see Appendix B.

A. *The Interview*

Faculty who have worked and taught for several years often forget how sheltered and inexperienced most undergraduate students are in their real-world professional development. Relationships and activities that older persons take for granted are mysteries to the young. The interview option gives students the opportunity to engage a practicing attorney or sitting judge in a direct and personal way that can dispel some of the mysteries of the profession and professionalism.

Students are provided with a list of suggested questions to help them elicit meaningful information and focus attention on constructive communication.<sup>15</sup> The questions range from educational background and why they chose to practice law to the role of ethics in legal practice and the attorney's or judge's most memorable case. The most important section of the paper is the last – the student's reaction. In this section, the student describes upon reflection what he or she learned from the interview experience.

For most students, this is not only the first time that they have interacted directly in a career-revealing way with a person who is engaged in the practice of law or with the judicial system, but it is also the first time that they have discussed career paths with a "professional" of any sort. For all students, it is a career-broadening experience. Students have little idea about what skills and

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<sup>15</sup> For Suggested Questions, see Appendix C.

sacrifices it takes to become a lawyer or judge, let alone to become any type of professional, and they know even less about what the daily work life of a lawyer or judge entails. For some students, it is transformational. They are so inspired by the experience that they reconsider their career paths. Whether or not the interview results in a decision to change careers, the dedication of the men and women who make our legal system work leaves a deep impression on the students who interview them.<sup>16</sup>

### *B. The Court Observation*

Most students have never been in a courtroom. Their concept of how the judicial system functions is formed by watching television shows and movies that depict trials in ways that often bear little resemblance to reality. In order to expose students to a real court and to dispel misconceptions, students may choose to observe a trial or an appellate court argument as their curricular enhancement project.

Before entering the courtroom, students are instructed on what to look for.<sup>17</sup> They are to identify the various actors – judge, lawyers, parties, court reporters, clerks, tip staff, etc. They need to determine who is suing whom for what or who is appealing what. They are expected to note how an attorney proceeds with questioning a witness or making his or her argument to the appellate court, as

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<sup>16</sup> For sample student reactions to the attorney/judge interview, see Appendix D.

<sup>17</sup> For Suggested Things to Observe, see Appendix E.

well as how the witnesses and jurors/judge react. Most importantly, at the end of their curricular enhancement paper students must reflect on their observations and experience and describe what they learned.

Like the lawyer/judge interview, the experience of students sitting in a real courtroom and observing an actual trial or appellate court proceeding is enlightening, if not transformational.<sup>18</sup> Most students are profoundly struck by the innate drama of the environment as real people struggle with real issues of truth and justice. Most come away with a deeper respect for the process by which we as a society attempt to resolve disputes and find justice in an imperfect world. Some students even discover where and how they want to employ their skills and talents once they complete their formal education.

### C. *The Law Review Report*

While not as engaging as the interview or the court observation is to the real world of the law, the Law Review Report (LRR) is both a valuable and useful assignment. Not every student has the time to spend half of a day traveling to court and observing a trial. Also, not every student has a relative or friend who is a lawyer, and he or she may not be comfortable interviewing a legal professional with whom they have never met. In addition, some students develop an interest in a particular area of the law that a legal environment course covers. Finally,

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<sup>18</sup> For sample student reactions to the court room observation, see Appendix F.

some students are procrastinators who fail to plan, and they wind up postponing assignments to the last minute. To meet these contingencies, the law review report gives the student maximum flexibility to meet the professor's expectations.

The rules of the LRR are relatively simple: to wit, find a law review article published within the past two (2) years that relates to an area of the law that is covered in the legal environment of business course.<sup>19</sup> Once the student selects an article of interest, the student summarizes the article and states his or her opinion about the author's conclusion. Having the freedom to choose the article allows students to pursue their interests. For example, it has been my experience that student athletes in the class often find articles about the NCAA and the various legal issues unique to them such as compensation, recruitment, etc.

#### **IV. BENEFITS OF CURRICULAR ENHANCEMENT**

In addition to honing students' writing skills, the curricular enhancement described above provides advantages that term paper assignments sometimes lack.

First, giving students a choice of assignment allows them to "play to their strengths." Not every student is an expert researcher, especially in a complex and unfamiliar field such as law. By allowing students to write about their experience in

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<sup>19</sup> For Instructions for the Law Review Report, see Appendix G.

conducting an interview or visiting a courtroom in lieu of a research project, they can achieve all of the benefits of a written assignment without the research component. This can be a very attractive alternative, since quality and interest are generally related.

The second advantage of the curricular enhancement is the opportunity for students to immerse themselves in a real-world experience. Many students note in their papers that they would never have interviewed a lawyer or judge or sat through a court proceeding if the curricular enhancement exercise had not required them. Being placed in the situation, most students marvel at what they have seen, heard and learned. In a way no classroom can reproduce, students experience firsthand the life of the law. Even the Law Review Report can be an epiphany for students who discover legal rights and responsibilities that they never envisioned. As stated earlier, to some the experience is so profound that it becomes transformational – i.e., they have found their calling in life – the law profession.

The third advantage of the curricular enhancement is its integration into the objective of academic integrity. Term paper mills abound on the Internet, and even powerful tools like Turnitin.com are not perfect. However, when a student is required to write a report and reflection on his interview with a lawyer or her day in court, it becomes inherently personal and unique. In short, it is an assignment that is difficult to plagiarize successfully.

There is another advantage to this activity that belongs exclusively to the faculty member.

Simply put, it is enjoyable and heartening to read how the students describe their experience. Like children describing their first exposure to some new and exciting experience, students are often effusive in their descriptions of what they saw and heard, and what they learned. More important, they are genuinely moved by the experience of listening to a lawyer or judge relate the story of their professional life or observing the workings of a real court hearing a real case. Not surprisingly, no two papers are ever the same, which makes reading them quite enjoyable to the professor.

## **V. THE DATA**

In the spring semester of 2014, I began collecting data from students relating to their assessment of the merits of the Curricular Enhancement assignment. Over the next four (4) years, over three hundred and fifty-five (355) students answered a survey that I developed to evaluate the effectiveness of four (4) aspects of each assignment.<sup>20</sup> The surveys were tailored to the assignment that the students chose, and their answers were based upon a 5-point Likert Scale, with five (5) being strongly agree and one (1) being strongly disagree.<sup>21</sup> For the Attorney/Judge Interview, the students were asked to evaluate the following statements:

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<sup>20</sup> Surveys were taken in the Legal Environment of Business course as follows: Spring '14, Fall '14, Spring '15, Fall '15, Fall '16, Fall '17.

<sup>21</sup> For the Survey, see Appendix H.

- 1) It taught me about the commitment it takes to become a professional.
- 2) It taught me what it is like to work as an attorney/judge.
- 3) It taught me the importance of ethics in the practice of law.
- 4) It taught me what it takes to maintain the status of a professional.

For the Courtroom/Appellate Court Observation, the students were asked to evaluate the following statements:

- 1) It taught me about the dynamics of a trial/appellate court.
- 2) It taught me about the preparation that goes into trying/arguing the case.
- 3) It taught me about the fairness of the judicial process.
- 4) It taught me about the role of the judge/attorneys in a courtroom.

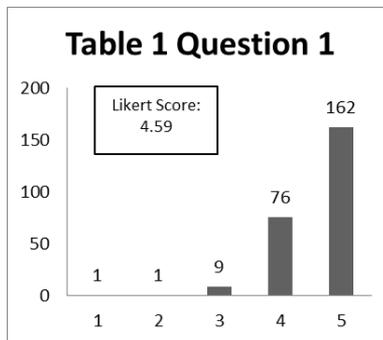
Finally, for the Law Review Report. The students were asked to evaluate what the article that they chose taught them:

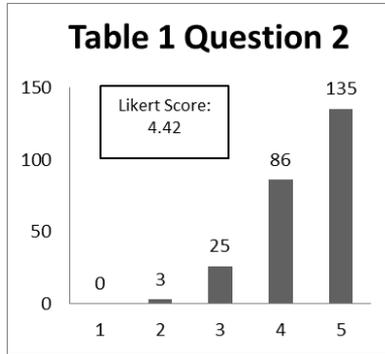
- 1) It taught me about an area of law that I knew little about.
- 2) It taught me about how detailed and complex the law can be.
- 3) It taught me about how a well-researched manuscript is presented.

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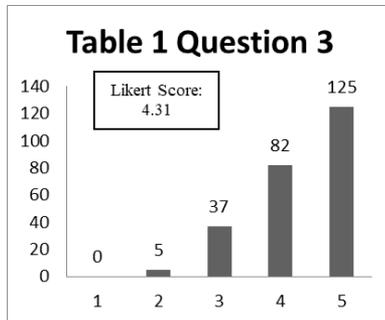
4) It taught me to think about and react to a legal issue.

For those students who chose to interview a lawyer or a judge, the experience was an eye-opener. It taught students not only about lawyers, judges and the legal profession, but also about being a professional in general. Of the two hundred and forty-nine (249) students who elected to conduct the interview, sixty-five (65%) percent strongly agreed with the statement that it taught them about the commitment it takes to become a professional (at least in law), and another thirty (30%) percent agreed, for a combined ninety-five (95%) percent of survey takers. The average Likert score for this question was 4.59. Impressive results were also noted involving what the students learned about the work that lawyers and judges do. Fifty-four (54%) felt that they learned a great deal about the work, and another thirty-five (35%) percent believed that they learned a lot, for a combined total of eight-nine (89%) percent. The average Likert score for this question was 4.42.

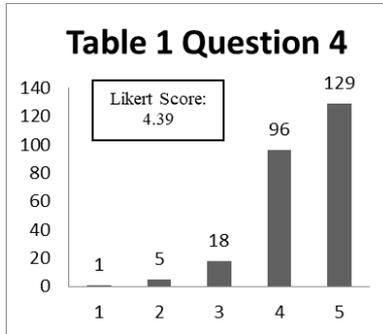




Students who interviewed a lawyer or judge also learned about the importance of ethics in the practice of law and about what it takes to maintain the status of a legal professional. Fifty (50%) percent of students rated the importance of ethics a 5 on the Likert scale, and another thirty-three (33%) percent, a 4, for an average of score of 4.31. Learning about what it takes to maintain the status of a professional was also a revelation to students, garnering an average Likert score of 4.4.



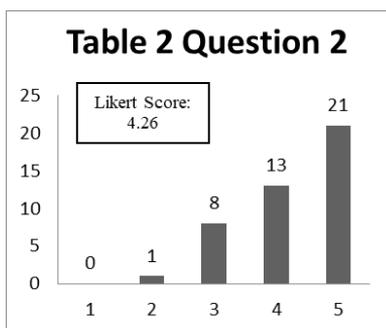
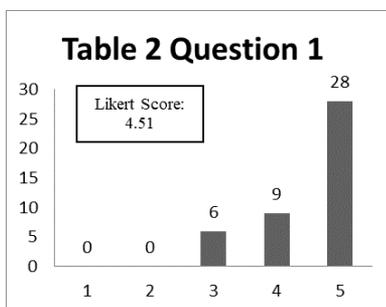
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Only forty-three (43) students opted to travel to court to observe a part of a trial or appellate court argument.<sup>22</sup> However, the value of the experience to these students was remarkable. Eighty-six (86%) percent either strongly agreed or agreed that the experience taught them about the dynamics of a trial or appellate court proceeding. Nearly eighty (80%) responded similarly to the question about what the observation taught them about the amount of preparation that apparently goes into the trial or oral arguments. On a Likert scale, the numbers were 4.5 and 4.25, respectively.

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<sup>22</sup> Because of the school's proximity to federal court, most students who observed a trial visited the U.S. District Court, and those who observed an appellate court argument went to the U.S. Court of Appeals, although some went to the local state trial or appellate courts.

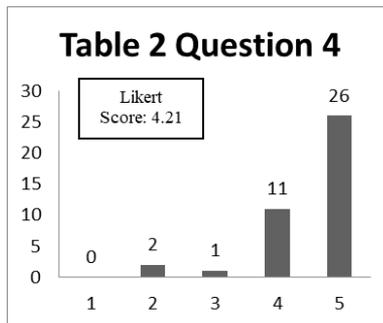
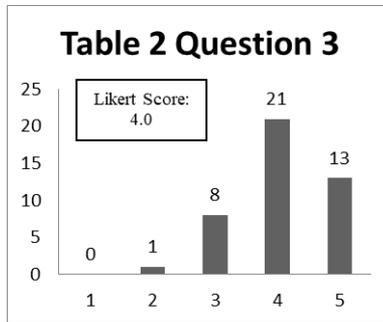


Despite the relatively short time that the students could sit through the trial or appellate court arguments,<sup>23</sup> an overwhelming majority of them agreed strongly or agreed that the process was fair (Likert score 4.0). They agreed even more strongly with the statement that the experience taught them about the role of the judge and attorneys in the courtroom (Likert score 4.21).

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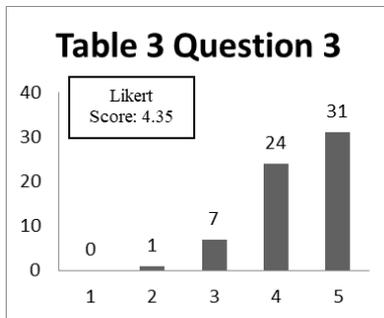
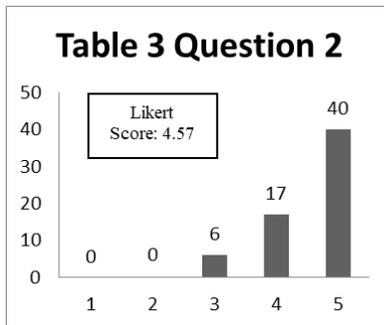
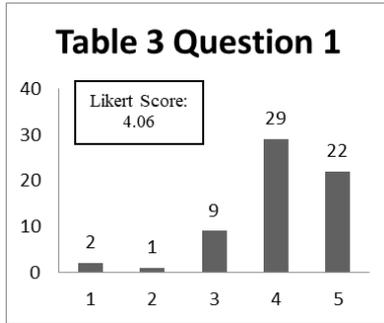
<sup>23</sup> Most students reported that they spent about two (2) hours in the courtroom.

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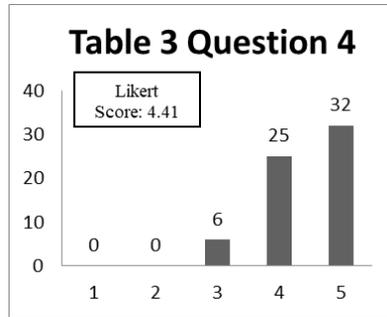


The Law Review Report also proved to be a valuable pedagogical assignment. Eighty-one (81%) percent of sixty-three (63) students who selected this assignment strongly agreed or agreed that reading the law review article taught them about an area of the law with which they had little knowledge (Likert score 4.06). An even larger percentage (90%) strongly agreed or agreed that reading the article taught them about how detailed and complex the law can be (Likert score 4.57), and eighty-seven (87%) agreed, many strongly, that they learned how a well-researched manuscript is presented (Likert score 4.35). Perhaps more important, the students who read, summarized and commented upon a law review

article felt that they learned how to think about and to react to a legal issue (Likert score 4.41).



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In short, whether the student chose to interview a lawyer or a judge, sit through part of a trial or an appellate court argument, or read a law review article and comment on it, his or her knowledge of the legal environment of business was enhanced.

## VI. THE BOUNCE

In recent years, programs have been developed that incorporate a unique website for each course known as a learning management systems (LMS). Popular LMSs are Blackboard Learn, a product of Blackboard, Inc., and Canvas, which was developed by Instructure, Inc.<sup>24</sup> Both of these LMSs have a tab entitled Discussion Board or Discussions where, *inter alia*, the teacher can post questions to the class and have students comment on them. Another feature of the Discussion Board allows

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<sup>24</sup> For information on Blackboard, *see* <https://www.blackboard.com/index.html>. For information on Canvas, *see* <https://www.instructure.com/>.

students to initiate discussion threads for comments, including uploading documents.

Several years ago, I decided to use the Discussion Board in Blackboard, and later Canvas, to expand the pedagogical value of the Curricular Enhancement assignment. I set up a Discussion Board in Blackboard (and later Discussions in Canvas) and tasked the students to upload their Curricular Enhancement papers. The students then had to read three (3) other students' CE papers and comment on them on the Discussion Board.<sup>25</sup> Students were encouraged, but not required, to read at least one (1) paper that was different from their own. For example, if the student interviewed a lawyer, then he or she should read a paper about a courtroom observation or a law review report.

Requiring students to read other students' papers and comment on them not only amplified the utility of the CE assignment, it also broadened the students' exposure to other aspects of the legal profession and the law in general. Many students who commented on their fellow students' papers were as enthusiastic and amazed at what they learned as they were when they reacted to their own Curricular Enhancement experience.<sup>26</sup> In short, the

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<sup>25</sup> In order to facilitate choosing papers to read, the students were advised to give their CE papers a descriptive name, like Interview with Attorney Jones, or Trial – U.S. vs. Smith, or LRR, NCAA and Payment of Athletes.

<sup>26</sup> For sample student comments to other students' CE papers, see Appendix I.

value and impact of the CE assignment were significantly expanded for the students.

## **VII. CONCLUSION**

In 1990, the television show “Law and Order” debuted. It ran for twenty (20) years until 2010 on NBC.<sup>27</sup> This police and legal drama gained the attention of millions and drew us into the streets of New York City, to the office of the district attorney, to the prosecutor and into the courtroom. Although the program focused primarily on criminal law, it provided a glimpse, albeit somewhat unrealistic, into the legal system. Today’s college students - Generation Z - were born and grew up during this period, watching this and similar shows with their parents. They would grow up with a smart phone in one hand, and many of their beliefs were being shaped through social media.

So what is the connection to a curricular enhancement? How does the average college student perceive today’s business environment and business law? What are the sources of their ideas, and what spawns their opinions? Today, more than ever, we need to connect with our students in a relevant manner and sustain that connection in a way that increases the richness and reach of our pedagogy. As educators we understand our role in bringing the classroom alive through active learning. “Scientists have discovered that our brain is a connection machine. Or, to be more specific, the underlying

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<sup>27</sup> Law & Order – NBC.com, *available at* <https://www.nbc.com/law-order?nbc=1>.

functionality of our brain is one of finding associations, connections and links between bits of information.”<sup>28</sup>

Edgar Schein, a leading authority on culture from MIT, once said if you want “to become more culturally literate ... travel more ...”<sup>29</sup> Inherent in his comment is the belief that to understand culture it isn’t enough to read about it, you need to experience it. As stated earlier, “learning is not a spectator sport.” The curricular enhancement assignments outlined in the preceding pages are designed to help students experience the law and thus provide depth and context. The findings highlight the value and impact of this approach.

The opportunities to engage young minds and promote understanding can be replicated in many disciplines. A business student conducting an informational interview; a mentorship conversation to guide future growth; learning about banking by visiting the Federal Reserve Bank; a service-learning course that links theory with practice - the opportunities are endless, and the rewards are limited only by the professor’s imagination and intuition. If we leverage our understanding of the associative functionality of the brain and appreciate the power of Schein’s comments, then we have the potential to dramatically influence the learning and understanding of the next generation of professionals.

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<sup>28</sup> DAVID ROCK, *QUIET LEADERSHIP* 3 (2006)

<sup>29</sup> Karl Moore, *Edgar Schein on Corporate Culture*, YouTube (Jan. 14, 2011), <https://www.youtube.com/watch?v=6ZB3jJIGWuk>

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As educators we have the unique opportunity and ability to incubate a new generation of business students into the workplace. These future business leaders will be well-grounded, knowledgeable, talented, and better prepared to meet the expectations of both emerging and legacy businesses - expectations that, more than ever before, require an ability to operate and prosper in a global environment that demands solutions to competently navigate through a complex amalgam of business and legal issues. It rests with us, the educators, to enhance our curricula and unleash the potential within our students.

**APPENDIX A: AREAS OF LAW COVERED IN A  
ONE-SEMESTER LEB COURSE**

<b>Date</b>	<b>Chapter</b>	<b>Topic</b>
<b>Jan. 15</b>	1	Today's Business Environment: Law & Ethics
<b>Jan. 17</b>	1	Today's Business Environment: Law & Ethics
<b>Jan. 22</b>	1	Today's Business Environment: Law & Ethics
<b>Jan. 24</b>	2	The Court Systems
<b>Jan. 29</b>	2	The Court Systems
<b>Jan. 31</b>	3	Trials and Resolving Disputes
<b>Feb. 5</b>	3	Trials and Resolving Disputes
<b>Feb. 7</b>	4	The Constitution
<b>Feb. 12</b>	4	The Constitution
<b>Feb. 14</b>		<b>Test #1</b>
<b>Feb.19</b>	5	Criminal Law
<b>Feb. 21</b>	5	Criminal Law
<b>Feb. 26</b>	6	Elements of Tort
<b>Feb. 28</b>	6	Elements of Tort
<b>Mar. 5</b>	7	Business Torts
<b>Mar. 7</b>	10	Contracts
<b>Mar. 12</b>		<b>Spring Break</b>
<b>Mar. 14</b>		<b>Spring Break</b>
<b>Mar. 19</b>	10	Contracts
<b>Mar. 21</b>	10	Contracts

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<b>Mar. 26</b>	11	Domestic Sales (pp. 240-59)
<b>Mar. 28</b>		<b>Test #2</b>
<b>Apr. 2</b>	12	Business Organizations
<b>Apr. 4</b>	12	Business Organizations
<b>Apr. 9</b>	14	Agency & the Employment Relationship
<b>Apr. 11</b>	15	Employment Law (pp. 352-70)
<b>Apr. 16</b>	15	Employment Law (pp. 352-70)
<b>Apr. 18</b>	16	Employment Discrimination
<b>Apr. 23</b>	17	The Regulatory Process
<b>Apr. 25</b>	17	The Regulatory Process
<b>Apr. 30</b>	22	The International Legal Environment
<b>May 2</b>		Reading Day
<b>May 8</b>		<b>Final Exam</b>

## APPENDIX B: CURRICULAR ENHANCEMENT

### *General Instructions*

Choose one (1) of the following Curricular Enhancement projects:

1. Interview an attorney (government, corporate, private) as to what he/she does.\*
2. Interview a judge.\*
3. Attend all or part of a trial at the United States District Court or state trial court.\*\*
4. Attend an oral argument at the United States Court of Appeals or state appellate court.\*\*
5. Law Review Report: summarize and comment on a recent law review article on a topic that we cover in class.

The Curricular Enhancement will comprise the percentage of your final grade as stated in the syllabus.

Papers should be between 5 to 7 pages in length, double-spaced, numbered pages. While content is paramount, you will lose points for grammatical, punctuation and spelling errors. Also, your personal reflection/reaction on what you learned is as important as your report on your project. If you attend a trial or appellate court argument with

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other students, each student must write his/her own unique paper.

For suggested interview questions, courtroom observation points, law review report instructions and sample papers, see the Canvas website for this course under “Assignments.”

\* Only one (1) student can interview any individual attorney or judge.

\*\* Although you can attend court as a group and you can compare notes on your experience, papers must be individual. If attending court, please dress appropriately.

**APPENDIX C: ATTORNEY/JUDGE INTERVIEW  
(SUGGESTED QUESTIONS)**

**Attorney Interview**

- Educational background
- What caused your choice of a career in law
- Practice history (types, where, with whom)
- Clientele/areas of practice
- Current job/responsibilities
- Supporting staff at work
- Research system(s) used
- Role of ethics in practice
- Legal volunteerism
- Membership in professional organizations/  
bar of courts
- Memorable case(s)
- What aspects of profession you like
- What aspects of profession you dislike
- Where you like to be in five (5) years
- Qualifications that one needs to be a  
successful besides a J.D.
- Student's reaction to the interview

**Judge Interview**

- modify the above questions when  
interviewing a judge.

**APPENDIX D: SAMPLE STUDENT REACTIONS TO  
ATTORNEY/JUDGE INTERVIEW**

- There are countless takeaways from my interview with Honorable Alyce Farrell. I was taken aback with her career path and how she came to be a magistrate for Scranton, Pennsylvania. I was very surprised to hear that she majored in communication and specialized in radio and television. This made me really reflect on different people's career paths and how unpredictable and dynamic someone's career may be. M.N.

- Concluding my interview with my uncle, John P. O'Sullivan, I was astonished by how knowledgeable and how successful he is. I have never seen my uncle in this type of light, in a professional way. I have always seen him as my goofy uncle who hugs too much. I have always respected him because of his wisdom, and I knew that he was a lawyer, but listening to his portfolio of cases and use of terminology I finally realize how legit he indeed is in his practice. It was eye-opening to see the internal conflicts he faces in his career. E.S.

- I found my interview with Mr. John J. McGovern Jr., Esq., CPA, provided very important insights into the daily activities and jobs of being an attorney. Mr. McGovern was able to shine a light on a multitude of facets regarding the profession that I had not previously comprehended or considered. The interview gave me a new appreciation for attorneys and law professionals working in today's society while also providing me with new perspectives and ideals regarding my own education and future

following my graduation.... Following the interview, I am more strongly considering a profession in law due to the assortment of different possibilities and qualifications that are possible with a degree in accounting. N.L.

- Interviewing my aunt for this project was a rewarding experience. I was able to learn a lot from her background and history as an attorney. Not only did she provide me with strong insights to what life as attorney is like, but I also learned a lot about the kind of person my aunt is and how her career has shaped her life. I see a lot of myself in my aunt and look up to her as a role model. C.G.

- I now get the opportunity to see a man whom I have known for many years in a different light than I had before. I always knew that he was a dedicated father, husband, and hard worker. Now, I get to see how dedicated he is in another area of his life. I am fortunate to know Mr. Vullings and all that he does, and I am incredibly thankful for his time regarding this interview. C.D.

- I can honestly say this has been one of the most fun assignments I have ever had to complete for a class. My opinion aside, I was able to learn so much from speaking with Justice McCaffery. Being able to sit down with him individually made me realize how much of an impact he had on so many people's lives. Learning the legal environment of business aspect in class through the textbook, PowerPoints, in-class discussions is very helpful, but nothing compares to the knowledge obtained from actually speaking to someone who has worked their whole career in the profession. Because I interviewed

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someone who invested his life into his work, it has helped me discover a passion and affinity for chasing after what I really want to do. “Vincent, passion and hard work can drive you a long way.” V.L.

**APPENDIX E: TRIAL/APPELLATE COURT  
OBSERVATION**

- Identify the parties
- Describe the attorneys
- Describe the judge
- Explain the nature of the case/proceeding
- Describe the testimony or oral arguments;  
legal issue(s) involved
- Note the various other actors in the  
courtroom
- React to the experience, including what you  
learned

**APPENDIX F: SAMPLE STUDENT REACTIONS TO  
COURT OBSERVATION**

- Overall, I think that going to court was a great learning experience. It was really cool to go to court and see how what we are learning about in class is applied in the real world. At first, I thought that this was not going to be fun and that this was just going to be for the sake of doing my paper, but I actually didn't want to leave the courtroom and wanted to stay to see if the jury came out with a verdict today or not. C.D.

- Personally, I was expecting a small case to be going on and not a big election related case. I wish I could have stayed longer for this trial, but we ended up leaving during the lunch break at 12:30. My classmate's friend on the jury said that the case would be another 2 to 3 weeks until it will be over. I really wanted to hear the verdict, but after hearing that I was dumbfounded to know that I had only witnessed only about 5% of this trial when it seemed like I learned so much! C.Z.

- At first, I was not looking forward to having to do this project because of the hassle of getting to the court house and coordinating the plans for it all, but I am glad I did. I thought this was a great learning experience to witness a real-life situation like this, and it was honestly one of the best learning experiences I have had at [college] regarding a school assignment. I thoroughly enjoyed going to the courthouse in center city and watching a real federal case unravel. It has certainly gotten me more

involved in finding out about other federal cases. Once the case is over, I do hope to reach out to my friend and find out the verdict and other interesting details on the case. M.F.

## **APPENDIX G: INSTRUCTIONS FOR LAW REVIEW REPORT (LRR)**

Read a law review article on a topic covered in this course and write a paper, 5 to 7 pages in length, double-spaced with page numbers, that:

1. summarizes the author's main points and thesis (Summary)
2. states your opinion/comments on the author's conclusions (Your Reaction)

You can find law reviews/journals online through the university library. The best sources for online articles, which you can access through the university library, is WestlawNext.

You can access WestlawNext as follows:

### **WestlawNext**

- Go to Databases A-Z
- Click on W
- Click on WestlawNext
- Click on Secondary Sources
- Click on Law Reviews & Journals
- Fill in Search Box for topic in which you are interested
- Narrow search to Last 3 years
- Select law review article to read, summarize and comment upon

**Rules:**

- Article must have been published within the past **2 years**
- Article must relate to an **area of law** that we studied/will study in this course
- Article must be a **comprehensive article** (more than 10,000 words) – *short notes and comments are not acceptable*
- Include the title, author, and citation on the cover page
- Citation example: 93 North Dakota L. Rev. 521 (2018)
- **Cite** the page number(s) of **any quotes** that you take from the article in your paper; page numbers are in brackets in the online text: e.g., [531]

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**APPENDIX H: SURVEY QUESTIONS**

Please select the Curricular Enhancement assignment that you choose and evaluate the effectiveness of the exercise in the Legal Environment of Business course based on the below-listed outcomes. Use a scale of 1 (strongly disagree) to 5 (strongly agree), Use whole numbers.

<b>ATTORNEY/JUDGE INTERVIEW</b>	<b>Scale: 1-5</b>
It taught me about the commitment it takes to become a professional.	
It taught me what it is like to work as an attorney or judge.	
It taught me about the importance of ethics in the practice of law.	
It taught me what it takes to maintain the status of a professional.	

<b>COURTROOM/APPELLATE COURT OBSERVATION</b>	<b>Scale: 1-5</b>
It taught me about the dynamics of a trial/appellate court.	
It taught me about the preparation that goes into trying/arguing a case.	
It taught me about the fairness of the judicial process.	
It taught me about the role of the judge and attorneys in a courtroom.	

<b>LAW REVIEW REPORT</b>	<b>Scale: 1-5</b>
It taught me about an area of law that I knew little about.	
It taught me about how detailed and complex the law can be.	
It taught me about how a well-researched manuscript is presented.	
It taught me to think about and react to a legal issue.	

**APPENDIX I: SAMPLE COMMENTS OF STUDENTS  
ON OTHER STUDENTS' CE PAPERS**

- Megan I really enjoyed reading your paper about Margaret Spencer. I really enjoyed learning about how she used her law degree to practice law at places other than law firms. You can tell Mrs. Spencer is a good lawyer since she would rather settle a case for a client that go to court, so the client can save money. It is also reassuring to hear about someone who didn't know they wanted to go to law school till towards the end of college, it shows that there will always be time to go to law school.

- The fact that Regan knew she wanted to be a lawyer since she was in eighth grade is awesome, since most people today struggle with choosing a career. Her career history was interesting to read too. I also think that one of the hardest tasks of being a lawyer has to be having to separate their personal feelings from any case or client that they are defending, so I think it's amazing that Regan doesn't let her personal opinions enter her cases. While reading her most memorable case, I realized how challenging Regan's work must be emotionally, as she probably deals with medical suits that involve severe damage or possible fatality.

- Michelle your paper was awesome! It was so cool to see how Attorney Fisher went from being a model to a lawyer. It's a good reminder that it's never too late to change your profession if you're not happy. The cases you mentioned in your paper were fascinating. Attorney Fisher has been involved in some pretty crazy cases. The fraud case involving the

military was particularly interesting. Overall, I really liked your paper and Attorney Fisher seems like a really interesting person!

- Sierra, I thought your interview with Judge Moyle was very compelling and has some similarities to a Judge I interviewed from Scranton as well. I thought it was very interesting how she worked in Miami while having to take care of four children. It seems like she has a passion for her profession, which is really cool to see. I have also known Judge Moyle's children for many years, so it was very interesting to read some background information on their mother.

- Cole, it was really interesting to read about what you saw and learned through going to the court case. I liked how you talked about everything in detail that went on as you went through the day at the courtroom. I definitely understand how you grew to respect attorneys after attending this case. I thought your paper was overall very detailed and interesting.

- Garrett, your paper on Body-Worn-Cameras is very fascinating. Obviously, it is a very hot-topic as it directly relates to the police brutality cases and overall tension between police forces and people of minorities in today's current climate. Personally, I agree with you, in that BWCs should in fact be required for police to wear, across the country. BWCs benefits are two-fold; they protect the people involved with police as well as the police themselves. A person being arrested may take comfort in the fact that they know the policeman won't try to hurt him or do anything against the law, as his body camera will be uploaded to the cloud and reviewed by others.

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It also protects the police from false claims against them, as a court can replay footage to see if it matches up with a testimony. Good work on this topic!

**- END OF ARTICLES -**

**- BOOK REVIEW -**

## BOOK REVIEW

CORPORATE TAXATION AND SOCIAL RESPONSIBILITY, by Axel Hilling and Daniel T. Ostas. Stockholm, Sweden: Wolters Kluwer Sverige AB, 2017. 169 pp. Hardbound. \$90.00/Euro 82.00. ISBN: 9789139114826.

BENEDICT SHEEHY\*

The unassuming title does not do justice to this outstanding book.<sup>1</sup> Axel Hilling and Daniel T. Ostas's new book, *Corporate Taxation and Social Responsibility*, makes a very significant contribution to the urgent issues of eroding global tax bases and massive multinational enterprise (MNE) profit shifting, and the critical debates in law, policy and politics that need to be brought together to address the issue. Through their intricate and carefully crafted arguments, Hilling and Ostas have produced a first-rate volume that is so sharply written, focused

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\* Ph.D., M.A., LL.M., M.A., J.D., BT.h., Head of School and Associate Professor of Law, Canberra Law School, University of Canberra, Canberra, Australia.

<sup>1</sup> This review is reprinted with the kind permission from the editor of the *Law and Politics Book Review*. See Benedict Sheehy, *Corporate Taxation and Social Responsibility*, 29 L. & POL. BOOK REV. 16 (2019) (book review), <http://www.lpbr.net/2019/02/corporate-taxation-and-social.html#more>.

and consistently argued, that it reads more like novel than the work of scholarship that it is. In a mere 155 pages of text they not only introduce the concepts necessary to engage in the argument, but also lay out and argue even-handedly the parameters and major substantive issues in the whole law and policy space. This work is a major achievement in an area of increasing importance for global policy makers, tax professionals, judges and academics.

The book, set out in eight chapters, is divided roughly into two parts: the first part is on tax and the second on social responsibility and law. Tax can be daunting for those unfamiliar with its intricacies. However, Hilling and Ostas manage to take the bite out of tax by identifying the areas of law and policy specifically relevant and explaining them simply so that the reader is able to follow the analysis intelligently. They begin Chapter 2 with an explanation of tax policy, namely, the three reasons for tax: revenue raising, regulation of behavior and redistribution of wealth. These reasons operate, they argue, within the fundamental constraint of any government—that tax be seen as legitimate, itself a function of fairness and rule of law.

Hilling and Ostas examine the fairness of tax through the perspectives of legal philosophers in relation to taxation from the polar opposite perspectives of Rawls and Nozick. They next turn to Hart's principle, quoting him directly: "When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from

those who have benefitted by their submission.”<sup>2</sup> In its specific application to tax they argue that “fair taxation is measured with reference to the burden imposed on taxpayers... and their expectations of each other.”<sup>3</sup> This insight and its application provide a cornerstone and a common starting point for the arguments and evaluation throughout the rest of the book.

While fairness allows for a range of approaches, two facets of the rule of law create profound problems in this complex area. The first problematic facet is the necessity of certainty. Rule of law requires the law to be clear and precise so that citizens can know what is expected of them with reasonable certainty. In financial matters and particularly in tax, citizens must be able to order their affairs with certainty, and this includes dealing with potentially significant taxes. The second problem from rule of law arises from its important role in placing constraints on government action, and, in this case, the range of judicial discretion. In law, this doctrine is mobilized by narrow construal of statutes—a fundamental cannon of statutory interpretation. In practice, this works by interpreting a statute to limit government powers and in favor of maximizing citizens’ liberty. Thus, rule of law is a shield for citizens against capricious, overreaching government; however, in the case of tax statutes, rule of law becomes a sword in the hands of creative tax

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<sup>2</sup> Herbert L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 179, 185 (1955).

<sup>3</sup> AXEL HILLING & DANIEL T. OSTAS, CORPORATE TAXATION AND SOCIAL RESPONSIBILITY 37 (2017).

advisors whose questionable professional ethics combine with an overly technical approach to thwart government public policy objectives. As Hilling and Ostas put it, the rule of law is used “to circumvent the legitimate policy goals sought by the legislature and then tax courts feel unable to address that circumvention.”<sup>4</sup>

Explaining the additional basic tax concepts necessary for the tax novice, they next review the concept of “jurisdiction to tax.” Two core approaches are taken: income-based source jurisdiction or jurisdiction based on tax-payer residence. While the benefits principle attempts to ensure that the jurisdiction providing the necessary public infrastructure (both social and physical) reaps the tax rewards, residence-based jurisdiction attempts to acknowledge the state ties and connections of the particular taxpayer. The challenges that these conflicting approaches pose for states attempting to tax international persons such as multinational enterprises are obvious, and out of these challenges a global industry aimed directly at avoiding taxes has been created by those enterprises, tax haven jurisdiction and their advisors, who have clearly understood the jurisdiction approaches. Hilling and Ostas then review three of the wide array of strategies employed to create “stateless income,” providing insight into the nature and extent of the problem.

Chapter 3 deals with the state’s inability to respond individually to the problem and the corollary inability to coordinate a solution at the international

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<sup>4</sup> *Id.* at 21.

level, leaving it to the executives and their advisors to consider and address the tax problem. The problem requires them to consider the role of their enterprises in society, or, perhaps more precisely, to consider the role of society in the creation, operation and maintenance of their enterprises. For explanation, analysis and evaluation of these issues, Hilling and Ostas turn to the concepts and arguments of Corporate Social Responsibility (“CSR”). In this regard, they note the challenges posed by the growth of the shareholder modeled corporation, the wide regulatory environment created post-New Deal and the varying libertarian and progressive political philosophies. This collection of actors with their different focal points and conflicting philosophies inform the approaches taken to tax. Hilling and Ostas develop that the idea of CSR, including Milton Friedman’s, not only allows for business taking account of both law and ethics in the pursuit of profits, but requires it.<sup>5</sup> In this regard, they argue that CSR creates a duty for executives to not only comply but to go beyond and cooperate with public officials.

The strong voice of libertarian political philosophers today requires additional attention for anyone making cooperative arguments. Hilling and Ostas deal carefully and thoughtfully with libertarian thought. They bring out the underlying commitments and analyze them on their own terms in reference to virtue ethics. In the case of corporate

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<sup>5</sup> *Id.* at 63-71. See generally Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (stating that the pursuit of profit must conform to law and to “ethical custom”).

tax, they argue that the commitment to the virtue of liberty creates a coincident virtue to obey the law. They conclude that, “even within libertarian thought, ethics comes first in discussions of CSR, with economics and politics playing secondary roles.”<sup>6</sup>

The fourth chapter brilliantly connects the fundamental legal theories, formalism, realism, natural law and pragmatism to the approaches taken by lawyers, judges and advisors in approaching tax law interpretation and advice. Each of these theories has something different to say in terms of tax law. The argument they put forward is that the law can be interpreted as a formalist and informed by political libertarian philosophies, but a pragmatic philosophy connects with law’s fairness principles and allows modern societies to function. While taking account of capture theory and public choice theory, they make a carefully argued and convincing case for following “Public Interest Theory” which, as advocated by Breyer among others, promotes a cooperative approach toward law and regulation.<sup>7</sup>

In the fifth chapter Hilling and Ostas deal with the twin problems of under-enforced laws (laws which are not enforced on the basis of cost-benefit analyses) and legal loopholes, defined as a “linguistic imperfection in a legal text, whereby a literal interpretation of a text does not conform to nor

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<sup>6</sup> AXEL HILLING & DANIEL T. OSTAS, *CORPORATE TAXATION AND SOCIAL RESPONSIBILITY* 71 (2017).

<sup>7</sup> *Id.* at 84, n.25 (citing STEPHEN BREYER, *REGULATION AND ITS REFORM* 1-11 (1982) (contrasting alternative approaches to regulation and offering a normative critique of how an ideal regulatory regime would operate)).

advance the spirit of the text.”<sup>8</sup> The chapter further deals with the conflicting conceptions of the lawyer’s role, as advocate and as advisor. While the former requires the lawyer to focus exclusively on the client’s interest against all other parties, the latter requires the lawyer to lay out all options and provide advice with ethical reflection. The authors emphasize the ethical obligation on tax advisors and especially lawyers to provide professionally honest advice—a real challenge given that well-paying clients are looking to them for advice that allows them to avoid billions of dollars of tax.

Chapter 6 explores the conflicting views of tax: as private burden to be avoided versus a public benefit view which acknowledges the role of the state in creating and maintaining the institutional environment that allows profits to be made. They note the courts’ preference for private burden interpretations and the conflict those interpretations create against the broader societal preferences expressed in tax law, including redistribution and greater levels of equality. By combining a public benefit view with the duty to obey the law, Hilling and Ostas make a strong argument for compliance. It further engages with the libertarian view of property that property is an innate right of the individual and taxation is viewed as a taking of individual labor or capital. The chapter notes the conflicted nature of tax legislation and judicial interpretation.

The seventh chapter reviews a variety of influential articles on the issues of tax and CSR. This

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<sup>8</sup> *Id.* at 23.

literature, Hilling and Ostas note, is divided between the private burden and public benefit views. They brilliantly dissect the preferences and connect them to prior commitments and to specific political philosophies of property. One group prefers property as private domain and the other as stewardship. These political philosophies are correspondingly connected to legal philosophies, the former connected with formalism and the latter with pragmatism. The authors further explore the implications not only for individual taxpayers, but for broader policy outcomes by connecting these views to social responsibility and payment of tax.

Next, Hilling and Ostas identify the norm of shareholder wealth maximization as the problem driving the avoidance behavior. By the extreme focus on shareholder wealth and viewing tax as an expense or cost to be trimmed, executives are driven to minimize it. They argue that the company is no different from any other person operating a business. As they put it, “without shareholder profit maximization, the company would be on equal footing with any other tax subject in the society, and have to act accordingly, which would involve paying respect to all stakeholders in that society.”<sup>9</sup> Accordingly, they argue that the shareholder wealth maximization norm should not be taken in isolation. Rather, they argue that the human nature relations including business relations requires profit to be balanced against other obligations, including the obligations to obey law and comply with broader ethical norms. Following both Milton Friedman and

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<sup>9</sup> *Id.* at 141.

Archie Carroll, they argue that “the maxim of shareholder profit maximization is valid only insofar as it aligns with business ethics.”<sup>10</sup>

Using an eloquent turn of phrase, Hilling and Ostas state that “the letter of the law may have loopholes, but the spirit of the law does not.”<sup>11</sup> This sums up well the overall argument of the book. The solution the authors point to is that the spirit of law is purposive and embodied in society’s ethics. It is expressed in the business context through CSR which is a duty to cooperate with law makers whose laws are necessary for any modern business to operate. This understanding and related pragmatic approach to interpretation recognizes “law as an instrument of social policy.”<sup>12</sup>

The book’s strengths are many. It is extremely well thought out and it addresses an interdisciplinary problem using an interdisciplinary lens. Throughout the book the authors explain and work with the main pillars of all the relevant concepts, including tax law, CSR, legal philosophy and political philosophy. It is simultaneously theoretical and pragmatic, offering a very useful platform for discussion and debate among parties on opposite ends of the political spectrum. Finally, it is a well-written, tightly argued, and concise volume.

In terms of weaknesses, there are some initiatives and concepts that could have been further explored. For example, while the leading tax cases are raised and discussed briefly, I would have liked

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<sup>10</sup> *Id.* at 142.

<sup>11</sup> *Id.* at 20.

<sup>12</sup> *Id.* at 80.

*BOOK REVIEW: CORPORATE TAXATION AND SOCIAL  
RESPONSIBILITY*

to see the analysis expanded to include more detailed analysis of the tax legislation. Additional discussion of policy debate and development of general anti-avoidance rule (GAAR) would have been interesting. These weaknesses, however, are minor personal preferences that in no way diminish the value of the volume. Indeed, a significant virtue of the work is its brevity. In addition, although the authors have done an excellent job of making the co-authored work seamless in style, themes and argumentation, the occasional editing error has slipped into the work. Again, this is hardly a significant criticism of a fine argument. It is, however, something one would hope to have addressed in a following edition.

In summary, the authors of this work have made a major contribution to understanding and navigating this convoluted and highly contested space. As I see it, this remarkable little volume belongs on the shelves and desks of jurists, policy makers, tax advisors and academics around the world.

**- END OF BOOK REVIEW -**

## INFORMATION FOR CONTRIBUTORS

Manuscripts submitted to the *Atlantic Law Journal* that scrupulously conform to the following formatting and style rules, including the quick tips below, will be strongly preferred. These revisions are effective for Volume 21 of the *Atlantic Law Journal* and subsequent volumes. In order to simplify the submissions process for authors we have largely conformed the *Atlantic Law Journal* style sheet to the standards of the *Southern Law Journal* with the permission of its editors. We extend our thanks to the *Southern Law Journal* for their gracious permissions.

### MARGINS, INDENTS, & TABS:

- Top and bottom margins - one inch (all pages).
- Right and left margins – one inch (all pages).
- Set all “indents” to zero. In WORD 2007, use Paragraph drop box from Home tab. Use a zero indent throughout the manuscript (this is very important!). The only time you should use the indent feature is to set off long quotes (1/2 inch each side).
- Set tab to 1/2 inch. In WORD 2007, use the ruler, or use the Paragraph drop box from Home tab to set “tab stop position” at .5 inch. (1/2 inch is probably your tab set already!).

#### TITLE PAGE:

- Begin title on the fourth line after three skipped lines (press enter key four times).
- Title is centered, in ALL CAPITAL, using **Bold** letters and 12 point Times Roman font.
- Following the title of the paper, skip a line (press enter key twice).
- Author(s) names are centered in UPPER AND LOWER CASE CAPITAL letters and 12 point Times Roman font. Do not skip a line between author names.
- Identify author's (or authors') graduate degrees, academic rank, and institution name in non-numbered footnotes, denoted by the symbol \* Use the corresponding number of symbols for the corresponding number of authors.

#### TEXT:

- Begin text three hard returns (two skipped lines) after the last author.
- Body of the paper is 12 point Times Roman font, single spaced with full justification.

- Begin each paragraph with a tab set at 1/2 inch (see above).
- Do NOT skip a line between paragraphs.
- If you wish to emphasize something in the text, do NOT underline or put in quotation marks, use italics or a dash.
- Do NOT number the pages. Numbers will be inserted when the manuscript is prepared for publication.
- Insert two spaces (not one) following the period of each sentence, both in the text and in the footnotes.

#### HEADINGS:

- First Level Headings (I.): Preceded and followed by one skipped line, Centered, UPPER/LOWER CASE CAPITALS, and Bold in 12 point Times Roman font. □ Second Level Headings (A.): Preceded and followed by one skipped line; Centered, *Italics* in 12 point Times Roman font.
- Third Level Headings (1.): Preceded and followed by one skipped line, Centered, using Underlining in 12 point Times Roman font.

- Fourth Level Headings (a.): Preceded and followed by one skipped line, Centered and in 12 point Times Roman font.

#### FOOTNOTES:

- All footnotes must conform to the Harvard Blue Book Uniform System of Citation (currently in the 20<sup>th</sup> Edition).
- Footnotes must use auto numbering format of the word processing system. (Do not manually number footnotes)
- Footnotes are to be placed at the bottom of each page in 10 point Times Roman font.
- Do not skip lines between footnotes.
- Footnote numbers in text and within the footnote should be superscript.
- Footnotes are Single Spaced with Left Justification.

#### APPENDICES

- Identify all appendices by letter (ex. Appendix A, Appendix B, etc.)

**A DOZEN QUICK TIPS** for successful publication  
in the *ATLANTIC LAW JOURNAL*:

1. Use Microsoft WORD only (Word 2007 or later strongly preferred).
2. Use the BLUEBOOK! The QUICK REFERENCE: LAW REVIEW FOOTNOTES on the flip-side of the Bluebook Front Cover and the INDEX are much easier to use than the Table of Contents. Use both the QUICK REFERENCE and the INDEX! (The Index is particularly well done). If you don't have the latest version of the Bluebook, buy one!
3. Case Names. Abbreviate case names in footnote citations in accordance with Table 6 (and Table 10) in the BLUEBOOK. Abbreviate case names in textual sentences in accordance with BB Rule 10.2. Note that there are only eight words abbreviated in case names in textual sentences (10.2.1(c)), but more than two hundred words in abbreviated in case names is citations (Table 6 & Table 10). Please pay close attention to case name abbreviations.
4. Statutes: 22 U.S.C. § 2541 (1972). See QUICK REFERENCE (and BB Rule 12) for examples.

5. Constitutions: N.M. CONST. art. IV, § 7. See QUICK REFERENCE (and BB Rule 11) for examples.
6. Books: See QUICK REFERENCE (and BB Rule 15) for examples. Pay particular attention to how to cite works in collection. (UPPER AND LOWER CASE CAPITALS can be accomplished in WORD 2007 with a “control/shift K” keystroke.).
7. Journals (e.g. law reviews). See QUICK REFERENCE (and BB Rule 16.3) for examples. Abbreviate Journal names using Table 13.
8. Newspapers: See QUICK REFERENCE (and BB Rule 16.5) for examples.
9. Internet Citations: Use BB Rule 18 (significant changes were made to this Rule with the 20<sup>th</sup> edition of the BB, so be sure to review it for contemporary usages).
10. Please remove the "link" formatting from the URL (the URL should not be underlined or blue).
11. Using symbols (e.g. % or § or \$), numbers (325 or three hundred and twenty five), abbreviating United States (U.S.), etc. can be

tricky. Use the Bluebook INDEX to quickly find the BB Rule!

12. Recurring Rules: BB Rule 1.2 on Introductory Signals, BB Rule 3.5 on Internal Cross-References, and BB Rule 4.2 on the use of *supra* come up a lot. Become familiar with these three rules.

The editors of the *ATLANTIC LAW JOURNAL* will help put citations in proper BLUEBOOK form; however, the responsibility begins with the author. *Conformance with BLUEBOOK rules is one of the factors that the reviewers considered when selecting manuscripts for publication.* Time spent with the BLUEBOOK is time well spent!

**- END -**